ISSN 2321-1059

Journal of Legal Studies

An International Journal of Legal Studies

Published By:
Manavta Samajik Sanstha
Mughalsarai, Chandauli, U.P. India

Cite this Volume as *JLS* Vol. 3, Issue 2, July, 2015

The Journal of Legal Studies is an International Journal of Legal Studies is published biannually in the month of January and July. The Journal focused on gathering knowledge on the different issues of Law. The Journal welcomes and encourages original legal research papers and articles in not more than 3000-5000 words in English. Main body A-4 size paper 12 pt. in Times New Roman Font in single space.

Papers are processed through a blind referral system by experts in concerned subjects. To ensure anonymity in reviewing the papers, name of the author, co-author, designation, address, contact number, e-mail, and title of the paper should appear only on the first page of the paper.

Except calling for paper, the most valuable and suggestive comments of all the readers are always awaited and welcomed in order to achieve the ultimate goal. We are looking forward for your contributions; all communications must be made only in electronic form e-mailed to: journalforlegalstudies@gmail.com

Journal
of Legal Studies

An International Journal of Legal Studies

CONTENTS

Copyright and Judicial Attitude

Dr. Alok Pandey*

Introduction

Limitation has always been a human practice. It may be in the form of copying, reproduction or change of name of the original work. When the incidents of copying increased, necessity was felt to have some check and control upon this practice. It was through that the original creator of a work must have exclusive control upon his creation. He must have some rights for this purpose and the word "Copyright" was given to it. Thus the concept of copyright stands upon the fact that no one should be allowed to "Copy "the original work of another. The original work may be literary, dramatic, artistic, musical, sound or cinematograph film.

"Copyright" is a right given to or derived from works and it is not a right in novelty only of ideas. The increased incident of copying compelled the law makers to make law to cheek such incidents. In India the earliest statute law on copyright is the Indian Copyright Act, 1847. This Act was enacted in new form in 1914. The Act of 1914 protected the interests of creators of original .Works and prescribed penalties for infringement of copyright.

The present law on copyright in India is the Copyright Act, 1957.The basic features of this Act confirm to the provisions of two international conventions on copyright. The Berne Convention and the Universal Copyright Convention. India is a member of both the Conventions. The copyright Act, 1957 has been amended in 1983, 1984, 1992, 1994 and 1999. These amendments have been incorporated due to changed circumstances.

'Judiciary' is a strong protector of rights of the people. Copyright cannot be an exception to it. The Judicial attitude has always been in favor to prevent the infringement of copyright. The Supreme Court of India and various High Courts have also explained and clarified important aspects of copyright. Some of the leading/recent cases are discussed and analyzed here.

The copyright law in India was laid down, perhaps for the first time, by the Delhi High Court in 1984 in the case of *Penguin Books Limited vs. India Book Distributors and Ors* wherein the court held as "Copyright is a property right. Throughout the world it is regarded as a form of property worthy of social protection in the ultimate public interest. The law starts from the premise that protection should be as long and as broad as possible

**** Principal, Sanjivani College of Law, Bahraich, Uttar Pradesh.***

and should provide only those exceptions and limitation which are essential in the public interest. The courts adopt a "purposive" approach to statutes".

In *Indian Performing Right Society vs. Eastern India Motion Picture Association and others*, the Supreme Court held that the author of a film song or composer of a musical work who has authorized a film producer to make a film of his work, cannot restrain the owner of the film from producing the accosted portion of the film to be performed or screened in public for profit or for any others purpose. Justice V.R. Krishna Iyer observed cinematograph is a felicitous blend a beautiful totality, a constellation of stars, Slurring over the rule against mixed metaphor. Cinema is more than long stripes of celluloid, more than miracles in photograph, more than song, dance and dialogues and indeed more than the dramatic story, exciting plot, gripping situations and marvelous acting. But it is that ensemble which is the finished product of orchestrated performance by each of the several participants although the components may, same times in themselves the elegant entities.''

In *R.G Anand vs. Deiux Film* the supreme court has held that there can be no copy right of an idea , subject matter, plots or historical or legendary facts .What is necessary for copy right is the originality only in the form of expression. In this Case the defendant made a film which was allegedly based on a play of the plaintiff. The court declared that although the plaintiff was the owner of copyright of his play but the defendant has not infringe his right , because what is protected is not original thought or information , but the original expression of thought or information in some concrete from Fazal Ali J., In this case discussed a number of American, English and Indian cases. He said, "As a violation of copyright amounts to an act of piracy, it must be proved by clear and cogent evidence after applying the various tests."

In *Tata Oils Mills Co. vs. Rewards Soap work* the Delhi High Court has held that the issue of jurisdiction of courts can not be in question at the time of seeking temporary injunction in the matters of infringement of copyright and trademarks. The Court granted injection restraining the defendant regarding the copyright as well as trademark infringement during the pendency of the suit.

In *Najma Heptullah vs. Orient Longman Ltd.* the Court ruled that where there was active and close intellectual collaboration and co-operation between the narrator and the writer of the book, both would be entitled to first and joint ownership. The facts of this case are that Maulana Abdul Kalam Azad entered into an agreement with Prof. Humayun Kabir to write up his thoughts and conversation in English .Fifty percent of the royalty of the book has been paid the legal representative of Maullana Azad. The Court ruled that the legal representatives cannot challenge the agreement or copyright after 30 years.

In *Gramophone Co. of India Ltd. vs. Super Cassatte Industries* the Delhi High Court has ruled that version recording is neither copying nor reproduction of the original recording. In this case, the plaintiff company produced audio records titled "Hum Apke Hain Kaun."

With the permission of the copyright owner the Rajshree Production Pvt. Ltd. The plaintiffs alleged that the defendants too had launched an audio cassette by the same name, designed, colour and layout. However the defendants denied the allegation by saying that what they were doing was version recording and it was done after formalities. The court directed them not to use similar, design, colour and layout and to use an unoffending alternatives title.

In *Gramophone Co. of India Ltd vs. Shanti Films Corporation* the High Court ruled that the assignment of copyright should be in writing and signed by the assigner or his authorized agent. Oral assignment of copyright in neither permissible nor valid. The Court also said that it has to see whether the damage the plaintiff is likely to suffer can be compensated in money. If the balance of convenience is in favor of printing he may also be granted injunction.

In *Anil Gupta vs. Kunal Dasgupta* the Delhi High Court has held that where the some idea is being developed in a different manner. It is manifest that the source being common similarities are bound to occur. The Court should examine whether or not the similarities are on fundamental or substantial aspects of the mode of expression. In this case the defendant broadcasters were prevented from telecasting a programme ‘’Swayamvar’’ which was the original idea of the plaintiff.

In *F. E. Engineering & consultancy Pvt. Ltd. vs. L.G. Cable Ltd*. the Delhi High Court has ruled in order to bring an action within the category of infringement of copyright, it must be shown that there is a reproduction in material form of a work or substantial part thereof in respect of which there is an exclusive right. In this case the defendants used certain words Similar to the plaintiff. The Court did not consider it as a violation of copyright of the plaintiff. The Court said that in this era of Science and technology it is not possible to retract the use of words beyond a certain limit.

In *Hawkins Cookers Ltd vs. Magicook Appliances Co.* the Delhi High Court prevented the defendant company from using the some setup of label as that of the plaintiff company. In This case the plaintiff a well –known manufacturers of pressure cookers filed an injunction suit against the defendants alleging that they have acquired the trademark. “Apsley “in relation to pressure cookers with the label substantially and deceptively similar to that of the plaintiff. The court observed, the defendants having infringed the copyright of the plaintiff company in terms of the provisions of section 51 of the copyright act, the plaintiffs are entitled to their civil remedies under section 55 of the Act.”

In *Zee Telefilms Ltd. vs. Sundial communication (P) Ltd*. the Bombay High Courts has developed the concept of ‘’ claim of confidence’’ in copyright matters. In this case the defendants were prevented from telecasting a T.V. Serial “Kanhaiyya” which was the original idea of the plaintiff Company. The court observed, an idea per se has no copyright.

But if the idea is developed in to a concept fledged with adequate details then the same is capable of registration under the Copyright Act.

In *Khajanchi Films Exchange vs. State of M.P.* the Madhya Pradesh High Court held that screening of a film before its release by cable operators does not amount to infringement of copyright. In this case the petitioner claimed copyright over the film "Kabhi Khushi Kabhi Gum," The court observed that there must be a judicially enforceable right as a legally protected right before anew suffering a legal grievance can ask for a Mandamus."

In *Eastern Book Co. vs. Navin J. Desai t*he High Court has held that mere reproduction of a part of the judgment is not the infringement of copyright. However, the court held that if the head notes are not the reproduced copies of the judgment and were written by using knowledge, labour, judgment or literary skill or task, the publisher will have copy right to them.

In *Eastern Book Co. vs. D.B Madok* the appellants publisher of well known journal, the Supreme Court Cases (SCC) complained that the respondent was infringed their copyright by copying the former's material by making and selling C.D ROM. The court restrained the responcedent from copying the head notes and editorial notes of the appellant's journal.

In *Dhana Vilas Madras Snuff Co. vs. Vani Snuff Co*. the court ruled that change of name or title does not result in infringement of copyright. In this case, the appellants were manufacturing and selling the snuff under the name and style of ''D.S" The defendants were also doing the same under the name of "E.T.S". The Court held that as the names are not identical, no question of infringement of copyright or trademarks does arise.

In *Exphore SA vs. Euphorma Laborites* Supreme Court has held that the owner of the copyright may file a suit for infringement of copyright within the jurisdiction of a court where he receives seize and desist notice from defendant. The Court restrained the defendants from using the deceptively similar colour also discussed the question of jurisdiction in cases of copyright infringement.

The Supreme Court, in *Entertainment Network (India) Limited vs. Super Cassette Industries Limited*, upon consideration of arguments urging the court to rule on the impugned Act on the basis of its contribution to public interest within the framework of the Copyright Act, expressly held as follows: "The protection of copyright, along with other intellectual property rights, is considered as a form of property worthy of special protection because it is seen as benefiting the society as a whole and stimulating further creative activity and competition in the public interest."

Conclusion

The above discussion confirms the facts that the judiciary has always been in favor of protection of copyright. It says that the owner of a copyright has no monopoly in the

subject matter and he cannot prevent others from doing the same work even from the common source. What is required is that the later should do it independently and the work should be original. Thus, the judicial attitude is in favor of originality. It has emphasized that original creations should be protected from copying.

References:

1. AIR 1997 SC 1443.
2. AIR 1978 SC 168.
3. AIR 1983 SC Del 286.
4. AIR 1989 Del. 63.
5. 1995 PTR 64.
6. AIR 1997 Cal. 63.
7. AIR 2002 Del379.
8. AIR 2003 NOC 267.
9. AIR 203 Del 191.
10. (2003) 6 ILD 76 (Bom).
11. AIR 2003MP 3.
12. AIR 2001, Del 185.
13. 2003 PTR 30.
14. 2003 (27) PTC 417Mad.
15. AIR 2004 SC 1682

The Corporate Criminal Responsibility in India: A New Beginning

Dr. Amitabh Singh*

Introduction

Criminal Liability is attached only those acts in which there is violation of Criminal Law i.e. to say there cannot be liability without a criminal law which prohibits certain acts or omissions.[1] The basic rule of criminal liability revolves around the basic Latin Maxim "*Actus non facit reum, nisi mens sit rea*". It means that to make one liable it must be shown that act or omission has been done which was forbidden by law and has been done with guilty mind. Hence every crime has two elements one physical one known as actus reus and other mental one known as *mens rea*.[2] This is the rule of criminal liability in technical sense but in general the principle upon which responsibility is premised is autonomy of the individual, which states that the imposition of responsibility upon an individual flows naturally from the freedom to make rational choices about actions and behaviour.[3]

Although the general rule as stated above is applicable to all criminal cases but the criminal law jurisprudence has seen one exception to the above said concept in form of doctrine of strict liability in which one may be made liable in absence of any guilty state of mind. This happens in cases of mass destructions through pollution, gross negligence of the company resulting in widespread damages like in the Bhopal Gas tragedy, etc.[4] Hence, there can be no dispute of imposing criminal liability on corporations as regards no *mens rea* requiring offences but however, it used to come to be questioned before the Chartered Bank judgement when *mens rea* was concerned.

Meaning

"The word person includes any Company or Association or body of persons, whether incorporated or not." ***Section 11 of IPC*** seeks to define, person is firstly not exhaustive. It simply declares that it includes (a) a company or association (b) a body of persons whether incorporated or not. Secondly the definition operates unless the context warrants otherwise**.** ***Section 3 (42) General Clauses Act, 1987*** which reads: person shall include any company or association or body of individuals, whether incorporated or not. Vicarious liability principle applies in case of companies also who can be held liable for acts committed by some natural persons who are identified with it because in such a case the acts and intentions of those who control the corporation are deemed to those of the corporation itself. A company has none of features that characterize a living person, a mind that can have knowledge or intention or be negligent.[5]

---

* ***Asstt. Professor, Deptt. of Law, Assam University, Silchar, Assam.***

An officer in a case had committed irregularities in relation to matters of investment of the company, without the knowledge of the Board of directors. He was considered identifiable with the corporation as he was the directing mind and will of the corporation and his knowledge was attributable to the company.[6] Glanville Williams says, "The independent legal existence of a company is useful because individual shareholders may come and go; and it has the great advantage of creating limited liability", e.g. the company is responsible for its debts in case of insolvency of the company the creditors to the company cannot proceed against the private property of the shareholders. When an offence is committed by the partners of a firm, there is no general rule that firm, an artificial person is liable. All depends on the particular facts of the case. Resistance prior to the twentieth century to extension of the doctrine of corporate criminal liability was tied to the widely-held juridical belief that a corporation lacked the requisite *mens rea* essential to sustain a criminal conviction. It was widely prevalent and followed that: A Corporate has 'no soul to damn, and nobody to kick.'

Criminal Liability of Corporates

In the modern day world, the impact of activities of corporations is tremendous on the society. In their day to day activities, not only do they affect the lives of people positively but also many a times in a disastrous manner which come in the category of crimes. For instance, the Uphar Cinema tragedy or thousands of scandals especially the white collar and organized crimes can come within the categories that require immediate concern. Despite so many disasters, the law was reluctant to impose criminal liability upon corporations for a long time. This was for basically two reasons that are[7]: That corporations cannot have the *mens rea* or the guilty mind to commit an offence; and those corporations cannot be imprisoned, the only other remedy being left is that of fine which merges criminal liability with that of a civil one. These two obstacles were in the late 20th century and very early 21st century.

The general belief in the early sixteenth and seventeenth centuries was that corporations could not be held criminally liable. In the early 1700s, corporate criminal liability faced at least four obstacles. The first obstacle was attributing acts to a juristic fiction, the corporation. Eighteenth-century courts and legal thinkers approached corporate liability with an obsessive focus on theories of corporate personality; a more pragmatic approach was not developed until the twentieth century. The second obstacle was that legal thinkers did not believe corporations could possess the moral blameworthiness necessary to commit crimes of intent.

The third obstacle was the *ultra vires* doctrine, under which courts would not hold corporations accountable for acts, such as crimes, that were not provided for in their charters. Finally, the fourth obstacle was courts' literal understanding of criminal procedure; for example, judges required the accused to be brought physically before the court.[8]

Ways In Which Corporations Commit Crimes

On the population as a whole: The Supreme Court of India ordered the government to pay a remaining $325.5 million (15.03 billion rupees) due to Bhopal gas tragedy victims. The U.S. based Union Carbide Company, now owned by Dow Chemical Co., paid $470 million in compensation to victims in 1989. The story goes back to the 1984 Union Carbide accident in Bhopal, India, which released a cloud of methyl isocyanides (MIC), hydrogen cyanide, and other toxins. Somewhere between 4000 and 8000 people died at the time, and victims' advocates estimate that in total over 20,000 have died as a result of this largest industrial accident ever, with 1, 50,000 suffering continuing injuries and medical problems. The cause was extreme corporate malfeasance. The plant was not up to minimal Union Carbide safety standards - large quantities of MIC were unwisely stored in a heavily populated area, the refrigeration unit for the MIC (which is supposed to kept at temperatures below 32 F) was deliberately kept turned off to save $40 per day in costs, the safety systems were dismantled, and the alarm system was turned off. This was in spite of the fact that the same plant had earlier suffered potentially lethal accidental releases of gases like the deadly nerve agent phosgene.

On the investors: One of the major havoc that is created in present times is because of mysterious disappearance of corporations. Of the 5,651 companies listed on Bombay Stock exchange, 2750 have vanished. It means that one out of two companies that come to the stock exchange to raise crores of rupees from investors, loot and run away. Many corporations came up with huge publicity stunts but after raising money, vanished into the thin air. About 11 million investors have invested Rs. 10,000 crore in these 2750 companies. We have Securities Exchange Board of India, Reserve Bank of India and Department of Companies Affairs to monitor the stock exchange transactions but none has documented the whereabouts of these 2750 odd companies suspended from the stock exchange. Many of the promoters and merchant bankers who are responsible for these are roaming scot-free. The market regulators and stock exchanges are unable to penalize them or recover their funds. The regulators have been able to identify only 229 of 2750 vanishing companies so far. The Supreme Court ordered CBI probe into possible criminality indicated in corporate lobbyist Niira Radia's intercepted telephone calls lead the agency to look into some of high value deals linked to big corporate houses headed by Mukesh Ambani, Anil Ambani and the Tatas.[9]

In Halsbury's Laws of England which lays down. "In general, a corporation is in the same position in relation to criminal liability as a natural person and may be convicted in common law for statutory offences including those requiring Mens Rea. There are, however, crimes which a corporation is incapable of committing or of which a corporation cannot be found guilty as a principal; nor can a corporation be convicted of a crime for which death or imprisonment is the only punishment." This view has been adopted in various Indian cases. Kenny lies down: Corporations formerly lay outside the ambit of criminal law due to technical rules, these expected prisoners to stand at their bar, and did not allow appearance by attorney. A corporation could not have a guilty will and even if by

legal fiction, a will is created it must be such as to cover those activities which can be consistently ascribed to the fictitious will thus created with the purposes which it was created to accomplish. The House of Lords have held that, a company will be liable if the action of the defaulting person is the very action of the company itself.[10] With the increasing involvement of corporations in the daily life of the people it was considered important that the immunity available to the corporations should be taken away as it hindered the interests of the people, thus an innovation was introduced by drawing a distinction between misfeasance and non-feasance , on the ground that, whilst in the case of a criminal misfeasance the servant or agent who actually did the criminal act could always be himself indicted, no such indictment would be available in the case of non-feasance; for the omission would not be imputable to any individual agent but solely to the corporation itself.

Hence, in 1840, an indictment for non-feasnace in omitting to repair highway, was allowed against a corporation ***in R. vs. Birmingham & Gloucester Ry. Co***.[11], soon afterwards, in the case of ***R. vs. The Great North of England Railway Co.***[12] an indictment was allowed for misfeasance, that of actually obstructing a highway. The principle has obtained legislative approval by Interpretation Act, 1889, which provides that in the construction of every statutory enactment relating to an offence, the expression 'person' shall, unless a contrary intention appears, include a body corporate.

Judicial Response

In India, certain statutes like the IPC talk about kinds of punishments that can be imposed upon the convict and as per Sec. 53 include death, life imprisonment, rigorous and simple imprisonment, forfeiture of property and fine. In certain cases the sections speak only of imprisonment as a punishment like in case of Sec. 420 thereby the problem arises as to how to apply those sections upon the companies since a criminal statute needs to be strictly interpreted wherein there is no scope for corporations to be imprisoned. Going with the above viewpoint and with the growing trend of corporate criminality, the Courts in India have finally recognized that a corporation can have a guilty mind but still were reluctant to punish them since the criminal law in India does not allow this action.

In The ***Assistant Commissioner, Assessment-II, Bangalore and Ors. vs. Velliappa Textiles Ltd. and Ors***.[13], B.N. Srikrishna J. said that corporate criminal liability cannot be imposed without making corresponding legislative changes. For example, the imposition of fine in lieu of imprisonment is required to be introduced in many sections of the penal statutes. The Court was of the view that the company could be prosecuted for an offence involving rupees one lakh or less and be punished as the option is given to the court to impose a sentence of imprisonment or fine, whereas in the case of an offence involving an amount or value exceeding rupees one lakh, the court is not given a discretion to impose imprisonment or fine and therefore, the company cannot be prosecuted as the custodial sentence cannot be imposed on it.

The legal difficulty arising out of the above situation was noticed by the Law Commission and in its 41st Report, the Law Commission suggested amendment to Section 62 of the Indian Penal Code by adding the following lines: "In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only." As per the jurisprudence evolved till then, under the present Indian law it is difficult to impose fine in lieu of imprisonment though the definition of 'person' in the Indian Penal Code Includes 'company'. It is also worthwhile to mention that our Parliament has also understood this problem and proposed to amend the IPC in this regard by including fine as an alternate to imprisonment where corporations are involved in 1972.[14] However, the Bill was not passed but lapsed. Such a fundamental change in the criminal jurisprudence is a legislative function and hence the Parliament should perform it as soon as possible by also considering the following arguments that the author has brought about.

However, the Apex Court later overruled this decision ***in Standard Chartered Bank and Ors. vs. Directorate of Enforcement and Ors.***[15] on account of providing complete justice to the aggrieved which could not be prejudiced in the garb of corporate personality. In this case, the Court did not go by the literal and strict interpretation rule required to be done for the penal statutes and went on to provide complete justice thereby imposing fine on the corporate. The Court looked into the interpretation rule that that all penal statutes are to be strictly construed in the sense that the Court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have included if thought of.[16]

Simultaneously, it also considered the legislative intent and held that all penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment. It was of the view that here, the legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. It is sheer violence to commonsense that the legislature intended to punish the corporate bodies for minor and silly offences and extended immunity of prosecution to major and grave economic crimes. If an enactment requires what is legally impossible it will be presumed that Parliament intended it to be modified so as to remove the impossibility element. These Courts have applied the doctrine of impossibility of performance in numerous cases including the aforementioned.[17]

Finally, the Court decided that as the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which

could be enforced against the company. Such discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company.

This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The well known maxim 'judicis est just dicere, non dare' best expounds the role of the court. It is to interpret the law, not to make it. This read with the Doctrine of Separation of Powers has bound the Court's hands in imposing various kinds of punishments and all that it is left with is to impose fines. In order to avoid compelling the Courts to go out of the statute and interpret and therefore define the law which is essentially the task of the legislature[18], it is advised that the legislature amends the various penal statutes in a way so as to bring in various forms of punishments for the corporations as well, thereby maintaining the separation of powers regime and hence the rule of law.

Conclusion

From the above analysis, it is proved that the criminal law jurisprudence relating to imposition of criminal liability on corporations is settled on the point that the corporations can commit crimes and hence be made criminally liable. However, the statutes in India are not in pace with these developments and the above analysis shows that they do not make corporations criminally liable and even if they do so, the statutes and judicial interpretations impose no other punishments except for fines. It is therefore recommended that amendments should be carried out by the legislature as soon as possible so as to avoid judiciary from defining the law and make the statutes fit for strict interpretation by providing for infliction of criminal liability on the corporations as also providing for various kinds of sanctions apart from only fines. Moreover, The Indian Parliament has passed the historic Companies Law Amendment Act 2013 on 8th August 2013.The 2013 Act replaces the Companies Act1956 (1956 Act).

The Act, will allow the country to have a modern legislation for regulation of corporate sector in India. The said Act is amongst other aspects provides for business friendly corporate regulation / pro-business initiatives, e-governance initiatives, good corporate governance, Corporate Social Responsibility (CSR), enhanced disclosure norms, and enhanced accountability of management, stricter enforcement, audit accountability, protection for minority shareholders, investor protection and activism and better framework for insolvency regulation and institutional structure. The objective behind the 2013 Act is lesser Government approvals and enhanced self-regulations coupled with emphasis on corporate democracy. The 2013 Act delinks the procedural aspects from the

substantive law and provides greater flexibility in rule-making to enable adaptation to the changing economic and technical environment. There are several procedural aspects that would be prescribed by the Rules to be framed by the Central Government. The prescribed Rules are yet to be announced. In this document we have used the expression "prescribed" or "as prescribed" or "as may be prescribed" to mean that Central Government will prescribe the Rules for implementing the substantive provisions of the 2013 Act.

It can safely be concluded that laws relating to corporate criminal liability in India are vastly insufficient. The legislature needs to be active in this regard and form certain concrete laws which would ensure that the corporations do not go unpunished and a better social order is established. Certain Provisions relating to procedural law also need to be created and modified so that the corporations can be adequately dealt with. The Supreme Court in Iridium appears to have crystallized the law and further confirmed by Aneet Hada's case. it lays emphasis on the theory through which the intention of the directing mind and will of a company is attributed to the company, and confirms that a corporation can be held liable for crimes of intent (i.e., offences involving mens rea.). The judgments further clarifies that a company is not immune from any prosecution for criminal offences for which a sentence of mandatory imprisonment its prescribed, as the sentence can imposed in terms of penalty and fine.

References:

[1] Abhishek Anand, Holding Corporations Directly Responsible For Their Criminal Acts: An Argument, www.manupatra.com, visited on April 24th 2014.

[2] Actus reus connotes those result of human conduct which is forbidden by law and hence constitutes of Human action; result of conduct and act prohibited by law. One other hand mens rea is generally taken as blame worthy mental condition: Russell, W.O., Russell on Crime p.17-51 (J.W.C. Turner Ed., New Delhi; Universal Law Publishing Pvt., 2001).

[3] A. Ashworth, Principles of Criminal Law p. 79-81 (Oxford: Clarendon Press, 1991) cited by Fisse, Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions, 56 S. Cal. L. Rev. 1141.

[4] Assn. of Victims of *Uphaar Tragedy vs. Union of India*, 104(2003)DLT234, & See also *Rylands vs. Fletcher*.

[5] Lord Reid in Tesco supermarket Ltd. (1971)ALL ER 127.

[6] Meridian global fund management Asia Ltd v/s Securities commission 1995 (2) AC 500 (PC).

[7] *Zee Telefilms Ltd. v. Sahara India Co. Corporation Ltd*., 2001 (3) Recent Criminal Reports (Criminal) 292; *Motorola Inc. vs. UOI*, 2004 CriLJ1576. V.S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?, 109 Harv. L. Rev. 1477; Beck & O'Brien, Corporate Criminal Liability, 37 American Criminal Law Review 261; Reinier H. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 93 Yale L.J. 857, 857-58 (1984).

[8] V.S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?, 109 Harv. L. Rev. 1477; Beck & O'Brien, Corporate Criminal Liability, 37 American Criminal Law Review 261; Reinier H. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 93 Yale L.J. 857, 857-58 (1984).

[9] See TOI Dated 20th Oct 2013 Jaipur edition page 1.

[10] Sennar'ds carrying co Ltd v/s Asiatic petroleum Ltd. 1915 (AC) 705.
[11] 1840(2) QB 47.
[12]1846 (9) QB 315.
[13] AIR2004SC86.
[14] The proposed Indian Penal Code (Amendment) Bill, 1972, Clause 72(a) reads as hereunder: "Clause 72(a)(1) - In every case in which the offences is punishable with imprisonment and fine, and the offender is a company, it shall be competent for the Court to sentence such offender to fine only. (2) - In every case in which the offence is punishable with imprisonment and any other punishment not being fine, and the offender is a company, it shall be competent for the Court to sentence such offender to fine only. Explanation: - For the purpose of this section, 'company' means anybody corporate and includes a firm or other association of individuals."
[15] AIR2005SC2622.
[16] *Tolaram Relumal and Anr. vs. The State of Bombay* MANU/SC/0057/1954 and *Girdhari Lal Gupta vs. D.H. Mehta and Anr.* MANU/SC/0487/1971.
[17] *State of Rajasthan vs. Shamsher Singh*, 1985(Supp.) SCC 416; Special Reference No. 1 of 2002 reported in MANU/SC/0891/2002.
[18] *Asif Hameed and others vs. State of Jammu& Kashmir*, AIR1989SC1899.

E-Commerce: Legal Solutions to Possible Problems

Anuranjan Sharma*
Pratima Pandey**

Introduction

"The old order changed , yielding place to new."[1] This line gives expression to one of the very foundation laws of nature, that life's means change, that the old must pass away and its place must be taken by the new. This is manifested in every sphere of life including business and commerce. Since the advent of computer, which has virtually conquered the world, trade and commerce have gone through a sea-change .e-Commerce is now the call of the day.

E-commerce is a recent phenomenon in the business world where business deals are conducted electronically over the internet. Information is electronically transformed from computer to computer, in an automated way therefore such type of business practice involves use of computers, computer systems or computer networks.

The world Trade Organisation (WTO) defines e-commerce as, "the production, distribution, marketing, sales or delivery or goods and services by electronic means." The six main instruments of e-commerce that have been recognised by WTO are Telephone, Fax , TV, Electronic payment and Money transfer systems, EDI and Internet.

In this era of globalization and development there is no geographical limitation between two business entities because of modern information technology. E-commerce proves to be a instrumental tool in harmonising the trade practices between the developed and developing countries. This new type of information based business includes on-line advertising and marketing, on-line order taking, on-line customer service. This facilitates formation of new type of information based products like electronic books, interactive games, and information on demand, along with this, it has improved efficiency in finding and interacting with customers, in communicating with trading partners and in developing new products and markets. However market response regarding e-commerce is mixed. Traditional firms and financial institutions such as banks and credit institutions view electronic commerce with a mixture of eagerness, fear, and confusion.

Possible problems

Assistant Professor Law, Jagran School of Law, Dehradun.
****** Independent Researcher and Law Student.***

The field of e-commerce is very wide and many of its aspects are still complex and prone to problems, which need to be legally solved. However the key issue of growth has to be kept in mind. Therefore, the scope of this study widens, envisaging possible problems and their legal solutions. Some of the main issues dealt with in this study are as following : 1) Legality of contract, 2) Legislation requirement, 3) User awareness and transparency,4) intellectual property rights, 5) security, 6) Protection against unfair means, 7) Safeguarding Privacy,8) Cyber Squatting , 9)Jurisdiction,10)Taxation.

Broadly the problem – areas can be classified into three categories:-

1. Problems relating to operations.
2. Problems relating to individuals.
3. Problems relating to the state.

Problems relating to Operations.

Law vis-à-vis e-commerce:

CONTRACT: The Core of e-commerce.

Legality

Formation of any contract, under the Contract Act, would require three main points. There has to be an offer, and then there has to be an acceptance of the said offer as such and there has to be some consideration for the contract. These ingredients are also applicable to e-contracts. However, a difficult question that in law often arises is how do we ensure that the offer has been accepted .

Internet communication does not consist of a direct line of communication between the sender and receiver of e-mail as in ordinary means of communication. The message is broken into chunks in the process of delivery. This raises issues of the exact time of communication of acceptance of the contract as such a time is critical for determination of the rights of the parties. The IT Act provides certain guidelines for this. However much depends on the type of transactions.

There are three main types of transactions in the world of electronic contracting:

1. Shrink wrap contract : this comes into play ,when purchasing off-the-shelf software. When the purchased product is received, it comes with additional terms and conditions in the packaging or in the accompanying documentation.
2. Click-wrap agreement: this is made at or before the time of purchase on a web site. The purchaser is required to click “I agree” before the transaction will continue, the installation will proceed or the user will gain access to the web site.
3. The browse wrap transaction: Here the user browses the pages of a web site. Somewhere on the web site, terms and conditions are posted that purport to bind anyone who uses the web site or its services.

Although the first type of transaction (the shrink wrap) has been around for some time and actually exists in a paper environment, the other two types of transactions (click wrap and

browse wrap) are unique to electronic commerce. All three types have raised fundamental questions, especially about assent.

Awareness, Assent and Timing

The question is about what types of conduct constitute assent to terms and conditions. The question is also concerned with timing. There are issues about how to treat terms that are not proposed or disclosed until after the user has already agreed to go forward with the transaction and has tendered the required consideration. There are also questions related to disclosure about whether there was assent, when was it manifested, is it only for terms about which the user had knowledge or awareness, or does it extend to terms and conditions which the user had not read or understood.

Legal Precedents

There are no international cases addressing these important issues. However, there is a series of conflicting cases often at variance in different jurisdictions with inconsistent regulatory overlay. That often makes it difficult for businesses to determine with certainty at the outset of the transaction whether the particular terms in any of these types of agreements would be enforceable. This is particularly the case in the United States. Some countries address these types of issues under the category of consumer protection. Directives in the European Union, for example, govern what terms will be recognized in standard form contracts. Other countries, such as the United States have originally addressed these types of issues under the notion of manifestation of assent, so that the result is great uncertainty. In the United States, the court that heard appeals of a leading case on shrink wrap, *ProCD Inc. v. Zeidenberg*, upheld the use of shrink wrap as a means of binding a purchaser to contractual terms. The user had purchased software and the vendor argued that the purchase was subject to license terms found in the software box and presented on the screen at the time of use, which required the user to indicate his assent. Rejecting the user's argument that the contract was formed at the time of purchase, and adopting what has now been dubbed a "rolling contract" theory, the court held the consumer was bound by the terms of the license, even though he had not seen them at the time of paying for the product. The consumer protection act can be amended and extended to cover many of these problems globally.

Legislation Requirement

Law is not keeping pace with the fast speed of development of e-commerce. This seems mainly due to the fact that e-commerce is running with technology, while law making is still largely traditional.

While the regulatory framework has become an element of the macro environment for the evolution of e-business, new procedures and technologies are continuously developed in order to remove potential barriers for e-business. The legal framework should match with the technological trends and the perception of legal barriers influencing the e-business activities must be addressed. Technological trends, current SMEs technological adoption as

well as the potential take up and interoperability of new technologies, offers the scenario to review whether emerging technologies increase or remove e-business barriers. In this regard, fast moving e-business trends and models based in emerging technologies show at times that legal regulation lags behind the quick pace of technological developments. Law should be made to facilitate e-commerce. Thus the developments of e-business continuously need to consider current laws and at the same time, new regulations need to follow emerging technological and market initiatives as well as innovations in order to guarantee a balanced market.

Problems Relating To Individuals

1) Lack of awareness and transparency

One of the major problems with e-commerce is that Consumers still lack confidence. Consumers do not consider the digital payment mediums secure, neither do they trust enough the procedures performed to comply with the privacy law and data protection law. With increasing reports of frauds, the common consumer is still not friendly with on-line trading. Apprehensive of misuse of his privacy, personal data, business secrets and other such information's which he would not like to divulge is preventing his mind and mood for e-commerce.

2) Growth

Problems encountered while doing e-business

While new technologies and increasing broadband access have the potential to foster e-business at national and cross-border retail trade, want of clarity and the lack of awareness of existing e-business legislation, problems related to technical implementation of existing law (i.e. implementation of e-signatures, e-invoicing, etc) and inadequate considerations on present legislation (expectation of clearer legal provisions for electronic data exchange or transactions) are some of the legal problems to the growth of a wider e-market.

3) Protection of Intellectual Property Rights

The protection of intellectual property rights ("**IPRs**") is a challenge and a growing concern amongst most e-businesses. While there exist laws in India that protect IPRs in the physical world, the efficacy of these laws to safeguard these rights in e-commerce is uncertain. Some of the significant issues that arise with respect to protecting IPRs in e-commerce are as follows:

Obtaining a Patent

With the advent of new technologies, new forms of IPRs are evolving and the challenge for any business would be in identifying how best its intellectual assets can be protected. For example, a software company would have to keep in mind that in order to patent its software, the software may have to be combined with physical objects for it to obtain a patent. Like wise other key areas are copyright, trade mark , trade secrets, designs etc.

Protecting originality

Most intellectual property laws require that the work / mark / invention must be novel or original. However, the issue is whether publication or use of a work *I* invention *I* mark in electronic form on the Internet would hinder a subsequent novelty or originality claim in an IPR application for the work / invention / mark. For this an e-commerce company would have to devote attention to satisfying the parameters of intellectual -property protection. This may include the fundamental issue of originality in the work. The intention is to preclude any infringement actions from third parties who own similar IPRs. The aim of setting up the requisite parameters is to avoid duplication or unscrupulous use in any possible way.

The problem of enforcing the law with regard to intellectual property rights.

The key question is how to adjudicate and decide cyber-disputes. The Internet makes the duplication, or dissemination of IPR- protected works easy and instantaneous and its anonymous environments makes it virtually impossible to detect the infringer. Moreover, infringing material may be available at a particular location for only a very short period of time. A company must also keep in mind that since IPRs are inherently territorial in nature, it may be difficult to adjudge as to whether the IPR in a work or invention is infringed, if it is published or used over the Internet, which is intrinsically boundless in nature. For example, if 'Company A' has a trademark registered in India for software products, but a web portal based in the US uses the same trademark for marketing either software products or for marketing some other goods, it may become difficult for Company A to sue for infringement. Moreover, due to differences in laws of different nations, what constitutes infringement in one country may not constitute infringement in another. Further, even if Company A succeeds in proving an infringement action, since the IPR that it owns is only valid for India, the scope of remedies that may be available to Company A would be territorial and not global. Thus, the web-portal may be restrained from displaying its site in India or may have to put sufficient disclaimers on its website. In order to restrain infringement in other countries, Company A may need to file proceedings in those countries also.

This process may prove to be time-consuming and expensive for the aggrieved Company. In light of certain technology driven mechanisms such as electronic copyright management systems ("**ECMS**") and other digital technologies that are evolving to prevent infringement, the recent World Intellectual Property Organisation ("**WIPO**") Copyright Treaty explicitly mandates that all contracting parties to the treaty shall have to provide adequate legal remedies against actions intended to circumvent the effective technological measures that may used by authors to prevent infringement of their works. However, these mechanisms may not be commercially viable and their use may also depend on international interoperability standards, as well as privacy concerns. But for the future of e-commerce their enforcement of laws governing Intellectual Property rights must be ensured, irrespective of any territorial hindrance.

Security factor

Security over the Internet is of immense importance to promote e-commerce. Companies that keep sensitive information on their websites must ensure that they have adequate security measures to safeguard their websites from any unauthorised intrusion. A company could face security threats externally as well as internally. Externally, the company could face problems from hackers, viruses and Trojan horses. Internally, the company must ensure security against its technical staff and employees. Security can be maintained by using various security tools such as encryption, firewalls, access codes, passwords, virus scans and biometrics. For example, a company could restrict access to the contents on its website only through the use of a password or login code. Similarly confidential information on websites could be safeguarded using firewalls that would prevent any form of external intrusion. Apart from adequate security measures, appropriate legal documentation would also be needed. For example, a company could have an adequate security policy that would bind the all people working in and with the company. Moreover, a company could also be held liable for inadequate security procedures on its website. For example, last year, a person decided to sue Nike because the Nike's website was hacked and the contents of the domain were re-directed through the person's web servers in the U.K., bogging them down and costing the web hosting company time and money.

The problem of use of unfair means

This is a prime problem in e-commerce. Greed leads to the use of unfair means. Protection against unfair competition covers a broad scope of issues relevant for electronic commerce. So far, electronic commerce has not been subject to specific regulations dealing with matters of unfair competition. Companies on the Internet, have to constantly adapt to and use the particular technical features of the Internet, such as its interactivity and support of multimedia applications, for their marketing practices. Problems may arise with regard to the use of certain marketing practices such as "**Privacy and Data Protection**".
Such problems are not uncommon and need a separate head.

Problem of Safe-Guarding Privacy

Legally and ethically privacy should be respected and safeguarded. It is an important consideration for every e-commerce website thus to maintain the privacy of its users. Use of innovative technologies and lack of secure systems makes it easy to obtain personal and confidential information about individuals and organizations, which should never happen. There are numerous cases of this misuse, and many complaints cropped up about the privacy breach in Microsoft's Windows XP operating system. This is because some features of the Operating System store personal information such as passwords and credit card data, so that users are not required to constantly re-enter this information, as they surf through websites. This problem still exists and requires proper attention and legal protection, after which e-commerce would not only be safe but more effective.

Moreover, privacy concerns exist regarding the Internet Corporation for Assigned Names and Numbers ("**ICANN**") "Whose" database, which is a publicly searchable resource used

to determine the identity of domain name registrants. The database includes the name of the individual or company that registered a given domain name, as well as the owner's address, the dates on which the domain was created, when it expires and when it was last updated. This information can be unscrupulously used.

Some of the important privacy concerns over the Internet include:

1) Dissemination of sensitive and confidential medical, financial and personal records of individuals and organisations;
2) Sending spam (unsolicited) e-mails;
3) Tracking activities of consumers by using web cookies; and
4) Unreasonable check and scrutiny on an employee's activities, including their email correspondence.

It may be noted here that presently there exists no legislation in India that upholds the privacy rights of an individual or organisation against private parties. While the Constitution of India upholds the right to privacy as a fundamental right of every citizen, the right seems to be exercisable only against the State. Even the IT Act addresses the issue of protecting privacy rights only from Government .Misuse by individuals still needs to be cheked. The violation of privacy rights is a major and a practical problem soliciting legal solutions which may apply to domestic as well as foreign consumers.

Property Rights

Cyber Squating

Misuse or an illegal use of Domain is cyber squatting. A company that commences e-commerce activities would at first have to get its domain name registered. While registering domain names, if the company chooses a domain name that is similar to some domain name or some existing trademark of a third party, the company could be held liable for cyber squatting. Over the past few years, domestic and international for a have handled and decided numerous cyber squatting disputes. Recently the ".info" top-level domain was opened for registration and within no time the WIPO has already received two cases for dispute settlement. Further, another US Company, NeuLevelInc. who had been restrained from distributing the ".biz" domain names, has now been allowed to do so as the plaintiffs declined to post a bond that would have prevented the company from handling out new domain names. Moreover, the ICANN recently confirmed that it had finalised a contract with Museum Domain Management Association whereby ".museum" has also been included as a generic top-level domain in the global domain name system.

Jurisdiction

Problems Relating To State

At the State level Jurisdiction and Taxation are the main issues with regard to e-commerce.

1) Jurisdiction

According to the traditional rules of private international law, the jurisdiction of a nation only extends to individuals who are within the country or to the transactions and events that occur within the natural borders of the nation. However, in e-commerce transactions, if a business derives customers from a particular country as a result of their website, it may be required to defend any litigation that may result in that country. As a result, any content placed on a website should be reviewed for compliance with the laws of any jurisdiction where an organisation wishes to market, promote or sell its products or services as it may run the risk of being sued in any jurisdiction where the goods are bought or where the services are availed of.

The fact that parties to a contract formed through the Internet may be located in different jurisdictions may have implications for the interpretation and enforcement of the contract. For example, XYZ, a company in London, having its server in USA, may sell its products to customers in India or other countries. In such a situation, if you receive defective goods or if you regret having made the purchase, the question would arise as to which jurisdiction can you sue the company or claim damages or withdrawal respectively. The company, on the other hand, might find itself confronted with foreign laws, which he may not be aware of. For example, the US courts have in numerous cases have held a company in X state liable in Y state on the basis that the website could be accessed in Y state. Action, against the host company, may be by way of a civil law suit, criminal prosecution or an action by regulators.

2) Taxation

The massive growth of e-commerce business has not gone unseen by the tax authorities. Realising the potential of earning tax revenue from such sources, tax authority's world over are examining the tax implications of e-commerce transactions and resolving mechanisms to tax such transactions. In India the High Powered Committee was constituted by C.B.D.T. However the problem still remains at both ends of paying and receiving. Corruption and mall practices add to the woe.

Some Suggested Solutions

The solutions discussed here under have not been categorized or compartmentalized as the problems. These solutions are interrelated and encompass almost all categories of problem. Therefore they are being presented in a general way.

Online Identity Requirement:

Transactions on the Internet, particularly consumer-related transactions, often occur between parties who have no pre-existing relationship, which may raise concerns of the person's identity with respect to issues of the person's capacity, authority and legitimacy to enter the contract. Digital signatures, is one of the methods used to determine the identity of the person. The regulatory framework with respect to digital signatures is governed by the provisions of the IT Act. However, various countries have different legislations regulating digital signatures.

Authentication and Verification

Though the Internet eliminates the need for physical contact, it does not do away with the fact that any form of contract or transaction is to be authenticated. For this purpose, different authentication technologies have come up over a period of time to ensure the identity of the parties entering into online transactions. However, there are some issues that need to be considered by companies. Verification here is very important for fool- proof authentication.

Digital Signatures

The IT Act stipulates that digital signatures should be used for the purposes of authenticating an electronic contract. The digital signature must follow the Public Key infrastructure ("**PKI**"). This acts as a limitation on the use of any other technology for authentication purposes. If Indian ecommerce companies use some other form of authentication technology, it could be said that there has been no authentication at all.

Domain Names

Solution to the problem of jurisdiction:

The US courts have developed the "minimum contacts" theory whereby the courts may exercise personal jurisdiction over persons who have sufficient minimum contacts with the forum state. These "minimum contacts" may consist of physical presence, financial gain, stream of commerce, and election of the appropriate court via contract. Various courts have held that statements purposely directed at the forum may create sufficient contacts for jurisdiction. This would mean that even if you are not physically present in a nation, you can be sued in that foreign court as long as your website has minimum contacts with that nation. Therefore, a company should insert appropriate choice of law and choice of forum clauses in its online contract, which should specify the jurisdiction to which the parties to the contract would be subject to. Such clauses have been held by courts to be binding upon the parties.

Solution to the Problem of Taxation:

Experience world wide has established that simpler way taxation is the best way. In this respect there is needed to evolve a global consensus, on uniform taxation policy. The same item should not be taxed variantly .The amount of tax must be similar for similar items , in this era of global market .The thrust should be to facilitate an honest tax payer with simpler ways of calculating and collecting tax. On the other hand punitive measures can be taken against the tax evaders. (1) Blacklisting of such firms can be one of the way. (2) And imposing sanctions against them and preventing them from e-market.(3) Temporary or Permanent time period restrictions in accordance to the default.

Some other legal solutions

One such solution which can be taken into consideration is evolving a system of double response, which can be useful like the clause of double verification in some legal

documents. This can be inserted at the initial stage of contract to ensure the acceptance of the offer. This will add credibility, finality and legality to the deal.

Second step towards this end can be State monitoring. A centalised state monitoring system can act as a watch-dog against wrong-doers. This may be a special memory column. Every transaction before reaching the final stage must be committed to this memory column. In the event of any dispute this can serve as binding evidence.

Solution of Online-Dispute Resolution:
E-commerce, as we see, is more a commerce which is not only far reaching but also one which saves time. A click at the computer is enough to operate it. In this context, it is befitting that its dispute resolution be also made time saving. This takes us to on-line resolution, which is decidedly not only one of the possible but convenient ways to resolve e-commerce disputes. This involves using the very same convenient and efficient mode in which these transactions are made in the first place, the Internet. Online Dispute Resolution ("ODR") can solve many intractable cost, travel, and inefficiency problems associated with trying to adjudicate ecommerce disputes using traditional litigation in physical courtrooms. Therefore, ODR, as envisioned herein, offers online buyers and sellers the necessary confidence, convenience, fairness, and security to support the growth and stability of e-commerce far into the future.

Conclusion
To conclude we see, e-Commerce is no more a new phenomenon. It has entered into the lives of people and nations. It has become a virtual lifeline of International business. It is a business option which cannot be ignored at any level.

E-Commerce has broken the geographical boundries. Bringing people together, it has not only economically but also socially and politically benefitted the world. E-commerce has already brought harmony in trade terms and practices between the developed and developing countries. The colour of money does not matter any longer. E-commerce has decidedly helped man to conquer space and time. Problems come and go but life proceeds on . Let us hope that e-commerce would go on helping the people for a better future.

It is appropriate here to end with the following lines from Robert Frost -

“We have miles to go before I sleep,
We have miles to go before I sleep “

References:

1. These are oft –quoted words which were ,spoken by Arthur to the last of his Knights –Sir Bedivere , seem peculiarly full of meaning and relevance even today.

2. Mohanad Halaweh, Christine Fidler "Security Perception in Ecommerce: Conflict between Customer and Organizational Perspectives". Proceedings of the International Multiconference on Computer Science and Information Technology, pp. 443 449.
3. Yuanqiao Wen, Chunhui Zhou "Research on E Commerce Security Issues". 2008 International Seminar on Business and Information Management.
4. Rui Wang, Shuo Chen "How to Shop for Free Online Security Analysis of Cashier as a Service Based Web Stores".
5. Shazia Yasin, Khalid Haseeb. "Cryptography Based E Commerce Security: A Review". IJCSI Vol. 9, Issue 2, No 1, March 2012.
6. Randy C. Marchany, Joseph G. Tront, "E Commerce Security Issues"Proceedings of the 35th Hawaii International Conference on System Sciences 2002
7. Rashad Yazdanifard, Noor Al Huda Edres "Security and Privacy Issues as a Potential Risk for Further Ecommerce Development"International Conference on Information Communication and Management IPCSIT vol.16 (2011).
8. Dr. Nada M. A. Al Slamy, "E Commerce security" IJCSNS VOL.8 No.5, May 2008.
9. W. Jeberson, Prof. (Col.). Gurmit Singh. "Analysis of Security Measu res Implemented on G2C Online Payment Systems in India" MIT International Journal of Computer Science & Information Technology Vol. 1 No. 1 Jan. 2011.

Examining the Interface between Intellectual Property Rights and Plant Genetic Resources

Dr. Mamta Rana*

Introduction

Intellectual property rights have been created to ensure protection against unfair trade practices. Owners of intellectual property are granted protection by a state or country under varying conditions and periods of time. The need for Intellectual Property Rights has arisen because the concept of property has changed over the years. In the early days the term property was used to denote 'land related property' only (immovable property). But because of its bewildering nature, property is said to include all legal rights of whatever description. Intellectual property can be loosely defined as creations of the human mind.

These could be incorporated in creative or inventive works, including distinctive signs or marks. Examples are books, paintings or other literary and artistic works, inventions, designs and trademarks. Intellectual property rights (IPRs) are legal rights governing the use of such creations. This term covers a bundle of rights, such as patents, trademarks or copyrights, each different in scope and duration with a different purpose and effect.[1] The potential knowledge as a creator of wealth is gaining currency all around the world. But only knowledge that is protected or protectable can have the potential of wealth creation. The inclusion of IPRs in the form of TRIPs[2] is an indication of this realization.

Intellectual Property Rights and Plant Genetic Resources

All plant genetic resources are a part of a 'common biological heritage' was at least tacitly accepted until 1930, when the United States passed the Plant Patent Act. The biological diversity of the earth which is primarily concentrated in the tropics, i.e. developing countries, which is the raw material for biotechnology i.e. genes, folk varieties, land races, which can be used to develop new varieties by biotechnology.

The research and development in biotechnology is principally confined to developed countries, particularly in private hands (mainly with MNCs). For their research and development they generally fall back on the genetic resources provided by developing countries, which were available to them free of charge till recently from the farmers and plant breeders from developing countries. The products or plant varieties, particularly created or developed from these genetic resources are protected through patents and plant

Assistant Professor, College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

breeder's rights (PBR) in developed countries and are not freely accessible to developing countries. The protected products are exported to them at high prices, after 'value-adding' without acknowledging the source or repaying their dues from cultivation and protection of this raw material.[3] For example, cancer like Hodgkin's disease and pediatric lymphocyte leukemia could be cured by vinblastine and vineristine, two alkaloids derived from the rosy periwinkle. Since their introduction in the early 1960's, these plant derived pharmaceuticals have been primarily responsible for improving Hodgkin's disease remission rates remarkably. Elilily, the corporate producer of these pharmaceuticals earns a lot, while Madagascar, the original home of rosy periwinkle, earns nothing from them. This is how there is a direct interface between biodiversity and biotechnology which has the enormous potential for improving human health while at the same time utilizing biological diversity in an economically beneficial and environmentally responsible manner. It is important to note that genetic resources are store of knowledge. As 'genotypes' i.e. information embodied in the genetic constitution of plants and animals, they become the subject matter of patents and plant breeder's rights (PBRs).[4]

Protection of Agricultural Biodiversity and Farmer's Rights

The ecological vulnerability of agricultural monocultures has made the conservation of agricultural biodiversity an environmental imperative. The Convention on Biodiversity Conservation has been one of the responses of the world community to conserve the ecological basis of biological production through biodiversity conservation. There are two new political conditions to which CBD has given rise. First, it has recognized the national sovereign right of countries to their biological wealth. Second, it has recognized the contribution of indigenous communities to knowledge about the utilization of biodiversity. The recognition of sovereignty and indigenous knowledge creates a major shift in the political context of the ownership, use and control of genetic resources, especially in the area of agricultural biodiversity including seeds and plant genetic resources.[5] Certain measures have been evolved over a period of time to protect agricultural biodiversity and farmer's rights.

It has often been said that the concept of Farmers' Rights is based on equity considerations to compensate traditional farmers for their past contributions in improving and making available Plant Genetic Resources for Food and Agriculture (PGRFA). While the concept had already been introduced in FAO discussions in the early 1980s and is now well established, the debate has recently turned to the question of how to best implement farmers' rights. Here, a market based solution, that is treating Traditional Plant Genetic Resources for Food and Agriculture (TPGRFA) as private goods is often contrasted with a compensation solution, in which TPGRFA remain in the public domain, but the nation states where they occur are empowered to negotiate compensation for their traditional farming sectors. Because of the difficulties in assessing the value of landraces and other forms of TPGRFA, the focus in this field has been on compensation approaches based on equity considerations, so that the use of 'rights' in this context has been largely symbolic. This means also that the paradigm shift from 'heritage of mankind' to proprietary concepts

has been incomplete. While resources are now under national control, this control has not yet been further devolved to local communities, cooperatives or individuals. Further, the Multilateral System of the ITPGRFA, designed to counter the emerging proprietary concepts in this field, has been described as "a hybrid approach to agricultural innovation, combining open source and proprietary elements." Some of these important measures are discussed herein under:

Development of Plant Breeder's Rights System

Plant breeders' rights are the rights granted by the government to a plant breeder, originator or owner of a variety to exclude others from producing and commercializing the propagating material of that variety. It is important that the object of protection in PBR is the variety, and the genetic component and the breeding procedures are not protectable. In addition PBR systems also contain some form of breeders' exemption and farmers' privilege.

The most significant event in the development of PBR systems was the efforts to harmonize PBR laws of different countries through UPOV (*Union International pour la protection des obstentions vegetable*, International Union for Protection of New Plant Varieties). The first UPOV Convention was signed in 1961. In Paris, in 1993, it had 24 member states. Nationals of one member state have rights in other member countries.[6]

Interface between Plant Variety Protection and TRIPs

TRIPs seek to promote protection of intellectual property rights in all fields of technology. Article 29 of TRIPs states that the members are free to determine the appropriate method of implementing the provision of agreement. It was the TRIPs agreement that defined patentable subject matter. Member states are free for the protection of plant varieties by patent or by an effective *suigeneris* system or by combination of both laid down in Article 29.3(b). According to Article 31 of the TRIPs agreement, under certain conditions, member states in their *suigeneris* system may allow anybody, the use of subject matter of a patent without the authorization of the right holder. This provision is described as 'compulsory licensing'.[7]

Plant Variety Protection: National Perspective

Under the provisions of TRIPs (a part of GATT), India had commitment to bring forth legislation on Plant Breeder's Rights (PBR) or a related *suigeneris* system for plant variety protection (PVP). Following are the advantages of *suigeneris* system in India:

- This would allow the availability of superior planting material leading to increased agricultural production.
- This will lead to investment by private sector not only in agricultural R & D for the development of superior varieties, but also in building up infrastructure for seed industry.

- This will encourage competition between private and public sector in the field of plant breeding to make them effective and efficient in the larger national interest.
- It will meet the national obligations under the International Agreement on Trade (GATT).

In the view of above Indian Government had drafted a Plant Variety Protection Act, 1993 (PVPA) intended to protect the interest of farmers as well as the private seed industry. The provisions in above Act that were not acceptable to seed industry included the following:

- Need to deposit a prescribed quantity of protected seed with the National Gene Bank.
- Compulsory licensing for seed production and compulsory certification.
- Need to compensate the farmers, when the variety does not give promised yield.[8]

Later on Protection of Plant Varieties and Farmers Right Act (PPV & FRA) 2001 was passed.

Protection of Plant Varieties and Farmer's Right Act (PPV & FRA), 2001

In the PPV & FRA the provisions relating to Breeder's right are more or less the same as recognized by International Union for Protection of New Varieties (UPOV). One of the most important features is that it grants farmer's rights by recognizing farmer's as breeders, cultivars and conservators of seed in their possession. It allows the farmers to use for resolving or selling their harvest seed, although they will not be allowed to sell the seed under a brand name. A farmer will also be able to register a variety developed by him, provided it confirms to criteria of novelty, uniformity and stability. India is the first country in the world which has provided for farmer's rights in the Protection of Plant Variety Act. It also provides for establishment of National Gene Fund, which would facilitate 'benefit sharing' between the farmers and anybody interested in their knowledge.[9]

On the other hand, the legislation attempts to balance in a rather unique manner the rights of commercial breeders and those of traditional small-scale and subsistence farmers. The conflicting goals come to expression in the preamble of the Act. On one hand, it speaks of the necessity "to recognize and protect the rights of farmers in respect of their contribution made at any time in conserving, improving and making available plant genetic resources for the development of new plant varieties", while on the other hand it regards plant breeders' rights protection as a necessary precondition "for accelerated agricultural development" and "to stimulate investment for research and development" as well as to "facilitate the growth of the seed industry."

Plant Breeder's Rights (PBR)

The PBRs are used in most OECD (Organizations of Economic Cooperation and Development) countries. There is a use of plant breeder's right in India with the expansion of private seed industry in India, however, there is a pressure from this industry to provide due reward for their investments, so that innovations in plant breeding may be encouraged.[10] Under the UPOV Convention of 1978 the breeder's right did not prohibit the

farmer from reuse of farm saved seed of a variety from his own harvest for planting another crop.[11]

Furthermore, the protected plant variety could be freely used earlier as plant genetic resource for the purpose of breeding other varieties. However, most countries are expected to limit the PBR with regard to farmer's plant back, although the farmers will not be able to sell the seed. PBR has analogies to patents, but there are also important differences. Rights are granted for a limited period (20 years) to the breeders.

A PBR protected variety must fulfill some requirements:

- It should be new distinct, uniform and stable.
- New means that the variety should not have been previously exploited commercially.
- Distinct means it should be clearly distinguishable from all other varieties known at the date of application for protection
- Uniform means that all plants of variety should be sufficiently uniform.
- Stable means that the variety could be reproduced and multiplied without losing its characteristics and uniformity.[12]

Farmer's Rights

Farmer's rights reflect the recognition of sovereignty in ownership and creativity in traditional breeding by farmers as well as alternative breeding strategies for protection of the biodiversity base of agriculture. Without farmer's rights the biodiversity rich third world countries cannot assert their sovereign rights to their agricultural biodiversity or in their agricultural policy. Without the ownership rights of farming communities' biodiversity cannot be conserved.[13] Agriculture began some 10,000 years ago. During this vast period of time genetic resources have been selected, developed, used and conserved by farmer families and farming communities of particularly the gene rich developing countries. These same materials have been and are being collected, conserved and used as raw materials to evolve the modern high yielding varieties of various crops. Seed sales of these improved varieties earn huge profits for the seed corporations.[14]

Local communities have been the custodians of the biological wealth of this planet. It is their control, their knowledge and their rights that need to be strengthened if the foundations of biodiversity conservation are to be strong and deep. But instead of being treated as the common property of local communities, or as the national property of sovereign states, the third world's biodiversity has been treated as the common heritage of human kind. In contrast the modified biodiversity is sold back to the third world as priced and patented seeds and drugs.[15]

The unequal exchange of biological resources between the north and south was finally challenged in the FAO in the mid 1980s. It recognizes that farming communities have greatly contributed to the creation, selection and preservation of genetic material and

knowledge. Therefore, it is the obligation of world community to help those farmers to carry out this task and also help them in utilizing the genetic diversity available with them. No intellectual property system exists for the reward to farmers for their work. Efforts, therefore, have been made to give a concrete legal form to these rights, described as 'farmers' rights'.

According to FAO Conference resolution adopted in 1989 (5.89) are defined as follows:

- Rights from the past, present and future contributions in conserving, improving and making available plant genetic resources (PRGs), particularly those in centers of origin/diversity. The idea of informal innovations eligible for farmer's right is based on following:
- Farmer's land races, plants (used for medicinal purposes and other biological products), processes and innovations are the result of human inventions and arise from informal efforts, which are purposeful and creative.
- The plant breeders collect the present day improved germplasm generated by the farmers and gather from them the knowledge about its breeding and discovery.[16]

These aspects in relation to farmer's rights are not covered under TRIPs within GATT negotiations. The concept of farmer's rights aims at benefit sharing through a process of compensation for the use of traditional knowledge systems. Thus, the farmer's rights include the following rights- (1) The Right to land, (2) Right to conserve, reproduce and modify seed to plant material, (3) Right to feed, to ensure food security and to save the country, (4) Right to just agricultural prices and public support for sustainable agriculture, (5) Right to information, (6) Right to participatory research, (7) Right to natural resources, (8) Right to safety and health.

The Plant Variety Protection Acts introduced in advanced countries generally confirm to the provisions stipulated by the UPOV Act of 1991. Because of this Act, it has become necessary to classify the farmer's rights into two distinct categories-(1) Farmer cultivators: Farmer's cultivating new varieties of crops by buying seeds should have unrestricted rights to keep seeds for raising crops in their own fields for successive generations. They should also be allowed to enter into a very limited sale, exchange of seeds with their immediate neighbour. (2) Farmer Conserver's: Those indigenous people who have preserved land races and varieties raised by them through their own selection belong to this category of farmer's that should be given under 'farmer's rights'. There was a strong recommendation in UPOV that a balance should be stuck between homogeneity and heterogeneity in the genetic makeup of new cultivars. As a sequel to this strong proposition, a resource center for farmer's rights was organized in MS Swaminathan research foundation (MSSRF) in Chennai. The Government of India has planned the establishment of a national community gene fund for rewarding farmer's efforts in maintaining agro biodiversity.[17]

Patents and Farmer's Rights

Patent protection implies the exclusion of farmer's right over resources having these genes and characteristics. This will undermine the very foundation of agriculture. For example, a patent has been granted in the US to a biotechnology company, Sungene, for a sunflower variety with very high oleic acid content. Sungene has notified others involved in sunflower breeding that the development of any variety high in Oleic Acid will be considered an infringement of its patent. A landmark event for the patenting of plants was in 1985, when scientist Kenneth Hibberd and his co-inventors were granted patents on the tissue culture, seed and whole plant of corn line selected from tissue culture. In 1998, leading NGOs focused world attention on a patent over an invention in genetic engineering that was creatively dubbed the 'Terminator', owned jointly by a US seed company, Delta and Pineland, and the US Department of Agriculture.[18] The terminator have raised alarm in developing countries that the farmer's practice of saving and replanting seed or using it for breeding new varieties could be effectively nullified even in countries that choose to allow this as an exception in their Patent or Plant Breeder's Rights Laws. Subsistence level farmers can not in particular, afford to purchase expensive seed for every crop season. The possible effects on agricultural biodiversity through non-generation of farmer's varieties or through gene drift of the genetically used restriction technologies (Variety-GURTs) incorporated seeds to other traditional crops being grown in neighbouring field, thus rendering them sterile, has created further panic in developing countries.[19]Since seed makes itself a strong utility patent, it implies that a farmer purchasing patented seed would have the right to use (to grow) the seed, but not to make seed (to save and replant) [20]

If such patents are introduced in India, the farmers who save and replant the seed of a patented or protected plant variety will be violating the law. The 1970 Patent Act excluded all methods of agriculture and horticulture from patentability. The Patent (Amendment) Bill, 1995 removes these restrictions in the field of agriculture. It allows the patenting of plant, plant products, plant characteristics their genes, bio-pesticides, bio-fertilizers etc.[21]

The Constitution of India under Article 47 guarantees that "the state shall regard the raising of the level of nutrition and standard of living of its people and the improvement of public health as among its primary duties." The duty of the state is in fact a reflection of the fundamental right of citizens to have access to health and nutrition. The TRIPs agreement militates against people's human right to food and health by conferring unrestricted monopoly rights on corporations in the vital sector of health and agriculture. The patent ordinance which allows exclusive marketing rights in the area of agricultural chemicals and when combined with breeder's rights allows monopolies for seed corporations under Plant Variety Act being drafted by the government of India as part of its obligations under TRIPs to have an IPR system to cover plant varieties and seeds will undermine farmer's rights and people's rights to food as human rights.[22]Farmers' rights therefore need to be built into patent legislation, not just plant variety legislation.

Biological Diversity Act, 2002

Biodiversity plays a vital role in sustaining conservation of nature and development of biotechnology industry. Biodiversity is a basis to progress in improving the productivity of plants, animals, fishes and all living organisms. Conservation of biodiversity ensures ecological stability and also involves protection of socio-ecological interest of the people actively associated with conservation. All over the world legal strategies at global, regional and local level have been developed for ensuring protection of such interest alongside maintenance of ecological stability. Realizing that India has vast and rich biodiversity, its protection against biopiracy and ensuring equitable sharing of benefits enshrined in the CBD is a challenging task. One of the major challenges before India lies in adopting an instrument which helps in realizing the objectives of equitable sharing of benefits. CBD affirms the sovereign rights of the states over their biological resources and India being a member of CBD and WTO decided to bring the BD Act, 2002 after making extensive and intensive consultation process involving various stakeholders.[23]

India's National BD Act, shares the concern of the CBD and subscribes to the principles of Prior Informed Consent (PIC), the legislation is not entirely patterned on the lines of CBD. Indeed, the BD Act has attempted to steer away from the text of the CBD in some respects. While the Preamble of the Act states the objectives of the Act to be "conservation of biological diversity, sustainable use of its components and equitable sharing of its benefits arising out of the use of biological resources and for matters connected therewith or with incidental thereto", there are some differences between the Act and CBD.

The legislation mainly addresses the issues concerning access to genetic resources and associated knowledge by foreign individuals, institutions or companies and equitable sharing of benefits arising out of use of resources and also provides safeguards to protect the interest of local people and farmers, who contributed to generation of biological diversity and also discourages bio piracy of resources.

Concluding Remarks

Plant variety and farmers rights legislation requires specialized capabilities for enforcement of PVFR and to prevent its harmful effect on people. Additional strategies need to be developed to support breeding activities for resource poor farmers. Efforts have to be made to promote plant breeding activities and simultaneously, to protect agricultural community from the adverse effects of PBR. Legal strategy is not sufficient to protect the rights of farmers unless and until it is supplemented with agricultural educational programme. A strong institutional mechanism has to be developed to access environmental and social impact assessment to ensure that plant variety does not threaten agro biodiversity. Sturdy efforts have to be made to identify and check use of terminator, trait or varieties that are harmful and genetically modified organisms such as transgenic etc. should not be used.

References:

1 Watal, Jayashree, *Intellectual Property Rights In the WTO and Developing Countries*, 1 (2001, 1st ed.)

2 Trade Related Aspects of Intellectual Property Rights

3 Verma, S. K., Biodiversity and Intellectual Property Rights, *Journal of the Indian Law Institute*, 205, Vol. 39, 1997.

4 *Ibid.*

5 Shiva, Vandana, Agricultural Biodiversity, Intellectual Property Rights and Farmer's Rights, *Economic and Political Weekly*, 1623, Vol. 31, 1996

6 Singh, B.D, *Biotechnology Expanding Horizons*, 801 (2004, 1st ed.)

7 Meena, Poonam, Sampat Nehra and P. C. Trivedi, *Role of Biotechnology in the Protection of Intellectual Property Rights*, 413 (2006, 1st ed.)

8 *Id*., at 418

9 Meena, Poonam, supra note 7 at 420

10 *Id*., at 413

11 *Id*., at 418

12 *Id.*, at 419.

13 Shiva, Vandana, supra note 5 at 1623

14 Singh, B.D, supra note 6 at 804

15 Shiva, Vandana, supra note 5 at 1623.

16 Meena Poonam, supra note 7 at 419

17 Krishnamurthy, K. V., *An Advanced Textbook on Biodiversity*, *Principles and Practice*, 192, (2007 1st ed.)

18 Watal, Jayashree, supra note 1 at 161

19 *Id*., at 162

20 Shiva, Vandana, supra note 5 at 1627

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

Independent Directors under Companies Act 2013: An Analysis

Dr. Chitra Singh*
Kriti Sinha**

Abstract

Companies Act 1956 (CA 1956) was in existence for about 45 years, had undergone 25 amendments and seemed quite ineffective in controlling today's challengesand corporate scandals therefore a need was felt for a new legislation, hence Companies Bill 2009 was passed in the Parliament.The said bill has undergone several suggestions & amendments and finally Companies Bill 2012 was introduced which got assent by hon. President of India on Aug.30, 2013 as Companies Act, 2013. The purpose of this paper is to study the changing role of independent directors under CA 2013. CA 2013 is a welcome step in strengthening CG with introduction of provisions regarding duties & liabilities of Independent Directors.

Key Words: Companies Act 2013, Independent directors

Introduction

The 2013 Act has introduced several new concepts and has also tried to streamline many of the requirements by introducing new definitions. The changes in the 2013 Act have far-reaching implications that are set to significantly change the manner in which corporate operate in India. Certain reasons for enactment of CA 2013 are as follows:

(1) CA 1956 is half a century old law.
(2) Changes in national & international economic environment.
(3) Drastic changes in our economic growth & expansion.
(4) Conceptof corporate governance has been shattered due to recent corporate scandals so to enhance corporate democracy.
(5) Bring better transparency and strict regulations.

CA 2013 shows a titanic shift from "government control" to "self control". With the changes in CA 2013 it is expected to believe that the quality of functioning of BOD will increase, responsibility level of top management will enhance, and deep understanding of concept of corporate governance and increase in trust of investors & stakeholders will be seen.

Comparison between CA 1956 & CA 2013

S. No.	Particulars	CA 1956	CA 2013
1.	Appointment of ID	Not Given	Given

**** Associate Professor, Mewar University, Chittorgarh.***
*****Research Scholar, Mewar University, Chittorgarh.***

2.	Qualification of ID	Not given	Given
6.	Code for ID	No provision	Schedule IV Of Act.
7.	Liability of ID	No provision	Sec. 149(12) of Act
8.	Role & duties of ID	Role & duties not described	Sec.149(6)of Act

Source: the Companies Act, 2013, Universal Law Publishing Co.

Need of Independent directors

After Satyam scam, the need of independent director arose. Under CA 1956 no provision for independent director has been made but under CA 2013 all listed companies should have at least 1/3 of the board as independent director

Qualification criteria:

CA 2013 prescribes detailed qualifications for the appointment of an independent director on the board of a company.

Duties of director

Under CA 1956 only fiduciary duties has been described but under CA 2013 duties of director and independent director has been prescribed clearly. CA 2013 imposes significantly onerous duties on independent directors, with a view to ensuring enhanced management and administration. While a list of specific duties has been introduced under CA 2013, it should by no means be considered to be exhaustive. Independent directors are unlikely to be exempt from liability merely because they have fulfilled the duties specified in CA 2013, and should be prudent and carry out all duties required for effective functioning of the company.

Liability on director

CA 2013 doesnot restrict an Indian company from indemnifying its director & Officer as was under CA 1956. CA 2013 proposes to empower independent directors with a view to increase accountability and transparency. Further, it seeks to hold independent directors liable for acts or omissions or commission by a company that occurred with their knowledge and attributable through board processes. While CA 2013 introduces these provisions with a view of increase accountability in the board this may discourage a lot of persons who could potentially have been appointed as independent directors from accepting such a position as they would be exposed to greater liabilities while having very limited control over the board.

Pros and Cons Regarding Provisions of Independent Directors

Definition of Ids

The Companies Act 2013 for the first time introduces the definition of independent director

Requirements

Section 149 (6) prescribes the criteria for IDs. These were introduced mainly to ensure transparency in corporate governance and safeguard the autonomy of IDs.

Responsibility

The act casts greater responsibility on the IDs. For example---it specifies that any decision taken by the board in the absence of IDs must be circulated to all directors and can be final only upon receiving the ratification from at least one ID.

Liability

The act explicitly provides under section 149 (12) that IDs are made liable only for offences committed with their knowledge, connivance or negligence. This should limit their liability and instill confidence in the minds of such individuals for taking honest and unfettered decisions, which eventually will ensure proper monitoring of company's management.

Remuneration

The act disallows IDs from obtaining remuneration other than sitting fees and reimbursement of travel expense for attending the board other meetings. The reason for restricting the remuneration under section 197(7) was to prevent personal financial nexus with the company and to safeguard their Independence.

Rendezvous

Schedule IV code VI of the act states that all independent directors must meet at least once annually without the presence of non independent directors and members of the management. Such meetings are termed as separate meetings. Where they are required to evaluate the performance of the company's chairperson, non-independent directors and the board as whole. This would help directors to express freely in an open environment as well as allows them to take suitable and impartial decisions based on the performance of the board.

Schedule IV code VII mandates the board to convene the meeting for evaluating the performance of independent directors without their presence and where the board should determine to continue their term. These provisions act as a check and ensure that their powers are being utilized in a proper and rational, manner.

Cons

Appointment of Ids

IDs in India are appointed by promoters. This is the biggest paradox:"an ID is appointed by the very promoter whose wrongdoings he is supposed to prevent. As long as ID is appointed by the promoters, to whom they owe their office, independence shall remain a myth. In the Indian culture guests will always be polite to their hosts, and in this case, these are guests who are also being paid by the hosts.

Almost all IDs tent to trust and provide blind support to the promoters because of the inherent paradox of not being able to take a stand against the very promoters who have appointed them .if some high profile IDs do get uncomfortable with an issue that could

tarnish their public image, they would hurriedly resign from the board giving no reasons for their exit.

And yet, the regulator expects that it is the institution of ID. That should ensure CG. Can this shortcoming be overcome? If Indeed the role of the ID is to protect the minority shareholder from the promoters, common sense would dictate that the appointment of IDs. Has to be by someone other than the promoters. The reality is that no company would take on its board a person unless the promoter is extremely comfortable with him; no one will ever take the risk of getting a stranger on its board. And logically too, no sensible person would ever join a strange companies board.

Selection of Ids from Database

Under section 150- CA there is suggestion that IDs shall be selected from a database of professionals, this too would not help. A company would for request their preferred candidates to enroll in the database and then would seek their profiles from this database. Since no qualifications for experience filters are being prescribes by the law, it would be possible for anyone to enroll in the database.

Any Person Can Become an ID

As such, every single Indian, who is above 21 years of age, is qualified to become an ID, which means over 70 crore Indians are eligible to become IDs, and that too for handling such professional and technical job. No educational qualifications or trainings necessary to understand the corporate world and laws / regulations have been prescribed for IDs in the regulations. It is amusing that as low level operator in a broking firm has to pass the NCFM exam or to sell mutual fund, a person has to pass the AMFI (association of mutual funds in India)) test. But to be at the helm of a corporate, one does not need to have any qualification or pass any exam!

Advantages of CA 2013

Diversified background in boardroom---- introduction of appointment of women director is a welcome step for women as it helps in enhancing women empowerment. Act provides that the board consist of one-third of independent directors which will help in curbing nepotism to a large extent. With this Act, benefits to small companies now are remarkably enhanced.

Disadvantages of CA 2013

In India IDs are appointed by promoters which is a great hindrance in their independence as ID are under their obligation because they are being employed by promoters. Id gives full support to promoters & can’t speak against them as they are being paid by the promoters. There is no qualification mentioned in the Act to become an ID due to which anybody can enroll himself for the said post.

Role of Judiciary

Minimum number of directors

The provisions as to the minimum number of director are mandatory & consequently any business transacted after the number fell below the minimum was held to be invalid. **Sly,**

Spink & Co. Re (1911)2 Ch430.

Filling of Casual Vacancies among Directors

A casual vacancy means any vacancy occurring by death, resignation or insolvency & not by efflux of time or retirement by rotation. **Srinivasavn (M.K.) vs. W.S. Subramanya Ayyar (1932) 2 Com Cases 147**

Restriction on Number of Directorship

A director can also be precluded by contract & is already bound by a fiduciary duty not to pass on confidential information from one company to another.**The Street Pty. Ltd. vs. Cott (1990)3 ACSR 54 (Aust.)**

Only Individuals Additional Directors

Without a power given by the articles, the board cannot appoint additional directors. The section applies to all companies, public &private. **Needle Industries (Indian ltd.) vs. Needles Industries Wewey (India) holdings ltd. AIR 1981 SC 1298**

Conclusion

CA 2013 has introduced significant changes regarding the board composition and has a renewed focus on board processes. Whilst certain of these changes may seem overly prescriptive, a closer analysis leads to a compelling conclusion that the emphasis is on board processes, which over a period of time would institutionalize good corporate governance and not make governance over-dependent on the presence of certain individuals on the board. Though with the introduction of CA 2013, the liability & responsibility on directors/ ID has increased but it's a reforming change & is expected to improve corporate governance norms, transparency, accountability & protection of interest of investors. It is supposed to bring friendly environment within the corporate world which will help in economic growth and development of corporate sector in India.

Suggestions

ID as Whistleblower: The companies' bill also stipulates that a director should give detailed reasons for his resignation from a board. This is a good idea. But in reality these reasons would continue to be vague. What is required is an n exit interview by an independent body; this would be a good way to convert these IDs into whistleblowers of sorts.

The 1/3 Formula: There is also a need to bring a new paradigm on board composition an s suggestion, 1/3 of the board should be of promoter- directors, another 1/3 should be of

professional directors appointed by the management who would not be deemed as ids and the balance 1/3 should be they IDs.

Eligibility Exams for ID: IDs should be required to pass a 'directors'' test before appointment there should be a professional institution of directors, membership of which should be obtained by passing the necessary examination after a course of instruction at or by reputed/ selected business schools/ academic centers. The board appointments should be limited to such certified directors. All existing ID should be given a 6 month time frame to pass the same. The test should be very extensive and assess the person's knowledge of finance, companies act, Sebi Act/ regulations and the like

Nomination Committee for IDs: Foremost, there is a need to change the appointment process. A NC comprising only ID (like in the US), should me made compulsory. Appointment of IDs should be on merit and on some objective criteria. Only persons who can clearly demonstrate that they have enough time should be considered. Public disclosures should be made on hoe and ID was found and why his he being nominated, along with all his past and present relationship of any kind with the company/promoters/major shareholders/ management. Profile of the ID along with all present significant commitments as also the proposed remuneration should be put on the websites of the company and the stock exchanges for public comments for twenty on e days. Existing shareholders alone may not know enough about these people and as such comments from non shareholders, including potential shareholders, would only help the cause. In addition, each ID should provide as detailed certificate of independence at the time of appointment and annually thereafter.

References:

1. The Companies Act, 2013---- Universal Law Publishing Co. New Delhi
2. Guide to the Companies Act--- A Ramaiya,Wadhwa & Co., Nagpur.
3. Analysis of Companies Act, 2013--- CCH-A Wolters Kluwer Business.
4. Available on www.governancenow.com/news/regularstory /regulationcantbeoutsourcedto independentdirectos accessed on 12 July, 2015 at 12: 23 p.m.
5. Available on www.thehindubusinessline.com. accessed on 12 July, 2015 at 12: 40 p.m.
6. Independent directors in changing legal scenario Company Law Journal (2013).
7. Corporate: Independent Directors in the Board, Global Journal of Management and Business Research Volume 11 Issue 1 Version 1.0 February 2011.
8. C. B. Baxi,, Corporate Governance: Critical Issues, (New Delhi: Excel Book, 2007)

Human Rights Issues of the Transnational Surrogacy Arrangements

Mrs. Richa Srivastava (Saxena)*

Abstract

Infertility is known as one of the biggest curse to the human race. Fortunately today, medical science is well developed and provides number of alternatives to those suffering from infertility. Surrogacy is a one of them and it provides not only the opportunity to the parents or parent to get the child but it also provides several alternatives to choose that child. In search of such kind of parenthood a transnational industry is established in recent years and converts the whole process of reproduction in to the production. By the effect of globalization the child birth is outsourced through transnational surrogacy arrangements where a woman contracted to carry the genetic foetus of an infertile foreign couple and being paid to deliver the child. In these arrangements all is well from one side because it provides opportunities to those who can't be parents or parent due to some deformity and they can choose many things like surrogate mother, type of surrogacy arrangements(gestational, or other), country which provides cheapest medical facilities and so on. But on the other side, different legal, ethical and human rights issues are involved such as use of reproductive capacity of women, rights of child, basic family law issues such maternity, paternity, custody of child etc. In this paper object of the author is to highlight the human right issues in transnational surrogacy arrangements with a view to examine the need of a uniform protection to the women and children involved in such arrangements.

Introduction

"By action of modern industry, all family ties among the proletarians are torn asunder, and then their children transformed into simple article of commerce....."

Karl Marx and Friedrich Engles
Manifesto of the Communist Party (1848)

This statement is made by Karl Marx in his party's Manifesto more than one hundred fifty years ago. In present circumstances, it is still relevant if we read it with other statement like "Infertile couple looking for women to bear the child for them, conception to be achieved through artificial insemination supervised by medical doctors and child to be given to couple through adoption. All expenses paid all responses confidential. Respond to...."Such type of advertisements may be seen frequently in the newspapers or on the covers of magazines, or on internet and in fact everywhere, are not for the sale and purchase of any product but it is for the services of woman who voluntarily rented her womb to bear the child of a couple who are unable to bear the child due to some medical infirmity or otherwise or of an individual who wish to be parent.

**** Assistant Prof. Faculty of Law, University of Lucknow, Lucknow.***

This practice is known as surrogacy. It is a medical science miracle which provides an opportunity to the infertile couple or an individual to get the child of same genetic characters as the parent or parents have. Surrogacy is an agreement in which a foetus is carried in the womb of a woman who bear it for the intended parent or for an individual in response to payment form them or sometimes without payment and surrender that child to the intended parents or to the individual depend upon the case after birth of the child. Such woman is called as Surrogate mother.

There are two types of surrogacy agreements; one is altruistic[1]i.e. without any payment to surrogate mother only medical expenses has to bear by the intended parents or an individual who wishes child. Such kind of agreements mostly between parties who are known to each other, family members like women helps her sister in law or sister or other female relative who is unable to bear the child by the reason of medical deformity. Other is Commercial Surrogacy[2] where woman is paid for providing such services of 'renting a womb', other than the medical expenses. Thus such International Surrogacy Arrangements actually commercialises the use of reproductive capacity of the women and established a transnational surrogacy industry which actually replaced the process of the reproduction in to a production.

An international surrogacy arrangement entered into by intending parent(s) resident in one State and a surrogate resident (or sometimes merely present) in a different State. Such an arrangement may well involve gamete donor(s) in the State where the surrogate resides (or is present), or even in a third State[3].Transnational surrogacy has grown very rapidly in recent years, due to rising rates of infertility, medical advances, ease of communication and transportation, lowering of the social stigma of infertility, trends towards medical tourism and active promotion of surrogacy services, often for profit[4].International surrogacy is a phenomenon which is truly global in its reach. Recent data shows that intending parents entering into international arrangements come from all regions of the world.[5] The States to which intending parents are travelling are also geographically diverse and primarily include Eastern Europe, Asia and North America. The phenomenon is also global in that one arrangement may often involve more than two States.[6]

Such arrangements may be a traditional[7] or gestational[8] and may be altruistic[9] or commercial[10] in nature. Presently this practice of gestating a child for another couple or for an individual through the use of Artificial Reproductive Techniques and in return for remuneration has drawn much attention and raised several ethical concerns. The Hague Conference on Private International Law ("HCCH") has estimated that there was a 1000% increase in the incidence of surrogacy between 2006 and 2010.[11] It has become common practice for intending parents to travel outside of their home country to engage in commercial surrogacy because in some developing countries surrogacy services are available in lower cost. They have other reasons to travel these countries because some time home countries prohibited commercial surrogacy and held it as criminal act[12]. Two of the "hubs" for transnational commercial surrogacy are India and Thailand, and reported

cases indicate that these are currently the most popular destinations for Australian commissioning parents.[13]Commercial surrogacy is often portrayed as a win-win situation. It is seen to give 'desperate and infertile' parents the child they want, and to provide poor surrogate women the money they need. In the face of this growing globalization of capital and shrinking local avenues for jobs and resources, women from marginalized communities and regions find themselves more impoverished, powerless and vulnerable.

For these women, access to work and occupations has decreased over time, while new markets have opened up for both their sexual and reproductive labour.[14] Not only this but some of the serious problems arising out of the International Surrogacy Arrangements such as complex and uncertain legal parentage, immigration, citizenship and contractual issues. There is lack of uniform approach in the world on surrogacy arrangements. Some countries like France, Italy, Germany, China, and Japan ban surrogacy, United Kingdom, Australia, New Zealand, Israel and Holland permits altruistic surrogacy only while India, Ukraine, Russia and some States of America permits commercial Surrogacy.J. Headly in an English case[15] held that in such circumstances children may be "marooned, stateless and parentless."

Legal procedure to bring such child to home is very slow and difficult thatis why sometimes desperate parents take the criminal attempt to bring the child home[16]. But the protection, care, and education of the children is central and moral obligation of humanity and it is also collectively necessary for survival and social flourishing.[17]On the other hand surrogacyexposes parenthood, not as a biological fact, but as a legally and socially constructed status with responsibilities and obligations as well as benefits[18]. The Hague Report provides that there is a booming business in transnational surrogacy arrangements.[19]In India alone, reproductive tourism is a $400 to $500 million per year business.[20]Transnational surrogacy results in complex, and often conflicting, rules regarding basic family law issues of maternity, paternity, custody, visitation, and children's rights.[21]

Human Rights of Surrogate Mothers

The Universal Declaration of Human Rights (1948), The International Covenant on Social Economic and Cultural Rights (1976), Convention on Elimination of All Forms of Discrimination against Women (1979) and Convention on Rights of Child (1990) though not deals directly with the issues of surrogacy but they address some of the important rights involved in the surrogacy arrangements like Right to Health[22], the Right to Support[23], the Right to know one's Origins,[24]and the right to a family[25]. Right to nationality[26] etc. The argument here is that, in surrogacy arrangements rarely human rights protection are assured to the surrogate mothers. In some cases, this may be accomplished through regulations[27] or contractual provisions, such as the assurance for the gestational mother of free pre-natal care. In other cases, this may be more difficult, such as treatment for as yet unknown conditions that may result from the hormonal treatments necessary for surrogacy. If, for any reason, such assurances are impossible, surrogacy should be barred as a violation of

human rights.[28] Next to this there is reproductive rights of women endorsed by the Cairo Consensus (1994)[29]such as right to decide the number, timing, and spacing between in the children, Right to voluntarily marry and establish a family and right to highest attainable standard of health care[30].

But the strange thing is that none of such human rights are directly applied to the case of gestational surrogacy. The surrogate mother offers her gestational services via clinic and broker to prospect parents in exchange for payments. The women who are recruited for the surrogate purpose, was of low socioeconomic status. Due to their financial need, these women were willing to become a surrogate mother. For example, earnings of surrogate mother in India sometimes equal to family income of five years. The adverse effect of the situation is that these surrogate mothers might not fully understand the consequence of being gestational surrogate.

The studies done by Smeredon, as mentioned by Saroahain her work that these women enter in to the contract without knowing the burden that they will have to carry mentally and physically. It is questionable that to what extent the prospect surrogate mother knows the danger of being surrogate[31].Dr Amrita Pandey shows the fact that in what conditions Surrogates Mothers are bound to give birth to the child. For example in India the reaction of one of the surrogate mother as follows.....
"We were told if anything happens to the child, it's not our responsibility, but anything happens to me, we can't hold anyone responsible. I think the legal contract says we will have to give up the child immediately after the delivery; we won't even look at it, Black or white, normal of deformed, we have to give it away".[32]

Thus surrogate mothers know about the delivery of the child to prospect parents but they did not know about the side effects of fertility treatments or even they didn't know the consequences if contract would fail. The surrogate mother is actually acting as health care worker who provides health care services to the prospect parents to overcome from their infertility problems. During the process, the surrogate mother has to go under medical procedures or treatments. Hence she must have right to know about the medical procedures which are applied on her and also about the mental and physical effects of the gestational services. Gestational surrogacy is a much more complex medical process than traditional surrogacy, since the surrogate is not genetically related to the baby and her body has to be 'prepared' for artificial pregnancy. The transfer of the embryo is complex medical process but the process of getting the surrogate ready for that transfer is also very difficult and it takes weeks and after that heavy medical intervention of the body of the surrogate mother.

First, birth-control pills and shots of hormones are required to control and suppress the surrogate's own adulatory cycle and then injections of oestrogen are given to build her uterine lining. After the transfer, daily injections of progesterone are administered until her body understands that it is pregnant and can sustain the pregnancy on its own. The side effects of these medications can include hot flashes, mood swings, headaches, bloating,

vaginal spotting, uterine cramping, breast fullness, light headedness and vaginal irritation[33].The general successful rate of implantation in IVF is very low and may not lead to pregnancy in single attempt. Surrogates often have to go no of cycles before successful pregnancy which including multiple embryo transplantation to increase successful rate. It causes the risk of multiple pregnancies and multiple foetal reductions.

The possible rick of multiple pregnancies is apprehension of miscarriage, obstetric complications, premature deliveries and birth complications. Foetal reductions may cause bleeding, perforations, infections, premature labour, loss of foetuses.[34] All these issues are directly related to right to health and reproductive rights of women but none of the domestic law or the international regulations available on the subject deals with these issues. Not only that chances of caesarean section are high because neither doctors nor commissioning parents are interested to take risk in delivery and the time of delivery is also artificially decided by the doctors in accordance to the availability of the commissioning parents. Surrogate is treated to stop the lactation after delivery in cases where she doesn't have to breastfeed the child in accordance to the term of contract.[35]There is no instances in the empirical studies to provide any kind of post-delivery care to the surrogate mothers neither by the commissioning parents nor by the hospitals which are working as facilitators. This is violation of the health rights of the surrogates[36].

Again these Surrogate mothers are exploited by denial of their justified dues. In developing Countries these surrogate mothers are working on very low charges because of poverty and economic disparity of developed and developing countries. For example total cost of surrogacy arrangement in US is $80000. From that amount $15000 goes to surrogate mother and $30000 goes to intermediary. As Jennifer Rimm found that in India, total cost ranges between $10000 to $30000, including payment to surrogate mother and medical expenses.[37] Thus due to International price competition in the international surrogacy market, international clients will be attracted to the lower prices of the surrogacy in developing countries which could potentially leads to the exploitation of surrogate mothers.[38]These Surrogacy arrangements actually commercialise the intimate process of gestation. Physically the body of the surrogate mother is control by others while they gestate, it is used for someone else's purpose in a constant and inseparable manner.

They are trapped physically in to their agreements. Biologically surrogate mothers are affected constantly by the foetus growing in her womb. Emotionally devastating effect on the life and psychology of the surrogate mother because she has to leave the child immediately after a birth. Thus a woman who is ready for surrogate motherhood has to bear both physical and psychological strains, though she is not genetically related to the child, but to give up the child immediately after birth is painful and affects the mother psychology negatively. As gestational surrogacy does not involve 'sex' but only artificial insemination it does involve renting one's womb, the so-called sanctum sanctorum of a woman's body. This puts commercial gestational surrogacy in the realm of what feminists call 'body work', a reason it is often likened to commercial sex work[39].

Human Rights of Child Born Out of Surrogacy Arrangements

Convention on Rights of child guaranteed the child right to dignity, protection from sale or trafficking, registration of his or her birth and to know his or her parents[40].For example the right of the child not to suffer adverse discrimination on the basis of birth and parental status, (Article 2 of the CRC) the rights of child to have his or her best interests regarded as a primary consideration in all actions concerning him or her (Article 3 of the CRC), as well as child rights to acquire a nationality (Article 7 Of the CRC) and to preserve his or her identity (Article 8 of the CRC)[41].The basic human right of the child is to get the parenthood and right to know the family[42] are violated in the surrogacy arrangements because of a complex family arises for the child born out of such arrangements. About five people can claim a parental status over the child born out of such arrangements the contracting parents, the genetic mother and father, and the surrogate.

Maternity is now divisible into genetic, gestational, and social motherhood, and these roles can be spread amongst a number of women. This division is most apparent in the case of surrogate mothers, where at least three (and possibly as many as five) women can attempt to claim parental rights over a child. "If Mrs. A is infertile and Mrs. B agrees to provide ova to be fertilized in vitro with semen from Mr. A, and embryos are transferred to Mrs. C, who agrees to carry the baby to term and hand it over to Mrs. A and her husband after birth, the situation becomes extremely complex and the basic tenets of family law are uncertain."[43]"The child's rights are to be respected and ensured without discrimination of any kind including birth or other status are not assured in such agreements[44]. In the case of transnational surrogacy arrangement the status of child sometimes become more confusing and complex. As the national laws on surrogacy in different countries are different consequently they (child born out of surrogacy arrangement) remain sometimes without legal identity or even stateless.In surrogacy arrangements, whether commercial or not, if there's a falling out between the gestational mother and the parents (who may or may not be genetically related to the child), the child may never know who gave birth to him or her.

This risk is magnified in international surrogacy.[45]Number of cases arises in last decade from different countries over the issues of legal parenthood and national identity of the child. For example two Indian cases i.e. Jan Balaz Case[46]where twins has to stayed in India for two years due to their statelessness, in Baby Yamada Case[47] custody of baby Manji was an issue because her commissioning parents divorced before the birth of the child, in an English case Re L (A Minor)[48] the issue was the legal parenthood because in UK commercial surrogacy was not allowed, in a French case the Mennesson [49] the issue was citizenship of the child because surrogacy is prohibited in the France. Thus in such cases oftransnational surrogacy arrangements there is no welfare of the child unless the intending parents gain the custody of the child and provide him or her citizenship. This practice of surrogacy also raises a number of issues over the physiological development of child in the womb of the surrogate mother. It is true that in the gestational surrogacy surrogate mother is not related to the child genetically but how it can be proved that who kept the foetus in her womb for nine months, nourish and, protect that, later give birth to

that and may not develop apsychological relation and attachment with the child.

The nine months spent in the womb may create the beginnings of an attachment bond and be a factor in a child's identity. As it is recognized that a child has a right to know and understand its history and identity[50]. Children born via surrogacy may feel commoditized by the way in which they were brought in to the world. One nearly eighteen year old boy born via surrogacy wrote *"How do you think we feel about being created specifically to be given away? ... "I don't care why my parents or my mother did this. It looks to me like I was bought and sold."*[51]

Some other issues related to the psychology of child born out of Surrogacy arrangements are considered as they are treated by surrogate mother as outsider or different and carried for certain purpose other than to get parenthood. Similarly the effect on psychology of the own child of surrogate mother may not be positive because it can develop sense of insecurity tothem thatwhen they can be relinquish on payment of money one day. These issues are directly related to the development and welfare of the child which is paramount human Right of the child.

Thus the commercial nature of international surrogacy makes the motherhood and child bearing highly controversial. At one end it commodities reproductive capacity of women and separates the physical act of child bearing from the mother and on other it uses child as a commodity.

Suggestions

Infertility is neither a disease nor does it is life threading. Therefore it would be better to use the intervention of medical science miracles to maintain the life of infertile couples and other individuals normally rather to interfere in those practices which are ethically questionable. For example altruistic surrogacy may be a good option.

To secure wellbeing of the child, protection of rights of surrogate mothers and to support positive moral values of the family and society certain uniform ethical standard should be maintained for the use of these artificial reproductive technologies. To remove the effect of infertility, such techniques have to be applied which causes least harm to involved people and to the child born out of such arrangements. Third parties role should be minimised or avoided. There are certain artificial reproductive technologies which meet these requirements like artificial insemination by husband (AIH), in veto fertilization of the couple's egg and sperms (IVF), or various tubal transfers' methods that neither use third party donors nor deliberately destroy embryonic life.[52]

Adoption can be other alternative to those infertile couples or individuals who wished to be parents. Adoption is well known ancient practice where a child who is already in this world and is in need of parental care. Adoption can be the suitable method to avoid the legal complexities about issues of parenthood and nationality of the child.

Hague Conference suggests that a comparative development in domestic and private International Law is required to achieve global consensus on the issues related to Transnational Surrogacy Arrangements. Some other international policies can be the measures to deal with the problems of transnational surrogacy arrangements. Such as Belgium Court[53] implicated the Convention on Rights of child and European Convention on Rights of Child. The Court held that in case where there is contract related to human beings and the human body are void under public policy, denying the child legal relation with father and mother would be even greater violation of public policy because it would be against the best interest of the child. It further held that Article 3 of the European Convention applied to commercial surrogacy.[54]

To address the international surrogacy arrangements United States has adopted a uniform regulation for every State. Such as Uniform Parentage Act 2002 (Sec 801 and 803)[55] and the American Bar Association Model Act Governing Assisted Reproductive Technology.Both of these Acts were created and revised as solution to the disparities in the stated Laws, but the issues still persist and additional regulations are necessary. Even with the Uniform Parentage Act and ABA Model Act in place, it is up to the states to take the next step and adopt an Act that will remedy the incongruence's.[56]

Sarah Mortazavi suggests that each country involved in surrogacy arrangement should be required to establish a central agency to serve as a conduit for arranging surrogacy agreements. These agencies would impose greater, country specific regulation for vetting intended parents, surrogates and facilitators and ensure their compliance with domestic law.[57]

Commercial Surrogacy could also be connected to the convention of the rights of Child under its Optional Protocol. The Protocol focuses on the sale of children, child prostitution, and child pornography. This draws attention to the criminalization of children's rights violations and emphasizes the importance of public awareness and international co-operation in efforts to prevent them[58].

Conclusion

Though the right to form a family[59] and right to benefit from scientific progress [60]are the human rights provided by the Universal Declaration of Human Rights. But none of these rights justifies outsourcing of the child. The question is that, 'is practice of surrogate mother is justified under right to work?'[61]It doesn't mean that this exercise of discussing the human rights of surrogate mothers and the children born out of surrogacy is to condemn the miracle of medical science which makes the surrogacy arrangements as boon for childless couples and for single parent. The exercise is to make a caution that such a miracle must not converted in to curse because unregulated acts may cause destruction.

To give birth to the child is not an artificial phenomenon as taken in these cases of transnational surrogacy arrangement but it is matter of emotion, love and care. It has to be

practiced very cautiously. Commoditisation of reproductive capacity of a woman must not be permissible. Surrogacy arrangements can be permissible up to the extent where it is altruistic in nature. Commercial use of such practice is disgraceful. Mother is mother always. Relation of mother with her child cannot be characterised in to social mother, biological mother, or surrogate mother or genetic mother. A woman who take care the child of another women in certain exigencies is treated as the mother of the child (for example of Yashoda and Krishna).

It is not easy for a woman who kept the foetus in her womb for nine months will give it to other immediately after birth, though in certain circumstances she has to give that child as in the case of surrogacy contract. It is not mere a 'renting of womb' but the whole body of a woman is involved in that. Pregnancy is not the function of an isolated organ. Mother and child develop physical and social relationship during pregnancy[62], doesn't matter that it is caused naturally or artificially. If such relinquishment of child is in consideration of money then it is unethical and immoral. A child cannot be produce with prior decision of relinquishment. Thus it can be said that commercial surrogacy is ethically objectionable, psychologically fraught with hazards and legally on dubious ground. On the other hand it does not mean to ban such practice totally but it has to be regulated in such manner that sanctity of the reproduction may to be protected, essence of parenthood may be maintained(doesn't matter that it is couple or otherwise), childhood may be cured and existence of family maybe secured.

References:

[1]A surrogacy arrangement where the intending parent(s) pay the surrogate nothing or, more usually, only for her "reasonable expenses" associated with the surrogacy. No financial remuneration beyond this is paid to the surrogate. This may be a gestational or a traditional surrogacy arrangement. Such arrangement often (not always) take place between intending parent(s) and someone they may be already know (e.g.) a relative or a friend. (From the glossary of Hague Conference on private International law A preliminary report on the Issues arising from International Surrogacy Arrangements, March 2012)

[2] A surrogacy arrangement where the intending parent(s) pay the surrogate financial remuneration which goes beyond her "reasonable expenses". This may be termed "compensation" for "pain or suffering" or may be simply fee which surrogate mothers charges for carrying the child. (From the glossary of Hague Conference on private International law A preliminary report on the Issues arising from International Surrogacy Arrangements, March 2012)

[3] Permanent Bureau, Hague Conference on Private International Law ("HCCH"), *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 10 of March 2012)

[4] J. Brad Reich and Dawn Swank, "Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyberprocreative Era" (2011) 14 *Health Care Law and Policy* 241.

[5]Supra note 4 at p 8 provides that the Aberdeen University research project explains that five "agencies" that specialise in international surrogacy (based in the United States of America, India and the United Kingdom), evidences that international surrogacy arrangements have been entered into by intending parents resident in Europe, Australasia, North and South America, Asia and Africa.

[6]Supra note 4 provides that this is particularly the case where gamete donors are used: for example, intending parents resident in one State may use an egg donor in a different State and a surrogate mother in a third State (*e.g.*, the documentary "Google Baby" illustrates such an example: < http://www.hbo.com/documentaries/google-baby/index.html#/documentaries/google-baby/synopsis.html >, last

consulted 16 March 2012). The involvement of more than two States may also arise where a woman is asked (or forced) to move from one State to another for the purposes of being a surrogate and the intending parents then reside in a third State: see *supra* note 12 regarding the trafficking concerns this may raise. A different example of a case involving three States (which also highlights the vulnerabilities of surrogate mothers) is: < http://reformtalk.blogspot.com/2011/10/international-surrogacy-debacle.html.

[7] Traditional surrogacy arrangement is where the surrogate provides her own genetic material (egg) and thus the child born is genetically related to the surrogate such an arrangement may involve natural conception or artificial insemination procedures.(From the glossary of Hague Conference on private International law A preliminary report on the Issues arising from International Surrogacy Arrangements, March 2012).

[8]Gestationala surrogacy arrangement in which the surrogate does not provide her own genetic material and thus the child born is not genetically related to the surrogate. Such an arrangement will usually occur following IVF treatment. The gametes may come from both intending parents, one, and neither. This may be an altruistic or commercial arrangement. From the glossary of Hague Conference on private International law a preliminary report on the Issues arising from International Surrogacy Arrangements, March 2012).

[9]Supra note 2.

[10] Supra note 3.

[11]Supra note 4 p. 8.

[12]France, Italy, Germany and Japan Prohibits Surrogacy

[13]For example *Ellison & Karnchanit* [2012] FamCA 602; *Gough & Kaur* [2012] FamCA 79; *Edmore & Bala* [2011] FamCA 731; *Hubert & Juntasa* [2011] FamCA 504; *Findlay & Punyawong* [2011] FamCA 503; *Dudley & Chedi* [2011] FamCA 502; *Ronalds & Victor* [2011] FamCA 389;*McQuinn & Shure* [2011] FamCA 139; *Dennis & Pradchaphet* [2011] FamCA 123; *O'Connor & Kasemsarn* [2010] FamCA 987.

[14] Birthing A Market A Study on Commercial Surrogacy, Sama Resource Group for Women and Health,2012, page 8

[15] Re X & Y (Foreign Surrogacy) [2009] Fam 71, at 76C.

[16] The Guardian 24 March 2011A French intending father attempted to smuggle a twin girls born to a surrogate mother from Ukraine to Hungry, fox news published on Feb 11 2011. Belgium same sex couple tried to smuggle their child from Ukraine to Poland

[17]Sidney Callahan, *The Ethical challenges to new Reproductive Technologies* 81

[18]Barbara Stark, *Transnational Surrogacy And International Human Rights Law*, Ilsa Journal Of International & Comparative Law [Vol.18:2], page 2Electronic Copy Available At: Http://Ssrn.Com/Abstract=2118077

[19]Supranote 4

[20] Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 225 (2009).

[21]Supra note 19

[22]Article 12 of ICESCR provides "the right of everyone to the enjoyment of highest attainable standard of physical and mental health, andArticle 12 of the CEDWA provides "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related should be accorded to the family planning".

[23] Article 10 of the ICESCR provides "the widest possible protection and assistance should be accorded to the family, special protection should be accorded to the mothers during a reasonable period before and after child birth, special measures of protection and assistance should be taken on behalf of children and young persons without any discrimination for reasons of parentage or other conditions, children and young persons should be protected from economic and social exploitation.

[24]Article 7 of the CRC provides "The child shall be registered immediately after birth and have the right from birth to a name, the right to acquire a nationality and. as far as possible the right to know and be cared for by his or her parents".

[25]Supra note 23.at p 2

[26]Article 8 of the CRC provides "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

[27] Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 146 (2009)
[28]Supra note 19 at p 4
[29]International Conference on population and development 1994
[30]Chapter 7 para 7.3 Cairo Conference 1994
[31]International Commercial Surrogacy: A mission for GATS? Submitted in fulfilment of the requirements for the degree of Master of Science By Sarocha (Youy) Chootipongchaivatibmg February 2013Page 16 and 26.
[32] Amrita Pande "Commercial surrogacy in India: Nine months of labour?" (January 1, 2010). *Doctoral Dissertation*
[33]Amrita Pandey, *Not an 'Angel', not a 'Whore': Surrogates as 'Dirty' Workers in India, p 147*Downloaded from ijg.sagepub.com at HALSOUNIVERSITETS BIBLIOTEK on November 23, 2010
[34]These are the result of study on the surrogate mothers of India by Sama- Resourse Group of Women and Health,2012 and 2006,*Birthing a Market a Study on Commercial Surrogacy*
[35]Studies by Sama ' Construction Conceptions: Mapping of Assisted Reproductive Technologies in India
[36]Para 8.25 chapter 7 of the Cairo Conference provides that reproductive health care includes counseling, information, education and services for family planning, all stages of pregnancy and delivery, prevention and treatment of infertility, abortion and management of the consequences of unsafe abortion, prevention and treatment reproductive tract infections(RTIs)and sexually transmitted disease(STDs)human sexually and parenting.
[37] Jennifer Rimm *Booming Baby Business: Regulating Commercial Surrogacy in India*, University Of Pennsylvania Journal of International Law, Vol. 30, Iss. 4 [2014],
[38]Ibid 37
[39] The Curious Case Of Commercial Surrogacy By Sneha Banerjee 09 March, 2011 Countercurrents.org
[40]Supra note 25 and 27.
[41]Article 2 of the CRC provides "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". Article 3 of the CRC provides "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Article 8 of the CRC provides "States Parties undertake to respect the right of the child to preserve his or her identity, including
Nationality, name and family relations as recognized by law without unlawful interference".
[42]Supra note 23 and 25p 4
[43] Bryn Williams-Jones, *Commercial Surrogacy and the Redefinition of Motherhood*, vol. 2 Feb 2002,Journal of Philosophy Science and Law
[44]Supra note 23 and 25
[45] Liz Bhishop and Babe Loff, *Making surrogacy legal would violate children's rights*,1 August 2014 at monash.edu.au
[46]Jan Balaz vs. Anand Municipality LPA 2151\2009
[47]Baby Manji Yamada v UOI (2008)13 SCC 518
[48] Re L(A Minor)[2010] EWHC 3146 (Fam)
[49]Available at www. Courtdecessation.fr
[50]Supra note 25.
[51] Willium J. Winslande, "Surrogate Mothers: private right or public wrong?" (1981)7 J. Medical Ethics 153
[52]Sidney Challahan,The ethical challenges of the new reproductive technologies
[53] Pattirick Waultelet, Belgium Judgment 27 April 2010
[54]Ibid
[55]Sec 801 of the Uniform Parentage Act 2002 provides that"(a) A prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that:(1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;(2) the

prospective gestational mother, her husband if she is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and(3) the intended parents become the parents of the child.(b) The man and the woman who are the intended parents must both be parties to the gestational agreement.(c) A gestational agreement is enforceable only if validated as provided in Section. Sec 803 of Uniform Parentage Act 2002 provides "If the requirements of subsection (b) are satisfied, a court may issue an order validating the gestational agreement and declaring that the intended parents will be the parents of a child born during the term of the of the agreement.(b) The court may issue an order under subsection (a) only on finding that:(1) the residence requirements of Section 802 have been satisfied and the parties have submitted to the jurisdiction of the court under the jurisdictional standards of this [Act];(2) unless waived by the court, the [relevant child-welfare agency] has made a home study of the intended parents and the intended parents meet the standards of suitability applicable to adoptive parents;(3) all parties have voluntarily entered into the agreement and understand its terms;(4) adequate provision has been made for all reasonable health-care expense associated with the gestational agreement until the birth of the child, including responsibility for those expenses if the agreement is terminated; and(5) the consideration, if any, paid to the prospective gestational mother is reasonable.

[56]Cara Lucky, Commercial Surrogacy: Is Regulation necessary to manage the industry?

[57]Sarah Mortazavi, It takes a village to make a child: creating guidelines for International Surrogacy

[58]Supra note 57 at p236-238

[59]Article 16 of the UDHR provides "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."

[60]Article 15 of the International Covenant on Economic Social and Cultural rights(1976)

[61]Article 23 of the UDHR provides that "Everyone has right to work, to free choice of employment, to just and favorable work and to protection against unemployment."

[62]Usha Rengachary Smerdon,Crossing Bodies, Crossing Borders: International Surrogacy Between The United States And India, Columbia Law Journal Vol. 39:1 P 55.

Protection of Farmers' Rights in India: Human Rights Perspective

Dharam Deshna*
Jasdeep Singh**

Introduction

The importance and value of farmers cannot be undermined in any country or in developing countries in special, as they need special protection or attention due to their dependence on farming for their Survival and our dependence on them for food. Farmers in India face lot of obstacles which prevent their financial stability. While the situation of small and survival farmers has hardly been stable, the past ten years have witnessed in large number of farmer suicides as a result of crop failure, mounting debt and lack of sales. Earlier the seeds were not of any economic value. With the recognition of the plant breeders rights (PBR); and Farmers rights the countries were required to come out with a legislation on protection of farmers rights Additionally, with the ratification of Trade-Related Aspects of Intellectual Property Rights (TRIPS) by the World Trade Organization (WTO)**,** India was obligated to provide some type of protection to plant breeders, which posed grievous consequences and threats to traditional farming practices and farmers' innovations in India. In recent years, India has attempted to address the concerns of the farmer and balance them against the interests and needs of the plant breeder's industry.[1]While recognizing the rights of plant breeders, Indian legislation has given farmers a role alongside plant breeders, recognizing that farmers, like plant breeders, are innovators and have made major contributions to the development of agriculture and agribusiness that deserves protection.

Defining Plant Breeders and Farmer

Plant Breeders rights

Plant breeders rights (PBRs) are a special form of IPRs created to provide incentives for the seed industry. Breeders led the move to evolve plant breeders rights as an alternative to patents (the main form of IPRs for industrial innovations) because of the political opposition to extending patent protection to plants and legal complexities of defining plant varieties. The initial move to harmonize plant breeders rights emerged with the UPOV (Union pour la Protection des Obetentions Vegetales) in 1961**.** The plant breeders right as defined by UPOV is an exclusive right over the commercial production and marketing of

* ***Assistant Professor, Ideal Institute of Management and Technology, Karkardooma, Delhi affiliated to GGSIP University, Delhi.***
** ***Assistant Professor, Ideal Institute of Management and Technology, Karkardooma, Delhi affiliated to GGSIP University, Delhi.***

the reproductive or vegetative propagating material of the protected variety. This right was less stringent than patents as it allowed for: 1) research exemption (a protected variety may be used in competing breeding programs as long as subsequently derived varieties do not require the repeated use of the protected variety for its production) 2) Farmers Privilege: use and exchange of saved seeds allowed but not sale of seeds. In 1991 UPOV was revised to increase breeders rights by including the notion of essentially derived variety and making the farmers privilege optional. Accordingly under UPOV 1991, essentially derived variety (a variety that is predominantly derived from the initial variety itself) which fulfils the normal protection criteria of novelty, distinctness, uniformity and stability, may be the subject of protection but cannot be exploited without the authorization of the breeder of the protected variety. Plant Breeders Rights were initially adopted only in industrialized countries and most developing countries did not grant PBRs. The demand for extending PBRs in developing countries arose with the conclusion of the TRIPs (Trade Related Intellectual Property Rights) Agreement in the WTO.

Farmers Rights

Farmers Rights are based mainly on the idea that farmers also contribute to agricultural innovations and deserve recognition and rewards just as breeders do. The definition of Farmers Rights has not been clearly articulated and has undergone several changes. There are three basic aspects of Farmers Rights: 1. Farmer Privilege: Referred to as the farmers exemption under UPOV 1961, it essentially provides an exemption for farm saved seeds by farmers under plant breeders rights. Originally, plant breeders rights under UPOV was only for commercial production and marketing and since the use and exchange of saved seeds was considered non-commercial, the activity was considered outside the scope of PBRs. It thus allowed farmers to save, use and exchange seed but not sell seed without penalty under plant breeders right systems. In the 1991 UPOV revision, the farmers exemption was reduced to an optional clause leaving it to states to decide on the extent of farmers rights to save and exchange seed.[2]The PPVFRA defines even an agricultural laborer as a farmer, as the only ingredient necessary is, cultivation of crops, irrespective of the ownership over the land.[3]

Historical Perspective

Although **Paris Convention of 1883** which is the first multilateral agreement for harmonizing IP Laws extended protection to Industrial property, the succeeding 50 years witnessed various attempts by different countries in Europe to extent IP protection to the agricultural field. The first attempt to recognize the Intellectual Property Right of a plant breeder was the enactment of the Plant Patent Act by USA in 1930 and it aims at protecting asexually propagated plants by patents. As time passed, the European Patent Convention adopted these exceptions in its Article 53 and the same language was reproduced in the TRIPS Agreement, 1995 in Article 27.3(b). Although by 1970s it was settled in developed nations that IP protection will be extended to agriculture, the developing countries agreed to it only by 1995 with the adoption of TRIPS Agreement.

The tremendous progress in agricultural productivity in various parts of the world is principally based on these improved high performing plant varieties, which in turn is a critical factor in improving rural income and overall economic development. Since, the process of plant breeding is long and expensive, it is not possible to have continuous breeding efforts unless there is a chance of reward for the investment in time and labor. In 1980's as a response to the enlarged demand for plant breeders' rights the concept of farmer's rights came up, to call attention to the unremunerated innovations of farmers. The first mention of the farmers' rights was made in the meeting if the Working Group of the **FAO Commission on Plant Genetic Resources, 1986** in the context of the International Undertaking on Plant Genetic Resources (IUPGR)

The 25th Session of the FAO Conference of 1989 is the landmark in the history of recognition of farmers' right. The IUPGR observed that generations of farmers have conserved, improved and made available plant genetic resources, however, the contributions of these farmers were not sufficiently recognized or rewarded.[4]

The major NGOs in the movement against the recognition of PBRs included the **M.S. Swaminathan Foundation**.[5] These organizations have been instrumental taking the lead on documenting and conserving genetic resources and traditional knowledge in India. They have raised awareness about the importance of farmers' varieties through the use of the media, melas (gatherings/fairs) and education.[6]Additionally, many of the activists like Dr. Suman Sahai Navdanya, Dr. Vandana Shiva heading these organizations are internationally recognized and respected for their advocacy and scholarship in the field..[7] Navdanya promotes collective rights over IPRs**.** SRISTI, which stands for "society for research and initiatives for sustainable technologies and institutions,".[8]The enactment of the **Protection of Plant Varieties and Farmers -'Right Act 2001** was an outcome of the India's obligation which arose from art 27(3)(b) of the TRIPS Agreement which obligates members to protect Plant varieties either by patents or by an effective *sui generis* system or by any combination thereof .[9]

UPOV- International Union for the Protection of New Varieties of Plants

Set-up in 1961, the **International Union for the Protection of New Varieties of Plants (UPOV)** is an inter-governmental organization with headquarters in Geneva. . The UPOV was later revised in Acts adopted in 1972, 1978 and 1991 The Convention has been seeing several revisions to its mandate the most recent being the one in 1991 when to strengthen the protection offered to the breeder it prevented farmers from saving seed unless individual governments with the consent of the breeder allow limited exceptions. It also allowed patenting of plant varieties the same year ensuring dual protection to the breeder and none to farmers. The UPOV system is not suited for developing countries because it embodies the philosophy of the industrialized nations where it was developed and where the primary goal is to protect the interests of powerful seed companies who are the breeders. UPOV laws are formulated by developed, industrialized countries not agricultural economies. In the industrialized nations, Agriculture is a purely commercial

activity. For the majority of Indian farmers however, it is a livelihood. Indian farmers are the very people who have nurtured and conserved genetic resources. The UPOV system does not have to protect the farming community of Europe in the way that Indian seed laws will have to protect the farming community .India does not have big seed companies in essential seed sectors and its major seed producers are farmers and farmers' cooperatives. The UPOV system is expensive.

Constitutional Aspect of Laws Relating to Farmers' Rights

The concept of farmers' rights was first formalized under the **Food and Agricultural Organization of the United Nations in 1989** which read as follows: Farmers' rights mean rights arising from the past, present and future contribution of farmers in conserving, improving and making available plant genetic resources, particularly those in centers of origin/diversity. These rights are vested in the International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits of farmers, and supporting the continuation of their contributions, as well as the attainment of the overall purposes of the International Undertaking.[10]

In 1996 they sent a proposal to FAO Commission on Genetic Resources for Food and Agriculture (CFRFA) on rights that should be included under the International Law. Farmer's Rights can also find further support through Articles 21, 38, 39, 41 and 45 of the Constitution as a Right to Electricity and Water on subsidy rates. A farmer's right to electricity and water can be argued for under Article 21 of the Constitution which recognizes the right to livelihood, and Article 38 of the Constitution which concerns the duty of individual states to secure a social order for the promotion of the people" and "minimize the inequities in income, and endeavor to eliminate inequalities in status, facilities and opportunities.[11] It can be argued that under Article 38, the state is obligated to further the objectives of PPVFR and assist with helping farmers realize their rights. Under Article 39, the state's failure to provide electricity and water is a violation of its duty to promote the welfare of its people where it is dependent on individuals having the means with which they can exercise their right to livelihood.[12] A claim can also be brought under the consumer protection laws of the country. Consumer protection is governed by the National Consumer Disputes Redressal Commission which has district and state offices set up to resolve disputes. Final appellate jurisdiction is vested in the Supreme Court.

Conclusion and Suggestion

In recent years, India has attempted to address the concerns of the farmer and balance them against the interests and needs of the plant breeder's industry. While recognizing the rights of plant breeders, Indian legislation has given farmers a role alongside plant breeders, recognizing that farmers, like plant breeders, are innovators and have made major contributions to the development of agriculture and agribusiness that deserves protection. While the legislation has served to give farmers at least some advantages in their competition with multinational corporate plant breeders and seed producers, it has done little to establish financial security and ensure the survival of small farmers. While

providing farmers with rights over their innovations is necessary, it is not sufficient. Thus far, it has not guaranteed their livelihood, financial stability or their survival in the marketplace. Indeed, how to implement farmers' rights in India is still an issue of research. Judicial initiative is also necessary for the recognition of their Rights.

References:

[1] The Protection of Plant Varieties and Farmers' Rights Act, India Act 53 (2001) *available at* http://grain.org/brl_files/india-pvp- 2001-en.pdf.
[2] Retrieved from http://ageconsearch.umn.edu
[3] Retrieved from http://dyuthi.cusat.ac.in/xmlui/bitstream/handle/purl/2932/Dyuthi-T0923.pdf?sequence=1 on 21 September 2015
[4] Available on http://www.legalservicesindia.com/ accessed on 10 July 2015 at 12 :45 pm.
[5] *Id.*
[6] Ramana, *supra* note 6, at 21-23, 46-47
[7] *Id.*
[8] *Navdanya* at http://www.navdanya.org
[9] Laws vol. 12 No.01.issue 137 January 2013
[10] Annex II, Resolution 5/89 adopted by FAO Conference, 25th Conference, 25th
[11] Article 38, The Constitution of India
[12] Article 39, The Constitution of India.

A Study Relating to International Humanitarian Law and Human Rights

Prayag Dutt Pandey*
Dr. Shashi Kumar**

Introduction

The present paper highlights the relation between the two branches of public international law namely humanitarian law and human rights law. Both the human rights law and humanitarian law is the branch of public international law. The humanitarian law is applicable in time of war whereas the human rights law is applicable in peace time. The inter-relationship between humanitarian law and human rights has been source of some doctrinaire disagreement. Prof. A. H. Robertson, a former Director of Human Rights at the Council of Europe considered humanitarian law to be the species of the genus of human rights when he described "humanitarian law" as "one branch of the law of human rights" and concluded that "human rights afford the basis of humanitarian law".[1] He argued that "human rights law relates to the basic rights of all human beings everywhere, at all times; humanitarian law relates to the rights of particular categories of human beings, basically, the sick, the wounded, prisoners of war in particular circumstances, i.e. during periods of armed conflicts".[2] He supported his argument by referring to certain provisions of the human rights conventions which must be respected at all times without any derogation.

Mrs. Jean S. Pictet, a legendry scholar of humanitarian law and a former Director General of ICRC who had presided over the experts conferences in charge of the negotiation of the two Additional Protocols to the Geneva Conventions observed that "for some years it has been customary to call 'humanitarian law' that considerable portion of international law which owes its inspiration to a feeling for humanity and which is cantered on the protection of the individual".[3]According to him "humanitarian law comprises of two branches: the law of war and human rights".[4] The efforts of the international community to alleviate human sufferings during armed conflicts pre-date the endeavours for safeguarding certain universal rights for the well being and development of the human personality. There exists today a set of two codes: (a) a body of law, which is applicable during armed conflicts, that is called humanitarian law and (b) a code which is applicable at all times during peace as well as armed conflicts that is human rights. The former regulates the relationship between

**** Research Scholar, Deptt. of Human Rights, School for Legal Studies, B.B.A. University, Lucknow.***
**** Assistant Professor, Deptt. of Human Rights, School for Legal Studies, B.B.A. University, Lucknow.***

the states whereby the states are obligated to assuage the suffering of victims of armed conflicts. The latter regulates the relationship between states whereby they are obligated to provide certain rights in their relationship with persons under their jurisdiction.

The rationale of the humanitarian law and human rights norms are identical even though the formulations are different. "Wilful killing" of protected persons is prescribed by the four Geneva Conventions and "murder" is forbidden by the two Additional Protocols. The human rights instruments require statutory protection of the "right to life".[5] The idea behind all these prohibitions and enjoinments is the recognition and protection of the sanctity of life of the human person and their paramount importance is to safeguard human lives. The present paper highlights the importance of both the law and made it clear that there is no difference between them. The present paper is divided into four parts along with introduction and conclusion. First part introduces the International Humanitarian Law and International Human Rights Law. Second part deals with the differences between human rights and humanitarian Law, third part is relating to implementation of both the laws and lastly the fourth part of the paper signifies the similarities between them.

International Humanitarian Law & International Human Rights Law

Both international humanitarian law (further known as IHL) & international human right law (further known as IHRL) strive to protect the lives, health & dignity of individuals, but from a different angle. It is therefore not surprising that, while very different in formation, the essence of some of the rules is similar, if not identical. For example the two bodies of law aim to protect human life, prohibit torture or cruel treatment, prescribe basic rights for person subject to a criminal justice process, prohibit discrimination, comprise provisions for the protection of women & children, regulate aspects of the right to food & health. On the other hand, rules of IHL deals with many issues that is outside the purview of IHRL, such as the conduct of hostilities, combatant & prisoner of war status & the protection of the Red Cross & Red Crescent emblems. Similarly, IHRL deals with aspects of life in peacetime that are not regulated by IHL, such as freedom of the press, the right to assembly, to vote & to strike.[6]

Humanitarian law aims to protect people who do not or no longer taking part in hostilities. The rule embodied in IHL imposes duties on all parties to a conflict. Human rights, being tailored primarily for peacetime, apply to everyone. Their principal goal is to protect individuals from arbitrary behavior by their own governments. Human rights law does not deal with the conduct of hostilities.

The duty of implement IHL & human rights lies first & foremost with States. Humanitarian law obliges state to take practical & legal measures, such as enacting penal legislation disseminating IHL. Similarly, states are bound by human rights law to accord national law with international obligations. Notably, states are required to ensure also by other states. Provision is also made for an enquiry procedure, a protecting power mechanism, & the

international fact- finding commission. In addition, the ICRC is given a key role in ensuring respect for the humanitarian rules.

International Humanitarian Law

IHL is a set of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts. IHL covers both persons and property that are, or may be, affected by an armed conflict and limits the rights of the parties to a conflict to use methods and means of warfare of their choice.

The expression "international humanitarian law applicable in armed conflict" is often said 'International Humanitarian Law or Humanitarian Law'. But the military personal always prefer to use it as the expressions "Laws of Armed Conflicts" (LOAC) or "Laws of War". There is no difference between these two expressions but they should be understood as synonymous with "IHL".

The main treaty sources applicable in international armed conflict are the four Geneva Conventions of 1949 and their Additional Protocol I & II of 1977 and Additional Protocol III of 2006. The main treaty sources applicable in non-international armed conflict are article 3 common to the Geneva Conventions and Additional Protocol II of 1977.

International Human Rights Law

IHRL is a set of international rules, established by treaty or custom and recognised by courts, on the basis of which individuals and groups can expect and/or claim certain rights or benefits from governments. "*Human Right means the rights relating to life, liberty, equality and dignity of individual guaranteed by the constitution or embodied in the international covenants and enforceable by the court in India*."[7] However, most people would point to theories by influential writers, such as John Locke, Thomas Paine or Jean-Jacques Rousseau, as having prompted the major developments in human rights in revolutionary constitutions of the eighteenth and nineteenth centuries. These theorists of the natural law school pondered on the relationship between the government and the individual in order to define the basis for a just society. They founded their theories on analysis of the nature of human beings and their relationships with each other and came to conclusions as to the best means of assuring mutual respect and protection. The most commonly cited "classical" natural lawyer is Locke, whose premise is that the state of nature is one of peace, goodwill, mutual assistance and preservation. In his opinion the protection of private rights assures the protection of the common good because people have the right to protect themselves and the obligation to respect the same right of others. However, as the state of nature lacks organization, he saw government as a "social contract" according to which people confer power on the understanding that the government will retain its justification only if it protects those natural rights. He generally referred to them as "life, liberty and estate". Positivist human rights theorists, [8]on the other hand do not feel bound by any overriding natural law but rather base their advocacy for

human rights protection on reason which shows that cooperation and mutual respect are the most advantageous behaviour for both individuals and society.[9]

Human rights are those rights which are inherent entitlements to every person as a consequence of being born as a human being. There are various non-treaty based principles and guidelines ("soft law") which are also belonging to the body of international human rights law. However, most people would point to theories by influential writers, such as John Locke, Thomas Paine or Jean-Jacques Rousseau, as having prompted the major developments in human rights in revolutionary constitutions of the eighteenth and nineteenth centuries. These theorists of the natural law school pondered on the relationship between the government and the individual in order to define the basis for a just society. They founded their theories on analysis of the nature of human beings and their relationships with each other and came to conclusions as to the best means of assuring mutual respect and protection. The most commonly cited "classical" natural lawyer is Locke, whose premise is that the state of nature is one of peace, goodwill, mutual assistance and preservation. In his opinion the protection of private rights assures the protection of the common good because people have the right to protect themselves and the obligation to respect the same right of others. However, as the state of nature lacks organization, he saw government as a "social contract" according to which people confer power on the understanding that the government will retain its justification only if it protects those natural rights. Positivist human rights theorists generally referred to them as "life, liberty and estate".[10] On the other hand, do not feel bound by any overriding natural law but rather base their advocacy for human rights protection on reason which shows that cooperation and mutual respect are the most advantageous behaviour for both individuals and society.[11]

IHRL main treaty sources are the International Covenants on Civil and Political Rights and the International Covenants on Economic, Social and Cultural Rights (1966), as well as Conventions on Genocide (1948), Racial Discrimination (1965),Convention on Elimination of all Forms of Discrimination Against Women (1979), Torture (1984) and Convention on the Rights of the Child (1989). The main regional instruments are the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Declaration of the Rights and Duties of Man (1948) and Convention on Human Rights (1969), and the African Charter on Human and Peoples' Rights (1981). While IHL and IHRL have historically had a separate development, recent treaties include provisions from both bodies of law. Examples are the Convention on the Rights of the Child, its Optional Protocol on the Participation of Children in Armed Conflict, the Rome Statute of the International Criminal Court and the optional Protocol of the International Covenants on Civil and Political Rights.

Differences between Human Rights and Humanitarian Law

The human rights treaties are arranged in a series of assertions, each assertion setting forth a right that all individual have by virtue of the fact that they are human being. Thus the law

concentrates on the value of the persons themselves, who have the right to expect the benefit of certain freedom and forms of protection. The **first** difference we can see a difference in the manner in which humanitarian law and human rights treaties are worded. The former indicates how a party to the conflict is to behave in relation to people at its mercy, whereas human rights law concentrates on the rights, of the recipients of a certain treatment.

The **second** difference is that the text of humanitarian law seems long and complex, whereas human rights treaties are comparatives short and simple.

Thirdly, there is a distinction between civil and political rights, economic and cultural rights in human rights treaties but such type of distinction is not found in humanitarian law. The human rights treaties are universal regional but the humanitarian treaties are only internationally. The legal different between these treaties is that the "civil and political" ones require instant respect for the rights enumerated therein, whereas the "economic, social and cultural" ones require the state to take appropriate measures in order to achieve a progressive realization of these rights. The scene has been further complicated by the appearance of so-called "third generation" human rights, namely, universal rights such as the right to development, the right to peace, etc[12] but there is no such type of categorization in IHL.

Fourthly, it is said that humanitarian law originated in notions of honourable and civilized behaviour that should be expected from professional armies whereas Human rights law has less clearly-defined origins. There are a number of theories that have been used as a basis for human rights law, including those stemming from religion (i.e. the law of God which binds all humans), the law of nature which is permanent and which should be respected, positivist utilitarianism and socialist movements.[13]

Fifthly difference at application level: The applications of both the laws are different. We study it separately. IHL is applicable in times of armed conflict, whether international or non -international. International conflicts includes war or war like situation, involving two or more states, and wars of liberation, regardless of whether a declaration of war has been made or whether the parties involved recognize that there is a state of war. Non-international armed conflicts are those in which government forces are fighting against armed insurgents, or rebel groups are fighting among themselves. Because IHL deals with an exceptional situation – armed conflict –no derogations whatsoever from its provisions are permitted.

The IHRL applies at all times, i.e. both in peacetime and in situations of armed conflict. However, some IHRL treaties permit governments to derogate from certain rights in situations of public emergency threatening the life of the nation. Derogations must, however, be proportional to the crisis at hand, must not be introduced on a discriminatory basis and must not contravene other rules of international law – including rules of IHL.

Certain human rights are never derogable such as Article 21 and 22 of the Indian Constitution.[14] Among them are the right to life, prohibition of torture or cruel, inhuman or degrading treatment or punishment, prohibition of slavery and servitude and the prohibition of retroactive criminal laws.

Sixth who is bound by these bodies of law? IHL binds all actors to an armed conflict: in international conflicts it must be observed by the states involved, whereas in internal conflict it binds the government, as well the groups fighting against it or among themselves. Thus, IHL lays down rules that are applicable to both state and non-state actors. IHRL lays down rules binding governments in their relations with individuals. While there is a growing body of opinion according to which non-state actors – particularly if they exercise government-like functions – must also be expected to respect human rights norms, the issue remains unsettled.

Seventh are individuals also bound? IHL imposes obligations on individuals and also provides that persons may be held individually criminally responsible for "grave breaches" of the Geneva Conventions and of Additional Protocol I, and for other serious violations of the laws and customs of war (war crimes). IHL establishes universal jurisdiction over persons suspected of having committed all such acts. With the entry into force of the International Criminal Court, individuals will also be accountable for war crimes committed in non-international armed conflict. While individuals do not have specific duties under IHRL treaties, IHRL also provides for individual criminal responsibility for violations that may constitute international crimes, such as genocide, crimes against humanity and torture. These crimes are also subject to universal jurisdiction. The ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as the International Criminal Court, have jurisdiction over violations of both IHL and IHRL.

Eighth who is protected? IHL protects the persons who do not, or are no longer taking part in hostilities. Applicable in international armed conflicts, the Geneva Conventions deal with the treatment of the wounded and sick in the armed forces in the field (Convention I), wounded, sick and shipwrecked members of the armed forces at sea(Convention II), prisoners of war (Convention III) and civilian persons (Convention IV). Civilian persons include internally displaced persons, women, children, refugees, stateless persons, journalists and other categories of individuals (Convention IV and Protocol I). Similarly, the rules applicable in non- international armed conflicts (article 3 common to the Geneva Conventions and Protocol II) deals with the treatment of persons not taking part in the hostilities. IHL also protects civilians through rules on the conduct of hostilities. For example, parties to a conflict must at all times distinguish between combatants and non-combatants and between military and non-military targets. The basic principle of IHL is neither the civilian population as a whole nor the individual civilians may be the object of attack. It is also prohibited to attack military objectives if that would cause disproportionate harm to civilians or civilian objects whereas IHRL are concerned it applicable in all time and applies to all persons.

Implementation of IHL & IHRL: National Level

The duty to implementation of both IHL and IHRL lies on states. States have a duty to take a proper legal and practical actions (both in peacetime and in armed conflict situations) for ensuring the implementations of IHL, including: translating IHL treaties; preventing and punishing war crimes, through the enactment of penal legislation; protecting the red cross and red crescent emblems; applying fundamental and judicial guarantees; disseminating IHL training personnel qualified in IHL and appointing legal advisers to the armed forces.

IHRL contains provisions regarding implementation of the basic and fundamental human rights, whether immediately or progressively. IHRL imposed duties on the States that, they must adopt a variety of legislative, administrative, judicial and other measures which may be necessary to give effect to the rights provided for in the treaties. This may include enacting criminal legislation to outlaw and repress acts prohibited under IHRL treaties, or providing for a remedy before domestic courts for violations of specific rights and ensuring that the remedy is effective.

Implementation of IHL & IHRL: International level

When we see the implementation of IHL at international level we find that, states have a collective responsibility under common article 1 of the Geneva Conventions to respect and to ensure respect for the Conventions in all circumstances. The supervisory system also comprises the Protecting Power mechanism, the enquiry procedure and the International Fact-Finding Commission envisaged in Article 90 of Protocol I. States parties to Protocol I also undertake to act in cooperation with the United Nations in situations of serious violations of Protocol I or of the Geneva Conventions. The ICRC is a key component of the system, by virtue of the mandate entrusted to it under the Geneva Conventions, their Additional Protocols and the Statutes of the International Red Cross and Red Crescent Movement. It ensures protection and assistance to victims of war, encourages states to implement their IHL obligations and promotes and develops IHL. ICRC's right of initiative allows it to offer its services or to undertake any action which it deems necessary to ensure the faithful application of IHL.

When we see the implementation of IHRL we find that there is a supervisory system consists of bodies established either by the United Nations Charter or by the international bill of human rights. The principal UN Charter-based organ is the UN Commission on Human Rights and it’s Sub-Commission on the Promotion and Protection of Human Rights. "Special procedures" have also been developed by the Commission over the last two decades, i.e. thematic or country specific special rapporteurs, and working groups entrusted with monitoring and reporting on the human rights situations within their mandates. The international bill of human rights includes six main international human rights treaties. The main IHRL treaties also provide for the establishment of committees of independent experts for monitoring the State actions regarding implementation of human rights. A key role is played by the Office of the High Commissioner for Human Rights which has primary responsibility for the overall protection and promotion of human rights. The Office aims to enhance the effectiveness of the UN's human rights machinery, to

increase UN system-wide implementation and coordination of human rights, to build national, regional and international capacity to promote and protect human rights and to disseminate human rights texts and information.

Implementation of IHL & IHRL: Regional Level

The implementation of human rights at the regional level is different and it is found that only Europe, America and Africa take proper action for the implementation of IHRL. The work of regional human rights courts and commissions established under the main regional human rights treaties in Europe, the Americas and Africa is a distinct feature of IHRL, with no equivalent in IHL. Regional human rights mechanisms are, however, increasingly examining violations of IHL.

The European Court of Human Rights is the centrepiece of the European system of human rights protection under the 1950 European Convention. The main regional supervisory bodies in the Americas are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The African Commission on Human and Peoples' Rights is the supervisory body established under the 1981 African Charter.

Similarities between Humanitarian Law and Human Rights:

There are some similarities between the IHL and IHRL because the main object of the both laws is to maintain peace and protect the human being in their changing circumstances. IHL protects during war whereas IHRL is concerned it is applicable in every situations. When we see the origins and formulation of these two areas of law then we can turn to their present method of interpretation and implementation. The most important change so for as humanitarian law is concerned is the fact that recourse to war is no longer a legal means of regulating conflict. In general, humanitarian law is now less perceived as a code of honour for combatants than as a means of sparing non-combatants as much as possible from the horrors of war.[15] From a purist human rights point of view, based as it is on respect for human life and wellbeing, the use of force is in itself a violation of human rights.[16] This was indeed stated at the 1968 Human Rights Conference in Tehran as follows:

"Peace is the underlying condition the full observation of human right, and war is their negation."[17]

However, the same conference went on to recommend further developments in humanitarian law in order to ensure a better protection of war victims.[18] This was an acknowledgement, Therefore, that humanitarian law is an effective mechanism for the protection of people in armed conflict and that such protection remains necessary because unfortunately the legal prohibition of the use of force has not in reality stopped armed conflicts.

There is a conceptual debate whether human rights law can be applied at all times. The answer in one sense is that they do continue to be applicable. The difficulty as regards human rights treaties is that most of them allow parties to derogate from most provisions in time of war, with the exception of what are commonly termed "hard-core" rights, i.e. those which all such

treaties list as being non-derogable. These are the right to life, the prohibition of torture and other inhuman treatment, the prohibition of slavery and the prohibition of retroactive criminal legislation or punishment. However, the other rights do not thereby cease to be applicable, but must be respected in so far as this is possible in the circumstances. Recent jurisprudence and the practice adopted by human rights implementation mechanisms have stressed the importance of this, and also, in particular, the continued applicability of certain judicial guarantees that are essential in order to give effective protection to the "hard-core" rights.[19] However, the major difficulty of applying human rights law as enunciated in the treaties is the very general nature of the treaty Language. Even outside armed conflict situations, we see that the documents, attempt to deal with the relationship between the individual and society by the use of limitation clauses. Thus the manner in which the rights may be applied in practice must be interpreted by the organs instituted to implement the treaty in question. Although the United Nations Human Rights Committee**,** created by the Civil and Political Rights Covenant, has made some general statements on the meaning of certain articles, the normal method of interpretation by both the United Nations and regional system has been through a decision or an opinion on whether a particular set of facts constitutes a violation of the article in questions. A study of the jurisprudence shows that although at first sight an assertion of an individual right may seem very favourable to the individual, its interpretation in practice reduces implementation considerably in order to take into account the needs of others.[20]

It is very good thing for us that the present trends will continue in future. The obvious advantage of human rights bodies using humanitarian law is that humanitarian law will become increasingly known to decision-makers and to the public who, it is hoped, will exert increasing pressure to obtain respect for it. On the other hand, it is said that the growing politicization of human rights by governmental bodies could affect humanitarian law. However, there are several reasons for which we can discard it. First, humanitarian law treaties are applicable universally and there are no regional systems which could encourage a perception that the law varies from one continent to another. Secondly, we have seen that humanitarian law does not present the kind of theoretical difficulties encountered by human rights law as regards "first", "second", and "third" generation rights. Thirdly, the most politically sensitive aspect of human rights law, namely, political rights and mode of government, is totally absent from humanitarian law. What will probably not be avoided, however, are the political influences that leads States to insist on the implementation of the law in some conflicts whilst ignoring others. This, however, is not new and it is to be hoped that a greater interest in humanitarian law will tend to bring about more demands for it to be respected in all conflicts.[21]

It is said that the growing prominence of human rights law in recent decades is largely due to the activism of non-governmental human rights organizations. Several have now begun to use humanitarian law in their work[22] and may well exert a considerable influence in the future. Such an interest could encourage both the implementation and the promotion of law. As one of the major factors in the development humanitarian law, namely the perception of honour in combat, has influence in modem society, there is a need for a motivating force to fill this void. A perception of human rights has in effect done so, and

will continue to be of importance in the future. Another area in which interest in human rights could help further develop humanitarian law is that of internal armed conflicts. Common Article 3 and 1977 Protocol II are much less far-reaching than the law applicable to international armed conflicts and yet internal conflicts are more numerous and are causing untold misery and destructions. When we give the priority of human rights law within a State, it is possible that resistance to further responsibility in internal armed conflicts will be eroded by human rights pressure. We have already seen how there are moves towards further regulation in states of emergency. Which have been influenced by humanitarian law although they are outside its sphere of action.[23]

It may well be, however, that States will recognize their own interest in respecting humanitarian law and will not in future perceive themselves as being induced to show such respect solely because of human rights activism. The benefits of respecting humanitarian law are self-evident, in particular the prevention of extensive destruction and bitterness so that a lasting peace is more easily established.[24] If the chivalry of earlier times cannot be resurrected, it would be a positive development if the military could be encouraged to take a certain pride in the professionalism shown when behaving in accordance with humanitarian law.[25] As this law is still largely rooted in its traditional origins, it is not alien to military thinking and has the advantage of being a realistic code for military behaviour as well as protecting human rights to the maximum degree possible in the circumstances. It is to be hoped that continued recognition of the specific nature of humanitarian law, together with the various energies devoted to implementation of human rights law, will have the effect of enhancing the protection of the person in situations of violence.[26]

Conclusion

On the above discussion we can easily said that there are some differences and similarities between IHL and IHRL. But this difference is now removed by the changing time and emerging scope of law. The most important difference between human rights and humanitarian law is that human rights applicable in peace time whereas humanitarian law is concerned it is applicable in time of war, is now vanished point of study because the Optional Protocol of ICCPR and the Optional Protocol of the CRC made it clear that international human rights law applicable both in peace time and time of war, on the other hand the Common Article 3 of the four Geneva Convention is also applicable in peace time as well as war time.

References:

[1] A. H. Robertson and J. G. MerrilIs (later edition 1996), *Human Rights in the world: An Introduction to the Study of Human Rights*, p. 118, ICRC Publication,1978.
[2] Ibid.
[3] Jean S. Pictet, *The Principles of International Humanitarian Law*, p.9,ICRC publication,1966
[4] Ibid, p.10.
[5] Article 2 of the European Convention on Human Rights 1950, Article 6 of the International Covenant on Civil and Political Rights 1966 and Article 4 of the American Convention on Human Rights 1969.

[6] N.L. Mitra, *Bulletin on IHR & Refugee Law*, vol.1, no.1, January-June 1996.
[7] Section 2(d), of the Protection of Human Rights Act,1993.
[8] T. Meron (ed), *Human Rights in International Law*, Voll I, p.79, Oxford University Press, Landon 1984.
[9] Larry Maybee and Benarji Chakka(ed), *International Humanitarian Law, A Reader for South Asia*, p.141, ICRC Regional Delegation, New Delhi, 2007.
[10] T. Meron (ed), *Human Rights in International Law*, Voll.I, p.79, Oxford University Press, Landon 1984.
[11] Larry Maybee and Benarji Chakka(ed), *International Humanitarian Law, A Reader for South Asia*, p.141, ICRC Regional Delegation, New Delhi, 2007.
[12] Larry Maybee and Benarji Chakka(ed), *International Humanitarian Law, A Reader for South Asia*, p.140, ICRC Regional Delegation, New Delhi, 2007.
[13] J. Shestack, *The Jurisprudence of Human Rights*, in T. Meron (ed), *Human Rights in International Law*, Vol. I, p.69, Oxford University Press, Landon 1984.
[14]*A.D.M Jawalpur v S.S.Shukla* AIR 1976 SSC1207.
[15] The main justification of the continued applicability of humanitarian law is that of the rules have as their aim the protection of the vulnerable in armed conflicts and that these rules can be applied in practice only if they are applicable to both sides. Further, applicability of protection to all persons, irrespective of whether the individuals are perceived as "good" or "bad".
[16] Larry Maybee and Benarji Chakka (ed), *International Humanitarian Law, A Reader for South Asia*, p.144, ICRC Regional Delegation, New Delhi 2007.
[17] Resolution XXIII "Human Rights in Armed Conflicts" adopted by the International Conference on Human Rights, Tehran, 12 May 1968.
[18] Resolution XXIII "Human Rights in Armed Conflicts" adopted by the International Conference on Human Rights, Tehran, 12 May 1968.
[19] For the Human Rights Committee: Lan a de Netto, Weismann and Perdomo v. Uruguay, Com. No R.2/8, A/35/40, Annex IV, Paragraph 15; Camargo v. Colombia, Com. No. R. 11/45, Annex XI, paragraph 12.2.
[20] Larry Maybee and Benarji Chakka (ed), International Humanitarian Law, A Reader for South Asia, p. 145, ICRC Regional Delegation, New Delhi 2007.
[21] Larry Maybee and Benarji Chakka (ed), International Humanitarian Law, A Reader for South Asia, p. 155, ICRC Regional Delegation, New Delhi 2007.
[22] In particular Human Rights Watch, which has used humanitarian law in a number of its reports, e.g. *Needless Death*, issued in 1992 on the Second Gulf War. A large number of these organizations have recently begun *a* campaign to reduce the severe problems caused by the indiscriminate use of land mines, by calling for better respect for existing humanitarian law and for the eventual ban of the use of anti-personnel mines.
[23] Ibid 22 at page156.
[24] The importance of humanitarian law for facilitating the return to peace indicated in nineteenth century instruments, including the Brussels Declaration of 1874.
[25] Modem teaching methods at humanitarian law stress the importance of inculcating correct behaviour during military exercise, rather than separate lessons that appear to have nothing to do with practicalities.
[26] Larry Maybee and Benarji Chakka(ed), *International Humanitarian Law, A Reader for South Asia*, p 156, ICRC Regional Delegation, New Delhi 2007.

Human Rights of Prisoners in India

Manobhaw Kaushik*

Historically prisons were used mainly for securing the safe custody of political criminals and others of similar variety. In modern sense, prisons are said to be the creation of the early nineteenth century and East India Company used to keep in custody the prisoners only with intent of maximum profit to the Government. Therefore, it was not surprising that utmost neglect and cruelty were associated with the administration of jails. Consolidating the four related enactments of British India and recommendations of the Jail Committee of 1889, the Prisons Act, 1894 came into force. But the brutality towards prisoners remained more or less same. Numerous expert groups and Jail Reform Committees recommended for the prison reformation since independence, but the dominant features of the Indian prisons are not much different from those in British India. **T**he Constitution of India puts prisons along with the police into State List of the Seventh Schedule. The Union Government has literally less responsibility of modernising prisons and updating their administration. Even the five year plans offer a very low priority to the criminal justice area in general and jail administration in particular.

In ancient time, the violator of the law was regarded as one who had broken the rules made by God. Today he is the violator of the rules of the society, in fact, of a dominant minority. The position now is not much different. Imprisonment is only another mode of exiling an offender from the society[1]. This inculcates the methods of carrying out the spirit of revenge only in order to secure retributive satisfaction. So, the prisoners are treated as socially branded exiles[2] and they are left with this brand out until to atone for their crime. But the hard fact is that instead of expiating the inhuman treatment in prisons makes them more dangerous to the society when they are released out of prison-fetters.

Treatment of Prisoners In Indian Prisons

The present era is considered to observe the reformative theory of punishment focusing on the criminal treatment, but jails still follow the conservative tradition that once he (i.e., accused as well as prisoner) enters into the four walls of jail he loses all rights.

The attention of the rehabilitation ideal makes a shift from crime to criminal, since the criminal is accepted as mentally unhealthy and insane, therefore to change the personality and make him suitable for society. This secondary objective of punishment system says that offender should be treated individually and punishment should be forward-looking[3]. Socialization, therefore, should be the objective of treatment and they must be treated as

**** Asst. Professor, D.H.R., S.L.S., B.B.A.U., Lucknow.***

human being. The trend in the Indian prisons let the prisoners to be monotonous and they are treated as like any sub-human species. Making them monotonous leaves them not to think anything good or to be harmonic with society and on being convicted of crime and deprived of their liberty in accordance with the procedure established by law, even the residue of the constitutional rights available to them are eclipsed. This is the way by which they are left even not to be a human, and the proposal of their socialization cuts sorry figure.

The conditions prevailing in prisons are extremely deplorable and sub-human; prisoners are mal-treated; and above all, police brutality is legendary[4]. Jails are overcrowded[5]. A number of prison buildings are more than hundred years old. They are ill-equipped, ill-furnished, without ventilation or sanitation, and with insufficient water supply arrangements. Increasingly, a large number of people in Indian prisons are not convicts but people awaiting trial[6]. According to Bureau of Correctional Services, in its report covering 12 States and Union Territories, it was found that near about 85 per cent of men and near about 95 per cent of women accused goes for sentence less than 6 months, but they remained there for more than that. The prison administration continues to be basically governed by the Prison Act, 1894 which is out of date. The situation of changelessness is made consistent through trained mastery of inertia, despite a large number of expert group reports prescribing reform and innovation, since independence[7]. There are persistent impediments to the flow of information to make jails socially visible[8]. The governing elites of free India regard jails, more or less, as the governing elites of British India did. The state attaches the low priority to administration of criminal justice, and particularly the aspect of human rights in such administration.

To act efficiently the severe regimentation and most rudimentary discipline are the natural resorts and the jailor or warden adopts coercive rules and procedures. The prison monotony and rough treatment to prisoners creates disastrous influence and severe deviance and they remain unfriendly with the society even after the release from jail after completion of sentence[9]. Deprivation of sexual relationship for a long time creates sexual perversions[10]. The process of prisonization and adaptation of a prison sub-culture leaves a convict with a distinct set of values. The extent of internalization of prison values affects adversely the extent of social reinstatement into the society out[11].

Human rights do not recognise who is good and who is bad, rather these are internationally guarantied, protecting individuals and groups, and focus on the dignity of the human being. Having rights means that someone holds a claim, or legal entitlement, and someone else holds a corresponding duty or legal obligation. This means that government and their agents are accountable to people for fulfilling such obligations. Many of the civil rights guaranteed by democratic constitutions, inclusive of the Constitution of India, are obviously curtailed in the prison when they are accused of crimes; viz, right to practice religion, to be free from racial discrimination[12], to communicate freely[13], to vote[14], to enjoy privacy as equally as others[15]; and human rights in the administration of criminal justice

has not been perceived as an important issue. Human rights seem only of constitutional rhetoric and politics, and Indian jails remain the "ultimate ghetto of the criminal justice system without human rights"[16]. Even if these freedoms and rights exist in prisons; regimentation and control deprives much of its worth. Then a prisoner is not allowed to attend a place of worship or pilgrimage outside the prison, or their constructive or creative ideas, and a jail shares none of the attributes of privacy. In prison, official surveillance has traditionally been the order of the day. The bad effect of jail is that prisoner start leaving hope for any change and rather they cease to be a part of the society. If the true sense of religion is to regulate the life of a human being and its society in a civilised manner, then there must be no doubt also about this fact that it serves rehabilitative function by providing an area within which the prisoner can reclaim its dignity and reassert his individuality and also its humane duties towards society. In our secular democratic Constitution the freedom of religion is not only enshrined but guaranteed as a fundamental right. But the prisoner is not allowed to attend a place of worship or pilgrimage even after not being curtailed by any Sentence. The law regarding free expression in prisons remains virtually unchanged. Prison authorities are free to censor communications and screen out "reasonably objectionable", "informatory" or " subversive" articles or publications blocking important outlet for prisoner's feelings of frustration as well as their constructive and creative ideas[17]. The denial of privacy by the official prison surveillance is asserted in the name of prison security.

Judicial Response

In A. K. Gopalan vs. State of Madras[18], it was held that prisoners are non-persons and it assured that fundamental rights are not available to them by their being incarcerated. The majority view was that when a person is totally deprived of his personal liberty under a procedure established by law, the fundamental rights are not available. This proposition was changed in some extent in D. B. Patnaik vs. State of A. P[19]., and in State of Maharashtra v. Prabhakaran Pandurang[20] that conditions of detention cannot denude all the fundamental rights other than those consistent with the fact of detention. The key to judicial activism can be found in the ruling in Maneka Gandhi vs. Union of India[21] that-

1. The phrase "procedure established by law" in Article 21 does not mean 'any procedure' laid down in a statute but "reasonable, just and fair" procedure; and
2. The term "law" in Article 21 envisages not any law but a law which is "right, just and fair, and not arbitrary, fanciful and oppressive".

This judicial approach has made Article 21 more or less synonymous with the concept of procedural due process in the U S A[22]. While thanking to Article 21, Supreme Court in Sunil Batra v. Delhi Administration (II) held that "human rights jurisprudence in India has a constitutional status and sweep... so that this *magna carta* may well toll the knell of human bondage beyond civilized limits". All aspects of criminal justice fall under the umbrella of Articles 14, 19, and 21[23].

The long pre-trial incarceration of the accused, mainly poor ones, creates a heap of them awaiting trial because there is no one to post bail for them. The Law Commission in its 77th and 78th reports revealed that the matter of reducing delay and arrears in trial courts is of "the greatest importance" to which "the highest priority ought to be given. This 'appalling'[24] problem has jeopardized their personal liberty. The condition is that sometimes an under-trial may remain in prison for much longer than even the maximum prison sentence if he is convicted for an offence. This adversely affects the rights of the under-trials who are presumed to be innocent till proven guilty. Millions of under-trials are languishing in jails. This also leads to overcrowding in prisons. Because of incapability to provide financial security, even persons accused of a bailable offence are unable to secure bail and to remain in prison. Time and again, the Supreme Court has emphasized that Articles 14, 19 and 21 "are available to prisoners as well as freemen. Prison walls do not kept out fundamental rights[25]. In State of A.P. vs. Challa Ramkrishna Reddy[26], it was held that, "a prisoner, be he a convict or under-trial or a detenu, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his fundamental rights including right to life guaranteed to him under the Constitution. On being convicted of crime and deprived of their liberty in accordance in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights".

The practice of causing physical injury to prisoners in the name of maintaining discipline has exhibited shocking revelations of conditions in prisons. A prisoner also has right to the integrity of his physical person and mental personality. Fundamental rights do not stop at the prison's gates, thus no personal harm is to be suffered by a without affording a preventive remedy before an impartial, competent, available agency. "The goal of imprisonment is not only punitive but restorative, to make an offender no offender"[27]. Giving discretion to the prison authorities to impose punishments like solitary confinement and putting on bar-fetters should not only be curtailed but must be vanished. In Sunil Batra (l) the petitioner, sentenced to death on charge of murder and robbery, was being kept in solitary confinement pending his appeal before the High Court. He filed a petition under Article 32 before Supreme Court. The honourable Supreme Court emphasized that "Article 21 means that law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirements of Article 21 would not be satisfied. If it is arbitrary it would be violation of Article 14".

The resort to the oppressive measures to curb political beliefs could not be permitted[28]. The prisoners condemned to death sentence cannot be kept in solitary confinement and this practice is highly insulting to being a human, because a person under death sentence is held in jail custody so that he is available for the execution of death sentence when the time comes. No punitive detention can be imposed upon him by jail authorities except for prison offences he is not to be detained in solitary confinement as it will amount to imposing punishment for the same offence more than once which would be violation of Article 20(2)[29]. It is only when a person is under an executable sentence of death, i.e., when the

sentence of death has become final and conclusive and which cannot be avoided by any judicial or constitutional procedure, that he may be kept in solitary confinement.

Current Position of Prisoners in India

The human rights enshrined under Constitution of India and the judicial declarations are not able to change the disgusting scenario of Indian jails and prisoners are there to tolerate the hardships of rude sub-human treatments. The real scene is that there is no proper allocation of budget on prison expenditures[30], subject of prisons do not find a place in the planned development of a country. Development of prisons and correctional services remain divorced from the national development process. The Planning Commission, 1978 did not tried for prisons' betterment. The custodial death cases are near about 14,500 in number before National Human Rights Commission in the years from 2001 to 2010[31]. The prisoners have no right to vote; while Article 326 gives the constitutional right to vote to all citizens of or above 18 years of age; but Supreme Court of India took the notice of Section 62(5) of Representation of Peoples Act, 19561 and held that the prisoners have no right to vote[32]. But it plays not fair if on the other hand criminals are allowed to be elected for the Parliament or State assemblies. Moreover, in 1999, a draft Model Prisons Management (The Prison Administration and Treatment of Prisoners Bill- 1998) was proposed to replace out of date Prison Act, 1894, but it is yet to be passed. That is to say that State is not interested to reform the archaic structure of prisons and prison administration. The Model Prison Manual (2003) is not a satisfactory answer. The prisons has to be appeased with a poor expenditure on health care, on the other hand thousand of cases of tuberculosis and AIDS/ HIV are there in the prisons. Police and jail authorities' rampant torture are still in vogue[33].

Conclusion

A criminal also has human rights and human rights are talks of no value without having any right or freedom as the most basic rights and freedom make a person worthless by their absence. Reform is also an objective of punishment. We should not torture the criminal bodily, rather they should be treated and this very should be the objective of institution of imprisonment. A criminal is a socially diseased person and the idea of imprisonment should be to derive the knowledge to improve them. In some special cases, the Supreme Court has lamented on the tendency of continuing to detain persons as criminal lunatics for long period even after they have become sane. There should be an adequate number of institutions for looking after the mentally sick persons and the practice of sending lunatics or persons of unsound mind to jail for safe custody is not desirable, because jail is hardly a place for treating such persons[34]. Further, probation, as far as possible, is the better way to rehabilitate them and it is more economical[35] than the prison administration, because prisonization proves to be a parallel cultural contrast to the socialization. The realities of prisons prove the prisons to be a lab to invent the antithesis of the norms and behaviours of the normal society. There is a gross violation of human rights of prisoners as well as the society going to attend the person who is to return from the jail.

References:

[1] M. P. Singh; Prison: A False Promise; The Banaras Law Journal; January 1990-December 1990; Vol. 26; P. 126
[2] . ibid
[3] P. D. Sharma; Criminal Justice Administration; 1998; 1st Ed., P. 6
[4] See, Asian Centre for Human Rights- its report "Torture in India 2011".
[5] See, PSI Report, 2012, pp. 175- 224.
[6] The number of undertrial prisoners has increased by 5.7% in 2012 (2,54,857) over 2011 (2,41,200). Prison Statistics In India Report, 2012. P. iii.
[7] Upendra Baxi; The Crisis Of Indian Legal System; 1983; P. 153
[8] ibid
[9] See, the PSI Reports of 2012 and 2013.
[10] See, Human Rights Watch Report, 2001.
[11] Supra Note 1, at P. 129
[12] Article 2; UDHR, 1948.
[13] Ibid, Article 18.
[14] Article 326 of the Indian Constitution mandates adult suffrage, which means that every person who is a citizen of India and who is not less than 18 years of age can vote. However, India is one of the few countries in the world which does not allow prisoners or under-trials to vote. Section 62(5) of the Representation of the People Act, 1951 (ROPA) prohibits all those who are confined in a prison or are in lawful custody of the police from voting. This provision has been challenged on the grounds of Article 14 of the Constitution. In *Anukul Chandra Pradhan* v. *Union of India & Anr*, the Supreme Court observed that in view of the settled law on the point, it must be held that the right to vote is subject to the limitations imposed by the statute (ROPA). Further, in *Mahendra Kumar Shastri* v. *Union of India and Anr*, [(1984) 2 SCC 442] the Supreme Court observed that the restriction imposed by the ROPA was not unconstitutional and was in public interest. In a decision of the Patna High Court, *Jan Chaukidar (Peoples Watch)* v. *UOI & Ors.* [2004 (2) BLJR 988], the Court said that the right to vote is a statutory right. The law gives it, and the law can take it away. These views of the Courts against prisoners' suffrage have been upheld in more recent cases such as *Rama Prasad Sarkar* v. *The State Of West Bengal & Ors*. (decided on 18th March, 2011). In the year 2010, the West Bengal Government lobbied for prisoners to get voting rights. In Bihar as well, efforts were made in the same year to ensure that under-trial prisoners lodged in various jails of the state got voting rights and took part in the elections to the State Assembly which were to be held in October-November. Though there are Court judgments talking at length about the human rights of prisoners and under-trials, there has been little change as regards the stand on their voting rights. India must reconsider the blanket ban on prisoners' suffrage and consider involving the Election Commission along with the Courts in order to ensure a more progressive law on the issue. See, http://www.H:\Books\Human Rights\Prisoner\The Voting Rights of Prisoners Examining the Indian stand in light of the recent ECHR Decision in Scoppola v_ Italy HUMAN RIGHTS ON CAMPUS.mhtml, Medha Srivastava, The Voting Rights of Prisoners:Examining the Indian Stand in the Light of Recent ECHR Decision in Scoppola v. Italy, assessed on 23.10. 2015
[15] UDHR, 1948; Article 12.
[16] Supra Note 7, at P. 145
[17] Goldfarb and Singer; Prisoners, Protest and Politics; 1972; P. 81
[18] A I R, 1950, S. C., 27
[19] A I R, 1974, S.C., 2093
[20] A I R, 1966, S. C., 424
[21] A I R, 1978, S. C., 597
[22] M. P. Jain; Indian Constitutional Law; 2012; 6th Ed. ; P. 1197
[23] ibid
[24] 77th & 78th Law Commission Report; 1977
[25] T. V. Vatheeswaran v. State of Tamilnadu; A I R, 1983,S C, 361
[26] A I R, 2000, S C, 2083

[27] Sunil Batra v. Delhi Administration(i); AI R 1978 SC 1675
[28] Bhuvan Mohan Patnaik v. State of A.P.; AIR 1974 SC 2092
[29] Supra Note 27, Ibid.
[30] Finance Commission Report, 1973
[31] Asian Centre For Human Rights- its report "Torture in India 2011"
[32] Mahendra Kumar Shastri v. Union of India and Others; (1984) 2 SCC 442
[33] Human Rights Watch Report, 2001
[34] Veena Sethi v. State of Bihar; AIR 1983 SC 339; See also Rudal Shah v. State of Bihar; AIR 1983 SC 1086
[35] Most of the States have reported an increase in the budget allocation for the financial year 2012-13 in comparison to that of 2011-12. The sanctioned budget for the year 2012-13 (` 3,27,512.2 lakhs) has increased by 1.2% in comparison to the year 2011-12 (` 3,23,720.8 lakhs) at AllIndia level. The PSI Report, 2012, pp. 157- 166. Contrarily, the probation and rehabilitative programmes cost lesser. See, p. 173, The PSI Report, 2012.

Consumer Rights and their Protection: An Overview with Human Rights Concern

Gaurav Gupta*
Anand Kumar Singh**

Introduction

In today's globalizing and liberalized society, protection of the individual consumer assumes greater significance and protecting human dignity becomes an important cornerstone, especially against multinational corporations and big business monopolies. Consumer protection is often associated with efficient and effective implementation of regulatory laws in a democratic set-up. The state plays a major role as the protector of citizens' consumer rights. Traditions in ancient India consist of many instances where the state/ruler was made aware of his responsibility towards the well-being of his people and their rights in no uncertain terms. Today, it is the responsibility of the government to revisit these texts (Gita, Yajurveda, Mahabharata, Arthashastra) and take inspiration from them and redefine them to suit the context of consumer welfare and human development.

The human development experts emphasize a people-centric model and doctrine of human rights with an emphasis on individual prosperity, honour and dignity, which can serve as the basis for a discussion on consumer rights as human rights. Policy makers all over the world have emphasized the fact that materialistic development tends to neglect the basics of 'human' development. Amartya Sen rightly observed that, 'Development is essentially the expansion of human freedoms. These expanded human freedoms enhance the capacity of each individual to fully lead the kind of life sh/e values by ensuring the environmental condition necessary to realise personal choices and opportunities.' The phrase "consumer rights" is thrown around rather freely these days, but what are consumer rights? Are they written down somewhere? Where do they come from? What is the human rights approach to consumer rights? To know the answer of these questions we must observe the concept of consumerism, its need, their protection and different approaches and dimensions of it.

Consumerism: Conceptual Consideration

According to McMillan Dictionary (1985) "*Consumerism is concerned with protecting consumers from all organizations with which there is exchanged relationship. It encompasses the set of activities of government, business, independent organizations and concerned consumers that are designed to protect the rights of consumers*". In the good olden days the principle of ***'Caveat emptor'***, which meant buyer beware governed the relationship between seller and the buyer. In the era of open markets buyer and seller came

**** Assistant Professor (Law), Jagran School of Law, Dehradun, Uttarakhand.***
*****Assistant Professor (Law), Jagran School of Law, Dehradun, Uttarakhand.***

face to face, seller exhibited his goods, and buyer thoroughly examined them and then purchased them. It was assumed that he would use all care and skill while entering into transaction. The maxim relieved the seller of the obligation to make disclosure about the quality of the product. In addition, the personal relation between the buyer and the seller was one of the major factors in their relations. But with the growth of trade and its globalization the rule no more holds true. It is now impossible for the buyer to examine the goods before hand and most of the transactions are concluded by correspondence. Further on account of complex structure of the modern goods, it is only the producer / seller who can assure the quality of goods. With manufacturing activity becoming more organized, the producers / sellers are becoming stronger and organised whereas the buyers are still weak and unorganised. In the age of revolutionized information technology and with the emergence of e-commerce related innovations the consumers are further deprived to a great extent. As a result buyer is being misled, duped and deceived day in and day out. Mahatma Gandhi, the father of nation, attached great importance to what he described as the "*poor consumer*", who according to him should be the principal beneficiary of the consumer movement. He said: "*A Consumer is the most important visitor on our premises. He is not dependent on us we are on him. He is not an interruption to our work; he is the purpose of it*."

Law: For the Protection of Consumer Rights[1]

Consumer rights and consumer protection law provides a way for individuals to fight back against abusive business practices. These laws are designed to hold sellers of goods and services accountable when they seek to profit by taking advantage of a consumer's lack of information or bargaining power. Some conduct addressed by consumer rights laws is simply unfair, while other conduct can be described as outright fraud. Consumer rights laws exist at the federal and state level. They are enforced by government agencies, offices of attorneys general, and through individual and class action lawsuits filed by victims.

Background: International Consumer Rights Movement

History of protection of Consumer's rights by law has long been recognised dating back to 1824. Every year the 15th of March is observed as the World Consumer Rights Day because on that day in 1962 President John F. Kennedy of U.S. called upon the U.S. Congress to accord its approval to the Consumer Bill of Rights. They are:

1) Right to Choice
2) Right to Information
3) Right to Safety and
4) Right to be Heard.

President Gerald R. Ford added one more right i.e. right to consumer education. Further other rights such as right to healthy environment and right to basic needs (Food, Clothing and Shelter) were added. In India we have recently started celebrating 24th December every year as the National Consumer Rights Day. In the history of the development of consumer policy, April 9, 1985 is a very significant date for it was on that day that the

General Assembly of the United Nations adopted a set of general guidelines for consumer protection and the Secretary General of the United Nations was authorised to persuade member countries to adopt these guidelines through policy changes or law. These guidelines constitute a comprehensive policy framework outlining what governments need to do to promote consumer protection. These guidelines for consumer protection have the following objectives[2]:

a) To assist countries in achieving or maintaining adequate protection for their population as consumers;
b) To facilitate production and distribution patterns responsive to the needs and desires of consumers;
c) To encourage high levels of ethic al conduct for those engaged in the production and distribution of goods and services to consumers;
d) To assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers;
e) To facilitate the development of independent consumer groups;
f) To further international cooperation in the field of consumer protection;
g) To encourage the development of market conditions which provide consumers with greater choice at lower prices;
h) To promote sustainable consumption.

Though not legally binding, the guidelines provide an internationally recognised set of basic objectives particularly for governments of developing and newly independent countries for structuring and strengthening their consumer protection policies and legislations. These guidelines were adopted recognizing that consumers often face imbalances in economic terms, educational levels and bargaining power and bearing in mind that consumers should have the right of access to non hazardous products as well as the importance of promoting just, equitable and sustainable economic and social development. These U.N. guidelines for Consumer Protection can assist in the identification of priorities particularly in the light of emerging trends in a globalised and liberalised world economy.

The U.N. guidelines were never intended to be a static document and required to be revisited in the changed social, political and economic circumstances. On reexamination of U.N. guidelines in 1999 "*sustainable consumption*" was also included in the list which is certainly an important step in this direction. It would perhaps be apt to highlight that long back Mahatma Gandhi said that "*the rich must live more simply so that the poor may simply live*." There cannot be a better expression championing the cause of sustainable consumption. It may not be out of place to mention that the increased internationalisation of cooperation is also a part of the globalisation process. Rules adopted for corporations trading in OECD countries for the protection of the interests of consumers can now also be applied to their conduct for the protection of the interests of the consumers in non-OECD countries. A new investment guideline from the OECD spells out principles to be applied by multinational corporations dealing with consumers. The Guidelines, which deal with

fair business, marketing and advertising practices as well as safety and quality of goods and services lend themselves to consumer monitoring and campaigning. Possibilities for action include twinning arrangements in which groups from non- OECD countries work with groups from the home countries of multinational corporations to hold them accountable for failure to adhere to the Guidelines.

Consumer Protection in India[3]

Due to the efforts taken by the UN, the consumer movement succeeded in bringing pressure on business firms as well as governments to correct business conduct which may be unfair and against the interests of consumers at large. A major step taken in 1986 by the Indian government was the enactment of the Consumer Protection Act 1986, popularly known as COPRA. In order to protect the consumers from exploitation and to save them from adulterated and substandard goods and deficient services the Consumer Protection Act came into force on 15 April, 1986 and it applies to the whole of the India except the State of Jammu and Kashmir. india has been observing 24 December as the national consumers' day. It was on this day the Indian Parliament enacted the Consumer Protection Act, 1986. India is one of the countries that have exclusive courts for consumer redessal. However, the consumer redressal process is becoming cumbersome, expensive and time consuming. The object and reasons for passing the said act are in short as follows[4]:

a) The rights of consumers are to be protected against marketing of goods which are hazardous to life and property.
b) The rights of consumers are to be informed to them about the quality, quantity, potency, purity, standard and price of the goods against unfair trade practices.
c) The rights are to be assured, wherever possible, access to an authority of goods at competitive prices.
d) The rights are to be heard and to be assured so that the consumers' interests receive door consideration at appropriate forum.
e) The rights for redressal against unfair trade practices or unfair exploitation of consumers are to be provided.
f) The right to consumer education is also to be provided. these objects are promoted and protected by the consumer protection council at centre and at the state level. to provide speedy and simple redressal to consumer disputes a *quasi judicial* machinery has been set up at the district level known as District Forum, State Commission at state level and National Commission at central level. Besides the Consumer Protection Act, 1986 there are many provisions and Acts available to protect the consumers in India. In the following discourse, we intend to discuss the important of those provisions and Acts which are directly relevant for the present study.

The Constitutional Perspective

The Constitution of India in Articles 38, 39, 42, 43, 46 and 47 provides that the state shall strive to secure a social order for the promotion of welfare of the people; it shall direct its policies in such a way that operation of economic system does not result in the

concentration of wealth and means of production to the common detriment, it shall make provision for securing just and humane conditions of work and for maternity relief; it should endeavor to build an economic organization or to make suitable legislation to ensure a decent standard of life to all the workers who constitute the bulk of the consumers; it should promote educational and economic interests of schedule castes, scheduled tribes and other weaker sections and it shall also raise the level of nutrition and standard of living and to improve public health.

Article 46 of the Indian constitution provides that state shall endeavor to protect the economic interest of the weaker section of its population and also protect them from social injustice and all forms of exploitation which means all kinds of harassments and frauds in the market place. This also includes people should be entitled to unadulterated stuff injurious to public health and safety. This principle amply reflects the inclusion of the philosophy of the concept of consumerism in article 47 of the Indian Constitution.

The Indian Penal Code, 1860

It is the foremost penal law of the country which contains the substantive law of crime. It caters to the needs of the consumer in some manner. However, sections 264 to 267 of the Indian penal code relate to fraudulent use of false instrument for weighing, fraudulent use of false weight and measures, anyone in possession of false weight or measure respectively. The penal code further provides sections 269 to 271 on spreading of infections and in sections 272 to 276 on adulteration of food or drink, adulteration of drugs, sale of adulterated drugs and sale of drugs as a different drug or preparation are punishable with imprisonment or with both.

The Dangerous Drugs Act, 1930

In the area of drugs control the Dangerous drugs Act, 1930 is an important central legislation which empowers the central government to control certain operations relating to dangerous drugs. It further empowers to increase and render uniform penalties for offences relating to operations of dangerous act.

The Sale of Goods Act, 1930

Some spirit of concept of consumerism is also evident in the Sale of Goods Act, 1930. Before this enactment the situation was uncertain with regard to “sale of goods or movables, the law on the subject was not only uniform throughout British India but was also outside the limits of the original jurisdiction of the high court, extremely uncertain in its application.”

The Sale of Goods Act contains the spirit of the concept of consumer protection in several provisions in several provisions which include contract of sale, conditions and warranties in the sale, transfer of property between seller and buyer, duties of seller and buyers, right of unpaid sellers against the goods and suits for the breach of the contract.

The Drugs and Cosmetics Act, 1940

In order to defend the cause of consumer in the area of drugs and cosmetic industries in India, Drugs and cosmetic act of 1940 was enacted so as to regulate the airport, distribution and sale of drugs. In pursuance to the recommendations the pharmaceutical enquiry committee appointed by the Government of India, the drugs and cosmetics act, 1940 empowers the central government to control the manufacture of drugs, to appoint inspectors for inspecting manufacturing premises and taking samples of drugs, to appoint government analysts to whom samples drawn by such inspectors could be sent for analysis and to issue the state government for carrying into any of the provisions of the Act.

The Drugs (Control) Act, 1950

In 1950 the Drugs (Control) Act was passed which also provides for the control of the sale, supply and distribution of drugs. This Act briefly provides for fixing of maximum prices and maximum quantities which may be held or sold, general limitation on quantity which may be possessed at any one time, duty to declare possession of excess stocks, marking of prices and exhibiting list of prices and stocks.

The Industries (Development and Regulation) Act, 1951

Industries (Development and Regulation) Act, 1951 is another example on the part of the union government to make some attempts in implementing the objectives of consumerism. The act provides for the development and regulations of certain industries. The Act specifically deals with the central government's power to control supply, distributing price etc of certain articles.

The Indian Standards Institutions (Certification Marks) Act, 1952

The Act provides for the standardization and marking of goods which is a prerequisite to the establishment of a healthy trade and to compare favorably with the established makes of foreign products. The Act has been amended in 1961 and 1976 to make more effective in order to achieve its objectives.

The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954

The Act in brief provides for prohibition of advertisement of certain drugs for treatment of certain diseases and disorders. It further imposes curb on misleading advertisements relating to drugs, magic remedies for treatment and regulation of certain advertisements of Indian imports and exports. There is also provision for punishment for those guilty of contravention of the law.

The Prevention of Food Adulteration Act, 1954

The Act, keeping in view the menace of adulteration to the society and to make the machinery provided under it more effective to curb the increasing tendencies in adulteration, was amended in 1964. The amendment provides that for the proper enforcement of the provision of the Act that the central government also should have power to appoint food inspectors.

The Monopolies and Restrictive Trade Practices Act, 1969

The one of the most important steps taken by central government to protect the interest of consuming public is the enactment of the monopolies and restrictive Trade practices Act of 1969.the object of this Act is to provide that the operation of economic system does not result in the concentration of economic power to common detriment. It also provides for controlling the monopolies and prohibition of monopolistic and restrictive trade practices.

The Code of Criminal Procedure, 1973

Nevertheless, the criminal laws of the country do protect the consumer in some degree or so. In this regard section 153 of the code empowers a station- house officer of a police station without warrant to enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept and whenever there is reason to believe that in such place weights, measures or instruments for weighing or false.

Rights Available to a Consumer

Consumer rights are generally a reference to a body of law that pertains to things the producers of goods must do to protect customers from harm. These laws have come into existence through a series of legal disputes, and have been shaped by the results of those cases. In a few instances, some states have actually codified regulations that they refer to as "consumer rights" laws, but this is not yet the majority practice, and even these codifications may not cover all of the principles that are generally considered "consumer rights."

Right to Safety

One of the most widely accepted basic consumer rights is the ***right to safety***. In other words, consumers should be able to assume that the products they buy are reasonably safe for their intended purpose when used as directed. Defective safety equipment in cars, excessively flammable home products, and dangerous toys are a few examples of products that were found to be unreasonably safe and helped shape the body of law creating this right. Through decisions holding the makers and sellers of these products liable for injuries resulting from their dangerous designs, this "right" against unsafe products has been discerned.

Right to be Informed

Another commonly agreed upon right is the ***right to be informed***. This means the right of the consumer to have sufficient information to weigh alternatives and to protect the consumer from false and misleading claims in advertising and labeling practices. This is particularly relevant to products like medications and health care devices. Knowing exactly what the chemicals one puts into their body could do is critical to allowing the consumers to make an informed decision and allowing consumers to harm themselves through the use of a product about which they were not properly informed led to lawsuits that created this

"right." Truth in advertising and laws against unfair competition lend to the legal substance of this right.

Right to Choose

A third right is the ***right to choose***. This means having competing goods and services that offer alternatives in terms of price, quality, and service. This is one area of the consumer rights in which there are significant statutory provisions in the form of anti-trust and unfair competition laws. Examples of legal actions that led to this right include the breakup of the Bell telecommunications monopoly, anti-trust actions against companies like Microsoft, and so forth.

Right to be heard

Another increasingly recognized right is the ***right to be heard***. This means an assurance that government will take heed of the concerns of consumers and will protect those interests through wisely enacted statutes and administrative regulations. This is more of a politically crafted right than one that has evolved through litigation, as politicians who have not paid attention to the desires of consumers have found themselves with waning support from constituents. One strong example of this right in action has been the rise of alternatively fueled cars. After years of allowing automakers to continue manufacturing inefficient and environmentally damaging vehicles, voters began applying political pressure for more efficient or alternatively fueled vehicles as gas prices began to rise. The result was statutory and regulatory pressure applied to automakers requiring the development of more fuel efficient technologies, like hybrids, electric, and natural gas vehicles. While this is still an area in flux, it is an example of the right to be heard in action.

Right to Redress

This right means right to seek redressal against UTPs or unscrupulous exploitation of consumers. It also includes right to fair settlement of the genuine grievances of the consumer. Consumers must make complaint for their genuine grievances. Many a times, their complaint may be of small value but its impact on the society, as a whole, may be very large. The key aspects are:

- The right to be compensated for misrepresentation, shoddy goods or unsatisfactory services.
- The responsibility to fight for the quality that should be provided.
- To complaint effectively and refusing to accept shoddy workmanship.

The right to seek redress is set out in the Preamble to the Constitution of India, wherein it has been declared that people has the right to strive for justice, social, economic and political and equality of opportunity.

Right to Consumer Education

This right contains the provision to acquire knowledge and skills needed to make informed, confident choices about goods and services, while being aware of basic consumer rights and responsibilities and how to act on them.

- The right to acquire the knowledge and skills necessary to be an informed consumer.
- The responsibility to take advantage of consumer opportunities. Take action by attending seminars and workshops, work to ensure consumer education takes place in schools.

Consumer awareness and education is meant to ensure that the consumers have easy access to the knowledge and skills to be an informed consumer. Thus, the right to consumer education envisages the right to knowledge and skills needed for taking actions to influence factors, which affect consumers' decisions.

There is no legal framework establishing the right to consumer education nor are there guarantees in the Constitution. The Union and state governments, however, have accepted the introduction of consumer education in school curriculum and progress has been made in some states. Furthermore, the Government of India, through the Consumer Welfare Fund (CWF), supports consumer educational programmes undertaken by consumer groups or state governments. The Consumer Club scheme was launched in the year 2002, with funding from Consumer Welfare Fund, has the objective to educate children about the rights of the consumers, protection of their rights, and to strengthen the consumer movement in the country. The media has also been playing an important role in this context. Consumer education faces the universal problem of matching limited resources against an infinite need. Moreover, in a large country like India, with multiplicity of languages, the problem is of larger dimensions.

Right to Basic Needs

All consumers have the right to basic goods and services such as adequate food, drinking water, shelter, clothing, health care, electricity and education. These rights lay a foundation to lead a life with dignity and, therefore, give a meaning to citizen's rights. The key aspects are as follows:

- The right to basic goods and services, which guarantee survival.
- The responsibility to use these goods and services appropriately.
- To take action to ensure that basic needs are available.

The following eight needs constitute the inalienable right to basic needs: food; clothing; healthcare; drinking water and sanitation; shelter; education; energy; and transportation. Basic needs are important for everyone's survival and access to a decent standard of life. This is more important for a country like India, which has a history of the systematic denial of access to basic needs and services to the majority of its people.

Right to a Healthy Environment

To live and work in an environment, which is non-threatening to the well-being of present and future generations. The right contains the following elements:

- The right to live and work in an environment that is neither threatening nor dangerous and which permits a life of dignity and well-being.
- The responsibility to minimize environmental damage through careful choice and use of consumer goods and services.
- To reduce waste, reuse products and to recycle whenever possible.

The United Nations' Guidelines contain governments, which in partnership with business and relevant organisations of civil society, should develop and implement strategies to promote sustainable consumption through a mix of policies that could include regulations; economic and social instruments; sectoral policies in such areas as land use, transport, energy and housing; information programmes to raise awareness of the impact of consumption patterns; removal of subsidies that promote unsustainable patterns of consumption and production; and promotion of sector-specific environmental-management best practices.

As far as the issue of a healthy environment is concerned, Article 21 of the Indian Constitution requires the State, inter alia, to protect life, which is construed as including the right to a healthy and safe environment. A healthy and safe environment is inalienably linked with sustainability and promotion of sustainable consumption. Moreover, the Directive Principles of State Policy direct the state to endeavor to protect and improve the environment, forests and wild life. Consumer protection in India thus has dual dimensions. It first has to ensure availability and access to basic needs of life to one section of the society; on the other hand, those with the purchasing power need to be protected against violation of their other rights. The consumer policy should strive to cover and address the interests of both the have-nots and haves.

If you believe that one of these "rights" has been violated and you have been harmed as a result, you may wish to speak to a legal representative. You might have a cause of action for harm caused by a violation of your consumer rights and, if you have suffered harm, there is also a chance others have. Even if your individual harm is not that great, the cumulative effect of the harm against the entire consumer base may be staggering. Thus, if you are able to initiate a class action suit, you may be able to effect real change and help prevent others from harm.

Consumer Right: Human Right Perspective[5]

Human rights are the basis on which civil society moves towards an advanced state of social development. At every juncture the preservation and protection of human rights is a prime concern of a modern society. With the passage of time, new rights have been included in the widening scope of human rights to ensure justice and personal freedom. Today, the citizen is also armed with a set of consumer rights, which are a strong contender

for inclusion within the scope of human rights. Actually, there is no dichotomy between citizens and consumers, since consumers as members of civil society have obligations and responsibilities, besides having a set of rights. 'A customer is the most important visitor on our premises. He is not dependent on us, we are dependent on him. He is not an interruption in our work, he is the purpose of it. He is not an outsider in our business, he is a part of it. We are not doing him a favour by serving him. He is doing us a favour by giving us an opportunity to do so.' It was Mahatma Gandhi who rightly defined a consumer thus, well before the rise of any consumer movement. Gandhi ji placed the consumer right at the centre of a business set-up, thus underscoring the popular saying, 'consumer is king'.

The origins of the consumer movement, as it is today, can be attributed to John F. Kennedy, the US President who equated the rights of the common American consumer with the national interest of the country. In his presidential address on 15 March 1962, Kennedy underlined the importance of the consumer in the marketplace: 'If a consumer is offered inferior products, if prices are exorbitant, if drugs are unsafe or worthless, if the consumer is unable to choose on an informed basis, then his dollar is wasted, his health and safety may be threatened, and national interest suffers.'

The modern consumer movement also owes its success to the pioneer American consumer activist Ralph Nader, whose leadership, resourcefulness, and sheer persistence changed the equation between the consumer and the providers of goods and services. He has been at the forefront of scores of progressive campaigns during the past few decades.
Who is a consumer? Irrespective of who or where we are, we are all consumers. More and more, what is defining consumers is the way they consume. Consumer rights are a popular concept in our increasingly consumerism driven society. The conflict of interest between consumers and the business organizations have forced the framing of consumer rights and laws, despite which malpractices continue to occur, even while constant efforts are on to protect the interests of both buyers and sellers with the help of a legal system which has evolved as a result of the consumer movement. The movement has gained momentum in India during the last few years, and today it is a force to reckon with. Thus, it is the right time to recognize and accept the hypothesis that consumer rights fall within the purview of human rights.

All people are entitled to some basic and natural rights which help them in having a purposeful existence in the world. These basic rights have been defined as human rights and have become the backbone of social life. Equivalence of these rights is the fundamental principle and equal dignity of all persons stem out of this as the universal application. Each person across the world is born with basic human rights and responsibilities. The rights of individuals are inalienable in practice and do not overlap in an ideal society. They work smoothly so that there is no cause for friction. During the last few decades, consumer rights have gained increasing significance all over the world. This has happened in the background of the growing importance of human rights. The concept

of human rights has broadened since its inception in 1948 through the Universal Declaration of Human Rights (UDHR). Over the last few decades it has evolved to include within its ambit, civil and political rights (ICCPR 1966), economic, social and cultural rights (ICESCR 1966), convention on the rights of the child (CRC 1989), right to eliminate racial discrimination (1965), convention eliminating all forms of discrimination against women (CEDAW 1979), protection against torture (1984). The time is ripe in this broadening ambit of human rights to include 'consumer rights' in it.

We would like to narrate two case studies which shed light on the importance of having consumer rights as human rights. The ***first*** incident occurred in 2000, and it involved my buying a branded geyser by a well known manufacturer. The geyser with proper ISI marking and guarantee burst immediately after installation, fortunately averting a fatal accident. The manufacturer and dealer, by selling a defective product violated my right to life. The risk to my life and family, and even that of the electrician was a clear violation of human rights. The Bureau of Indian Standards, the state agency which allowed its ISI stamp on the product which influenced my decision to buy it, was equally responsible for the accident that violated the human rights of many individuals like myself. The ***second*** incident happened in 2004 and involved a giant telecom company. Their high-handed attitude towards an ordinary customer was an eye-opener. My phone was disconnected by the company stating that the monthly bill was not paid in time. However, I had not received the bill on time. The abrupt disconnection of my phone caused me serious trouble and trauma, both professionally and personally. My internet was also disconnected. The worst blow was the recorded message received by the callers who tried to contact me over the phone. The message said, 'The phone has been disconnected due to non-payment of the bill.' This violated my right to human dignity, which is an essential part of human rights. In both these instances the state apparatus came to my aid as protector and ensured that my grievances were addressed, and the opposing parties were made to pay a penalty and compensation for the mental trauma and financial loss caused to a consumer.

The protection given to me as a consumer was possible because of the Consumer Protection Act 1986 (CPA). This act, which is known as the Magna Carta of Indian consumers, recognizes eight basic rights, namely, the right to safety, right to information, right to choice, right to representation, right to redress, right to consumer education, right to basic needs and right to healthy and sustained environment. The last two rights were not a part of CPA 1986, but added through various amendments. The protection of these rights is the responsibility of the Ministry of Family Welfare and the Ministry of Environment and Forests.

In conformity with UN Guidelines for Consumer Protection of 1985, the Government of India, through CPA 1986, has provided for a three-tier mechanism of consumer grievance redress agencies. There are advisory bodies known as the Consumer Protection Councils, which advise the government at all three levels, namely district, state and national. Besides, there are adjudicatory bodies which look into consumer grievances and provide judgements

on disputes and protect consumer rights. This three-tier judicial system operating at district, state and national level, makes it easy for consumers to register their grievances at these forums as the procedures involved are simple and consumer friendly. Professional help is not required to file a complaint or to follow it through the various stages. My experience in both the above cases was not a cakewalk, but it was a great learning experience.

Besides the CPA 1986, there are several legislations to regulate business activities, thereby protecting consumer interests, these are: Drugs and Cosmetics Act 1940; Emblems and Names Act 1950; Drugs and Magic Remedies Act 1954; Prevention of Food and Adulteration Act 1954; Prize Competition Act 1955; Section 58 Companies Act 1956; Young Persons Harmful Publication Act 1956; Trade and Merchandise Marks Act 1958; Monopolies and Restrictive Trade Practices Act 1969; Prize Chits and Money Circulation Schemes Banning Act 1978; Indecent Representation of Women Prohibition Act 1986; Motor Vehicles Act 1988; Infant Milk Substitute, Feeding Bottles and Infant Foods Regulation of Production, Supply and Distribution Act 1992 and Amendment Act 2002; Pre-natal Diagnostic Techniques Act 1994; Transplantation of Human Organs Act 1994; Cable Television Networks Regulation Act 1995; Food Safety and Standards Act 2005; Protection Against Domestic Violence Act 2005; Right to Information Act 2005.

There are various regulatory authorities whose objective is to protect consumer interests in areas such as: Insurance Regulatory Development Authority; Telecom Regulatory Authority of India; Securities and Exchange Board of India; Reserve Bank of India; Medical Council of India; Chief Vigilance Commissioner; Banking Ombudsmen; Lok Ayuktas. Industry has also evolved a mechanism of self-regulation. Agencies such as the Advertising Standards Council of India (ASCI), Advertising Agencies Association of India (AAA) are a few examples.

During the last few decades, consumer rights have gained increasing significance all over the world. This has happened in the background of growing importance of human rights. In the US, the protection of consumer interests is ensured by various regulations carried out by various commissions. The Federal Trade Commission (FTC) prevents unfair competition and regulates trade; the US Food and Drug Administration (FDA) regulates food and drugs; Federal Communications Commission (FCC) regulates all radio and interstate cable, phone, and satellite communications; Fair Credit Reporting Act (FRCA) regulates the collection, dissemination, and use of consumer credit information; Fair Debt Collection Practices Act (FDCPA) eliminates abusive consumer practices to ensure fairness. These are a few examples.

Conclusion

The contemporary era is marked as the era of consumers. No country can knowingly or unknowingly disregard the interest of the consumers. This can be argued on the basis of fast enactment of consumer protection laws in almost all part of the world. Apart from the

consumer protection laws in developed world, we could find the accelerated rate of lawmaking for consumers in developing countries like Thailand, Sri Lanka, Korea, Mongolia, Philippines, Mauritius, China, Taiwan, Nepal, Indonesia, Malaysia and other countries. India is not an exception to this rule. The Consumer Protection Act, 1986, is one of the examples that is to be treated as a milestone in the history of socio-economic legislation to protect the interests of the consumers in India. Besides the CPA 1986, there are several legislations to regulate business activities, thereby protecting consumer interests but no amount of written legislation and acts can protect consumer interests unless they are implemented in letter and spirit.

The acts would be meaningless if not followed by action on the part of regulatory agencies. In fact, all theories such as the theory of justice, rights, equality, democracy and development reflect the principle of fairness and protection of human dignity in a society. This is also the aim and objective of consumer rights. Thus consumer rights serve as the foundation of human rights. On a closer look, consumer rights and human rights act as the two sides of the same coin. Consumer rights are an integral part of human rights and vice versa. The fine division between them occurs only in expression, and might be traced to the perceived split between a citizen and a consumer. Understanding that these sets of different rights are an extension of each other makes it easier to define and understand the inherent cohesion between them. For all practical purposes, human rights and consumer rights are intertwined.

References:

[1] Available on http://www.hg.org/article.asp?id=31356 accessed on 15 November, 2016 at 12: 45 PM.

[2]Available on http://gradestack.com/CBSE-Class-10th-Course/Consumer-Right/Consumer-Movement/15081-3004-4158-study-wtw accessed on 16 November, 2016 at 11: 30 AM.

[3] Aman Chatterjee, Sheetal Sahoo *"Consumer Protection: Problems and Prospects*" Postmodern Openings, 2011, Year 2, Vol. 7, September, pp: 157-182 **,**

[4] Saharay H.K., "textbook on consumer protection law" Ed.2010, Universal, pp.5-6

[5]Available on "Consumer rights as human rights" available at http://www.india seminar.com/2013/647/647_jayashree_pillai.htm accessed on 15 November, 2016 at 12: 55 PM.

Domestic Help Sector: Issues of Respect and Dignity in Human Right's Perspective

Prerna Gulati*

Introduction

Who are domestic workers? Are they the slaves of our country or the laborers? Do they don't require respect and dignity if they are working for their necessities? They are entitled to get respect and dignity at their workplace. They must have appropriate working conditions and also they must be provided with other benefits according to law.

Domestic help is the person who works for other's households. There is a large variety of work for them, eg, cleaning utensils, cleaning of floors, making food, babysitting, gardening, ironing, laundary etc. even after doing a variety for work, they are not paid with a good wage. The time is also not fixed for them. They work morning to evening and also without any leave and benefits. The conditions faced by them are rigorous throughout history.

With the tremendous growth in the domestic help sector, it has led to the trafficking and exploitation of millions of people including males, females and especially children. Most of the domestic workers are from the marginalized sections of society and also most of them are migrated workers. Over the last few years, it has become a trend to have domestic helps in the cities. These are although migrated from rural areas to the urban areas as it has become the necessity in the Metropolitan cities. Domestic work has a long history in India with both men and women working in other homes as servants.

Historical background

Domestic work has a long history in India with both men and women working in others homes as servants. The affluent had servants; mostly men with loyalty obligation and patronage bring the salient aspects of this relationship. Caste defined the hierarchy – lower castes performed the dirty work of cleaning while higher caste men cooked. Though domestic work is not a new phenomenon in India, it cannot simply be viewed as an extension of historical feudal culture where the affluent employed 'servants'. Both in the urban and rural contexts, the nature of work and workers have been rapidly changing.

The sector now primarily comprises women domestic workers who are not recognized as workers while their work is undervalued. This is primarily due to the gendered notion of housework; value is not ascribed to women's work in their homes, and by extension, even

**** Assistant Professor, Ideal Institute of Management and Technology and School of Law, GGSIPU, Delhi, & Research Scholar, Mewar University, Chittorgarh, Rajasthan.***

paid work in other's homes is not given any value or regarded as work. It is also undervalued because it is often performed by poor, migrant women from lower castes. All these contribute to the inferior states of their work, both in their own minds and in society.[1]

Domestic work, however, is still undervalued. It is looked upon as unskilled because most women have traditionally been considered capable of doing the work, and the skills they are taught by other women in the home are perceived to be innate. When paid, therefore, the work remains undervalued and poorly regulated. By contrast, studies that provide space for domestic workers to speak often reveal their belief in the dignity of their hard work, and, as such, it warrants recognition and respect and calls for regulation.[2]

Domestic service, or the employment of people for wages in their employer's residence, was sometimes simply called "service". It evolved into a hierarchical system in various countries at various times. Prior to the labour reforms of the 20th century, servants, and workers in general, had no protection in law.

The only real advantage that service provided was the provision of meals and accommodation, and sometimes clothes, in addition to the modest wage. In Britain this system peaked towards the close of the Victorian era, the equivalent in the United States being the Gilded Age. In the course of twentieth-century movements for labour rights, women's rights and immigrant rights, the conditions faced by domestic workers and the problems specific to their class of employment have come to the fore.[3]

Working Conditions

No formal contracts ensuring an employer- employee relationship, lack of organization, poor bargaining power, no legislative protection and inadequate welfare measures with no provision for weekly holidays, maternity leave and health benefits are the some of the keys that need to be addressed. This lack of regulations has led to countless violations of domestic workers' rights, including working hours ranging from 8 to 18 hours and the absence of any job security. Domestic workers invariably represent the more marginalized communities in society. Prejudice and bias related to social status reflected very strongly at workplace for many domestic workers. Female domestic workers, especially those who live in their employer's home, are vulnerable to sexual abuse.[4]

Domestic workers are among the lowest paid workers in India and are paid an amount which is even below the minimum wage of semi-skilled and unskilled workers (NDWM). In 2008, the wages of women domestic workers were less than the national floor level minimum wage of 80 rupees per day, both in rural and urban areas. Wage rates also vary by region and type of work, although some of this variation may be a result of the relatively small numbers surveyed. It is striking that while qualitative finding indicate that girls/ women are preferred as child minders and governesses, male wages are higher even in this category. The wages of urban, part time workers are first of all differentiated by the board division of work, such as cooking, cleaning, and babysitting, cleaning tasks, which

are paid between 100-400 rupees per month in 2008: the work also includes dusting, sweeping and mopping, laundry and dishwashing. The wage is tied to the hours that are spent at this task daily, which vary with frequency of visits in a day, the size of the house, and the number of house hold members.

However, since equivalence is difficult, part-time workers may avoid working for large households. The same or different workers may undertake each of the cleaning tasks, such as cooking, childcare and elder care. The returns per hour of work decline as one moves from cooking to elder care and then to child care, reflecting social and cultural notions of skill, purity and labour intensity. The wages of live-in workers range between 1000 to 4000 rupees per month, depending on the worker's experience and the specific tasks to which they are assigned. Board, lodging, clothes, and other articles of daily use are provided. In looking at the returns to their labour, however, a number of features have to be noted. Despite the specification of their work, the workers often must undertake multiple tasks, though the intensity of their involvement may vary. They are on call twenty-four hours a day. The basic wage perks, and benefits, such as festival bonus, loans, medical costs, and gifts at life cycle rituals, all differ as a result of the length of service of the worker and the personal ties that have formed between them and their employers, which is likely to be closer among live-in, rather than part-time workers.[5]

Legislative Perspective

The National Draft Policy on domestic workers as recommended by the task force on Domestic workers provides a definition of a domestic worker as:

"For the purpose of this policy, the "domestic worker" means, a person who is employed for remuneration whether in cash or kind, in any household through any agency or directly, either on a temporary or permanent part-time or full-time basis to do the household work, but does not include any member of the family of an employer."

According to Section 2(f)[6], "Domestic Worker" means, a person who is employed for remuneration whether in cash or kind, in any house hold 'or similar Establishments' through any agency or directly, either on a temporary or contract basis or permanent, part time or full time to do the household or allied work and includes a "Replacement worker" who is working as a replacement for the main workers for a short and specific period of time as agreed with the main worker; EXPLANATION: household and allied work includes but is not limited to activities such as cooking or a part of it, washing clothes or utensils, cleaning or dusting of the house, driving , caring/nursing of the children/sick/old/mentally challenged or disabled persons.

In 2010, the National Commission for Women (NCW) had drafted the "Domestic Workers Welfare and Social Security Act, 2010" Bill highlighting the exploitative nature of domestic work by spurious placement agencies. It addressed the working conditions of domestic workers, including their registration, but is yet to be passed.

"The draft was submitted by NCW, and it was meant for domestic workers above 18 years of age. It, however, remains a proposal. If it is implemented, it will bring domestic workers under the ambit of an organized sector and their rights will be safeguarded. In fact, a similar bill related to placement agencies is also pending before the Delhi government," said Supreme Court advocate Ravikant, who is also president of the NGO, Shakti Vahini.

The draft bill not only defines the rights of full-time domestic workers but also has provisions for registering part-time helps and migrant domestic workers. In many of the recent abuse cases the victims were minors, and the bill clearly mandates that no child shall be employed as a domestic worker, or for any such incidental or ancillary work.

Time and again, trial courts have also urged the government to make a law to deal with the issues of domestic workers that will not only protect the workers but also safeguard the employers from getting conned. In 2011, a trial court had raised the issue of exploitation of domestic workers. Additional sessions judge Kamini Lau, in her order, had noted that thousands of complaints of exploitation and abuse were received every year and most of them were about unpaid wages, food deprivation and long work hours with verbal, physical and sexual abuse.

"Many cases are never officially reported, due to the domestic workers' confinement in private homes, lack of information about their rights and ability of the employer to deport/ relieve them before they can actually seek help," the judge had said.

Legal experts say the law enforcement agencies cannot curb exploitation without a proper law. "It is not only about the domestic workers being harassed. In many cases, employers also get harassed by domestic helps. Then there are middlemen handling their employment, which leads to human trafficking. All these issues can be addressed if a specific legislation is enacted," said Pinky Anand, a senior advocate.[7]

Domestic work has enabled many women to enter the labour market and benefit from economic autonomy. However, this has not translated into gender equality. Worldwide, household responsibilities and unpaid care work continue to pose significant barriers to women's labour market participation. On many occasions, ILO has argued the need to change the idea that care-giving is a private domestic responsibility unique to women.

In order to leave behind the assumption that women alone must balance productive work with family and care responsibilities, we must foster alternative models of maternity, paternity and masculinity. Hence, what is needed is a reconfiguration of the financing of 'care' from the current model that relies heavily on the households, the women and the domestic workers, to the state. This can be done through measures such as making available good quality full-day child care especially for the low income population and facilitating the development of effective policies to enable workers to meet demands of unpaid work (for example, leave policies and working time policies).[8]

The large supply of domestic workers in India has meant a meant a shift of care responsibilities from women in the households to hired domestic workers who are a predominantly female and largely invisible. This, in itself, did not challenge broader structural gender inequality. Hence, ILO's demands for decent work for domestic workers are two pronged- first and foremost, it calls for recognition of the rights of domestic workers for fair terms of employment that are no less favourable than those of other workers; secondly, it calls for the active participation of the state and the recognition of the existence of structural inequality that is perpetuated by not recognizing the sheer weight of 'care work'.[9]

Human Rights Perspective

Domestic workers play a critical economic role globally, helping households manage responsibilities of child care, cooking, and cleaning. They also free up their employers to participate in the workforce themselves and provide care for the industrialized world's increasingly aging population. Migrant domestic workers send home billions of dollars in remittances to developing countries each year, but despite their economic contributions, sending governments have largely ignored protection concerns.

Domestic workers, who often make extraordinary personal sacrifices to support their families, have routinely been denied basic protections guaranteed others workers and are among the most exploited workers in the world. Gaps in legal protections, isolation in private homes, and social norms that have sanctioned exploitation of a "servant" class have given rise to abuses ranging from endemic labor exploitation in which workers toil around the clock for little or no pay, to trafficking into domestic servitude and slavery.[10]

In a review of 72 countries' labor laws, the ILO found that 40 percent did not guarantee domestic workers a weekly rest day, and half did not limit hours of work. Many national child labor laws currently exclude domestic workers, meaning employers can employ young children and make them labor for long hours, often at the cost of their education and health. A Human Rights Watch study in Indonesia found that only 1 in 45 child domestic workers interviewed was attending school.

Many domestic workers are international migrants who confront additional risks posed by language barriers, precarious immigration status, excessive recruitment fees, and employers' confiscation of passports. Human Rights Watch investigations across Asia and the Middle East have documented the failure of many governments to monitor recruitment agencies that impose heavy debt burdens or to ensure that migrant domestic workers have access to courts, information about their rights, and support services when they face abuse. Trade unions have begun organizing domestic workers in recent decades in places such as South Africa, Hong Kong, and Brazil, but for the most part the organized labor movement has been slow to take up domestic workers' concerns and the particular risks faced by children and migrants. The process of negotiating global labor standards on domestic work

brought together a diverse alliance of domestic worker organizations, NGOs, and trade unions working to reverse this dynamic.[11]

Hired domestic workers ease the burden of individual households by undertaking household chores in return for remuneration. The tasks include the care of children and the elderly, cooking, driving, cleaning, grocery shopping, running errands and taking care of household pets, particularly in urban areas. However, despite the benefits this work brings to individual households, domestic workers are often not recognized as workers by society.[12]

Tasks performed by them are not recognized as 'work'. Domestic workers in India continue to struggle for visibility and recognition. While several legislations such as the Unorganized Social Security Act, 2008, Sexual Harassment against Women at Work Place (Prevention, Prohibition and Redressal) Act, 2013 and Minimum Wages Schedules notified in various states refer to domestic workers, there remains an absence of comprehensive, uniformly applicable, national legislation that guarantees fair terms of employment and decent working conditions. Domestic workers should however be guaranteed the same terms of employment as enjoyed by other workers.[13]

Unlike other forms of labour market activity, domestic work takes place in an unconventional place of work, i.e. the household. Gaining public acceptance of a household as a place of work is a challenge. Implementation of labour laws such as minimum wages and regularized work hours, which are essential elements of any kind of work, also remain a challenge. Such regulation is complex because the nature of domestic work is unique compared to other forms of work. The sector lacks effective means to regulate working conditions, for example, through streamlined job descriptions which could be offered through standard contracts. Furthermore, unlike work in a formal setting, domestic work is not guided by clear and agreed production or output goals. Enforcing labour laws remains a significant bottleneck. This is because privacy norms do not bode well with the idea of labour inspectors entering private households and ensuring regulations.

Policymakers, legislative bodies and people need to recognize the existence of an employment relationship in domestic work. Such a view would see domestic workers as not just "helpers" who are "part of the family" but as employed workers entitled to the rights and dignity that employment brings with it.

Conclusion

Domestic work has enabled many women to enter the labour market and benefit from economic autonomy. However, this has not translated into gender equality. Worldwide, household responsibilities and unpaid care work continue to pose significant barriers to

women's labour market participation. On many occasions, ILO has argued the need to change the idea that care-giving is a private domestic responsibility unique to women.

A greater sense of social co-responsibility must be developed- first towards a redistribution of responsibilities between households, the market and the state, that is a shift toward society as a whole assuming responsibility for the process of reproducing the labour force; and second, towards redistributing reproductive work/unpaid care work between men and women, in line with the change that has already taken place regarding productive (paid) work.[14]

In order to leave behind the assumption that women alone must balance productive work with family and care responsibilities, we must foster alternative models of maternity, paternity and masculinity. Hence, what is needed is a reconfiguration of the financing of 'care' from the current model that relies heavily on the households, the women and the domestic workers, to the state. This can be done through measures such as making available good quality full-day child care especially for the low income population and facilitating the development of effective policies to enable workers to meet demands of unpaid work (for example, leave policies and working time policies).

The large supply of domestic workers in India has meant a meant a shift of care responsibilities from women in the households to hired domestic workers who are a predominantly female and largely invisible. This, in itself, did not challenge broader structural gender inequality. Hence, ILO's demands for decent work for domestic workers are two pronged- first and foremost, it calls for recognition of the rights of domestic workers for fair terms of employment that are no less favourable than those of other workers; secondly, it calls for the active participation of the state and the recognition of the existence of structural inequality that is perpetuated by not recognizing the sheer weight of 'care work'.

References:

[1] Domestic Women Workers in Urban Informal Sector by Dr. K. John published in *Abhinav Journal,* Volume No. 2, Issue No. 2.
[2] Ibid.
[3] Decent Work for Domestic Worker, Report by Bhartiya Mazdoor Sangh published on 23/07/2012.
[4]Available at http://wiego.org/informal_economy_law/domestic-workers-india, accessed on 12/07/2015 at 12:30 p.m.
[5] Available at www.ndwm.org accessed on 25/05/2015 at11:45 am.
[6] Domestic Workers Welfare and Social Security Act, 2010.
[7] No progress on law to protect domestic helps, *Times of India*, October 30, 2013.
[8] Amar Nath Singh, Women domestic workers, socio- economic life, Shipra Publications
[9] Available at http://in.one.un.org/page/rights-for-domestic-workers, accessed on 03/06/2015 at 04:06 p.m.

[10] The Right to Unite, a Handbook on Domestic Workers Right across Asia.
[11] World Report 2012; A Landmark Victory for Domestic Workers by Nisha Varia and Jo Becker
[12] Available at http://in.one.un.org/page/rights-for-domestic-workers, accessed on 22/06/2015 at 10:34 a.m.
[13] Ibid.
[14] Available at http://in.one.un.org/page/rights-for-domestic-workers, accessed on 28/05/2015 at 11:45 a.m.

Street Children- A Vulnerable Group

Vijeta Verma*

Abstract

Children today are the citizens of tomorrow. They are the future of the nation. Still, in age of innocence, they are being assaulted. Child sexual abuse is a crime so common, so hideous and yet, completely unspoken about within the Indian society. India is home to the largest number of children in the world. Nearly every fifth child in the world lives in India. There are about 43 crore children in the age group of 0-18 years; 16 crore children are in the age group of 0-6 years, of this there are 8.5 crore males and 7.88 crore females. In the age group of 6-18 years, there are about 27 crore children. It is estimated that about 40 per cent of children are in difficult circumstances or vulnerable which include like children without family support, children forced into labour, abused /trafficked children, children on the streets, vulnerable children, children affected by substance abuse, by armed conflict/civil unrest/natural calamity etc.

Introduction

The term 'street children' refers to children for whom the street more than their family has become their real home. It includes children who might not necessarily be homeless or without families, but who live in situations where there is no protection, supervision, or direction from responsible adults.

"A girl or boy for whom the street has become his or her abode and or source of livelihood, and who is inadequately protected, supervised or directed by responsible adult"[1]

The issue of street children is considered to be an urban problem. Children can be found in railway station, near temples and durgahs, in markets, under bridges, near bus deports and stops, etc. Hence the definition of street is not in the literal sense, but refers to those children without a stable home or shelter.

Types of Street Children

There are three major categories of street children:

- Children who lives on the street with their families and often work on the street. There may be children from migrated families, or temporarily migrated and are likely to go back to their families.
- Children who live on the street by themselves or in groups and have remote access or contact with their families in the village. Some children travel to the cities fort the day or period of time to work and then return to their villages.
- Children who have no ties to their families such as orphans, refugees and runaways.
- According to UNICEF Street children fall into two categories:
- on the street and

**** Assistant Professor, IIMT & School of Law, GGSIP University, Delhi.***

- of the street

Gender-wise percentage of street children reporting physical abuse by family members and others *

	Boys		Girls	
	No	Yes	No	Yes
Andhra Pradesh	34.25	65.75	60.87	39.13
Assam	15.81	80.19	10.29	89.71
Bihar	22.77	77.23	16.67	83.33
Delhi	7.44	92.56	7.59	92.41
Goa	61.26	38.74	46.81	53.19
Gujarat	44.12	55.86	19.19	80.81
Kerala	71.76	28.24	32.73	67.27
Madhya Pradesh	31.90	68.10	39.02	60.98
Maharashtra	23.53	76.47	50.51	49.49
Mizoram	0.00	100.00	0.00	0.00
Rajasthan	10.10	89.90	26.26	73.74
Uttar Pradesh	10.78	89.22	27.37	72.63
West Bengal	65.09	34.91	54.35	45.65
Total	34.01	65.99	32.08	67.92

* Others include teachers, employers, NGO Workers, Caregivers, strangers and person with whom children have little acquaintance

"Children of the Street" are homeless children who live and sleep on the street in urban areas. They are on their own and do not have any parental supervision or care though some do live with other homeless adults. "Children on the street" earn a livelihood from street such as street urchins and beggars. They return home at night and have contact with their families. The distinction is an important one because children of the street emotional and psychological support of a family.

It is the second and third category of children who are most vulnerable as they are easy victims of abuse, and inhuman treatment. They often engaged in petty theft or prostitution for economic survival. Children runaway from their homes for a variety of reasons. Some may have faced traumatic experience in their homes. Their parents may be abusive or have problems with alcoholism, poverty and unemployment. Some children leave home drawn by the glamour of the big cities.

The exact number of street children is impossible to quantify, but the figure almost certainly runs into tens of millions across the world which shows that the numbers are in increasing trend'.[2] The number of street children has grown in recent decades because of widespread recession, political turmoil, civil unrest, increasing family disintegration, natural disasters and growing urbanization.[3]

Sexual Abuse against Street Children

Out of the total sample size of child respondents, 18.6% were street children of which 55.33% boys and 44.67% were girls. The study revealed that 65.9% of the street children lived with their families on the streets. Out of these children, 51.84% slept on the footpaths, 17.48% slept in the night shelters and 30.67% slept in other places including under flyovers and bridges, railway platforms, bus stops, parks, market places, etc.

One of the major threats that street children experience is abuse. The term abuse from the perspective of a child is defined as an act that causes or permits any harmful or offensive contact with her/his body and any communication or transaction of any kind which humiliates, shames, or frightens the child. Abuse is also defined as any act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm to a child (WHO 1999).[4] There are many studies that have looked in detail at various kinds of abuse a child on the street has to undergo. Drug abuse, sexual abuse, and verbal abuse have been constantly deliberated upon.

Studies on street children (NLI 1992; UNESCO 2001; Wasi 2002; Goyal 2005) discuss the sexual abuse[5] that children experience on the street and at the workplace. A visible form of sexual exploitation is commercial flesh trade. While initially only girls were thought to be vulnerable to this, now the number of boys being trafficked for work in commercial flesh trade is increasing. In addition, the incidence of sexual abuse on the streets is very high, especially during the night. The children are largely exploited by strangers, adult street dwellers, and sometimes by fellow street children. Cases of sexual abuse by the police and other authorities are also reported. The implications of sexual abuse go deeper than is often reported.

While child sexual abuse cuts across caste, class, ethnicity and location, street/homeless children and working children, particularly domestic workers and poor children, have been identified as experiencing an especially high risk of sexual abuse.[6] Newspapers frequently report sexual abuse in schools and at work places, within institutions such as prisons and remand homes, on the streets and other public spaces.[7]

Homosexual rape of younger street boys has been reported in Mumbai, Delhi and Calcutta. Being traumatised by their first experience, they are often threatened into acquiescing subsequently. Moreover, the children subjected to this sexual violence have little or no access to information, counselling and services for the prevention of STIs including HIV/AIDS.

Street children are generally subjected to physical abuse by family members, caregivers, police and other adults. The incidence of physical abuse of street children by police has been reported high throughout the world. One of the studies conducted by Human Rights Watch in 1996 reported that street children in India are routinely detained illegally, beaten and tortured and sometimes killed by police. According to the study, several factors contribute to this phenomenon: police perceptions of street children, widespread corruption and a culture of police violence, the inadequacy and non-implementation of legal safeguards, and the level of impunity that law enforcement officials enjoy. The police generally view street children as vagrants and criminals. While it is true that street children are sometimes involved in petty thefts, drug-trafficking, prostitution and other criminal activities, the police tend to assume that whenever a crime is committed on the street, street

children are either involved themselves or are aware of who the culprit is. Their proximity to a crime is considered reason enough to detain them. This abuse violates both Indian domestic law and international human rights standards.[8]

The number of street children covered in this study was 2,317 which was 18.7 % of the total child respondents covered. Of this, 55.28% were boys and the rest were girls. The data revealed that the overall incidence of physical abuse among street children either by family members or by others or both was 66.8% across the states. Out of this, 54.62% were boys and 45.38% were girls. The data was not analyzed separately for physical abuse of street children by family members and others, as disaggregated data was not available. Further, gender- wise percentage of street children reporting physical abuse by family members or others showed that both girls and boys were facing equal incidence of physical abuse, although there was marked intra-state disparity in states like Kerala, Andhra Pradesh, Gujarat and Maharashtra.[9]

Incidence of physical abuse among street children either by family members or by others or both was 66.8% across the states. Out of this, 54.62% were boys and 45.38% were girls. The data was not analyzed separately for physical abuse of street children by family members and others, as disaggregated data was not available. Further, gender- wise percentage of street children reporting physical abuse by family members or others showed that both girls and boys were facing equal incidence of physical abuse, although there was marked intra-state disparity in states like Kerala, Andhra Pradesh, Gujarat and Maharashtra.[10]

Though street children are hard to define and hard to count, estimates of the member of street children range from about 20 million to well over 100 million worldwide. Street children often start engaging in sexual activity at a relatively young age. Moreover, their knowledge, awareness, and skills level related to preventive measures are low. These factors make street children highly vulnerable to HIV infection. Though there are very few prevalence studies on street children, the existing data shows that street children has HIV prevalence well above the average prevalence in the general population. Street children vary across cities and regions. But a majority of these children are boys. It is also important to note girl street children are often not found in visible spaces and hence hard to trace.

Causes of Sexual Abuse Against Street Children

There are a number of factor that lead children to living on the street. One root cause that has been identified is poverty. But poverty alone does not result in this problem. Other factor to be taken into consideration is the expansion and growth of cities, over-population, family disintegration, inadequacy of formal school institutions leading to large number of dropouts and failure, inability of institutions to deal with these problems, etc.

Street children mostly lives in open air spaces. There are few to no shelter available in the cities for homeless children. Some may live in temporary constructed hut or the house of

their employer. Majority of street children work. Almost 50% of street children are self-employed as rig- pickers, hawkers, and shoeshine boys, while others work in shops and establishments. Their work hours range between 10-13 hours a day. These children are exposed to high health hazards as population and unhygienic condition of living. Having no shelter they are constantly exposed to environmental conditions of heat, cold and rain.
Many street children also face harassment by municipal authorities and police. One- third of street children complain of persecution by such authorities. Street children also face abuse from their family member, employers and other people. The right to play of a street child is most nonexistent as they do not have access to recreational facilities and often venture into activities available to them on the street such as drug abuse, gambling, drinking, etc.[11]

In 2003, UNICEF estimated that there were at least 100 million street children in the worlds, but though this figure is commonly found it is not seen to be based on any actual studies or surveys. In 1994, UNICEF estimated that there were 11 million street children in India. This number is said to be a drastic under estimation. The Indian embassy estimated 314,700 street children in cities like Mumbai, Kolkatta, Madras, Kanpur, Bangalore and Hyderabad and around 100,000 street children in Delhi.[12]

In the 2007 MWCD report on Child abuse, the study found 65.9% of the street children lived with their families. Out of these children, 51.84% slept on the side- walks, 17.48% slept in shelter and 30.67% slept in other locations such as under flyover and bridges, railway platforms, bus stops, parks, market places, etc. 66.8% of children reported being physically abuse y family members and others.

Because of a lack of permanent shelter and the fact that the number of street children is not recorded in any national survey or study street children are often called the ‘hidden children’. Being hidden, they are at a higher risk to being abuse, exploited and neglected. Another group that is at risk of ending up on the street is migrant children. Children come to cities in hope of finding new jobs and opportunities for their families. Unfortunately increasing population in the cities, children that come to the cities face meager incomes, poor housing and usually end up on the street. The Indian embassy estimated 314,700 street children in cities like Mumbai, Kolkatta, Madras, Kanpur, Bangalore and Hyderabad and around 100,000 street children in Delhi.

According to the United Nations, there are 11 million street children in India - the highest number in the world. However, independent figures estimate that the number is approximately 20 million. The majority of children living on the streets of India are repeatedly exposed to maltreatment ranging from child labor, child trafficking, sexual exploitation, and many other forms of violence and abuse, according to a report released on July 16 by the Associated Chambers of Commerce and Industry of India.

Indian street children are routinely detained illegally, beaten and tortured and sometimes killed by police. Several factors contribute to this phenomenon: police perceptions of street children, widespread corruption and a culture of police violence, the inadequacy and non-implementation of legal safeguards, and the level of impunity that law enforcement officials enjoy. The police generally view street children as vagrants and criminals. While it is true that street children are sometimes involved in petty theft, drug-trafficking, prostitution and other criminal activities, the police tend to assume that whenever a crime is committed on the street, street children are either involved themselves or know the culprit. Their proximity to a crime is considered reason enough to detain them. This abuse violates both Indian domestic law and international human rights standards.

Street children are also easy targets. They are young, small, poor, and ignorant of their rights and often have no family members who will come to their defense. It does not require much time or effort to detain and beat a child to extract a confession, and the children are unlikely to register formal complaints.

Police have financial incentives to resort to violence against children. Many children report that they were beaten on the street because the police wanted their money. The prospect of being sent to a remand home, the police station or jail, coupled with the threat of brutal treatment, creates a level of fear and intimidation that forces children or in some cases, their families, to pay the police or suffer the consequences.[13]
In damning statistics, a government study has found that a vast majority of street children face sexual abuse in India, which is home to the world's largest number of destitute children.[14]

According to a study conducted by the ministry of women and child development, the overall incidence of physical abuse among street children was 66.8 per cent.
The majority of the street children facing physical abuse are in the age group of 5-12 years.

The problems of street children are more significant in the developing than developed world and it was estimated that more than 100 million children live and work on the streets in the developing countries. Moreover, India alone is home to the world’s largest population of street children, estimated to be 18 million.[15]

Some estimates put the number of street children living in India’s six most populous cities at 500,000; more than 100,000 may be found in Delhi alone.[16] War, poverty, urbanization, rapid economic growth, the breakdown of families, and domestic violence are the most immediate causes of this phenomenon’s growing proportions[17]. Street children in India indulge in substance use at any time in their life and the minimum age at starting substance use in the study was 5 years.[18] Street children are abusing wide range of substances, from inhalant to solid cigarettes and some of the children are employed in preparation of "charas" cigarettes in India.[19] This situation brought the street children in various health

and social effects. As a result, over half of the 18 year-old street girls reported Sexually Transmitted Infection (STI) and, and 20% of them admitted due to early pregnancy.[20]

Children who are vulnerable to street life include those who have been abandoned by their families or sent into cities due to family's intense poverty, often with hopes that a child will be able to earn money for the family.[21] It was found that most of the street children were from joint families and higher percentage of street children had illiterate parents[22]. Beside these, low income of the parents, presence of step parents, guardian other than parents and intra-familial physical abuse were associated with the runaway group of street children in India.[23]

Conclusion

Child sexual abuse is perhaps one of the worst perils that India faces today. Unlike other forms of sexual abuse, we cannot indulge in blaming the victim or other external forces (like the influence of Western culture). Child sexual abuse throws a mirror to the society and shows a face of humanity we are afraid to see. The only way we can fight what we see in this mirror is by first looking the problem straight in its eyes instead of brushing it under the carpet. In India, many legislations and policies have been adopted by our government but merely having the necessary piece of legislation does not translate to an effective law. Issues of this nature do not invite open discussion and are often considered social taboo. Most families choose to cover up such incidents may be in a bid to protect the interest of the child involved.

Suggestion

It is suggested that in the cases of sexual abuse wherever corroboration is necessary, it should be from an independent sources but only necessarily that every part of evidence of the victim should be confirmed in every details by an independent witness. In most of the case, such evidence could also be sought from either direct or circumstantial evidence or from both and from the totality of the background of the case. It is also suggested that society should come forward to rescue the victim of sexual abuse. Even law expected them to come forward to help the helpless victim. Although payment of compensation s but a poor solace to a victim of sexual abuse, unless people come forward to rescue the victim's human dignity, the victim of sexual abuse will continue to remain under erosion of societal values.

References:

[1] International Labour Organization 2002.
[2] Visano L. The socialization of street children: The development and transformation of identities. Sociological Studies of Child Development, 1990; 3:139-161.
[3] Tuladhar S. Alcohol and Drug Use among Street Children in Nepal. Kathmandu: Child Workers in Nepal (CWIN); 2002.

[4]World Health Organisation (1999): 'Report of the Consultation on Child Abuse Prevention', Geneva. Available at: http://www.who.int/violence_injury_prevention/ violence/neglect/en/ (accessed in November 2012).
[5] Sexual abuse of a child is defined as, "the involvement of a child in a sexual activity that he or she does not fully comprehend, is unable to give informed consent to or that violate the laws or social taboos of society," World Report on Violence and Health. WHO, Geneva 2002.
[6]Kabir, Rachel (2001), Report on Finding from Consultations with Children on Sexual Abuse and Exploitation. Dhaka, Bangladesh: UNICEF.
[7]Human Rights Watch (1999), Prison Bound: The Denial of Juvenile Justice in Pakistan. New York, USA: Human Rights Watch (www.hrw.org/reports/1999/pakistan2/Pakistan.htm).
[8]Study on child abuse: India 2007- 'Ministry of Women and Child Development' Government of India.
[9] Ibid.
[10] Study on child abuse: India 2007- 'Ministry of Women and Child Development' Government of India.
[11] Avilable on www.childlineindia.org.in/Vulnerable Children › Children's Issue accessed on 10 July, 20015 at 10:50 a.m.
[12] Ibid.
[13]"Police Abuse And Killings Of Street Children In India"-Human Rights Watch Children's Rights Project.
[14] Avilable on http://www.speakingtree.in/topics/people/children.n accessed on 10 July, 20015 at 10:45 a.m.
[15]Gurumurthy, R. HIV/AIDS risk taking behaviour among street children in Mumbai, Mumbai: International Conference on AIDS; 2000.
[16]UNICEF Rapid Assessment of street children in Lusaka. UNICEF, 2002; Available from: http://www.unicef.org/evaldatabase/files/ZAM_01-009.pdf. Accessed on 21 Nov 2009.
[17] Joshi NC. Integrated Child Protection Scheme- taking care of overall care of overall development of children. The India Post; 2009; Available from: http://www.theindiapost.com/articles/ integrated-child-protection-scheme- -taking-care-of-overall-development-of-children/. (Accessed 25 June 2012).
[18] Harold E. Concepts of Chemical Dependency, California: Brooks/Cole-Thomson Learning; 2002.
[19] Pagare D, Meena GS, Singh MM, Saha, R. Risk Factors of Substance Use Among Street Children from Delhi, New Delhi: Maulana Azad Medical College; 2003
[20]UN-ODCCP. Rapid situation assessment of street children in Cairo and Alexandria. Cairo: UN-ODCCP; 2001.
[21]Tiwari PA, Gulati N, Sethi GR, Mehra M. Why do some boys run away from home? Indian Journal of Paediatrics; 2002; 69(8):732.
[22]Tiwari PA, Gulati N, Sethi GR, Mehra M. Why do some boys run away from home? Indian Journal of Paediatrics; 2002; 69(8):732.
[23] Kacker L, Varadan S, Kumar P. Study on Child Abuse India 2007. Delhi: Ministry of Women and Child Development, Government of India; 2007.

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989: A Critical Analyses

Dr. Kabindra Singh Brijwal*

Introduction

India became a Republic in 1950 when the Constitution of India came into existence. The country is governed according to the rules and principles mentioned in the Constitution. The Constitution promises to enforce the human and social values of equality, freedom, justice, human dignity and fraternity. The Constitution requires the governments, Central and of the States, to provide special protection to the Scheduled Castes and Scheduled Tribes. This is Constitutional obligations that the governments are to do everything possible to raise standard of living of the SCs & Sts and to make them equal to other citizens.

However, even after so many years of Independence most of the members of the SCs and STs are still living in utter poverty, without schooling or education of any kind, and in miserable conditions. Their rights are systematically violated by every sections of the society, be they government or non-government. They are harassed and exploited by the powerful elements of the society. These oppressed people have not been able to benefit much from the developmental programmes and welfare projects set up by the governments, because of the indifference of the administrative authorities at various levels. Hence the socio-economic life condition of SCs and STs is very pitiable even today.

Atrocities continue to be committing against SCs and STs. Every news papers are full of such news. Much social legislation has been enacted for the protection and welfare of these people. Due to improper implementation these people are unable to get the protection and benefits of these laws. Loopholes in these laws also have been used by the offenders of law to escape from punishments. Consequently the victims of atrocities are compel/bound to live in anxiety and fear.

Periodic survey conducted by social action groups and the annual reports of the SCs & STs Commission reveal that atrocities against SCs & Sts are increasing day by day. The normal provisions of the existing laws like, the Protection of Civil Rights Act 1955 and Indian Penal Code have been found inadequate to check these atrocities continuing the gross indignities and offences against Scheduled Castes and Tribes. In order to protection the rights of the SCs and STs, and to prevent atrocities against them the Central Government has enacted a new law, “The Scheduled Caste and Scheduled Tribes (Prevention of

**** Assistant Professor, Department of Law, Assam University, Silchar, Assam.***

Atrocities) Act, 1989". The Act is popularly known as POA, the SC & ST Act, the Prevention of Atrocities Act, or simply the Atrocities Act.

The salient features of the Act are:

1. Creation of new types of offences not in the Indian Penal Code (IPC) or in the Protection of Civil Rights Act 1955 (PCRA).
2. Commission of offences only by specified persons (atrocities can be committed only by non-SCs and non-STs on members of the SC or ST communities. Offences among SCs and STs or between STs and SCs do not come under the purview of this Act).
3. Defines various types of atrocities against SCs/STs [Section 3(1)(i) to (xv) and 3(2) (i) to (vii)].
4. Prescribes stringent punishment for such atrocities [Section 3(1)(i) to (xv) and 3(2) (i) to (vii)].
5. Enhanced punishments for some offences [Section 3(2) (i) to (vii) and Section 5].
6. Enhanced minimum punishment for public servants [Section 3(2) (vii)].
7. Punishment for neglect of duties by a public servant (Section 4).
8. Attachment and forfeiture of property (Section 7).
9. Externment of potential offenders (Section 10).
10. Creation of Special Courts (Section 14).
11. Appointment of Special Public Prosecutors (Section 15).
12. Empowers the government to impose collective fines (Section 16).
13. Identification of atrocity prone areas [Section 17(1), 21(2)(vii), Rule 3(1)].
14. Provides compensation, relief and rehabilitation for victims of atrocities or their legal heirs [Section 17(3), 21(2) (iii), Rule 11, 12(4)).
15. Denial of anticipatory bail (Section 18).
16. Denial of probation to convict (Section 19).
17. Cancellation of arms licences in the areas identified where an atrocity may take place or has taken place Rule 3(iii) and seize all illegal fire arms Rule 3(iv).
18. Grant arms licences to SCs and STs Rule 3(v).
19. Setting up deterrents to avoid committing of atrocities on the SCs amongst others Rule 3(i) to 3(xi).
20. Setting up a mandatory, periodic monitoring system at different levels Section 21(2) (v):
    - District level Rule 3(xi), 4(2), (4), 17.
    - State level Rule 8(xi), 14, 16, 18.
    - National level Section 21(2), (3) and (4).

Together with the rules, it provides a framework for monitoring the state response to the atrocities against Scheduled Castes and Scheduled Tribes. According to the Act and Rules, there are to be monthly reports (from the District Magistrates), quarterly review meetings at the district level by the District Vigilance and Monitoring Committee (DVMC) and half yearly reviews by a 25 member State Vigilance and Monitoring Committee (SVMC) the chaired by the Chief Minister. The performance of every Special Public Prosecutor (SPP)

will also have to be reviewed by the Director of Public Prosecutions (DPP) every quarter. Annual reports have to be sent to the Central government by 31st March every year.

The Act and rules are a potent mechanism and precision instruments that can be used in tandem with the Right to Information (RTI) Act, 2005 to motivate the State to hold the mandatory meetings and enforce compliance. A Human Rights Defenders Monitoring Calendar has been developed from the Act and rules to help human rights defenders, and the functions and duties of the monitoring authorities the State Vigilance and Monitoring Committee (SVMC) and District Vigilance and Monitoring Committee (DVMC).

Object

Thus objectives of the Act very clearly emphasise the intention of the Government to deliver justice to SC and ST communities through proactive efforts or affirmative action in order to allow them to live in society with dignity and self-esteem and without fear, violence or suppression from the dominant castes or classes.

This law is enacted to prevent atrocities against the members of the Scheduled Castes and the Scheduled Tribes, & to establish special courts for the trial of such offences committed against them and to provide relief and rehabilitation for the victims of atrocities.

This Act is composite with 23 Sections divided in five chapters. Chapter-I is introduction part of the Act. Section 1 and 2 are in this chapter. Chapter-II is related with offences of atrocities. This chapter is composite with seven Sections. Section 3 to Section 9 comes with different headings. Chapter-III is related with externment of accused person. There are four Sections in this chapter. Chapter-IV is says about the establishment of Special Court and appointment of special Public Prosecutor. Chapter-V is related with miscellaneous, which is composite with eight Sections.

The provisions of SC or ST Act can be divided into three different categories, covering a variety of issues related to atrocities against SC or ST people and their position in society.

1. The first category contains provisions of criminal law. It establishes criminal liability for a number of specifically defined atrocities, and extends the scope of certain categories of penalizations given in the Indian Penal Code (IPC).
2. The second category contains provisions for relief and compensation for victims of atrocities.
3. The third category contains provisions that establish special authorities for the implementation and monitoring of the Act.

The Act came into force with effect from **30th January, 1990**. The term 'atrocity' was not defined until this Act was passed by the Parliament in 1989. In legal parlance, the Act understands the term "atrocity"[1] mean an offence punishable under Sections 3.
In specific terms:

1. Atrocity is "an expression commonly used to refer to offences against Scheduled Castes (SCs) and Scheduled Tribes (STs) in India".
2. It "denotes the quality of being shockingly cruel and inhumane, whereas the term 'offences' relates to an act punishable by law".
3. It implies "any offence under the Indian Penal Code (IPC) committed against SCs by non-SC persons, or against STs by non-ST persons. Caste consideration as a motive is not necessary to make such an offence in case of atrocity".
4. It signifies "offences which have ingredients of infliction of suffering in one form or the other that should be included for reporting". This is based on the assumption that "where the victims of offence are members of Scheduled Castes or Tribes and the offenders do not belong to Scheduled Castes or Tribes considerations are really the root cause of the offence, even though caste or community considerations may not be the vivid and minimum motive for the offences".

The Act lists 22 offences relating to various patterns of behaviours inflicting criminal offences for shattering the self-respect and esteem of SCs and STs, denial of economic, democratic and social rights, discrimination, exploitation and abuse of the legal process, etc.

Punishments for offences of atrocities

1. Section 3 of the Act lists the criminal offences and the punishments. It contains:
2. Nineteen offences in their own right [Section 3(1) contains 15 subsections with an equal number of offences. Section 3(2) contains four subsections with offences].
3. Two derived offences [Sections 3(2) (vi) and (vii)]. The derived offences are based on the offences given in the SC or ST Act. They only come in the picture provided that another offence under the SC or ST Act has been committed.
4. One subsection that increases the punishment for certain offences under the IPC [Section 3(2) (v)].

These protections can be broadly divided into protection from-

- social disabilities (denial of access to certain places and to use customary passage and to get water from any spring, reservoir or any other source).
- personal atrocities (forceful drinking or eating of inedible or obnoxious substance, against stripping, outrage of modesty, sexual exploitation, injury or annoyance).
- atrocities affecting properties (land, residential premises, existing properties).
- malicious prosecution.
- political disabilities.
- economic exploitation.

According to Section 3 if the following acts committed by any non-Scheduled Castes or Scheduled Tribes person, forcing a member of a Scheduled Caste or Scheduled Tribe to eat any inedible (uneatable) or obnoxious substance (hurtful matter)[2]; dumping excreta, waste

matter, carcasses or any obnoxious substance in his premises or neighborhood with the intention of causing him insult or annoyance[3]; forcefully removing the clothes of a Scheduled Caste or Scheduled Tribe person and parading him or her naked or with painted face or body or doing any similar act derogatory to human dignity[4]; illegally occupying or cultivating any land owned by or allotted to a Scheduled Caste or Scheduled Tribe person and illegally transferring any land allotted to a Scheduled Caste or Scheduled Tribe person to any other person[5]; illegally evicting a Scheduled Caste or Scheduled Tribe person from his land or premises or interfering with the use of land, water or premises[6]; compelling or forcing a Scheduled Caste or Scheduled Tribe person to do Begar (forced labour) or other similar forms of forced or bonded labour prohibited by law[7]; preventing a Scheduled Caste or Scheduled Tribe person from voting or forcing him or her to cast to vote for a particular candidate or in a manner prohibited by law[8]; instituting a false, malicious suit or criminal proceeding against a Scheduled Caste or Scheduled Tribe person[9]; giving false information to any public servant and thereby compelling him to use his power to cause injury, harm or harassment to a Scheduled Caste or Scheduled Tribe person[10]; insulting or intimidating a Scheduled Caste or Scheduled Tribe person in public with the intention of humiliating that person[11]; dishonoring or outraging the modesty of any woman belonging to a member of the Scheduled Caste or Scheduled Tribe[12]; using any custodial or authoritative position to exploit (sexually) a woman belonging to a member of the Scheduled Caste or Scheduled Tribe[13]; polluting the water of a spring or reservoir ordinarily used by members of Scheduled Caste or Scheduled Tribe so as to make it unfit for use[14]; denying a Scheduled Caste or Scheduled Tribe person a customary right of passage to a public resort or preventing him or her from using it[15]; forcing a Scheduled Caste or Scheduled Tribe person to leave his or her house or village[16] are considered as offences or atrocities and such person shall be punished with imprisonment of minimum six months and maximum five years and with fine.

If a non-Scheduled Caste or a non-Scheduled Tribe person intentionally gives or knowingly fabricates false evidence against any Scheduled Caste or Scheduled Tribe person and thereby causing his or her conviction for a capital offence, he can be punished with imprisonment for life and with fine, and if the person thus convicted is an innocent member of a Scheduled Caste or Scheduled Tribe, then the person who gives or fabricates the false evidence can be punished with death[17]; if false evidence is given or falsely made up against a Scheduled Caste or Scheduled Tribe person and thereby he is convicted for an offence punishable with imprisonment for more than seven years then the person who give the false evidence can be punished with imprisonment of minimum six months and maximum seven years and with fine[18]; intentionally committing mischief by fire or any explosive substance for damaging the property of a Scheduled Caste or Scheduled Tribe, shall be punished with minimum six months and maximum of seven years imprisonment and with fine[19]; if any place of worship or residence for keeping the property of a member of the Scheduled Caste or Scheduled Tribe is destroyed by committing mischief by fire or any explosive substance the person causing the destruction shall be punished with imprisonment for life and with fine[20]; commits any offence under the Indian Penal Code

punishable with imprisonment for ten years or more, against any Scheduled Caste or Scheduled Tribe person or his or her property, he shall be punished with imprisonment for life and with fine[21]; having the knowledge that an offence under the Indian Penal Code has been committed against a Scheduled Caste or Scheduled Tribe person or his or her property and intentionally remove all the evidence to protect the offender from legal punishment or gives false information against the offence or the offender, shall be punished with imprisonment provided for that offence[22]; a public servant who neglects his duties under this section shall be punished with minimum one years imprisonment for a term and which may be extend to the punishment provided for that offence.[23]

The common denominator of the offences is that criminal liability can only be established if the offence is committed by a person who is not a member of a Scheduled Caste or a Scheduled Tribe against a person who belongs to a Scheduled Caste or a Scheduled Tribe.

Punishment for neglect of duties[24]
A public servant who willfully neglects his duties under this Act shall be punished with minimum six months to one year imprisonment for a term.

Punishment for subsequent conviction[25]
If a person is convicted more than once for committing offences under this law, he can be punished with minimum of one year imprisonment. It can be extended to the punishment provided for that offence.

Application of certain provisions of the Indian Penal Code[26]
Provisions of Section 34 (common intention), Chapter III- of Punishments (Section 53-75), Chapter IV- of General Exceptions (Section 76-106), Chapter V -of Abetment (Section 107-120), Chapter VA- Criminal Conspiracy (Section 120A-120B), Common object (Section 149) and Chapter XXIII-of Attempts to Commit Offences (Section 511) of the Indian Penal Code can be applied for the purposes of this Act.

Forfeiture of property of certain persons
When a person is convicted of any offence punishable under Chapter II of this Act the Special Court trying the case may give a written order, to forfeit the movable or immovable property used for the commission of the offence, to the government.[27] This may be given in additional to the normal punishment. The Special Court trying an accused person may attach any of his property during the period of trial. If the trial ends in the conviction of the accused person the property attached earlier may be forfeited to the extent it is required for the realisation of any fine that may be imposed by the Court. [28]

Presumption of offences[29]
In a prosecution for an offence, if it is proved that the accused provide any financial help to a accused person, the Special Court shall presume that such person had abetted the offence or a group of persons committed an offence under this Act and if it is proved that such

offence committed was a consequence to any existing dispute regarding land or any other matter, it shall be presumed that the offence was committed in furtherance of the common intention or in prosecution of the common object.

Conferment of powers

To deal with a case or class or group of cases and for the prevention of offences under this Act, the State Government may through its Gazette notification confer on any of its officers the power exercisable by a police officer in a district. The government in particular may confer the power of arrest, investigation, and prosecution of person before any Special Court.[30] All police and government officers are bound to assist the above mentioned special officer in the execution of the provisions of this Act and its rules and schemes.[31]

Removal of person likely to commit offence

When a Special Court is satisfied with the truth of a complaint or a police report that a person likely to commit an offence mentioned in Chapter II of this Act in a 'Scheduled Areas' or 'Tribal Areas' under Article 244 of the Indian Constitution, it may through a written order direct that person to go out of that area through a special route within a specified time. It may also direct that person not to return to that area for a period not more than two years.[32] Along with the order of externment the Special Court must give him the grounds on which the order has been made.[33] The Special Court which has issued the order of externment may revoke or modify it provided the affected person or any other person on his behalf make a representation to the Court within 30 days of its order. When revoking or modifying the earlier order the Court must record the reasons for the same.[34]

Procedure on failure of person to remove himself from area and enter thereon after removal

If a person to whom a direction has been issued under Section 10 disobeys the order to leave the place or re-enter the place without prior permission of the Special Court in such a situation the Special Court may order the arrest of the accused person and his removal to a specific place.[35] The Special Court has power to permit the person to come to the place for a temporary period and under certain conditions. He can also be asked to execute a bond with or without surety for the observation of the conditions imposed.[36] The Court may at any time revoke the permission.[37]

Taking measurements and photographs, etc. of persons against who order under Section 10 is made

The Special Court allows a police officer to take the measurements and photographs of a person against whom it has issued an externment order under Section 10.[38] If that person resists or refuses to allow his taking of measurements or photographs, it is lawful for the police officer to use all necessary means to secure his measurements and photographs.[39] Resistance or refusal to allow the taking measurements and photographs can be considered as an offence under Section 186 of the Indian Penal Code.[40] When an order of externment

under Section 10 is revoked, all measurements and photographs (including negative) must be either destroyed or given to the person against whom the order is made.[41]

Penalty for non-compliance with order under Section 10[42]
If a person to whom a direction has been issued by Special Court under Section 10 disobeys the order, can be punished with imprisonment up to one year with fine.

Special Court[43]
For the purpose of providing speedy trial, the State Government is consultation with the Chief Justice of the High Court, by notification in the official Gazette, may specify for each district a Court of Session to be a Special Court. This Court is empowered to try all the offences under this Act.

For speedy trial, Section 14 of the Act provides for a Court of Session to be a Special Court to try offences under this Act in each district. Rule 13(i) of SCs and STs (Prevention of Atrocities) Rule, 1995 mandates that the judge in a Special Court be sensitive with right aptitude and understanding of the problems of the SCs and STs.

However, that is seldom the case. Most States have declared a court as a 'Special Court'. The hitch is that they are designated courts (as opposed to exclusive Special Courts) and so have to hear many other cases too. State Governments and Union territory administration of Andhra Pradesh, Assam, Bihar, Chhattisgarh, Goa, Gujarat, Haryana, Himachal Pradesh, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Manipur, Maharashtra, Meghalaya, Odisha, Punjab, Rajasthan, Sikkim, Tamil Nadu, Tripura, Uttarakhand, Uttar Pradesh, West Bengal, Andaman & Nicobar Islands, Chandigarh, Dadra & Nagar Haveli, Daman & Diu, Delhi, Lakshadweep and Puducherry have designated District Session Courts as Special Courts.

Special Court Justice Ramaswamy observed in the case of ***State of Karnataka v. Appa Balu Ingale***[44] that more than seventy-five percent of the cases brought under the SC & ST Act end in acquittal at all levels. The situation has not improved much since the case was decided in 1992.

Special Public Prosecutor[45]
The State Governments and Union Territories appoint a public prosecutor or an advocate with seven (7) years of practise as a Special Public Prosecutors for the purpose of conducting cases in special Courts.

Power of State Government to impose collective fine[46]
For committing the offence of untouchability under Section 10A of the Protection of Civil Rights Act, 1955 and committing any offence under this Act, the State Government may impose collective fine.
Preventive action to be taken by the law and order machinery

A District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate or any Police Officer not to below the rank of a Deputy Superintendent of Police, who receives any information, has sufficient reason to believe (after making necessary inquiry) that a person or a group or persons not belonging to the Scheduled Castes or Scheduled Tribes may commit any offence mentioned in this Act, in a particular area, he may declare that area be an area prone to atrocities and take necessary legal action to prevent the commission of such offence for keeping the peace and good behavior and maintenance of public order.[47] The relevant provisions of Chapter VIII (Section 106-124) are related to the security for keeping the peace and for good behavior, Chapter X (Section 129-148) is related with the maintenance of public order and tranquility, Chapter XI (Section 149- 153) is related with the preventive action of the police of the Criminal Procedure Code, can be applied for the purpose of preventing offences under this Act.[48] The Act gives power to every State Government to make one or more schemes specifying the manner in which the officers mentioned above can take appropriate action and to restore the feeling of security among the members of the Scheduled Castes or Scheduled Tribes.[49]

Section 438 of the Code not to apply to persons committing an offence under the Act[50]
A person accused of committing an offence under this Act is not entitled to get Anticipatory Bail' under Section 438 of the Code of Criminal Procedure.

Section 360 of the Code or the provisions of the Probation of Offenders Act not to apply to persons guilty of an offence under the Act[51]
A person above 18 found guilty of having committed an offence under this Act cannot be release on probation of good conduct or after admonition.

Act to override other laws[52]
The provisions of this Act will prevail upon any other existing laws or custom.

Duty of Government to ensure effective implementation of the Act
Under this Act the State Government is obliged to take necessary measures for the effective implementation of this Act.[53] Such measures may include the following: giving legal aid to the victims of the atrocities[54]; meeting the travelling and maintenance expenses of the witnesses and the victim during the investigation and trial of the case[55]; providing facilities for the social and economic rehabilitation of the victim of atrocities[56]; appointing officers to supervise and conduct prosecutions for committing offences under this Act[57]; setting up of committees to assist the government in formulating or implementing appropriate measures to prevent atrocities[58]; conducting periodic surveys of the working of the provisions of this Act with a view of suggesting measures for their effective implementation[59]; identifying areas where members of Scheduled Castes or Scheduled Tribes are likely to be subjected to atrocities and adopting measures to ensure their safety.[60] The Central Government is obliged to take necessary steps to coordinate the measures taken by the State Governments mentioned above.[61] Section 21(1) and (2) of SC & ST

(POA) Act, 1989 stipulate that the State Government shall take all such measures as may be necessary for its effective implementation.

Rehabilitation

According to the preamble of the SC or ST Act, it is an Act to prevent the commission of offences of atrocities against SC or STs, to provide for Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences. The Madhya Pradesh High Court also had the same view and observed in the case of ***Dr. Ram Krishna Balothia v. Union of India***[62] that the entire scheme of the SC or ST Act is to provide protection to the members of the Scheduled Castes and Scheduled Tribes and to provide for Special Court and speedy trial of the offences. The Act contains affirmative measures to weed out the root cause of atrocities, which has denied SCs or STs basic civil rights. The Act has addressed the problem the regarding the dispensation of justice, but what the failed to deal with is the problem of 'rehabilitation'.

There is mention of rehabilitation under Section 21(2) (iii), but there are no provision addressing the same. As it has been stated earlier that victims of atrocities are on a different level when compared to victims of other crimes, hence there should be special provision for the same. According to the report submitted by the National Commission for Review and Working of the Constitution, victims of atrocities and their families should be provided with full financial and any other support to make them economically self-reliant without their having to seek wage employment from their very oppressors or classes of oppressors. Also it would be the duty of the state to immediately take over the educational needs of the children of such victims and provide for the cost of their food and maintenance.

Any suit, prosecution or other legal proceeding cannot be instituted against any Government Officers or authorities for anything done in good faith or intended to be done under this Act. [63] Only the Central Government has the power to make rules for carrying out the purposes of this Act. These rules must be notified in the Official Gazette.[64]

Conclusion

However, even after so many years of independence most of the members of the Scheduled Castes and Scheduled Tribes are still living in utter poverty, without schooling or education of any kind, and in miserable conditions. Their rights are violated. They are harassed, cheated and exploited by the powerful elements in the society. These oppressed people have not been able to benefit much from the developmental programmes and welfare projects set up by the Governments, because of the indifference of the administrative authorities at various levels. Hence the socio-economic life situation of Scheduled Castes and Scheduled Tribes is very pitiable even today.

Awareness and demand for their lawful rights is of utmost importance. Enactment of the laws alone will not produce adequate results. Effective implementation of the laws by the law enforcing machinery and the Courts is necessary. This is possible only when social

action groups, social organisations and public spirited persons play a major role in organising the members of Scheduled Castes and Scheduled Tribes and make them aware of the applicable laws.

Despite various measures to improve the socioeconomic conditions of SCs & STs, they remain vulnerable. They are denied a number of civil rights; they are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious atrocities are committed against them for various historical, social and economic reasons. Despite the Act and Rules, the situation has not changed much. The most important areas of concern are the following:

1. firstly, there is a high rate of acquittal;
2. secondly, there is a high rate of pendency of cases and very low rate of disposal;
3. thirdly, there is an inadequate use of the preventive provisions of the Act, while the punitive provisions are invoked and FIR is registered, preventive provisions are rarely invoked;
4. fourthly, that the committees and other mechanisms provided in the Act have virtually not been put to use;
5. fifthly, the Act itself may not be deterrent, perhaps it is not being as deterrent as we thought it could be;
6. sixthly, the Act does not give any relief when a dispute arises between SCs and STs; and
7. seventhly, the Act does not provides any remedy to a Schedules Castes or Schedules Tribes (Government servant) who is harassed, exploited, commented or taunted by colleagues or senior officers.

References:

[1] Section 2 (a).
[2] Section 3 (1) (i).
[3] Section 3 (1) (ii).
[4] Section 3 (1) (iii).
[5] Section 3 (1) (iv).
[6] Section 3 (1) (v).
[7] Section 3 (1) (vi).
[8] Section 3 (1) (vii).
[9] Section 3 (1) (viii).
[10] Section 3 (1) (ix).
[11] Section 3 (1) (x).
[12] Section 3 (1) (xi).
[13] Section 3 (1) (xii).
[14] Section 3 (1) (xiii).
[15] Section 3 (1) (xiv).
[16] Section 3 (1) (xv).
[17] Section 3 (2) (i).
[18] Section 3 (2) (ii).

[19] Section 3 (2) (iii).
[20] Section 3 (2) (iv).
[21] Section 3 (2) (v).
[22] Section 3 (2) (vi).
[23] Section 3 (2) (vii).
[24] Section 4.
[25] Section 5.
[26] Section 6.
[27] Section 7 (1).
[28] Section 7 (2).
[29] Section 8.
[30] Section 9 (1).
[31] Section 9 (2).
[32] Section 10 (1).
[33] Section 10 (2).
[34] Section 10 (3).
[35] Section 11 (1).
[36] Section 11 (2).
[37] Section 11 (3).
[38] Section 12 (1).
[39] Section 12 (2).
[40] Section 12 (3).
[41] Section 12 (4).
[42] Section 13.
[43] Section 14.
[44] (1992) 3 S.C.R. 284.
[45] Section 15.
[46] Section 16.
[47] Section 17 (1).
[48] Section 17 (2).
[49] Section 17 (3).
[50] Section 18.
[51] Section 19.
[52] Section 20.
[53] Section 21 (1).
[54] Section 21 (2) (i).
[55] Section 21 (2) (ii).
[56] Section 21 (2) (iii).
[57] Section 21 (2) (iv).
[58] Section 21 (2) (v).
[59] Section 21 (2) (vi).
[60] Section 21 (2) (vii).
[61] Section 21 (3).
[62] AIR 1994 MP 143.
[63] Section 22.
[64] Section 23 (1).

Women and Disability: International and Indian Implementation Mechanisms

Archna Singh*

Abstract

Women of all ages with any form of disability are among the multi-leveled vulnerable and marginalized of society. There is therefore need to take into account and to address international and national concerns to implement their rights in all walk of life. Gender is one of the most important categories of social organization, yet people with disabilities are often treated as asexual human beings. However women with disabilities and men with disabilities have different life experiences due to biological, psychological, economic, social, political and cultural attributes associated with being female and male. Patterns of disadvantage are often associated with differences in the social position of women and men.

Introduction

The gendered differences are reflected in the life experiences of women with disabilities and men with disabilities. Women with disabilities face multiple discriminations and are often more disadvantaged than men with disabilities in similar circumstances. Women with disabilities are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of covert discrimination. Women with disabilities face particular disadvantages in the areas of education, work and employment, family and reproductive rights, abuse, violence and health. Disability studies have traditionally used a gender blind approach to examine the lives of people with disabilities and have neglected to explore the influence of gender in the lives of men and women with disabilities. The field of disability has not yet recognized the combined discrimination of gender and disability experienced by women who have disabilities, and policies and practices in the field have not been designed to meet the specific needs of women with disabilities.[1]

Disabled person's rights are grounded in a broad human rights framework which find place international recognition enshrined in United Nations Charter, the Universal Declaration of Human Rights[2], international covenants[3] on human rights and other human rights instruments. On 13 December 2006, the General Assembly adopted the Convention on the Rights of Persons with Disabilities[4]. The Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention entered into force on 3 May 2008[5]. Convention status has Signatories: 158 and Parties: 139[6].

* ***Assistant Professor, Faculty of Law, University of Lucknow, Lucknow.***

International Normative Framework on Women and Girl with Disabilities

Through setting international norms and standards in the form of Conventions and Declarations, international community recognizes the need for the gender perspective and the empowerment women with disabilities to achieve the equal enjoyment of all human rights and development for all, including persons with disabilities.

The World Programme of Action concerning Disabled Persons states that the consequences of deficiencies and disablement are particularly serious for women. Generally women are subjected to social, cultural and economic disadvantages, making it more difficult for them to take part in community life.

The Standard Rules on the Equalization of Opportunities for Persons with Disabilities[7], recall the provisions in the Convention on the Elimination of all Forms of Discrimination against Women[8]to ensure the rights of girls and women with disabilities, and includes references to women and girls with disabilities under several Rules, such as Rule 4 on Support services, Rule 6 on Education, and Rule 9 on Family life and personal integrity.

Additionally, in its two resolutions on Realizing the Millennium Development Goals for persons with disabilities, the General Assembly called for the incorporation of a gender perspective. General Assembly resolution 63/150 of 18 December 2008 urges States to pay special attention to the gender specific needs of persons with disabilities, including by taking measures to ensure their full and effective enjoyment of all human rights and fundamental freedoms. General Assembly resolution 64/131 of 18 December 2009, calls on Governments to enable persons with disabilities to participate as agents and beneficiaries of development, in particular in all efforts aimed at achieving the Millennium Development Goals, by ensuring that programmes and policies to promoting gender equality and empowerment of women and improving maternal health, among others, are inclusive of and accessible to persons with disabilities.

The text of the Convention on the Rights of Persons with Disabilities contains an article on women with disabilities, as well as several references to girls, women, and gender issues[9]. The Convention on the Rights of the Persons with Disabilities recognizes that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation. To address this concern, the Convention on the Rights of the Persons with Disabilities has also taken a two track approach to promoting gender equality and the empowerment of women with disabilities. It has as one of its principles equality between men and women, and it devotes an article to women with disabilities.

Implementation Framework of Convention's Rights of Women with Disabilities

The Optional Protocol of Convention on the Rights of Person with Disabilities establishes two procedures aimed at strengthening the implementation and monitoring of the Convention. The first is an individual communications procedure allowing individuals to

bring petitions to the Committee claiming breaches of their rights; the second is an inquiry procedure giving the Committee authority to undertake inquiries of grave or systematic violations of the Convention.

Individual Communication Procedure under Optional Protocol to the CRPD

The Optional Protocol to the Convention creates an individual communications procedure. Committee considers communications from individuals or group of individuals claiming to be victims of a violation of the provisions of the Convention by a State Party. The Committee inspects the communication and the observations of the State, and on this basis formulates its views and recommendations, if any, forwards them to the State, and makes them public.

States Parties to the Optional Protocol recognize the authority of the Committee on the Rights of Persons with Disabilities to receive individual complaints alleging violations of any of the provisions of the CRPD. This is known as a quasi-judicial procedure – it is not a court, nor is the decision legally-binding, however it is adversarial and there is a publicly available decision

Inquiries under Optional Protocol to CRPD

The Optional Protocol creates an inquiry procedure. Committee member may conduct an inquiry on a State Party. If the Committee receives reliable information indicating grave or systematic violations by a State party to the Optional Protocol of any of the provisions of the Convention, the Committee may invite the State in question to respond to such information. After considering the State party's observations the Committee may designate one or more of its members to conduct an inquiry and issue a report urgently. If the State agrees, the Committee may visit the country in question. After undertaking the inquiry, the Committee transmits its findings to the State which has six months to submit further observations. The Committee eventually summarizes its findings which it makes public.

It is worth noting that both these additional procedures can, as a result of experience in relation to other human rights treaties, be very effective in considering the protection of rights of specific individuals. But unfortunately, India is neither signed nor ratified it, i.e. No any individual can attract to the Committee constituted under convention against violation of rights enshrined in convention.

Implementation under CEDAW

CEDAW has made three recommendations that address disability[10]. Two of these reflect a protective approach to women with disabilities. One calls for insurance to cover "the disabled" and the second to strengthen current policies aimed at combating violence, with special attention given to women with disabilities and migrant and minority women. Insurance is an essential issue, but with the focus only being on this, CEDAW has again reinforced that persons with disabilities are in need of protection. Similarly, violence

against women with disabilities is a very important issue, but again reinforcing the view that women with disabilities are in need of "special" protection. Issues such as participation, employment, education, and sexual and reproductive rights have been ignored.

Committee on the Elimination of Discrimination against Women in its General Recommendation No. 18 (Tenth session, 1991)[11], recommended that States parties provide information on disabled women in their periodic reports, and on measures taken to deal with their particular situation, including special measures to ensure that they have equal access to education and employment, health services and social security, and to ensure that they can participate in all areas of social and cultural life. In this way CEDAW enforce the rights of women with disability through the process of its Reporting System[12]

Implementation under CRC

The Committee on the Rights of the Child requires States parties to report according to "clusters" of obligations, which the Committee has devised. Article 23, addressing children with disabilities, is clustered under "Basic Health and Welfare". This has unfortunately led to disability being further marginalized as a welfare issue. Only two Concluding Comments addressed the right to life of children with disabilities, despite the data available on the killing or withholding of life saving medical treatment for children with disabilities[13].

Despite widespread abandonment of children with disabilities, only eight concluding comments mentioned children with disabilities under the cluster of "Family Environment and Alternative Care". This absence is even more surprising given that "many disabled children are living in institutions where little effort is made to promote opportunities for rehabilitation with their families and where the standards of care are extremely poor - inadequate food, health care, and access to education, protection from violence or opportunities for social inclusion."[14]

Indian Legal Framework for Women with Disabilities

India is original member of the CRPD signed first day as it opened for signature i.e. 30-3-2007, India was the 7th country in the world and the first significant country to do so and ratified it by1-10-2007. India in the process of CRPD negotiation agreed and stressed inclusion of disabled mother and girls in proposed convention[15]. In the preparation of draft India has plays an important role, Only 4 countries sent drafts. India was one of them. Ministry of Social Justice and Empowerment had discussions with NGOs, lawyers and with other Ministries to finalize the draft. There were two areas in which India's attempts remained unsuccessful – one was to involve parents associations. This was completely negated by the rest of the international community, except Costa Rica, Kenya and to some extent Israel. The second was to have a special focus group on persons with multiple & severe disabilities.

The Union Cabinet in India approved the ratification of UNCRPD without the Optional Protocol. So for India neither signed nor ratified the optional Protocol, in effect of that India is exempted from implementation of Communication procedure and Inquiries by CRPD committee.

India's position with regard to ratification is, when a complaint is made, an independent international body can come into India and scrutinise and an international body comes only when all the internal remedies – National Human Rights Commission (NHRC), High Courts & Supreme Court – have failed- which India never accepted. The Government's view is that India has strong internal systems in place. Therefore, we do not need Optional Protocol. NGOs, on the other hand, say that if we have strong institutions, then we should not worry about external scrutiny.

India adopted a number of measure to implement the international obligation to protect the rights of person with disability e.g. legislation and administrative measures to promote the human rights of persons with disabilities; protect and promote the rights of persons with disabilities in all policies and programmes; stop any practice that breaches the rights of persons with disabilities; ensure that the public sector respects the rights of persons with disabilities; ensure that the private sector and individuals respect the rights of persons with disabilities; undertake research and development of accessible goods, services and technology for persons with disabilities and encourage others to undertake such research; provide accessible information about assistive technology to persons with disabilities; promote training on the rights of the Convention to professionals and staff who work with persons with disabilities; consult with and involve persons with disabilities in developing and implementing legislation and policies and in decision-making processes that concern them.

Indian Constitution and Legislations

Preamble followed by Fundamental Rights and Directive Principal for State Policy of Indian Constitution makes provision not only on the basis of non discrimination however protective form towards women which naturally inherit women with disability. Art 15(3) explicitly written to protect the laws which positively discriminate in favor of women.

To address the issues of person with disability Indian Government enacted the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The enforcement mechanisms envisaged in the Act include a Central Coordination Committee at the national level and a State Coordination Committee at the state level. It also includes Chief Commissioner (Persons with Disabilities) at the national level and Commissioner (Persons with Disabilities) at the state level.

The central and state level coordination committees are entrusted primarily with the task of facilitating continuous evolution of comprehensive policy on disability in the areas of their respective jurisdiction. The Chief Commissioner and the Commissioner (Persons with

Disabilities), as the case maybe, are entrusted primarily with the task of monitoring disbursement and utilization of funds on disability allocated to various government departments and also to take cognizance of cases of violation of rights of persons with disabilities.

Ministry of Social Justice and Empowerment, Government of India had constituted a committee to suggest amendments in the existing PWD Act. It may be useful to write a new law rather than amending the present one in the light of international instrument signed by India. Act seems to have gained momentum in the wake of India ratifying the UN Convention of the Rights of Persons with Disabilities. In continuance of the said process, the Ministry of Social Justice and Empowerment, Government of India, has vide Govt. notification F.No. 16-38/2006 – DD.III dated 30th April 2010 has constituted a committee to draft a new law and submit the following to the government on or before 31 August 2010:

a) The draft of the new law
b) Note on requirement of financial resources for the purpose of implementing the proposed new law
c) The process followed in evolving the new draft law.

Other National Laws related to Disability

There are four Laws pertaining to disabilities in India:

1. The Mental Health Act, 1987
2. The Rehabilitation Council of India Act, 1992
3. The Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995
4. The National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999

Apart from these laws, India also has the National Policy for Persons with Disabilities which was adopted in 2006.

Indian Courts

Supreme Court and High Courts of India too endeavor the enforcement of rights of person with disability. Indian Supreme Court has ruled on a number of occasions that when an international commitment increases the rights protection of the citizenry, then such rights could become available to the people even directly from the International instrument without an enacted national legislation[16].

The Supreme Court of India upheld the right to motherhood of a girl with intellectual disability[17], who was raped at a government-run shelter. The woman was against the termination. Moreover, she was in the 19th week of pregnancy. An interim order was passed in July making reference to the UNCRPD. It stated that “in respecting the personal autonomy of mentally retarded persons with regard to the reproductive choice of

continuing or terminating a pregnancy, the MTP Act lays down such a procedure. We must also bear in mind that India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) on October 1, 2007 and the contents of the same are binding on our legal system."

In *Dr. Jagdish Saran & Ors. vs. Union of India*[18] Justice Krishna Iyer clarified that even apart from Articles 15 (3) and (4), equality is not degraded or neglected where special provisions are geared to the larger goal of the disabled getting over their disablement consistently with the general good and individual merit.

Persistence of certain cultural, legal and institutional barriers makes women and girls with disabilities the victims of two-fold discrimination: as women and as persons with disabilities

The Convention is the milestone to protect the rights of, *intre allia*, women and girl with disabilities. The challenge of implementing the Convention is manifolds as need for training, capacity building, awareness raising, good practices collection and validation, knowledge management, mainstream disability in all development activities, to include persons with disabilities in all stages of implementation, and build capacity of organizations of persons with disabilities to do so.[19]

Conclusion

Ministry of Social Justice and Empowerment, Government of India endeavor to implement the rights of person with disabilities in form of enactment, policies and financial assistance to women with disabilities. Indian Supreme Court being a guardian of rights of citizen too alert to protect the rights of women with disabilities. India enacted a number of laws to meet the issues of person with disabilities but did not pay much attention on gender discrimination with disabilities, hope to new laws on person with disabilities must be address the issues of women with disabilities prominently.

References:

[1] Available on http://dawn.thot.net/disability.html accessed on 07/08/2015 at 10:22 a.m.

[2] A/RES/217 A (III).

[3]Bone of Human Rights Bill are two covenants: first one is International Covenant on Economic, Social and Cultural Rights (16 Dec. 1966) available at A/RES/2200 A (XXI) ; other is International Covenant on Civil and Political Rights and [First] Optional Protocol (16 Dec. 1966) available at A/RES/2200 A (XXI).

[4]The above Convention was adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106. In accordance with its article 42, the Convention shall be open for signature by all States and by regional integration organizations at United Nations Headquarters in New York as of 30 March 2007.

[5] Available on http://www.un.org/womenwatch/enable accessed on 11/11/2013 at 12:11 pm.

[6]Seehttps://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV15&chapter=4&lang=en accessed on 11/11/2013 at 4:11 p.m.

[7] A/RES/48/96.

[8] A/RES/34/180.
[9] Preamble
(p) Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, color, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status,
(q) Recognizing that women and girls with disabilities are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,
(s) Emphasizing the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities,
[10] Avilable on http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html accessed on 11/11/2013 at 09:12 a.m.
[11] Avilable on http://www.un.org/womenwatch/enable/ accessed on 11/11/2013 at 09:30 a.m.
[12] Each State Party to the CEDAW submit the Report to the Committee for its consideration
[13]See for detail study www.unhchr.org accessed on 11/11/2013 at 10:10 a.m.
[14]Ibid.
[15]Background document: Towards a Gender Sensitive Disability Rights Convention, Side event to the Second session of the Ad Hoc Committee, 20 June 2003 on the issue right to access health services and family life India among stress that in many cultures and countries disabled girls and women have the least access to health services and disabled mothers are often neglected and discriminated against by health and family planning programs. Yet they are the primary caregivers both in the family and in health services. See also for detail study http://www.un.org/esa/socdev/enable/rights/gender accessed on 11/11/2013 at 11:05a.m.
[16] Suchita Srivastava & Anr. vs Chandigarh Administration, (C.A.NO.5845 OF 2009 @ Petition(s) for Special Leave to Appeal (Civil) No(s).17985/2009)
[17]*Suchita Srivastava & Anr. vs Chandigarh Administration*, (C.A.NO.5845 OF 2009 @ Petition(s) for Special Leave to Appeal (Civil) No(s).17985/2009).
[18] (1980 2 SCC 768),
[19]Further actions and initiatives to implement the Beijing Declaration and Platform for Action", General Assembly Resolution S-23/3 of 10 June 2000, annex, paragraph 63.

Dimensions of Judicial Activism in Indian Perspective

Dr. S.K. Chaturvedi*

Introduction

Activism has one word but constitutes many words. Judicial activism has become a subject of controversy in India. The Constitution of India operates in happy harmony with the instrumentalities of the executive and the legislature. The judiciary exercising democratic power must enjoy independence of a high order. But independence could become dangerous and undemocratic unless there is a constitutional discipline with rules of good conduct and accountability: without these, the robes may prove arrogant. Judicial activism is the views that the Supreme Court and other judges should creatively (re)interpret the texts of the Constitution and the laws in order to serve the judges' own visions regarding the needs of contemporary society. Judicial activism believes that judges assume a role as independent policy makers or independent "trustees" on behalf of society that goes beyond their traditional role as interpreters of the Constitution and laws. The concept of judicial activism is the polar opposite of judicial restraint.

Judicial Activism: Definition

The term 'judicial activism' has not been defined anywhere in the Constitution of India nor it has been defined in any Indian statute. However, according to Black law dictionary, judicial activism as a judicial philosophy which motives judge to depart from strict adherence to precedents in favour of progressive and new policies which are not always consistent with the restraint expected by appellate judges. According to the former chief justice of India A.M.Ahmadi, judicial activism is a necessary adjunct of the judicial function since the protection of public interest as opposed to private interest happens to be its main concern[1]. According to Prof. Upendra Baxi:"Judicial activism is an inscriptive term. It means different things to different people. While some may exalt the term by describing it as judicial creativity, dynamism of the judges, bringing a revolution in the field of human rights and social welfare through enforcement of public duties etc. Others have criticized the term by describing it as judicial extremism, judicial terrorism, and judicial transgression into the domains of the other two organs of the state negating the constitutional spirit."[2]

Assistant Professor Law, H.N.B. Garhwal Central University, SRT Campus, Tehri, Uttarakhand.

How does it work in modern society? In a modern democratic State there are three instrumentalities constituting the State and executing its functions. These are the executive, the legislature and the judiciary. Though the judiciary is considered the weakest link since it has neither the power of the purse nor the sword, yet in recent times its role has assumed considerable importance because it seeks to prevent the excesses of the executive and the legislature and acts for protection and enforcement of their rights and as a keeper of their liberties.

In a democratic form of government, it must be remembered, judges do not have the last word, and in fact it is not appropriate that the authority of one organ of democracy should be absolute and final. The decision even of the apex court can be altered by 'popular' judgment of the legislature if it is found to thwart legislative intent. Similarly, the court can void legislature if it is found to be inconsistent with the Constitution. Thus, there is, so to say, an understanding between each organ of democracy that its decision is not final and may not prevail. The Judges should guard against such flattery as it may tarnish the image of the judge and the judiciary.

It is well-known that the legislature often does not find sufficient time for a threadbare discussion before a Bill is turned into an enactment and therefore leaves gaps in the law, which gaps have to be filled by the courts through the process of interpretation. In an ever-growing and fast-changing societal set-up, the burden falls on the judiciary to mould the law to ensure its relevance in a changed scenario since amendment of the law may be a time-consuming process. There is therefore a partnership between the two organs and it would be wrong to assume, as some do, that the judiciary and the legislature are at loggerheads; to so think is to fail to appreciate their respective roles, albeit, in some situations their roles may conflict. Democracy can function smoothly only if there is a healthy respect for each other's role.

History of Judicial Activism in India

The evolution of the theory of judicial activism in India can be traced back to the late 1960s or early 1970s during the time when Mrs Indira Gandhi was the Prime Minister of India and an eminent lawyer and legal luminary, Mohan Kumaramangalam, was the Union Minister. When the late Mrs. Gandhi attempted to introduce progressive socialistic measures in order to implement her favourite slogan "*garibi hatao*" (remove poverty) by abolishing Privy Purses and privileges given to the erstwhile rajas and princes of the princely states of pre-independent India, and nationalizing the 14 major banks so as to serve the cause of the poorer sections of the society in a more meaningful manner, a conservative judiciary did not take it kindly and struck down the relevant legislation as unconstitutional. What happened to President Franklin Roosevelt during the period of the great depression and to his new deal legislation happened in India to Mrs Gandhi. The judgment of the Supreme Court of India in the Privy Purse abolition and bank nationalization cases was considered by Mrs Gandhi to be judicial overreach, and the reaction was at once strong and unequivocal. It is believed that on the advice of Mr

Kumaramangalam the conservative and most senior judges of the Supreme Court who participated in the majority judgment in the above cases were passed over for appointment to the post of Chief Justice of India.

Through judicial activism, the court moves beyond its normal role of a mere adjudicator of disputes and becomes a player in the system of the country, laying down principles and guidelines that the executive must carry out. In performing its activist role the court is required to display fine balancing skills. While protecting the fundamental human rights of the people, the judiciary must take care to ensure that its orders are capable of execution, for no amount of judicial activism is useful if its orders are incapable of execution; they then remain "paper tigers" only.

Unless the court is sure that its order is capable of being enforced, both in letter and spirit, it should be slow in passing such an order; for if it does so, it will appear to be speaking for effect and publicity only. If it passes orders that only attract media attention but are otherwise incapable of execution, they will be ineffective and in the long run will harm the court's credibility, reputation and image. In the past, the Indian Supreme Court has at times had to face the embarrassment of its orders and directions not being implemented in a few cases. There are cases where the implementing authorities have pleaded their inability to enforce the court's order on account of various difficulties faced at the ground level. This may give rise to a perception amongst certain sections of the people that the court is becoming a paper tiger, prone to emitting moralising roars, to which a deaf ear can be turned with impunity on account of their inherently unenforceable nature.

Judicial Activism under Constitution of India:

The Supreme Court is the Apex Court of India. The Constitution of India confers wide jurisdiction on the Supreme Court[3] It also confers on the Supreme Court the power of judicial review[4] the power to enforce its decrees and orders[5] and to some extent the power of law-making[6]. The High Courts of India are also conferred the power of judicial review[7]. The conferment of such wide jurisdiction and wide powers provides enough scope for judicial activism in India. Under the Constitution of India, the Supreme Court enjoys a wide jurisdiction by way of original[8], appellate[9] and advisory jurisdiction[10]. It also has a jurisdiction to entertain appeals by way of special leave[11]. Under the original jurisdiction the Supreme Court has to decide any dispute – (a) between the Government of India and one or more States; (b) between the Government of India and any State or States on one side and one or more other States on the other; or (c) between two or more States.

The Supreme Court through its original jurisdiction has played an activist role in promoting the principles of federalism by deciding issues relating to the distribution of legislative powers between the Union and the States or relating to the matters of both intra–State and inter–State freedom of trade and commerce[12]. Under its advisory jurisdiction the Supreme Court may decide a question of law or fact referred to it for its opinion by the President. In re Delhi Laws Act[13] Case the opinion of the Supreme Court was sought

regarding the validity of the Act with regard to delegated legislation. In re Kerala education Bill[14] the Bill was reserved for the consideration of the President who referred to the Supreme Court to give its opinion on its validity. In re Berubari Case[15] the opinion of the Supreme Court was sought to find out the manner in which the territory of India could be transferred to Pakistan. In Special Court reference Case[16] the Supreme Court was asked to consider the extent of the privileges of the legislature and the powers of judicial review in relation to it. In re Presidential Reference[17] the Supreme Court was asked to consider as to whether the recommendation made by the Chief Justice of India on the appointment of Judges of the Supreme Court and the High Court's without following the consultation process are binding on the Government.

As observed by S. P. Sathe in *A. K. Gopalan vs. State of Madras*[18] although the Court conceived its role in a narrow manner, it asserted that its power of judicial review was inherent in the very nature of the written Constitution[19]. In this case the Supreme Court upheld the validity of a pre-constitution preventive detention law on the grounds that once the deprivation was supported by law, Article 21 could not be said to be infringed. However, the judges of the Supreme Court did not take long to make their presence felt and began to actively pursue their functions assigned to them by the Constitution. This approach led to a series of decisions scuttling reformative legislation on the ground that the law interfered with the fundamental right to hold property.

The struggle between the two wings continued and, in fact, it was during this time that the Supreme Court, while interpreting Article 388 of the Constitution empowering Parliament to amend the Constitution, made its landmark judgment in *Keshavnanda Bharti case*[20] .In this case it was held that the basic structure of the Constitution was not amendable, not even by a legislation of the Parliament[21]. During this era, the Legislature sought to bring forth people-oriented socialistic measures which, when in conflict with fundamental rights, particularly the right to acquire, hold and dispose of property, were frustrated on the upholding of the challenge based on fundamental rights by the Supreme Court.

The imposition of the Emergency in 1975 and the consequent suspension of fundamental rights had a profound effect on almost every aspect of Indian life. The Supreme Court too was affected and was at the receiving end of brickbats for having delivered judgments that were perceived by many as being violative of the basic human rights of Indian citizens. In the post-Emergency era, the apex court, sensitised by the perpetration of large-scale atrocities during the Emergency, once again donned an activist mantle. In the case of *Maneka Gandhi vs. Union of India*[22] the court widened the ambit of constitutional provisions to enforce the human rights of citizens and sought to bring the Indian law in conformity with the global trends in human-rights jurisprudence.

In 1978 by an amendment of the Constitution[23] the right to property was omitted and introduced in Article 300A, thus ceasing to be a fundamental right. During the 1980's and the early 90's, the court moved beyond being a mere legal institution; its decisions had

tremendous social, political and economic ramifications. Time and again, it interpreted Constitutional provisions and directed the Executive to comply with the objective sought to be achieved by the Constitution. Simultaneously, it introduced procedural innovations with a view to making itself more accessible to disadvantaged sections of society giving rise to the phenomenon of Social Action Litigation or Public Interest Litigation. It is important, because both in theory and in practice, litigation in the realm of private law and public law is qualitatively different.

Of the many differences, the first is that for resolving a private law controversy the court ensures that a person who invokes its jurisdiction has sufficient interest, *locus standi*, in the subject-matter of the litigation. On the other hand, in public law litigation, the *locus standi* rule is waived; an illegal act of commission or omission of a public authority, directed against those who on account of economic constraints or illiteracy cannot knock at the doors of justice, is viewed as potentially applicable to a class or group insofar as its consequences are concerned. The assumption is that the potential litigants, large in numbers, have an almost similar stake in the outcome of the lawsuit pending before the court, its effect is not only in present but also futuristic, though only those actually adversely affected by it will be directly affected by the decision.

In fact, in India, it is Public Interest Litigants who have largely assisted the courts in playing a proactive role and have enabled the courts to go into various issues of exploitation of the poor and the needy, child education, environmental pollution, mass injuries, factory pollution, drinking water scarcity and the right to food and other basic needs, preservation of forests, health of women and children, workers' safety in factories, consumer justice, etc. The court looks to the provisions of the Constitution for guidance. Part IV of the Constitution, which contains the Directive Principles of State Policy, is of specific importance while dealing with public law litigation. In the case of State of Gujrat v. Mirzapur Moti Kureshi Kassab Jamat[24], the Supreme Court held that Part IV of the Constitution is not a pariah but a constitutional mandate and. In practice, however sufficient effort has not been initiated to implement most of these principles. It required the State to set up within ten years a system to provide free and compulsory education to all children below 14 years[25].

The role of the judiciary is extremely delicate in such cases because it must not appear to be playing to the gallery or playing a role which may be described as partisan. Great care must be taken to ensure that while the judge or judges play a participatory role, they do not appear to be entering the arena or give the impression of bias to the opposite party. It must also be realised that the position of the opposite. It is indeed true that, of late, many issues that can be described as socio-political or religio-political or eco-political are brought to court. Some of them do have far-reaching consequences and affect the social fabric of the nation. Courts have, while trying to steer clear of areas falling within the political thickets, not hesitated to exercise jurisdiction in appropriate cases. The courts have taken up causes of the poor, the underprivileged and the exploited, often acting on newspaper reports.

Further the Supreme Court has directed the executive to take steps towards environmental protection, rights of women and children, abolition of child labour in hazardous industries and several other socially desirable issues.

Conclusion

The Judicial activism is not an aberration. It is an essential aspect of the dynamics of a constitutional court. Judicial activism, however, does not mean governance by the judiciary. Today the judiciary is being increasingly called upon to enforce the basic human rights of the poor and the deprived ones and this new development is making the judiciary a dynamic and important institution of the State. The Judiciary cannot take over the functions of the Executive. The Courts themselves must display prudence and moderation and be conscious of the need for comity of instrumentalities as basic to good governance.

Judicial activism has to be welcomed and its implications assimilated in letter and spirit. The power of judicial review is recognized as part of the basic structure of the Indian Constitution. The activist role of the Judiciary is implicit in the said power. Judicial activism is a sine qua non of democracy because without an alert and enlightened judiciary, the democracy will be reduced to an empty shell. It may be stated that the judicial activism in its totality cannot be banned. It also must function within the limits of the judicial process. It is obvious that under a constitution, a fundamental feature of which is the rule of law, there cannot be any restraint upon judicial activism in matters in which the legality of executive orders and administrative actions is questioned.

References:

[1] A.M. Ahmadi "Judicial Process: Social Legitimacy and Institutional Viability"(1996).
[2] Quoted in Manika, "Judicial Activism: A means for Attaining Good Governance", Nyaya Deep, NALSA, Vol. VII, Issue 3, July 2006, pp. 117- 132, p. 120.
[3] Article 131 to 136 of the Constitution of India.
[4] Article 13 of the Constitution of India.
[5] Article 142 and 144 of the Constitution of India.
[6] Article 141, Constitution of India.
[7] Article 13,Constitution of India.
[8] Article 131,Constitution of India.
[9] Article 132,Constitution of India.
[10] Article 143,Constitution of India.
[11] Article136,Constitution of India.
[12] *Atiabari Tea Co .vs. State of Assam*, AIR 1951 SC 232.
[13] AIR 1951 SC 332.
[14] AIR 1958 SC 956.
[15] AIR 1960 SC 845.
[16] AIR 1965 SC SC I.
[17] AIR 1999 SC SC I.
[18] AIR 1950 SC 27.

[19] S. P. Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Limits, 2nd ed., (New Delhi: Oxford University Press, 2002), p. 4.
[20] AIR 1971 SC 1461.
[21] Ibid.
[22] AIR 1978 SC 597.
[23] The Constitution(Fourty-fourth Amendment)Act, 1978.
[24] AIR 2006 SC 212.
[25] Article 45, Constitution of India.

Social Action Litigation and Access to Justice

Anukriti Gupta*
Kanika Arora**

Abstract

Justice is an idea that affirms social equality against any kind of discrimination or abuse out of social class or any other reason. It is a concept involving fair, moral and impartial treatment of all people who face injustice in some or the other way. India's higher judiciary has created and overseen the evolution of social action litigation in India. Social action litigation is popularly known as Public Interest Litigation. Public Interest Litigation is a tool in the form of legal action initiated in a Court of Law regarding a matter which concerns public interest. The public interest litigation model is an instrument for the delivery of fair and equitable justice, resistant to governmental apathy as well as economic and social privilege. Social action litigation through its very effective and efficient machinery has slashed down many unnecessary practices of the Courts and authorities giving the much needed protection to the neglected and poor section of the society.

Introduction

The Indian judiciary, especially at the level of the Supreme Court and the High Courts, has for long been concerned with the concept and practice of justice. What constitutes justice and for whom? How do we truly achieve the admirable constitutional precepts that 'no one is above the law' and that 'all persons are entitled to the equal protection of the law'? How do we cope with the problem that in principle, 'all persons are equal under the law' but in reality, 'some are more equal than others'?[1]

In its infancy, immediately after independence, the Supreme Court of India grappled, not always successfully, with the problem of striking a balance between the much-needed programs of economic and social reform (for instance, land reform and land redistribution) on the one hand and establishing the credibility of the newly-born Indian State in terms of fostering the rule of law and respecting the rights vested under laws that preceded independence and the very Constitution itself, on the other.[2] During the first couple of decades when, for all practical purposes, India was functioning as a de facto one-party political system, the Supreme Court focused on promoting the values of constitutionalism, separation of powers and checks and balances over and in each organ of the State.

The Supreme Court and the High Courts were ever-vigilant in their review of executive actions, hence ensuring to the public requisite protection against excesses of authority or

**** Assistant Professor of Law, Ideal Institute of Management and Technology (School of Law), GGSIPU, Delhi.***
***** Assistant Professor of Law, Ideal Institute of Management and Technology (School of Law), GGSIPU, Delhi.***

abuses of power.[3] They were equally vigilant in their review of legislative actions, both in respect of lawmaking[4] as well as in balancing legitimate parliamentary powers, (necessary for the effective functioning of Parliament) with parliamentary privileges, notably that of punishing for Contempt.[5]

In the decades thereafter, the Supreme Court turned its attention towards the frequency with which the Parliament was amending the Constitution using the dominance of a single political party at both the national and state levels to the maximum. The Court elaborated upon the distinction between the constituent and legislative power.[6] Moreover, as the judiciary and the Indian political system matured, the Supreme Court firmly established the primacy of the Constitution through its articulation of the basic structure doctrine, thereby safeguarding those features that are inherent in the Constitution from being altered through the mere exercise of legislative power.[7]

As its confidence, skill and maturity developed from the above achievements, the Supreme Court turned its attention towards the challenge of securing 'justice for all', i.e., for the rich and poor, over-privileged and under-privileged, disadvantaged and vulnerable, exploited and excluded alike. It did so by creating a uniquely Indian breed of public interest litigation, which was given the nomenclature 'social action litigation' ('SAL') by noted jurist, Upendra Baxi.[8] After a thoughtful and balanced assessment of the early years of SAL in India, Professor Baxi concluded that as a result of SAL, the Supreme Court had evolved from being the Supreme Court of India into a Supreme Court for Indians—all Indians alike.[9]

SAL is the product of judicial activism on the part of the judges of the Supreme Court and the High Courts in India. It came into existence as a response to an endemic problem encountered in India, and indeed in many Third World countries, namely, that of the continued existence of a large number of groups and sectors who are subjected to exploitation, injustice, and even violence on a sustained and systemic basis. In this climate of exploitation, conflict and violence, judges were challenged to play a positive role. They could not rescue themselves by invoking the doctrines of self-restraint, strict constructionism, or passive interpretation. The Constitution confers upon judges a very potent power, namely, the power of judicial review. Given the historically prevalent conditions of poverty, squalor, and injustice in India, the judicious and sustained use of this power to further the cause of social justice became an absolute imperative.

The judiciary was called upon to play an important role in preventing and remedying abuses and misuses of power and in eliminating exploitation and injustice. It was necessary for this purpose to make procedural innovations that would enable it to meet the challenges posed by such new roles. In doing so, the judiciary, being alive to its social responsibility and accountability to the people of the country, sought to liberate itself from the shackles

of western thought and its ways. It made innovative use of the power of judicial review to forge new tools, devise new methods and fashion new strategies for the purpose of bringing justice to socially and economically disadvantaged groups. Through creative interpretation, the courts brought about democratization of remedies to an extent that was unimaginable ten or fifteen years earlier. The strategy of SAL, evolved by the Supreme Court has brought justice within the ken and reach of the common man and it has made the judicial process readily accessible to large segments of the population who were hitherto excluded from claiming justice.

One of the main problems that impeded the development of effective use of the law and the justice system in aid of the disadvantaged was that of accessibility of justice. The Constitution, which provides for fundamental rights, confers the right to move the Supreme Court by appropriate proceedings under Article 32 for their enforcement. Article 32 empowers the Supreme Court to issue any directions, orders, or writs for the enforcement of such fundamental rights. Article 226 vests similar powers in the High Courts.

Though these Articles of the Constitution are couched in the widest of terms and anyone can approach the Supreme Court or the High Courts for enforcement of fundamental rights under them, the interpretation which prevailed during the first three decades of the existence of the Supreme Court was such that Article 32 meant very little to the large bulk of the population of India who remained in awe and isolation of the Court.[10] The Court was, for a long time, used only by those who were wealthy and affluent and who, to borrow Marc Galanter's phrase, were 'repeat players' of the litigation game.[11] The poor were priced out of the judicial system and they had become what one would call 'functional out-laws'. It was impossible for the poor to approach the Court for justice because they lacked the awareness, assertiveness, and access to the machinery required to enforce their constitutional and legal rights.

The Supreme Court found that the main obstacle which deprived the poor and the disadvantaged of effective access to justice was the traditional rule of *locus standi* which insists that only persons who have suffered a specific legal injury, by reason of actual or threatened violation of a legal right or legally-protected interest, can bring an action for judicial redress.[12] It is only the holder of the right who can sue for actual or threatened violation of such right.[13] No other person can file an action to vindicate such right. This rule of standing was obviously evolved to deal with the right-duty pattern, which is to be found in private law litigation.[14] But it effectively barred the door of the Court to large masses of people who, on account of poverty and/or ignorance, were unable to avail of the judicial process. It was felt that even if legal aid offices were established, it would be impossible for them to take advantage of such legal aid programme because most of them lack awareness of their constitutional and legal rights. Moreover, even if they were made aware of their rights, many of them would lack the capacity to assert them.

The Supreme Court, therefore took the view that it was necessary to depart from the traditional rule of *locus standi* and to broaden access to justice by providing that where a legal injury is caused to a person (or to a class of persons) by violation of their constitutional or legal rights and where such person or class of persons is, by reason of any disability, unable to approach the Court for relief, any member of the public or any *bona fide* social action group can bring an application in the High Court or the Supreme Court seeking judicial redress for the injury caused to such person or class of persons.[15]

The Supreme Court also felt that when any member of the public or a social organization espouses the cause of the poor and the downtrodden, he/she should be able to move the Court, even by just writing a letter, because it would not be right or fair to expect a person acting *pro bono publico* to incur expenses from his or her own pocket for the lawyer's fees and prepare a regular writ petition to be filed in court. In such a case, a letter addressed by such person to the court can legitimately be regarded as an 'appropriate proceeding' within the meaning of Article 32 of the Constitution. The Supreme Court thus evolved what has come to be known as 'epistolary' jurisdiction[16] where the Court can be moved by just addressing a letter on behalf of the disadvantaged class of persons. Through this, the Supreme Court achieved a major breakthrough in bringing justice closer to large masses of the people.

The courts, for a long time, remained the preserver of the rich and the powerful, the landed gentry, the business magnate, and the industrial tycoon. They were used mainly to protect the rights of the privileged classes.[17] But, now for the first time, the portals of the Court were thrown open to the poor and the downtrodden, the ignorant and the hitherto subservient. Through SAL, their cases started coming before the courts at the Centre and in the States. The have-nots and the handicapped began to feel, for the first time, that there was an institution to which they could turn for redressal against exploitation and injustice. They could seek protection against both, governmental lawlessness as well as administrative deviance. The Supreme Court became a symbol of hope for the deprived and vulnerable sections of Indian society. It acquired fresh credibility with the people, as the courts began dispensing justice to under-trial prisoners,[18] women in distress,[19] juveniles in jails or otherwise incarcerated,[20] landless peasants,[21] bonded labour,[22] victims of environmental pollution[23] and many other disadvantaged groups of people, in a manner unprecedented in the annals of judicial history.

Right from the inception of SAL, one difficulty which became apparent was the total unsuitability of the adversarial procedure to this new kind of litigation.[24] The adversarial procedure is intended to be based on the rule of fairness. It has evolved an elaborate code of procedure in order to maintain basic equality between the parties and to ensure that one party does not obtain an unfair advantage over the other. But the adversarial procedure can operate fairly and produce just results only if the two contesting parties are evenly matched

in strength and resources. This is quite often not the case. Where one of the parties to the litigation belongs to the poor and deprived sections of the community and does not possess adequate social and material resources, she/ he is bound to be at a disadvantage in relation to a strong and powerful opponent in an adversarial system of justice. This was not only due to the difficulty in getting competent legal representation but also because of her/his inability to produce relevant evidence before the Court.

The problem of proof, therefore, presented an obvious difficulty in SAL cases. This problem become extremely acute in many cases because often, the authorities or vested interests who were the respondents, denied on affidavit the allegations of exploitation, repression, and denial of rights made against them. Often, the respondents contested the *bona fides* of the social activists who came to the Court. Sometimes, they attributed wild, ulterior motives to such social activists and denounced the source on which the social activists relied, namely, media and investigative reports of social scientists and journalists. Then, how is evidence to be produced before the Court on behalf of the poor in support of their case? It is obvious that the poor and the disadvantaged usually cannot produce material evidence themselves before the Court and often, it is extremely difficult for the public-spirited citizen to gather relevant material and place it before the Court. Similarly, while there may be exceptions, by and large, it would be difficult for most social action groups to collect the necessary materials.

What does the Court do in such cases? Would the Court be failing to discharge its constitutional duties if it refused to intervene when the relevant material had not been produced before it by the petitioner? If the Court were to adopt a passive approach and decline to intervene in such cases where relevant material had not been produced by the party seeking its intervention, fundamental rights would remain merely an illusion so far as the poor and disadvantaged groups are concerned. The Supreme Court, therefore, started experimenting with different strategies, which involved departure from the adversarial procedure, without in any way sacrificing the principles of fair play. It was found that the problems of the poor and the oppressed were qualitatively different from those which had hitherto occupied the attention of the Court. They needed a different kind of lawyering skills and a different kind of approach. It was necessary to abandon the *laissez-faire* approach in the judicial process and devise new strategies and procedures for articulating, asserting, and establishing the claims and demands of the have-nots. The Supreme Court, therefore, initiated the strategy of appointing 'socio-legal commissions of inquiry'.[25]

The Supreme Court started appointing social activists, teachers, researchers, journalists, government officers, and judicial officers as court commissioners to visit particular locations for fact-finding. They were also required to submit quick and detailed reports setting out their findings as well as their suggestions and recommendations. There have been numerous cases where the Supreme Court has adopted this procedure. The following paragraph mentions a few by way of illustration.

In one of the early cases in 1981, there was a complaint by a backward community called *chamars* (who had been traditionally carrying on the vocation of flaying the skin of carcasses of dead animals in the rural areas) that their fundamental right to carry on their vocation was being unreasonably taken away, through the system of auctioning to the highest bidder the right to flay dead animals and to dispose of the skin, horns, and bones. The *chamars* were, for various social and economic reasons, unable to produce any material in support of their case. The Supreme Court, therefore, appointed a socio-legal commission consisting of a professor of law and a journalist to investigate the complaint of the *chamars* and to gather material bearing on the correctness or otherwise of the complaint. The commission submitted a detailed report of its socio-legal investigation and put forward an alternative scheme under which carcass administrators would safeguard the rights of the *chamars*.[26]

In another case concerning the use of bonded labour in the Faridabad stone quarries, the Supreme Court appointed Dr. S Patwardhan, a Professor of Sociology working at the Indian Institute of Technology, to carry out a socio-legal investigation into the conditions of the stone quarry workers. On the basis of his report, the Supreme Court gave various directions in the well-known case of *Bandhua Mukti Morcha* v. *Union of India*[27] (‘*Bandhua Mukti Morcha*’).

Similarly, in the case of *Upendra Baxi and Lotika Sarkar* v. *State of Uttar Pradesh*, the Supreme Court appointed the District Judge of Agra as commissioner to visit the protective home and to make a detailed report with regard to the conditions in which the girls were living in the home. Consequent to the submission of his report, several directions were given by the Court, from time to time, which resulted in the improvement of living conditions in the protective home.[28]

The practice of appointing socio-legal commissions of inquiry for the purpose of gathering relevant material has now been placed on a sound jurisprudential basis as a result of the judgment of the Supreme Court in *Bandhua Mukti Morcha*, which specifically ruled that the Court, under the powers granted to it by Articles 32 and 226 of the Constitution, can appoint such commissions and specify their mandate and powers.[29]

When the report of the socio-legal investigation is received by the Court, copies of it are supplied to the parties so that either party wanting to dispute the facts or dates stated in the report may do so by filing an affidavit. The Court would then consider the report of the commissioner and the affidavits that have been filed and proceed to adjudicate upon the issues arising in the writ petition. This practice marks a radical departure from the adversarial system of justice, which India inherited from the British.

Ubi Jus Ibi Remedium

Even after these innovations were undertaken by the Supreme Court, the question concerning the kind of relief which the Court could grant still remained unanswered. The Court needed to evolve new remedies for giving relief. The existing remedies were intended to deal with private rights situations and were therefore simply inadequate. The suffering of the disadvantaged could not be relieved by mere issuance of the high prerogative writs, orders granting damages or injunctions. The Supreme Court, therefore, tried to explore new remedies, which would ensure distributive justice to the deprived sections of the community. These remedies were unorthodox and unconventional and they were focussed on enabling the State (and its authorities) to initiate affirmative action. *Bandhua Mukti Morcha* provides a typical example of the development and utilization of new remedies. In that case, the Supreme Court made an order giving various directions for identifying, releasing, and rehabilitating bonded labourers, ensuring payment of the minimum wage, the observance of labour laws, provision of wholesome drinking water and the setting up of dust sucking machines in the stone quarries. The Supreme Court also set up a monitoring agency to continuously monitor implementation of those directions.

In *Hussainara Khatoon* v. *State of Bihar* (Bihar pre-trial detention case),[30] the Supreme Court directed that the State Government should prepare an annual census of under-trial prisoners on October 31 each year and submit it to the High Court. Thereupon, the High Court would give directions for early disposal of cases where the under-trial prisoners had been under detention for unreasonably long periods of time. In *Khatri* v. *State of Bihar* (Bihar blinding case)[31] the Supreme Court directed that under-trials who had been blinded should be given vocational training in an institution for the blind and should be paid adequate compensation. Likewise, in *Peoples' Union for Democratic Rights* v. *Union of India* ('ASIAD Workers case'),[32] the Supreme Court set up a monitoring agency of social activists. In another case brought before the Court by Sheela Barse, a journalist[33] the Supreme Court directed that there should be a separate lock-up for women, where women police constables would be in charge and in addition, a notice should be put up in each police lock-up informing the arrested persons of their rights. The Supreme Court also ordered that a judicial officer should periodically inspect the police lock-ups. There are also cases where the Supreme Court has directed remedy by way of affirmative action.[34]

Journey from Directives and Orders to Compliance

The question further arises as to how the directives and orders made by the Court in SAL cases can be enforced. The orders made by the Court are obviously not self-executing. They have to be enforced through State agencies and if the State agencies are not enthusiastic in enforcing the court orders, the object and purpose of SAL would remain largely unfulfilled. The consequence of the failure of State machinery to secure the enforcement of court orders in SAL cases would not only result in the denial of effective justice to the disadvantaged groups but would also have a demoralizing effect on further attempts at litigation. It would make people lose faith in the capacity of the Court to deliver justice through SAL. The success or failure of the strategy of SAL would necessarily depend on the extent to which it is able to provide actual relief to the vulnerable sections of

the community. It is, therefore, absolutely essential to the success of the strategy of SAL that a method be found for securing enforcement of court orders in such litigation. There are two different methods that have been adopted to ensure that the orders made by the Court in SAL cases are carried out. These are dealt with below.

Public-spirited individuals or the social action group, which initiated the SAL and secured the order of the Court, should not remain content merely with the court order. They should also take the necessary follow-up actions and maintain constant pressure on State authorities or agencies to enforce and implement it. If it is found that the court order is not being implemented effectively, they must immediately bring it to the notice of the Court so that the Court can call upon the State authorities or agencies to render an explanation as to why it has not been carried out. If there is wilful or contumacious disregard of the court order, the Court can punish the concerned officers of the State for contempt of court. The Supreme Court has not so far used its contempt jurisdiction[35] in SAL cases. But if particular orders made in a SAL case are not carried out, the obligation of drawing the attention of the Court to such failure of implementation should be on the individual or social action group. If the Supreme Court has to use its powers to punish the concerned for contempt in appropriate and exceptional cases, it should not hesitate to do so. The Supreme Court has also started appointing monitoring agencies for the purpose of ensuring implementation of the orders made by it in SAL cases. This is another example of innovative use of judicial power by the Supreme Court.

The Supreme Court in *Sheila Barse* v. *Union of India*,[36] gave various directions regarding police lock-ups for women and directed that a lady judicial officer should visit the police lock-ups periodically and report to the High Court as to whether the directions of the Supreme Court were being carried out or not. This was also seen in *Bandhua Mukti Morcha*[37] where the Supreme Court issued approximately twenty-one directions, several of which have already been referred to above. With a view to ensuring implementation of these directions, the Supreme Court appointed Laxmi Dhar Misra, a Joint Secretary, in the Ministry of Labour, to visit the Faridabad stone quarries after a period of about two or three months. This was done to ascertain whether the directions given by the Court had been implemented and to make a report for the Supreme Court with regard to the implementation of those directions. Misra carried out the assignment as a monitoring agent and submitted a report for the Court's consideration. The Supreme Court in *Neeraja Chaudhary's case*[38] and in another case coming from the State of Madhya Pradesh[39] also directed that representatives of social action groups operating within the area should be appointed as members of the Vigilance Committees constituted under the Bonded Labour System (Abolition) Act, 1976.[40] The same strategy was also followed in the *ASIAD Workers' case*[41] where the Supreme Court, after clearly laying down the law on the subject, appointed three social activists as ombudsmen for the purpose of ensuring that labour laws were being observed by the state administration. The SAL strategy is still in the course of

evolution but it holds out great promise for the future. This is so because by adopting it the Court has tried to secure obedience to the orders made by it.

These are some of the methodologies that have been evolved for the purpose of securing implementation of the directions given by the Court in SAL cases. But it should be stressed that the judiciary in India is still experimenting with new techniques and in the years to come, there is little doubt that it will creatively develop new methods and strategies for perfecting this powerful tool.

Reforms Brought About By Social Action Litigation

Over a period of a decade and a half, the Supreme Court, later followed by several High Courts as well, has through a series of SAL judgments (several of which have been detailed above) drastically altered the jurisprudential landscape of the country. It has forged new concepts and procedures relevant to the cultural, economic, and social conditions in post-colonial India. At a procedural level, SAL has given a new dimension to the traditional rules of court procedure. At a substantive level, the courts have held up to intense scrutiny key areas of government action and inaction. This explosion of judicial activism (termed in India as *social action litigation*) has triggered constitutional, legislative, and judicial reforms in a couple of South Asian countries, notably Bangladesh, Pakistan, and Sri Lanka.

The most significant elements of innovation in the SAL approach:

Relaxation of the Doctrine of Standing

Traditionally, a petitioner only had the standing to move the court if she/he had suffered some actual or threatened violation of legal rights or interests. The Supreme Court jettisoned this doctrine, throwing its portals open to all Indians. It permitted NGOs, social action groups and individuals to bring action on behalf of others, whose fundamental rights under the Constitution were violated or threatened.

Epistolary Jurisdiction

Reforms of procedural laws in order to simplify them and make them less burdensome (financially and otherwise) by creating '*epistolary jurisdiction*',[42] under which actions can be initiated simply by addressing a letter to a judge thereby dispensing with the need to draw up a formal writ petition.[43] It was deemed unfair that a petitioner should have to incur the expenses of drafting a formal petition. Court fees are also waived.[44]

Departing substantially from the adversarial mode of judicial proceedings

The objective here is an attempt to level the playing field especially in terms of burden of proof (through the creative use of rebuttable presumptions) and proactive ascertainment of facts by the Court (through court-appointed commissions of inquiry, as elaborated further below) without in any way prejudicing the right of either party to due process of law.

Strengthening the investigative reach

Strengthening the investigative reach of the courts through court-appointed Commissions of Socio-Legal Inquiry comprising of lawyers, academics, social workers, district judges, and others to inquire into allegations raised in the petition, undertake fact-finding and report to the Court. Such reports were treated as *prima facie* evidence.

Encouragement to New Breed of Lawyering

It encouraged a new breed of lawyering through schemes to ensure legal representation for unrepresented or underrepresented groups, as well as through *use of amicus curiae* (and amicus briefs).

Conscious Retention of Jurisdiction over the matter

Conscious retention of jurisdiction over the matter, as long as is necessary in the interest of dispensing justice. Such retention of jurisdiction makes it possible to keep the matter *sub judice* as long as it is necessary and also enables the court to issue a succession of court orders and directions until the time is appropriate for the court to deliver an effective final judgment.

Protecting and Realizing the Right to Effective Remedies

Both the Constitution and the International Covenant on Civil and Political Rights[45] (which India has ratified) make the right to effective remedies itself a fundamental human right. In SAL cases, the Supreme Court has fashioned a range of new remedies that are proactive as well as reactive. Moreover, it has also tried wherever possible to provide the range of available constitutional, civil, and criminal remedies using a 'one-stop approach', thereby saving the petitioners from going through multiple processes of court proceedings.

Monitoring Compliance

Monitoring compliance with Court orders and directives through court appointed monitoring agencies and Commissions, as described above. Two further points merit notice when considering the above eight elements. First, each of the above eight elements of SAL (and further elements that may get evolved in the future) represents a distinct and severable aspect of judicial reform, which may be assessed, adapted, and adopted on its own, as appropriate in widely-varying contexts of different countries. Second, it is important to mention that these elements are interrelated and interdependent, and together form the composite that is SAL.

The components cumulatively achieve more than each of them (for example enhanced legal representation) can separately achieve in terms of enhancing access to justice. Through these innovations, SAL has not only changed the judicial landscape, but has also promoted the rule of law, the reign of constitutionalism and the supremacy of the Constitution. In this sense, so far as SAL is concerned, the whole is indeed greater than the sum of its parts.

Conclusion

It needs to be recognized that there will inevitably be opposition from affected quarters to the strategy of SAL. Such criticism may be blatant or subtler.[46] They may come from expected quarters or unexpected ones including from within the judiciary itself. An example of this may be seen in the judgment of a two-judge bench of the Supreme Court speaking through Katju, J. while setting aside a High Court judgment (which had directed the State to regularize the plaintiff gardener as a truck driver since he had been working in that capacity for the past 10 years).[47] The two-judge bench then went on to make gratuitous comments on the role of the judiciary and on the supposed limitations of public interest litigation in India. These were questions not arising for determination in that case.

As long as forty years ago, the Supreme Court rightly prescribed that, "*Obiter observations and discussion of problems not directly involved in any proceeding should be avoided by courts in dealing with all matters brought before them, but this requirement becomes almost compulsive when the Court is dealing with constitutional matters.*"[48] Blithely ignoring this sound directive, the two-judge bench went on to pronounce upon the supposed limitations of public interest litigation. Even worse, the two-judge bench went on to criticize two judgments delivered by a three-judge bench (in '*Jagadambika Pal's case* of 1998[49], and the *Jharkhand Assembly case* of 2005[50]) calling those judgments 'glaring examples of deviations from the clearly provided constitutional scheme of separation of powers'.[51]

This strain of criticism of judicial activism as articulated in judgment of Katju, J., as such is untenable. Courts have been consistent in granting relief in SAL cases relating to labour, to victims of custodial violence, and to victims of the excesses committed by the executive. Since previously the targets of the Court's orders were comparatively junior officials, and certainly not prominent politicians, the issue of judicial activism was not raised by the executive. The present charge of alleged interference by the courts has only now begun to emerge, as those who wield political and economic power are beginning to be threatened by the impact of SAL.[52] In this context, Justice Sachar maintains that:

"It will thus be amply clear that the judiciary (barring some rare escapades) as mentioned in the two-judge judgment is aware of its precise role in the constitutional set up. So when seemingly interested people, mostly politicians, accuse it of overstepping its constitutional limits, the anger is borne more out of frustration at their own partisan actions being challenged before the judiciary rather than the usurpation of power and jurisdiction by the courts."[53]

In this context it is important to note that the Indian judiciary has previously dealt with the issue of judicial constraint and public interest litigation. As with any innovation, there is a prospect of capture and abuse. But, so far as SAL is concerned, this has been recognized and addressed through development of procedures (constantly in the process of further refinement) to screen

SAL petitions when they are filed. A recent judgment of the Supreme Court states that frivolous petitions shall be dismissed with costs in order to dissuade persons from misusing the procedure established for SAL cases.[54] Dealing with two inter-connected appeals questioning a Bombay High Court decision, Justice Pasayat opined that the time had come to weed out petitions "which though titled as public interest litigations are in essence something else."[55] Recalling several decisions of the Supreme Court, the bench condemned in the harshest of words the trend of filing petitions under the garb of public interest litigation for service related matters. This case underscores the complexities involved in making decisions concerning the legitimacy of SAL petitions. While it may be true as a general rule that service-related matters ought not to be filed as SAL petitions, there is a need to make exceptions where there are allegations of blatant abuse of power or discretion, in whatever form, including dismissals, transfers or other forms of victimization of 'whistle-blowers'.

An important issue relating to the enterprise of democratising justice through SAL concerns its sustainability. This issue implicates the multiple tasks of sustaining the champions of change, of sustaining and increasing the inclusiveness of the broad-based popular constituencies who support and claim ownership of SAL, and the herculean task of strengthening of the capacities needed for effective application of the SAL approach among judges, lawyers, and court personnel.[56]

However, as long as the thirst for justice remains yet to be fully slaked, and as long as the hunger for justice remains yet to be fully-appeased, SAL will continue to hold its unique attraction, not only in the pursuit of justice for the privileged and affluent few but, more importantly, in the pursuit of justice for all.

Reference

[1] Orwell, George, Animal Farm 105 (1965).

[2] For instance, *Shankari Prasad Singh Deo vs. Union of India*, AIR 1951 SC 458 (upholding the validity of the first amendment to the Constitution that shielded land acquisition laws from legal challenge under Part III of the Constitution.) However, in later judgments starting with *State of West Bengal vs. Bella Banerjee*, AIR 1954 SC 170 the Court ruled that the meaning of 'compensation' in Art. 31(2) meant just equivalent for the property acquired, making meaningful land reform impossible. This in turn led to Parliament's adoption of the undesirable practice of shielding laws from constitutional challenge by placing them in the Ninth Schedule added to the Constitution by Parliament through a constitutional amendment.

[3] For instance, *C. S. Rowjee vs. Andhra Pradesh State Road Transport Corporation*, AIR 1964 SC 962.

[4] *A K Gopalan v. State of Madras*, 1950 SCR 88.

[5] *Keshav Singh vs. Speaker, Legislative Assembly, U.P.*, AIR 1965 All 349.

[6] Through a series of cases culminating in *I.C.Golak Nath vs. State of Punjab*, AIR 1967 SC 1643.

[7] *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 1461.

[8] Baxi, Upendra, *Taking Suffering Seriously*: *Social Action Litigation in the Supreme Court of India*, 4 Third World Legal Studies 107, 108-11 (1985).

[9] *Id*.

[10] *Kesavananda Bharati vs. State of Kerala*, (1973) 4 SCC 225, 947: AIR 1973 SC 1461, 2009 (Dwivedi, J. observed that the Supreme Court operated as an "arena of legal quibbling for men with long purses").
[11] Galanter, Marc, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 (1) Law and Society Review 165 (1974).
[12] *S.P. Gupta vs. Union of India*, 1981 Supp SCC 87, 204.
[13] *Nain Sukh Das vs. State of Uttar Pradesh*, 1953 SCR 1184
[14] Deva, Surya, *Public Interest Litigation in India: A Quest to Achieve the Impossible*, in Public Interest Litigation in Asia 57 (2011).
[15] For instance, *People's Union for Democratic Rights vs. Union of India*, (1982) 3 SCC 235: AIR 1982 SC 1473. Also, G L Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 International and Comparative Law Quart erly 66 (1991).
[16] The doctrine has its origins in the jurisprudence of the United States Supreme Court in *Gideon vs. Wainwright*, 372 US 335 (1963).
[17]For instance, *S.P. Gupta v. Union of India*, 1981 Supp SC 87, 210 (Explicitly stating that there is a need for opening standing to the disadvantaged where there is legal injury. The direct inference is an acknowledgement that it is unfavourable to continue to limit access to legal remedies).
[18] For instance, *Francis Coralie Mullin vs. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608; *Hussainara Khatoon (1) vs. Home Secretary, State of Bihar*, (1980) 1 SCC 81.
[19] For instance, *Vishaka vs. State of Rajasthan* (1997) 6 SCC 241; *Bodhisattwa Gautam vs. Subhra Chakraborty* (1996) 1 SCC 490.
[20] For instance, *Munna vs. State of Uttar Pradesh*, (1982) 1 SCC 545: AIR 1982 SC 806; *Sheela Barse vs. Union of India*, (1986) 3 SCC 596: AIR 1986 SC 1773.
[21] *Supra* note 24.
[22] *Bandhua Mukti Morcha vs. Union of India*, (1984) 3 SCC 161: AIR 1984 SC 802.
[23]For instance, *M.C. Mehta vs. Union of India*, (2001) 3 SCC 756: AIR 2001 SC 1948; *Vellore Citizens' Welfare Forum vs. Union of India*, (1996) 5 SCC 647: AIR 1996 SC 2715.
[24] For instance, *Upendra Baxi vs. State of Uttar Pradesh*, (1986) 4 SCC 106, 117; *Vincent Panikurlangara vs. Union of India*, (1987) 2 SCC 165.
[25] For instance, *Kamaladevi Chattopadhyay vs. State of Punjab*, (1985) 1 SCC 41.
[26] *Gulshan vs. Zila Parishad*, 1987 Supp SCC 619.
[27] *Bandhua Mukti Morcha vs. Union of India*, (1984) 3 SCC 161: AIR 1984 SC 802.
[28] *Upendra Baxi vs. State of Uttar Pradesh*, (1983) 2 SCC 308
[29] *Bandhua Mukti Morcha vs. Union of India*, (1984) 3 SCC 161: AIR 1984 SC 802
[30] *Hussainara Khatoon (3) vs. State of Bihar*, (1980) 1 SCC 93: AIR 1979 SC 1360.
[31] *Khatri (3) vs. State of Bihar*, (1981) 1 SCC 635
[32] *People's Union for Democratic Rights v. Union of India*, (1982) 3 SCC 235: AIR 1982 SC 1473
[33] *Sheela Barse v. Union of India*, (1988) 4 SCC 226.
[34] For instance, *Municipal Council, Ratlam vs. Vardhichan*, (1980) 4 SCC 162: AIR 1980 SC 1622.
[35] This is a constitutional power under Articles 129 and 142. 4 and 15 of the Contempt of Courts Act, 1971 provide for the substantive provisions with respect to the contempt of court.
[36] *Sheela Barse vs. Union of India*, (1988) 4 SCC 226.
[37] *Bandhua Mukti Morcha vs. Union of India*, (1984) 3 SCC 161: AIR 1984 SC 802.
[38] *Neeraja Chaudhary vs. State of Madhya Pradesh*, (1984) 3 SCC 243: AIR 1984 SC 1099
[39] *Mukesh Advani vs. State of Madhya Pradesh*, (1985) 3 SCC 162: AIR 1985 SC 1363
[40] In these situations whenever any case of bonded labour was brought to the notice of the District Administration by a representative of a social action group, the District Administration was required to proceed to inquire into it in the presence of a representative of the social action group who is a member of the Vigilance Committee. Further, rehabilitation was required be provided to the released bonded labourers in consultation with and in the presence of such representative of the concerned social action group.
[41] *People's Union for Democratic Rights vs. Union of India*, (1982) 3 SCC 235: AIR 1982 SC 1473

[42] *Sunil Batra (2) vs. Delhi Administration*, (1980) 3 SCC 488; *Upendra Baxi vs. State of Uttar Pradesh*, (1983) 2 SCC 308; *Veena Sethi vs. State of Bihar*, (1982) 2 SCC 583.
[43] Supreme Court Rules, 1966, Or. XXXV read with Or. XLVII R1.
[44] Supreme Court Rules, 1966, Order XXXV, Rule 2. *See*, P.P. Rao, Public Interest Litigations: Practice, Procedure and Precautions -Some Perceptions 31 Indian Bar Rev. 34 (2004).
[45] International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S.171, Article 2(3)(a).
[46] Rajagopal, Balakrishnan, *Pro-Human Rights but Anti-poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective*, 18 (3) Human Rights Rev. 157 (2007).
[47] *Divional Manager, Aravali Golf Club vs. Chander Hass*, (2008) 1 SCC 683. Also, Rajindar Sachar, *Judicial Power - No Tinkering Please*, 199 Asian Centre for Human Rights (ACHR) Weekly Review 1 (2007).
[48] *Id*.
[49] *Jagdambika Pal vs. Union of India*, (1999) 9 SCC 95.
[50] *Jharkhand Party vs. State of Jharkhand*, (2005) 2 BLJR 1559.
[51] Justice Jois, M. Rama, *Crossing the Lakshman Rekha*, The Indian Express (Kolkata) December 17, 2007.
[52] Bhushan, Prashant, *Supreme Court and PIL: Changing Perspectives under Liberalisation* 39EPW 194 (2004).
[53] *Id*.
[54] *Kushum Lata vs. Union of India*, (2006) 6 SCC 180. Also, Khosla, Madhav, *Finally Awakening to Frivolous PIL Petitions in India*, 12 Jud. Rev. 191 (2007).
[55] *Id*.
[56] For a well-balanced appraisal of SAL in India, *see* S.P. Sat he, Judicial Activism in India: Transgressing Borders and Enforcing Limits (2002) and Ashok H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems* in Supreme But Not Infallible: Essays in Honour of the Supreme Court of India 159 (2000).

Key Issues of Crime Investigation and Police System: In the Context of Crime Reform

Miss. Khoda Meena*

Abstract

It is very important to let us know how the police investigation in criminal cases as well as what reforms has been by our Indian government of the law and the Constitution of India. Criminal Procedure Code provides that the powers of an officer-in-charge of a police station may be exercised by superior officer of police throughout the local area of his jurisdiction. For the commission of crime investigation firstly we have to understand the meaning of charge, complaint, investigation, inquiry, non-cognizable offence. Similarly, examining witnesses and arranging raids and searches also form an integral part of the investigation.Modern technique and reforms of crime investigation viz forensic science investigation play important role in the crime investigation. They establish the presence or absence of a link between the crime, the criminal, the victim, the place and the time of occurrence. The investigation techniques of computer crimes have to be varied according to the nature of the crime.

Key Notes: CBI, CID, CRB, NHRC, IPC, Cr.P.C, NCRB, DNA, USA, FIR, Cr. L.J.

Introduction

The Criminal Procedure Code is mainly an adjective law of procedure. But there are at the same time some provision that are in nature of law e.g. provision relating to prevention of offences and maintenance preoeding[1]. The object of the code is to provide machinery for the punishment of offenders against the substantive criminal law as contained in the Indian Penal Code as well as in other acts. The present work cover the main heads such aspowers of superior officer of police, commission of crime investigation, modern technique and reforms of crime investigation, Mali Math committee report which is concern with crime investigation and crime reform.[*]

The applicability of the code of criminal procedure generally extends to investigation, inquiry or trail offence committed under the Indian penal code under any special or local statue. However when an enactment for procedure regulating the manner of place of investigation, inquiry or trail, the provision of that enactment shall prevail over the code of criminal procedure unless there is a specific provision to the contrary. Where no special or different procedure is provided by the special Act, the procedure provided by the criminal procedure code, shall be followed. In this chapter we are going to discuss the commission of crime and the police how they deal with the offender by legal way. It is very important to let us know how the police investigation in criminal cases as well as what reforms has been by our Indian government of the law and the Constitution of India.

Powers of superior officer of police

Under Section 36 of the Criminal Procedure Code provides that the powers of an officer-in-charge of a police station may be exercised by superior officer of police throughout the local area of his jurisdiction. The use of the word "May" in the section clearly indicates that the section does not compel but only empowers exercise of powers. Superintendent of police, deputy superintendent of police and an inspector CID also superior in rank to the officer-in-charge of a police station, but the section doesn't not permit such a superior police officer to oust the officer-in-charge of the police station from exercising his jurisdiction under this section.

A superior officer of police can, under orders of his superior officer, investigate a case anywhere within the state[2]. The inspector general of police will have jurisdiction extending over whole of the state[3]. The Supreme Court in *Nirmal Singh Kahlon vs. State of Punjab*[4], held that the words "in rank" used in Section 36 should be given purposive construction and the provision of this section should be read harmoniously with the provision contained in Section 3 of the Police Act, 1861. A plain reading of the aforesaid provision would show that it contains three ingredients, namely (I) the investigation

****Lecturer in Law, Arunachal University of Studies, Namsai, A.P.***

must be carried out by an officer- in-charge (ii) which may be supervised by an officer superior in rank and (iii) it should be in respect of a local area to which they are appointed. The members of public are required to help and assist a magistrate or police officer in three ways *viz* (i) in preventing the escape of an offender or (ii) prevention of breach of peace or (iii) in preventing injury to public property such as railways, telegraph, canals etc. Penalty for omission to do is provided in Section 187 of Indian Penal Code but this does not mean that the section confers general power on the police to call upon the members of the public to join them in apprehending the offender or collection the evidence against him. The demand made on the public in this regard should be reasonable.

Commission of Crime Investigation

Under the criminal procedure code it has given that how the police conduct investigation while dealing with crimes. For the commission of crime investigation firstly we have to understand the meaning of charge, complaint, investigation, inquiry, non-cognizable offence. Charge means under criminal procedure code of India that is framed by the court after a prima facie case about a certain offence or an offence having been committed by the accused is disclosed after the criminal investigation[5]. Complaint is a document which is sent or presented to the magistrate with a view to his taking action and not merely with a view to give information. A complaint therefore doesn't include the police report. The complaint may be made orally or in writing. There is no specific format in which a complaint should be made. Investigation means `defined in Section 2(h) has a very wide connotation. It includes arrest and detention of a person for the purpose of investigation of an offence[6].

Similarly, examining witnesses and arranging raids and searches also form an integral part of the investigation. Medical examination of the arrested person also forms a part of the investigation[7].
Generally speaking, the following steps in a criminal case may be deemed to be within the purview of the term 'investigation' under the code:

i. Proceeding to the spot of crime
ii. Ascertaining the facts and the circumstance of the case.
iii. Discovery and arrest of the suspected offenders.
iv. Collection of evidence, examination of various persons including the accused and recording their statements in writing.
v. Search of place or seizure of things considered necessary for the purpose of making out a prosecution case.
vi. Filing of a charge sheet under Section 173 of the code where materialcollected is sufficient to make out a prima facie case against the offender or offenders.

The provision relating to investigation by the police officers are contained in section of criminal procedure code. Under Section 154 of the Criminal Procedure Code this section applies to cases where information is received by police as to commission of a cognizable offence. The object of the FIR is to acquaint the court before which bail application is to be considered and accuses is to be produced[8], with the facts given out immediately after the occurrence of the offence and to safeguard the interest of accused against subsequent additions etc. Thus the loading the FIR sets the criminal law into motion and it has to be appreciated keeping in mind the facts and circumstance of each case.

The information regarding of an offence may be given to police orally or in writing. Where the information is given orally to the officer-in-charge of a police station, it shall be reduced in writing, and read over to the information. First information report has always been considered as a very important document relating to criminal cases. The supreme court in *Ramesh Kumar vs. State of (NCT) Delhi*[9] held that provisions of Section 154 of Cr. P.C is mandatory and the concerned officer of police station is duty bound to register the case on the basis of an information disclosing commission of cognizable offence. Under Section 155 provides that no police officer shall investigate a non- cognizable case without an order of a competent magistrate having power to try such case or commit it for trail. Under Section 156 authorises an officer-in-charge of police station to make an investigation in any cognizable offence without the necessity of an order of a magistrate and it is duty of the investigating officer to bring out real unvarnished truth before the court[10].

The Supreme Court in *S.N. Sharma Vs.Bipin Kumar*[11] observed that the power of the police to investigate any cognizable offence is uncontrolled by the magistrate and it is only in cases where the police decide not to investigate the case, that the magistrate can intervene and either direct an investigate or in the alternative himself proceed or depute a magistrate subordinate to him proceed to enquire into the case. Section 157 provides the procedure for investigation. The investigation in case of a cognizable offence begins when a police-in-charge of a police station has reason to inspect the commission of a cognizable offence on the basis of FIR or any other information so received.

When the police officer has reason to suspect the commission of cognizable offence, he should immediately send a report of the circumstance creating the suspicion to a magistrate having jurisdiction to take cognizable of such offence. The object of sending such report to the magistrate is to keep him informed about the investigation of such cognizable offence by police so that he may be able to control investigation and give appropriate directions under Section 159, if deemed necessary.
Under Section 160 in course of crime investigation, the police may secure the attendance of person who can supply necessary information regarding the commission of the offence. The investigating officer should issue written order addressed to the person is a sought specifying date, time and place where he has to appear for interrogation. Any person required by the investigating officer to attend in connection with investigation of cognizable offence is under a legal duty to comply with the order issued under Section 160(1). A person wilfully or intentionally omitting to attend is liable to punished under Section 174 of Indian Penal Code.

Section 61 empowers the police to examine witnesses during the course of an investigation. Any person who is supposed to be acquitted with the facts and circumstances of the case may be examined orally. The police are supposed to record the oral statement of witnesses which may subsequently be used as evidence in course of trail of the case. It is obligatory for person who is examined by police in course of investigation, to answer the entire question to him truly other than questions the answers to which to which are likely to incriminate him or expose him to a criminal charge. A person who gives false information or deliberately gives untrue answer is liable to be punished under Section 202 and 203 of the Indian Penal Code.

Section 162 protects the person making statement during police investigation under duress or inducement. The code allows police officer to record statement of witnesses with a view to facilitating investigation of the offence. But if such statements are made under duress or inducement, they are rendered inadmissible in evidence because they cannot be said to be free and fair statement made voluntarily. Sub section (1) prohibits an investigation officer from taking the signature of the person questioned when his statement is recorded in writing. Section 174 deals with police to enquire and report on suicide, etc.

Modern technique and reforms of crime investigation:
"Forensic" can be defined as related to court prudence. It means application of law of nature to the laws of man. Typically it embraces all the branches of science and applies them to problems of law. Though its technologies are borrowed from the various scientific disciplines like chemistry, medicine, surgery, biology, photography, maths, etc. But over the years it has developed its own branches like anthropology, ballistic, DNA, fingerprinting entomology, hair and fibres toxicology. Therefore the forensic science investigation play important role in the crime investigation. Forensic science in criminal investigation and trails is mainly concerned with material and indirectly through materials with men, places and time. Among men, the investigating officer is the most important person. He is the person who is expert in this field. In fact, nit is he whose work determines the success or failure of the application of forensic science in the processing of a criminal caseMaterial are identified and compared with the processes of forensic science. They establish the presence or absence of a link between the crime, the criminal, the victim, the place and the time of occurrence[12].

The science of fingerprints, anthropometry, track marks, documents (especially the examination of handwriting) and forensic ballistics essentially belongs to forensic science alone. The investigation techniques of computer crimes have to be varied according to the nature of the crime. However

certain basic aspects may be mention here. The investigation must understand the functioning of the computer, the cyberspace and the internet. He has to be either a computer technologist. Or, he procures the service of computer expert. Identification of voice or sound has always been important. The identification of criminal through fingerprints was the first important break0through in the scientific investigation of crime. As usual the judiciary and the public took some time to believe in the utility of fingerprints as a scientific aid.

The first case in which conviction was based on the basis of fingerprints was a unique attempt at hoodwinking the public at large in 1882. An Argentinean widow, with two live children, wanted to remarry. She found a husband but he would marry her only if she did not bring the children along. She found no way to get rid of the children except by murdering them. She murdered them and raised hue and cry that somebody else had murdered her children. Her fingerprints in blood on the floor nailed her lies. She was convicted for murder. The fingerprints as evidence are important because of the following features of the fingerprints. They are unique, permanent, universal, inimitable, classification and they are frequently available in crime situation as evidence. The culprits approaches, stays and then the scene of occurrence. He leaves tracks marks on and around the place in the form of prints and impressions (collectively called marks) of feet, shoes, tyres and the like. The evidence often connects the criminal with the crime conclusively. The track marks establish not only the presence of the culprits at the scene of crime but also give the number of participants. The most important development in the criminal investigation is the introduced of the DNA in 20th century. The correct identification of criminal and other individuals has always been one of the important problems in criminal and civil investigation. The best and certain method, so far, had been the identification through fingerprints. In all countries, thousand of dead bodies most of which are killed remain unidentified. DNA is helping to reduce the number of such unidentified bodies. In spinner *Vs.* Common Wealth[13], the USA court for the first time gave a guilty verdict based on DNA evidence that resulted in death penalty.

In India, the scientific investigation and evidence is appreciated by courts and acted upon in deciding criminal cases. In *Muktiar Singh vs. State*[14], the Supreme Court accepted forensic science experts evidence produced by the prosecution that the fired cartridges found at the site of occurrence were fired from the rifle recovered. In another case of *Raghubir Singh vs. State of Punjab*[15], the Supreme Court opined that science oriented detection of crime is made a massive programme of police because in our technological age nothing more primitive can be conceived of than denying discoveries of the science as aid to crime suppression and nothing cruder can retard forensic efficiency than swearing by traditional oral evidence only, thereby discovering liberal use of scientific research to prove guilty.
In *State of Rajasthan vs. Narender Kumar*[16]**,** a girl was rape. One evidence was report of forensic science laboratory which confirmed the presence of human semen on the lozenge of the prosecutrix. The court accepted the evidence and decided the case in favour of the state.

With the increase in crime rate there was evolution of many reforms has been made by law for crime investigation. Many departments has been introduce to help the police for reach their aim and to give justice to the victims. Crime investigation department is an apex unit of any police organization. This works as an integral part of the headquarters. CID over a period of time has come to be recognized as CID (crime branch) and (special branch). It works as special investigation agency of the state police. It is responsible for collection, collation, dissemination and analysis of criminal intelligence, maintenance of criminal record and preparation of statistics on various crime matters. It helps and guides district police units in prevention, detection and control of high profile, organized and special nature crimes.

We are leaving in the age of information. Information has obtained the status of power today. Information in the police parlance is called intelligence. One of the important functions of police is to collect intelligence. This intelligence is called as criminal intelligence and general intelligence. The intelligence and the information collected can be used for effective crime prevention, detection and investigation as well as for handling various law and order situation and also in various other areas of policing. The units and the places, which perform these functions, are called crime record Bureaux.

A Crime Record Bureau is an organization, which is primarily manned by technical persons called computer experts like Data Operators, Programmers and Analysts. These experts are categorizing into software and hardware experts. Police officers are also posted to the Crime Record Bureau. Crime data of various types and criminal intelligence play a significant role in prevention, detection and investigation of crimes. It plays an important role in evolving, developing and introducing various integrated police forms, format and return for standardizing and simplifying various crime related data, procedures and systems. The use of computers is responsible for reducing the paper work and it also ensures quick response. It provides useful and effective services for efficient policing and management of crime related issues.

The National Crime Record Bureau (NCRB) was created in 1986. The objectives of NCRB is to function as a clearing house of information on crime and criminals including those operating at national and international levels so as to assist the investigators and other related persons and enable them in linking crimes to their perpetrators and to store, coordinate and disseminate information on inter-state and international criminals from and to respective states, national investigating agencies, court and prosecutors, to collect and process statistical at the national level. To coordinate, guide and assist the functioning of the state crime records bureaux, to provide training facilities to personal of the crime records bureaux, execute and develop computer- based system for police organisation and also carter to their data processing and training needs for computerisation, to function as the National storehouse of fingerprints records of convicted persons including fingerprints records of foreign criminals. CBI is also one of the most important parts of criminal investigation. It helps police for crime investigation.

Mali Math Committee Report:

With the increase of crime in the society and the state's endeavour to control it in n effective way, the government of India, ministry of Home Affairs, constituted a committee on reform of criminal justice system to examine its working and suggest ways and means to improve the whole system of criminal justice administration. The committee was headed by Justice V.S. Mali Math, a former Chief Justice of Karnataka and Kerala High Court. The committee examined in details the two main systems of criminal justice, i.e. adversarial system and inquisitorial system which are followed in France, Germany and other countries. The committee suggested some good points can be adopted in our present system to make it more effective. They are as follows:

i. Right to silence: The committee recommends that without subjecting the accused to any duress, the court should have the freedom to question the accused elicit the relevant information and if he refuses to answer to draw an adverse inference against the accused. This results in great prejudice to the prosecution.
ii. Right to accuse: The accused has several rights and they have been liberty extended by the decisions of the various courts including the Supreme Court. The committee recommended that the accused person should know all his rights and the states should see that these are published in regional languages and are distributed among the accused persons. It recommended certain changes in the area of justice to victims of crime[18].
iii. Police investigation, there is a need to improve the police image and ensure credibility. For this the following changes have been suggested they are
    A. The investigating wing should be separated from the law and other wing
    B. There should be a security commission at national and state level as recommended by the National Police Commission.
    C. In each district a separate police superintendent should be made responsible for collection and dissemination of criminal intelligence.

The Malimath Committee has also recommended certain important changes with regard to prosecution, trial procedure, witnesses and perjury and also explained the role of courts and judges which will help to the images of the police. And recommended some important changes in relation to offence against women[19]. After Malimath Committee the government appointed another committee to submit a draft paper on national policy on criminal justice.

Conclusion

By above discussion we must understand that the modern technique in crime investigation has very significant role which they has to play for the criminal investigation. As we all know that the modern technique of crime investigation helps very much to the police to reach the goal and without these techniques it is impossible to prove the guilty of the offenders. As it is shown itself the importance of these techniques in the system of crime investigation the new dimension has emerged by this technique for the investigation.

Many reforms are made for the improvement of the system of investigation by our law. They helped police by giving appropriate way to find out the culprits. Many suggestions have been given to improve the system of police. And many agents like CBI, CID, CRB, NHRC has been introduced to help the police as well as it helps the victim also. Our Indian law also gives important to the rights of the prisoner like right to education, right to medical aid, sanitation and many more. It shows that our Indian law not only concerned with the victims but also it gives important value to the prisoner also.

References:

1. The Code of Criminal Procedure, Chapters viii, x and xi deal with prevention of offences and chapters ix of the code deals with maintenance proceeding.
2. *R. P. Kapur vs. P.S Kairon*, AIR 1961 SC 1117.
3. *State of Bihar vs. J.A.C Saldhana*, AIR 1980 SC 326.
4. AIR 2009 SC 984(decided along with *J.P Singla and Others vs. State of Punjab and others*).
5. Section 240(2), 246(2) and 228(2).
6. *Balder Singh vs. State of Punjab*, 1975 Cr. L.J 1662.
7. The Code of Criminal Procedure 1973 fourth edition p. no. 10.
8. *State of Assam vs. Raj Khowa*, 1975 Cri. L. J 354 (Assam).
9. AIR 2006 SC 1322 (1324).
10. Dr. N.V. Paranjapee, 'The Code of Criminal Procedure,' 4th edition, (Allahabad: Central Law Agency, p. no. 180).
11. AIR 1970 SC 786.
12. Forensic Science Criminal Investigation and Trails 4th edition p.6
13. 384 S.E. 2d. 775 (1989)
14. A.I.R 1971 S.C. 1864
15. A.I.R 1976 S.C. 91: 1976 Cr.L.J 172.
16. A.I.R 2000 S.C 1812
17. Ahmed Siddiques's, 'Criminology and Penology,' 6th edition, (Lucknow Eastern Book Company, p. 374).
18. Ibid.

Grievance Redressal through Insurance Regulatory and Development Authority of India

Chandrika Sharma*

Abstract

The insurance sector is open to participation by private insurance entities on the recommendation of the Malhotra Committee. This does not mean that the public sector entities do not continue their activities in the insurance sector. After privatization, both public and private sector entities play their roles simultaneously. In this context, financial institutions play a key role in the growth process of insurance. More competitive environment and rapid expansion in insurance sector is expected to emerge with new private participants. The nature and scope of the insurance sector is fast changing with the passing of the IRDA Act 1999.

Introduction

In the last decade of the last century, there was a wave of liberalization in all economic sectors of the country including the insurance sector. By that time, insurance was in the public sector and for recommending changes in the insurance sector, the government appointed a committee in April 1993 under the chairmanship of Sri RN Malhotra, ex-governor of the Reserve Bank of India. This committee on reforms of the insurance sector submitted its report on 7 January 1994 to then Union Finance Minister recommending many changes including privatization. The terms of reference of the committee included a requisition of recommendation, for creating more efficient and competitive financial system suitable for the requirements of the changing scenario of the economy of the country and in particular the examination of the structure of the insurance industry. Recommendations were also sought from the committee for strengthening and modernization of the insurance regulatory system for smooth development of the insurance sector. Far reaching and virulent changes were recommended to supplement the hitherto monopolistic insurers in the arena of the insurance industry.

It recommended far-reaching amendments to regulate the insurance sector to adjust with the economic policies of privatization. The most important recommendations are listed below:

1. Recommendation of the entry of private entities into the insurance sector to introduce healthy competition between the new private insurers and the existing monopolistic entities including limited participation of foreign equity, banking and cooperative sector.

**** Assistant Professor of Ideal Institute of Management and Technology and School of Law (GGSIP University), Delhi.***

2. Recommendation of gradual withdrawal of government capital in the existing public sector monopolistic entities, the Life Insurance Corporation and the General Insurance Corporation and its subsidiaries and also de-linking of the subsidiaries making them independent entities.
3. Recommendation that the General Insurance Corporation would exclusively deal with the reinsurance business.
4. Recommendation to spread the insurance sector to rural areas by taking assistance of institutions like panchayats, selected voluntary organizations, mahilamandals and cooperatives.
5. Recommendation to delink the tariff advisory committee from the General Insurance Corporation and the committee should act as an independent statutory authority.
6. In pursuance of the but most important recommendation of the Malhotra committee the government had taken decision in 1996 to establish a Provisional Insurance Regulatory and Development Authority to replace the erstwhile authority called the Controller of Insurance, constituted under the Insurance Act 1938, which first worked under the Ministry of Commerce and was later transferred to the Ministry of Finance.

The decision for establishment of Insurance Regulatory and Development Authority was implemented by the passing of the Insurance Regulatory and Development Authority Act 1999. The preamble of the Act reads:

An act to provide for the establishment of an authority to protect the interests of holders of insurance policies, to regulate, promote and ensure orderly growth of the Insurance industry and for matters connected therewith or incidental thereto and further to amend the Insurance Act 1938, the life Insurance Corporation Act 1956 and the General Insurance Business (Nationalization) Act 1972.

As can be seen from the above the first and the most important object of the Act are to establish a regulatory authority as recommended by the Malhotra Committee. Every institution where the ownership is divested from its management and the right of the management is vested in body other than the owners, an impartial independent and potent regulatory authority is inevitable. When the insurance industry was a part of the public sector with a monopoly, the owner was a single entity, the government, and in such a case it was sufficient if it is regulated by a governmental body like the Controller of Insurance; but when insurance is to privatized, there is a greater need of a regulatory authority since the smooth functioning of business depends upon the trust and confidence reposed by customers in the solvency of the entity now repose trust in the company to keep the promises it makes, the insurance products pale into insignificance in their value of the

customer-consumers. The regulatory framework in relation to insurance is desired to take care of three main concerns, viz,

a) To safeguard the interest of the consumers;
b) To ensure the financial soundness of the insurance industry, and
c) To pave the way to help a healthy growth of the insurance market, where both the government and private parties play simultaneously.

The need for a strong regulatory authority was not felt so long as insurance remained a monopoly of the government. With the granting of the permission for the private entities to play along with the instrumentalities of the government the need for an independent regulatory authority became paramount. With the passing of the Insurance Regulatory and Development Authority Act 1999 (hereinafter referred as the Authority) this has become reality.

The act is a small enactment containing 32 sections divided into 6 chapters. There are schedules attached to it of which the second and third schedules merely declare that the principle of exclusive dealings of the Life Insurance Corporation and General Insurance Corporation be withdrawn by introducing amendments to S.30 of the Life Insurance Corporation Act 1956 and S.24 of the General Insurance Business(Nationalization) Act 1972 and they read:

After s.30 insert the following:

30A. Exclusive privilege of corporation to cease:

Notwithstanding anything contained in this Act, the exclusive privilege of carrying on the life insurance business in India by the Corporation shall cease on and from commencement of the Insurance Regulatory and Development Authority Act 1999 and the corporation shall, thereafter carry on life insurance business in India in accordance with the provisions of Insurance Act 1938.

Further, the subsidiaries of the General Insurance Corporation were delinked and made independent entities. All these companies have to do insurance business along with new entrants, the private entities. The Insurance Act 1938 as amended by the Act applies to all companies, old and new as amended by first schedule of the 1999 Act. Section 30 of the Act says that The Insurance Act 1938 shall be amended in the manner specified in the first schedule.

The Insurance Regulatory And Development Authority Act 1999

Establishment of IRDA

Chapter 2 of the Act 2 provides for the establishment of the Insurance Regulatory and Development Authority. It declares the Authority to be a body corporate with perpetual succession and common seal. It can hold property, enter into contracts and is entitled to sue and is liable to be sued by its name. The Authority shall have its head office at such a place as the Central Government notifies and it may establish its branches at other places in

India. Section 13 provides for the transfer of all properties rights and liabilities of the Provisional Insurance Regulatory and Development Authority to the present authority.

Composition

The Act states that the Authority should consist of a person, not more than five full-time and not more than four part-time members to be appointed by the Central Government.[1] The chairperson and other members shall hold office for 5 years and are eligible for reappointment. The chairperson shall not be above 65 years and other persons above 62 years. The members are permitted to relinquish their offices and are also liable to be removed from office in accordance with the provisions of Sec 6. The Central Government may remove a member from office if he has or at any time has been adjudged as:

i. An insolvent or (b) has become mentally or physically incapable of acting as a member or (c) has been convicted of any offence involving moral turpitude or (d) has acquired financial interest as is likely to affect prejudicially his functions as a member or (e) has abused his position as to render his continuation detrimental to the public interest. He canonly be removed after providing him just and reasonable opportunity of being heard regarding the matter.
ii. Their salaries and allowances are to be prescribed by rules (s.7). "The chairperson and the whole-time members cannot accept for a period of two years from the time they cease to hold office any government appointment, central or state, or in a company in the insurance sector without previous approval of the Central Government".[2]

Duties, Powers and Functions of the Authority

Duties

The only duty the Authority is to regulate, encourage and certify orderly growth anddevelopment of the insurance and the reinsurance business. This is subject to the provision of the Act and any other law for the time being in force.

Powers and Functions

Section 14(2) describes and delineates the powers and functions mentioned therein are not exhaustive and the Authority reserves its powers to add to the list s.14(2)

a. It has power to issue any kind of certificate of registration, modification, renewal, withdrawal, cancellation or suspension of such registration.
b. It also has the duty to protect the interest of policyholder particularly in matters pertaining to assignment of policy, nomination by holders of policy, insurable interest, and surrender value of policy, clearance of insurance claim and other conditions and further terms of the policy or contracts of insurance.
c. It also specifies requisite qualifications, particular training or code of conduct for the rights or intermediaries or insurance intermediary.
d. It further specifies the conduct for the surveyors and loss assessors.

e. It promotes the professional organization connected with the business of insurance and also it regulates this organization.
f. It promotes the efficiency in the conduct of business of insurance.
g. It levies fees and other charges for the purpose of this act.
h. It also conducts inspection, calls for information and also investigates the matter related to insurance business.
i. It handles investment of funds by the companies of insurance business.
j. It regulates the solvency margin
k. It adjudicates the disputes between insurers and intermediaries.
l. It also supervises the functioning of the Tariff Advisory Committee.

The Act by amending the Insurance Act in effect transfers all the powers and duties hitherto enjoyed and discharged by the Controller to Authority.

Finance and Accounts

Chapter 5 deals with finance, accounts and audit of the Authority. Section.15 provides that the Central Government may grant such sums of money as the government may think necessary. Further, it is provided in S.16 that a fund may be created and called 'The Insurance Regulatory and Development Authority Fund' and consists of:

a) The government grants, fees and charges received by the Authority
b) All amounts received by the authority from other sources as it may be decided by the Central Government.
c) The prescribed premium percentage of income received from the insurer.

The funds shall be utilized for the payment of salaries, allowances, etc. of the members and other employees of the Authority and other expenses of the Authority incurred in discharging its functions. The Authority shall maintain proper accounts and accounts of the Authority shall be audited by the Comptroller and Auditor-General of India or his nominee.

Power of the Central Government

Chapter 6, though captioned as miscellaneous, still contains very important provisions. Sections 18-20 preserves the control of the Central Government over the Authority which intends to control the insurance sector. By Section 18 the Central Government is secured of the power to give direction to the Authority on the question of policy, usuallynot relating to technical and administrative matters and clause 2 provides that the decision of the Central Government is final on the question as to whether a particular matter is one of the policy or not.

Supersession: The Central Government is also invested with the power to supersede the authority by notification in the official gazette when the Authority does not discharge its duties properly or defies the directions of the Central Government. On the notification of the supersession of the chairman, the members should vacate their offices and new

Authority may be constituted. There is no prohibition for nominating the vacating members as the chairperson of the newly appointed authority.

Parliamentary Control: The ultimate control is vested with Parliament by requiring the notification of supersession and the full report of the action is therefore, to be laid before each Houses of Parliament at the earliest. A duty is cast under S.20 on the Authority to furnish an annual report of its activities including the activities for promotion of the development of the insurance business during the previous financial years and copies of these reports shall be laid before each house of Parliament.

Interim Arrangements: "If at any time, the Authority is superseded under sub-s (1) of S.19 of the Insurance Regulatory Authority Act, 1999, the Central Government may, by notification in the official gazette, appoint a person to be the controller of Insurance till as such time the Authority is reconstituted under sub-s 3 of s.19 of the Act.
In making any appointment under this section, the Central Government shall have due regard to the following considerations, namely, whether the person to be appointed has had experience in industrial, commercial or insurance matters and whether such person has actuarial qualifications"[3].

Insurance Advisory Committee

The Act is s.25 also provides for establishment of an Insurance Advisory Committee. The Chairperson and members of the Authority shall be ex-officio members of the advisory committee. The concerned committee shall consist of not more than 20 members to represent the interest of commerce, industry, consumer fora, agents, transport, intermediaries, research bodies and surveyors engaged in the study of loss and safety. It shall advise the Authority in making regulations and on such other prescribed matters.

Rule Making Power

Section 24 empowers the state and Central Governments to make rules and S.26 empowers the Insurance Regulatory Authority to make regulations on the subjects mentioned in the respective sections. The rules and regulations so made shall be laid before each House of Parliament. Section 28 makes it clear that the provisions of the Act shall be in addition to and not in derogation of any law for the time being in force.[4] Three schedules are attached to the Act making amendments in the Insurance Act 1938 in Schedule 1, the Life Insurance Corporation Act 1956 in Schedule 2 and the General Insurance Business (Nationalization) Act 1972 in Schedule 3. The second and third schedules contain only one section each, which abolish the exclusive privilege of the Corporations- of conducting life insurance business by LIC (s 30) and general insurance business by the GIC and its subsidiaries (s 24A) and directing them to conduct their respective business in India. In accordance with the provisions of the Insurance Act 1938, they are not abolished but their sole privilege to run the business is withdrawn. These entities have to carry on the business side-by-side

with the newly permitted private entities. It is made possible for the private entities even to collaborate with foreign investors within certain limits and subject to certain conditions. In the emerging scene of the gradual privatization it is rightly felt that there should be government regulation through an independent authority and so the Insurance Regulatory Authority originally set up provisionally, is no permanently constituted under the Act. It is but proper in view of the change that there should be greater control to safe-guard interests of the policy holders and to improve the methods of conducting the insurance business in India. The first schedule introduces a good number of amendments to the Insurance Act 1938. Particularly to shift all the powers and duties of the Central Government , the Controller of Insurance and to a limited extent the Insurance Tariff Commissioner to the chairperson of the Insurance Regulatory Authority. The Insurance Regulatory Authority is empowered to make Regulations under section 32, and section 114A of the Insurance Act 1938 and under Section 26 of the Insurance Regulatory and Development Authority Act 1999 on matters specified in the respective sections. Under section 26, the Insurance Regulatory and Development Authority can make regulations on the advice of the Insurance Advisory Committee. The Insurance Regulatory and Development Authority is to insurance law what SEBI is to company law. Both make regulations which by the doctrine of delegated legislation have the same force as law made by the Parliament itself. Both the Central Government and Parliament exercise control over this part of the law.

Conclusion

The proposal of Law Commission in the consultation paper for establishment of 'Grievance Redressal Authority' & 'Insurance Appellate Tribunal' is most appropriate and will go a long way in strengthening the insurance Industries credentials as caring, concerned and consumer friendly organisation. This setup will enhance credibility of Insurance Industry & its various stake holders by insulating the industry from the unnecessary public gaze and provide justifiable decisions in the mutual interest of customer & service providers.

The scope of 'Grievance Redressal Authority' to adjudicate 'only personal lines disputes' lacks logic. The complaints of all stake holders irregardless of any specific segment of Insured's, (not only the existing insured customer but prospective customers) insurer's, and intermediaries need be brought under the ambit of the IGRA to make it truly Insurance Grievance Redressal Authority'.

At present the insured can avail any of the three alternatives namely, the Insurance Ombudsman, Consumer Redressal Agencies and the Civil Courts without resorting to the process of Mediation, Conciliation or Arbitration already existing as alternative dispute resolution machinery. The introduction of IGRA will replace three mechanisms with limited scope of each by one Comprehensive mechanism.

The insurance Grievance Redressal Authority may be asked to explore both complainant and respondent to make sincere and serious efforts through In-house grievance redressal

machinery and other available alternative dispute resolution mechanism for resolving their complaints before invoking the jurisdiction of Insurance Grievance Redressal Authority.
The Insurance Companies may also be advised by IRDA to make use of alternative dispute redressal mechanism viz. Mediation, Conciliation or Arbitration before taking the dispute to any statutory mechanism. It is heartening to note that the IRDA has constituted a 'Grievance Committee' in 2006 to review grievance redressal system in Insurance Industry. This committee may be asked to consider the legislature's intensions clarified u/s 89 of Civil Procedure Code and Supreme Court'sdirectives in Salem Bar Association vs. Union of India directing the High Courts to make use of ADR's consciously by framing necessary rules & procedures as making reference to mediation, conciliation and arbitration are mandatory for Courts. The Law commission may think of legally empowering 'Insurance Grievance Redressal Authority', by including a provision to explore Mediation, Conciliation & Arbitration process. Further as per Sec 77 of Arbitration & Conciliation Act 1996 once Conciliation is in progress Insurance Grievance Redressal Authority must also provide for barring the parties to approach Arbitration or any other additional redressal machinery.

The idea of replacing the institution of 'Insurance Ombudsman' and transfer of all pending cases in Consumer Courts to a statutory mechanism provided for in the insurance Act 1938 itself. Taking a step further, the appeals emanating from IAT must go to a Settlement Commission instead of resting with Supreme Court, which has again limitation of monetary limits and disputes of legal points only meeting the Supreme Court's Jurisdiction. This system is akin to Central Board of Direct Taxes where the finality of decision rests with the Settlement commission being manned by the officers of the department with judicial background.

The suggestion of IRDA Chairman, for a dispersed non-judicial mechanism administered as Consumers' Pre Grievance Help Bench, akin to establishing a Call Centre, is a positive step to improve the image of the industry as a responsive industry. The pre grievance help bench can be constituted in the form of AVRU (audio visual response unit) viz. Interactive voice response system or establishing kiosks or direct reply from regulator towards frequently asked questions by insured to avail services.

Suggestions
IRDA (Protection of Policy Holders Interests) Regulations 2002 are prescriptive in nature in regard to procedures to be followed by various stakeholders of industry. The stipulation for initiating action has not been put forward in the form of penalties leaving the regulations merely advisory. The Adjudicating Officers proposed by Law Commission for IRDA to enforce Act provisions, rules, regulations, may include guidelines for penal action to induce transparency in working of the regulator.

As regard to prescription given for Policyholders in Regulations. IDRA may direct Insurance Companies to include the provisions of the clause 9 (2 & 3) in the Policy Contract to create obligation on the part of insured to comply. Similarly Clause 7 in respect of matters to be stated in General Insurance Policy may be made part of "file and use" system for its proper implementation by Insurers.

As regards to creating awareness about various redressal machinery by communication of information, the provision must be made on the face of the policy for additional dispute resolution machinery available for review/ in-house redressal/mediation/conciliation & arbitration with explicit specification of time limits. As the setting up of Insurance Grievance Redressal Authority would entail amendment to various supplementary Laws, the 'Grievance Review Committee' formed by IRDA must also suggest for enacting "Insurance Business Laws" which will reduce ambiguity in understanding insurance contracts, rules & regulations, definitions by clarifying application of insurance principles evolved over past two centuries of judicial interpretations in addition to Law of contract. This step will reduce customer dissatisfaction and will make the insurance business more transparent.

References:

[1] Section 4, IRDA Act.
[2] Section 8.
[3] IRDA, Act,1999, available at: https://www.irda.gov.in/ADMINCMS/cms/frmGeneral_Layout.aspx?page=PageNo108&flag=1&mid=Insurance%20Laws%20etc.%3E%3EActs.
[4] Section 28, IRDA Act 1999.

Languages in Administration of Justice

Gunjan Agrahari*

As we all know that without linguistic inclusion, social and economic inclusion is not possible. English language has not only come to occupy an indispensable and irreplaceable status in the country but has also become a world language. Language being the most important medium of communication and education, its development occupies an important place in the National Policy on Education and Programme of Action. Therefore, promotion and development of Hindi and other 21 languages listed in the schedule VIII of the Constitution including Sanskrit and Urdu has received due attention. In fulfilling the constitutional responsibility, the Department of Higher Education is assisted by autonomous organization and subordinate offices.

The Language Policy of India relating to the use of languages in administration, education, judiciary, legislature, mass communication, etc., is pluralistic in its scope. It is both language-development oriented and language-survival oriented. The policy is intended to encourage the citizens to use their mother tongue in certain delineated levels and domains through some gradual processes, but the stated goal of the policy is to help all languages to develop into fit vehicles of communication at their designated areas of use, irrespective of their nature or status like major, minor, or tribal languages.

The policy can accommodate and ever-evolving, through mutual adjustment, consensus, and judicial processes. Evolving and monitoring implementation of language policy is a major endeavor of the Language Bureau of the Ministry of Human Resource Development, Government of India. This is done by the Bureau through language institutions setup for the purpose under its aegis: Central Hindi Directorate, Centre for Scientific and Technical Terminology, Central Hindi Institute, Central Institute of Indian Languages, National Council for Promotion of Sindhi Language, National Council for Promotion of Urdu Language, Rashtriya Sanskrit Sansthan (RSKS), Maharishi Sandipani Rashtriya Vedavidya Pratishthan (MSRVVP), Central Institute of English and Foreign Languages.

Modern India, as per the 1961 Census, has more than 1652 mother tongues, genetically belonging to five different language families. The 1991 Census had 10,400 raw returns of mother tongues and they were rationalized into 1576 mother tongues. They are further rationalized into 216 mother tongues, and grouped under 114 languages. Out of the total population of 1,028,610,328 for India, the balance of 1,762,388 (0.17%) Speakers are "Total of Other languages" other than Scheduled and Non Scheduled languages.

**** Assistant Professor (Law), Jagran School of Law, Dehradun, Uttarakhand.***

If Supreme Court and High Courts are to switch over to Hindi, what advantage will such a change bring for Indian judiciary? Language is a highly emotional issue for the citizens of any nation. It has a great unifying force and is a powerful instrument for national integration. No language should be thrust on any section of the people against their will since it is likely to become counterproductive. It is not merely a vehicle of thought and expression, but for Judges at the higher level, it is an integral part of their decision-making process Judges have to hear and understand the submissions of both the sides, apply the law to adjust equities. Arguments are generally made in higher courts in English and the basic literature under the Indian system is primarily based on English and American text books and case laws. Thus, Judges at the higher level should be left free to evolve their own pattern of delivering judgments. It is particularly important to note that in view of the national transfer policy in respect of the High Court Judges, if any such Judge is compelled to deliver judgments in a language with which he is not well versed, it might become extremely difficult for him to work judicially.

On transfer from one part of the country to another, a High Court Judge is not expected to learn a new language at his age and to apply the same in delivering judgments. At any rate no language should be thrust upon the Judges of the higher judiciary and they should be left free to deliver their judgments in the language they prefer. It is important to remember that every citizen, every Court has the right to understand the law laid down finally by the Apex Court and at present one should appreciate that such a language is only English. The use of English language also facilitates the movement of lawyers from High Courts to the Apex Court since they are not confronted with any linguistic problems and English remains the language at both the levels. Any survey of the society in general or its cross-sections will clearly substantiate the above proposition which does not admit of much debate, particularly in the present political, social and economic scenario.

Judgements of the Supreme Court and High Courts of India are read and sometimes quoted before High Courts and Supreme Courts of other countries in the world. Such being the case, if the Supreme Court and High Courts are to deliver judgements in Hindi, the people in the south and the eastern regions including the learned members of the Bar and the Judiciary will not be able to know the judgements delivered in Hindi by the Supreme Court and High Courts except through translations in English of those judgements. Lawmakers can allow another language in a High Court, but so far only four High Courts—in the states of Rajasthan, Bihar, Uttar Pradesh, and Madhya Pradesh—have done so, in each case with Hindi. Article 348 of the Constitution mandates that all proceedings in the Supreme Court and in very High Court shall be in English language until Parliament otherwise provides by law. The question is whether Parliament should provide a different language for the Supreme Court and the High Courts when English is being followed for the last 59years. It is a historical advantage gained by the Indian judicial system to have the use of a language which is almost the language of the Judicial world now. That apart, when computers have adopted English as the medium of transmission, we should not divest ourselves of the

benefit of that language. English language has now ceased to be a mere mother tongue of the small country of England.

A PIL was filed by Shiv Sagar Tiwari, a lawyer who claimed that using English as an official language in higher judiciary was "a legacy of the British rule" which should be scrapped. The government shot down the idea of amending the Constitution to make Hindi the official language for conducting court proceedings in higher judiciary, and relied upon a 216th report by the Law Commission in this regard. While it summarily rejected the proposition to consider use of Hindi in the Supreme Court, the government highlighted that Clause (2) of the Article 348 already laid down an enabling provision whereby the Governor of a state, with the previous consent of the President, may authorise use of Hindi language in the proceedings of the high court in that state. Allahabad, Patna, Madhya Pradesh and Rajasthan High Courts have been using Hindi as an optional language.

Article 348 which provides Language to be used in the Supreme Court and in theHigh Courts and for Acts, Bills, etc. of the Constitution may be amended to enable the Legislative Department to undertake original drafting in Hindi. After the amendment of Article 348 of the Constitution, High Courts/Supreme Court should be asked to start delivering their judgments and decrees etc. in Hindi so that large number of Government Departments, who are carrying out judicial/ quasi-judicial functions, could be able to deliver orders in Hindi. At present, these departments are unable to pass orders in Hindi, because the appeal against their orders in High Courts/Supreme Court would have to be conducted in English.

Article 343 of the Constitution mandates that the Official Language of the Union shall be Hindi in Devanagari script. Notwithstanding the same, Clauses (2) and (3) thereof permit the use of the English language for the extended periods specified therein. It is therefore clear that Article 348(1) supersedes Article 343.Clause (a) of Article 348(1) posits that the language to be used in the Supreme Court shall be English until Parliament by law otherwise provides. (*Madhu Limaye vs. Ved Murti* AIR 1971 SC 2608).

It is also argued that the duties casted by Article 351(Directives for development of hindi language) has remained unfulfilled. The ultimate aim as provided in Article 351 is the spread and development of Hindi language and enrichment of the composite culture of India. Articles 343 and 344 deal with the process of transition to the use of Hindi for all official purposes of the Union and to determine the pace of progress to achieve the same. The overriding concern of the founding fathers of the Constitution as can be discerned also from the Constitution assembly debates is, not to impose the use of Hindi on the peoples speaking other Languages against their wishes.

Analysis of the aforesaid provisions clearly indicates that it starts with a non-obstante clause, i.e., irrespective of what has been stated under Articles 343, 344, 345, 346 and 347. Thus, in other words, this Article has been given a pre-dominant importance. The most

vital part of Clause (1) of this Article is "until Parliament by law otherwise provides". Thus, the entire Article is based on the assumption that anything to the contrary could be provided by Parliament by law. It is also clear that, no special majority has been provided for Parliament, and, in fact, any ordinary law made by the Parliament will supersede all the provisions of the three Clauses of this Article. Thus, the Parliament has been given the over-riding rights under the Article. In view of the scheme of the said Article, as stated above, in my considered view, there is absolutely no necessity for amending Article 348 to enable the Legislative Department to undertake original drafting in Hindi.

The Legislative Department, in fact, is subsidiary wing of Parliament and thus even without amending the Constitution, the desired result may be obtained. However, whether even Parliament should undertake such an exercise is an altogether different matter and regarding that I have already made my submissions in the earlier part of my report, which may kindly be perused. Moreover, our political system is based on the British Model of Cabinet Form of Government and there is a total cohesion between the two wings of the Government, namely, the Legislature and the Executive. Assuming without admitting that the Legislative Department belongs to Executive Wing, it presents no difficulty whatsoever, since the Executive can make a recommendation to the Parliament to make such a law under Article 348 and the advice of the Cabinet would be binding on the President and a law will have to be made by the Parliament on the basis of the said advice.

Thus, even this hypothesis creates no fetters for the Parliament to make the intended law. A closer look at various Articles contained under Part XVII, namely, Official Language, clearly reveals that the aforesaid power of the Parliament is not circumscribed by any other subsequent Article of the said Part. On the other hand, the multiple disadvantages which it might bring forth would even paralyse the judicial system, because ninety percent of the advocates belonging to the High Court of southern states cannot transact any legal work in Hindi. Not even one stenographer is available in many states of the High Courts in southern states who can take down dictation in Hindi much less to transcribe them into manuscripts.

All the law books remaining in various High Courts including all the law journals are in English language and translation of all those books would involve crores of rupees. When we do not have sufficient money to meet the urgent needs of the poor people, it would be a waste of public money in spending whopping sum simply for satisfying a few of the linguistic jingoists. That apart, a switch over from English to Hindi in the High Courts and the Supreme Court of India will create political and legal unrest throughout the country which is an avoidable exercise." Centre might have pushed for use of Hindi as the preferred official language in various ministries and other public offices, but the higher judiciary is evidently out of its net.

References:

1. 216th Law commission Report, December 2008, Government of India
2. M.P. Jain, Indian Constitutional Law, Seventh Edition (New Delhi: LexisNexis, 2015)
3. H.M. Seervai, Constitution of India, Fourth Edition (New Delhi: Universal Law Publishing Volume 3, 2015) .
4. V N Shukla, Constitution of India, 11th Edition (Lucknow: Eastern Book Company, 2008).

Legal Research Methodology & its Importance

Dr. Pradeep Kumar*

Introduction

Research is a logical and systematic search for new and useful information on a particular topic. In the well-known nursery poem:

Twinkle Twinkle Little Star
How I Wonder, What You Are

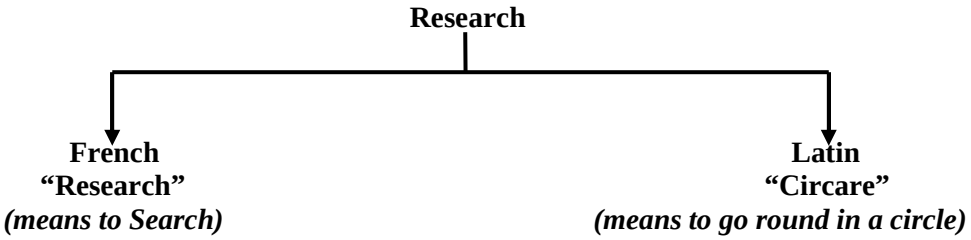
The use of the words how and what essentially summarizes what research is. It is an investigation of finding solutions to scientific and social problems through objective and systematic analysis.

Legal research is one of the aspects of study of human behavior. Legal research tries to establish causal connection between various human activities. The legal research also deals with the social and behavioral phenomena. Research is an enquiry for the verification of a fresh theory or for supplementing prevailing theories by new knowledge.

Conceptual Framework

Research

Research means an act of searching into a matter carefully and closely. The term research consists of two words, '*Re*' & '*Search*'. "Re" means again and again and "Search" means to find out something.



According to Advance Lerner's Dictionary of Current English

Research is a careful investigation or inquiry especially through search for new facts in any branch of knowledge.

According to Webster's Twentieth Century Dictionary

**** Head of Department, Jagran School of Law, Dehradun, Uttarakhand.***

Research as a careful, patient, systematic, diligent inquiry or examination in some field of knowledge undertaken to establish facts or principles.

According to L.V. Redman and A.V.H. Morry
Research as systematised efforts to gain knowledge.

According to Kerlinger
"Research as a systematic, controlled, empirical and critical investigation of hypothetical relations among natural phenomena".

According to Black and Champion,
"Scientific research consists of obtaining information through empirical observation that can be used for systematic development of logically related propositions attempting to establish casual relations among variable".

According to Dr. P.V. Young
Research is a scientific undertaking, aiming to discover new facts or verify old facts, analyse their sequences, interrelationship and causal explanations derived within an appropriate theoretical frame of reference, develop new scientific tools, concept and theory which would facilitate reliable valid study of human behavior. It is done by means of logical and systematised techniques.

Objective and function of Legal Research

1. **Where there is Law**--------the objective of legal research is to find the weakness of Law.
2. **Where there is no Law**------the objective of legal research is to prepare a draft of law and also to suggest a law on issues or facts for which there is no law in existence.
3. **Where there is Law but not working**------the objective of legal research is to identify the advantage or disadvantages of certain aspects of law, with a view to suggesting ways for improvement, such as a comparison between adjudication and arbitration as a means of conflict resolution, in a particular context, or a comparison between the development of law through cases and statutory law in a given situation.
4. **Where there is some conflict in Law**------the objective of legal research is to try to solve the problem, and examine whether and what changes would be needed to achieve better result, such as the working of an industrial tribunal.

Legal Research
Legal research is indeed society and determines the economic, social and political development of a nation. Legal research is one of the aspects of study of human behavior, their interactions, and attitudes leading to any law under the research study. Legal Research means research is that branch of knowledge which deals with the principle of law and legal institution. Legal research usually refers to any systematic study of legal rules, principle,

concepts, theories, doctrines, decided cases, legal institutions, legal problems, issues or questions or a combination of some or all of them.

Techniques of Legal Research

The objective of legal research is to analyse the human behavior in the present day society and hence, legal research must be directed to the study of the relationship between the world of the law and world that the law purports to govern. Apart from various techniques of research that is mentioned before the legal research can be broadly classified into doctrinal and empirical research (non doctrinal).

Doctrinal Research

A research based on analysis of case laws, statutes, by applying logic and reasoning power is Doctrinal research. Doctrinal research involves analysis of case law, arranging, ordering and systematizing legal propositions and study of legal institutions through legal reasoning or rational deduction.

According to Dr. S.N. Jain doctrinal research involves analysis of case law, arranging, ordering and systematizing legal propositions and study of legal institutions through legal reasoning or rational deduction.

Empirical Research

Empirical research is a way of gaining knowledge by means of direct and indirect observation or experience. Empirical research is carried on the basis of facts and data available through primary and secondary sources.

Various Stages of a Research

1. Selection of a research topic
2. Definition of a research problem
3. Literature survey and reference collection
4. Assessment of current status of the topic chosen
5. Formulation of hypotheses
6. Research design
7. Actual investigation
8. Data analysis
9. Interpretation of result

Citations Methodology

There are many ways to document one's research. Whichever method you choose, it is important to follow a format that is clear and consistent. When we write an article, dissertation, thesis, book or any other legal papers, we often use ideas, opinions or information found in various sources such as articles, books, reports, translated works, decided cases, laws passed by legislatures. A proper citation of legal documents or other source materials ensures that the work is free from plagiarism.

In the field of law, there are differences in the style of citation followed in Commonwealth countries and those found in the source of citation published in the United Nation. The mode of citation recommended in the *Harvard Blue Book method* and the *APA style Manual* is perhaps the closer to the method followed in Commonwealth countries in the field of law.

Citation is a reference to a published or unpublished source (not always the original source). A citation is an abbreviated alphanumeric expression embedded in the body of an intellectual work that denotes an entry in the bibliographic references section of the work for the purpose of acknowledging the relevance of the works of others to the topic of discussion at the spot where the citation appears.

Purpose of Citations

There are three main reasons to include citations in your papers:

1) To give credit to the authors of the source materials you used when writing the paper.
2) To enable readers to follow up on the source materials.
3) To demonstrate that your paper is well-researched.

Bibliographies

A bibliography lists all of the references you used to create a research paper. The bibliography appears at the end of the paper, after the endnotes, if any. If you have included footnotes or endnotes and source lines in your research paper, then you do not need to include a bibliography unless your professor has requested one.

Bibliographies have the following formatting conventions

1) The first author's name is inverted (Surname first), and most elements are separated by periods.
2) Entries have a special indentation style in which all lines but the first are indented.
3) Entries are arranged alphabetically by the author's Surname or by the first word of the title if no author is listed.

Footnotes and Endnotes

Footnotes and endnotes have the same function—to cite the exact page of a source you refer to in your paper. The only difference between footnotes and endnotes is placement: footnotes appear at the bottom of the page, whereas endnotes appear at the end of the document.

Harvard Blue Book method Citation

Mode of Citation for Books

Single author

Footnote

- M.P. Jain, *Indian Constitutional Law* (Calcutta: Kamal Law House, 5th edn., 1998), p. 73.

Bibliography

- Jain, M.P., *Indian Constitutional Law*. Calcutta: Kamal Law House, 5th edn.,1998.

Two authors

Footnote

- M.P. Jain and S.N. Jain, *Principles of Administrative Law* (Nagpur: Wadhawa, 2001). p. 73.

Bibliography

- Jain, M.P. and Jain, S.N., *Principles of Administrative Law*. Nagpur: Wadhawa, 2001.

Mode of Citation for Articles

Footnote

- Dr. Pradeep Kumar, "Live in Relationship Neither a Crime nor a Sin: A Study with Reference to Right to Marriage" *Journal of Legal Studies*, Vol. 2, Issue II, July 2014, pp.46-61.

Bibliography

- Kumar, Dr. Pradeep, "Live in Relationship Neither a Crime nor a Sin: A Study with Reference to Right to Marriage" *Journal of Legal Studies*, Vol. 2, Issue II, July 2014, pp.46-61.

News Paper

Footnote

- "Raising Taxes on Private Equity," *The New York Times*, June 26, 2007, p. E6.

Bibliography

- *The New York Times*, "Raising Taxes on Private Equity," June 26, 2007, p. E6.

Websites

- Pradeep Kumar, Patient's right vis-a-vis Medical Negligence: an overview of Right to Health as a Human Right, available on http://www.freewebs.com/manab/7.pdf, accessed on 13 January, 2016 at 02:05 Pm.

Mode of Citation of Case Law

- *Kesavananda Bharati vs. State of Kerala* (AIR 1962 SC 933).
- *Maneka Gandhi vs. Union of India* (AIR 1978 SC 597).

Acts

- The Information Technology Act, 2000 (Act No. 21 of 2000).

- The Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005).
- Right to Information Act, 2005 (Act No. 22 of 2005).

Reports

- Law Commission of India, 144th Report: Conflicting Judicial Decisions Pertaining to the Code of Civil Procedure, 1908 (April, 1992).
- Government of India, Report: Committee on Reforms of Criminal Justice System (Ministry of Home Affairs, 2003).

Importance of Legal Research

Legal research begins with the analysis of the facts of a problem and concludes with the result of the investigation. The purpose of legal research is to explore the possibilities of improving the existing law to make it more effective and result oriented and to suggest a law on issues or facts for which there is no law in existence.

1) Legal research tries to established casual relationship between various human behaviors.
2) Legal research tries to give solution to legal problems.
3) Testing of concept by collecting legal facts of a particular area.
4) To analyze the consequences of new Law.
5) To analyze the Laws into new theoretical framework.
6) To critically analyze the law.
7) To develop new legal research tools & Concepts.
8) To discover new facts.
9) To evaluate Law from historical perspective.
10) To explain nature and scope of law.
11) To test & verify old facts.

Conclusion

Thus we can say that research methodology is a way to find out the result of a given problem on a specific matter or problem that is also referred as research problem. In research methodology, researcher uses different criteria for solving/searching the given research problem. Further, in research methodology, researcher always tries to search the given question systematically in our own way and find out all the answers till conclusion. If research does not work systematically on problem, there would be less possibility to find out the final result.

References:

1. Harvard Business School Citation Guide, 2009 – 10 Academic Year, October 2009.
2. The Chicago Manual of Style, 15th ed. (Chicago: University of Chicago Press, 2003).
3. Dr. S.N. Jain, Legal Research & Methodology, 14 *JILI* 487, 491 (1972).

4. C.R. Kothari, *Research Methodology: Methods and Techniques* (New Delhi: New Age International (P) Limited, Publishers, 2004).
5. V. Pauline Young, *Scientific Social Surveys and Research,* 3rd ed., (New York: Prentice-Hall, 1960).
6. B.N Ghosh, *Scientific Methods and Social Research,* (New Delhi: Sterling Publishers Pvt. Ltd., 1982).
7. M.H., Gopal, *An Introduction to Research Procedure in Social Sciences,* (Bombay: Asia Publishing House, 1964).
8. B.C., Tandon, *Research Methodology in Social Sciences,* (Allahabad: Chaitanya Publishing House, 1979).
9. Shipra Agarwal, *Legal Research Methodology,* (Faridabad: Allahabad Law Agency, 2012).
10. Dr. Mona Purohit, *Legal Education & Research Methodology*, (Allahabad: Central Law Publication, 2014).
11. Prof. Tushar Kanti Saha, *Legal Methods, Legal Systems & Research*, (New Delhi: Universal Law Publication, 2010).
12. Dr. Vinay N. Paranjape, *Legal Education & Research Methodology*, 5th Edition (Allahabad: Central Law Agency, 2012).
13. Dr. S. R. Myneni, *Legal Research Methodology,* (Faridabad: Allahabad Law Agency, 2012).
14. Upendra Baxi, 'Socio-legal Research in India--A program', ICSSR, Occasional Monograph, 1975.