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Executive Editor & Managing Director
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Changing Paradigm of Sovereignty in International Law: An Analysis

Dr. Gurpreet Singh[1]

Sovereignty is a key element of a state. The other three essential elements of a state are fixed territory, government and population.[2] According to the Montevideo Convention, a state must have capacity to enter into relations with the other states.[3] This capacity is known as 'sovereignty' in common parlance. The dictionary means of sovereign is 'without limit; highest'. It is an attribute of a state which is 'fully independent and with complete freedom to govern itself'.[4] Austin defines sovereignty as,

"If a determinate human superior, not in the habit of obedience to alike superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society, (including determinate superior) is a society political and independence."[5] In Max Huber's wording, *"Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other state, the functions of a state."*[6] According to Hans J. Morgenthau, *"Sovereignty points to a political fact. The fact is the existence of a person or group of persons who within the limits of a given territory, are more powerful than any competing person or group of persons and whose power, institutionalised as it must be in order to last, manifests itself as the supreme authority to enact and enforce legal rules within that territory."*

The Permanent Court of International Justice defines sovereignty in Wimbledon case as sovereignty means that the state *"is subject to no other state and has full and exclusive powers within its jurisdiction without prejudice to the limits set by applicable law."* Sovereignty in this sense is a legal term, not implying either full *de facto* autonomy or effectiveness. It confers the *right* to act independently and with full domestic authority, not necessarily the ability to do so.[7] Mohammed Ayoob defines sovereignty as 'authority' since both internal control and external autonomy wax and wane in the real world of politics. Such a definition accepts that sovereignty has internal and external dimensions.[8]

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1 ***Assistant Professor, Faculty of Law, University of Delhi, Delhi.***

2 Montevideo Convention on the Rights and duties of States: Art.1 defines the characteristics of a state, *"The State as a person of international law should possess the following qualifications:(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States."*

3 *Ibid.*

4 Jonathan Crowther, Oxford Advanced Learner's Dictionary (5th ed. 1996).

5 S.K. Kapoor, International Law and Human Rights 124 (15th ed. 2005).

6 Max Huber, Island of Palmas Arbitration. *See Also* AJIL, VOL. 22, 875 (1928).

7 *See* Permanent Court Of International Justice, Series A, NO.1 (1923).

8 Mohammed Ayoob, *Humanitarian Intervention and State Sovereignty* 6, No. 1, The International Journal Of Human Rights 81-102 (Spring, 2002).

However, the above given definitions can be questioned in the context of the modern state. Since the Westphalian sovereignty is no more acceptable as international law puts many restrictions on the absolute sovereignty of a state, therefore, it is necessary to define the concept of sovereignty in modern contest.[9] The principle of sovereignty is not a rule of public international law which could be directly applied to factual situations. It is rather a 'principle' from which certain legal rules of customary international law, such as state immunity or the prohibition of intervention, have evolved in the context of competing principles.[10] In the modern notion, sovereignty is associated with political authority.[11]

Divisions of Sovereignty in the Present Global World

Whether, sovereignty is indivisible is a very pertinent question which can be raised in the context of the present globalised world in which complexities of inter-dependent world and compulsions of politics dominate and means of communication and transportation have made the world as a global village. In such scenario, whether a state can claim that it has absolute sovereignty and can do whatever it likes.

The basically sovereignty has three dimensions: the holders of sovereignty, the absolute or non-absolute nature of sovereignty, and the relationship between the internal and external dimensions of sovereignty. As suggested, diverse authorities have held sovereignty kings, dictators, peoples ruling through constitutions, and the like. The character of the holder of supreme authority within a territory is probably the most important dimension of sovereignty. [12]

However, some scholars argue that sovereignty can also be absolute or non-absolute. How is it possible that sovereignty might be non-absolute if it is also supreme? After all, scholars like Alan James argue that sovereignty can only be either present or absent, and cannot exist partially.[13] But here, absoluteness refers not to the extent or character of sovereignty, which must always be supreme, but rather to the scope of matters over which a holder of authority is sovereign. Bodin and Hobbes envisioned sovereignty as absolute, extending to all matters within the territory, unconditionally. It is possible for an authority to be sovereign over some matters within a territory, but not all.

A final pair of adjectives that define sovereignty is "internal" and "external." In this case, the words do not describe exclusive sorts of sovereignty, but different aspects of

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9 *See* It was at the Peace of Westphalia in 1648 that Europe consolidated its long transition from the Middle Ages to a world of sovereign states. The Westphalian sovereignty is based on a series of peace treaties signed between May and October 1648 in Osnabrück and Münster which ended the Thirty Years' War (1618–1648) in the Holy Roman Empire, and the Eighty Years' War (1568–1648) between Spain and the Dutch Republic, with Spain formally recognizing the independence of the Dutch Republic. It is also known as the 'Peace of Westphalia'

10 Bruno Simma, The Charter Of The United Nations: A Commentary 80 (1994).

11 *Ibid.*

12 *Ibid.*

13 A. James, *The Practice Of Sovereign Statehood In Contemporary International Society* 47(3) Political Studies 457–473 (1999).

sovereignty that are coexistent and omnipresent. Sovereign authority is exercised within borders, but also, by definition, with respect to outsiders, who may not interfere with the sovereign's governance. The state has been the chief holder of external sovereignty since the Peace of Westphalia in 1648, after which interference in other states' governing prerogatives became illegitimate. The concept of sovereignty in international law most often connotes external sovereignty. Montevideo Convention also provides in Article 8, *"No State has the right to intervene in the internal or external affairs of another."*[14]

Alan James similarly conceives of external sovereignty as constitutional independence a state's freedom from outside influence upon its basic prerogatives.[15] Significantly, external sovereignty depends on recognition by outsiders. To states, this recognition is what a no-trespassing law is to private property a set of mutual understandings that give property, or the state, immunity from outside interference. It is also external sovereignty that establishes the basic condition of international relations anarchy, meaning the lack of a higher authority that makes claims on lower authorities. An assemblage of states, both internally and externally sovereign, makes up an international system, where sovereign entities ally, trade, makes war and peace.[16]

Sovereignty and International Law

Is the state sovereignty consistent with international law? In Hobbes's view, states confront one another in the posture of gladiators – lacking a common superior; they could not be subject to any law. Austin regarded international law as a kind of positive morality: without sovereign, it could not be "law properly so called".[17] Attempts have been made to get around this difficulty by what Georg Jellinek termed "auto limitation": international law is binding because the sovereign states have imposed it on themselves.[18]

Article 2(1) of the United Nations Charter provides that the organisation is based on the sovereign equality of all members.[19] It makes the provision for the introductory framework for the basic principles of the Charter, and is thus of paramount significance. This must surely mean that states are sovereign if, unlike colonies or trust territories, they are not liable to have any binding obligations laid upon them by other states without their consent. However, such an interpretation of Article 2(1) only suggests that the UN Charter itself does not change the traditional rules of international law which hold that the principle of sovereignty determines relations between Member States. In addition, UN actions regulating legal relations between Members States on the basis of the Charter are

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14 Montevideo *supra* note 2.
15 James *supra* note 13.
16 *Ibid.*
17 John Austin, The Province Of Jurisprudence Determined VII (1832).
18 David Armstrong, Theo Farrell, et.al., International Law and International relations 81(2nd ed. 12).
19 Article 2 of the UN Charter**:** The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
(1) The Organization is based on the principle of the sovereign equality of all its Members.

to be conducted in accordance with the principle of sovereign equality. The UN organs must also treat equally and must not infringe their sovereignty.[20]

If international law is really a legal system, however, it cannot mean that a state has obligations only if, and for as long as, it chooses. For then there is no law. The notions of unlimited competence or overriding authority associated with "sovereign" in a state's internal relations are out of place here. A sovereign state in international law must therefore be a particular kind of legal personality, like corporations in municipal law, with characteristic powers, rights, immunities, and obligations, including those implied in the principle of equality---namely, freedom from interference in its domestic jurisdiction, and, in the absence of an international legislature, immunity from new obligations except by consent. Nevertheless, states are considered bound by the established law and custom of nations, and the obligations of new state date from their inception and do not wait upon any consent of deliberate act of acceptance.[21]

Finally, the alleged equality of sovereign states is not, of course, equality in power. Sovereignty in law is consistent with a large measure of actual control over state from outside, though a minimum of independence might be a qualifying condition for sovereign status. Even the most powerful state, however, cannot ignore altogether the need to placate its friends and to avoid provoking its foes to the point of inconvenient obstruction. Freedom to act is relative in international as in internal affairs.[22]

Every sovereign state can exercise the functions of state, to the exclusion of all other states. In other words, it exercises complete sovereignty within its territories. Since territories of a state are circumscribed by its boundaries, it has been rightly said, *"Boundaries are one of the most significant manifestation of state territorial sovereignty"*.[23]

In considering the principle of external sovereignty, distinction must be made between its political and legal aspects. From a legal perspective, states are still considered sovereign the exercise of their ostensibly exclusive sovereign powers is in fact dependent upon the will of a foreign state (as is the case with satellite States). Nor is sovereignty lost through states imposing duties upon themselves though treaties. Loss or more accurately partial loss of sovereignty can only occur if certain sovereign powers are transferred to other states (as e.g. in case of a protectorate) or to supranational organisations (such as the EC). Even then, for all other purposes, states remain sovereign, so that the principle of sovereignty still applies to them. Even such states, formally known as 'semi-sovereign', remain sovereign to the extent that the rules of international law derived from the principle of sovereignty remain applicable to them, with the exception of those legal rules

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20 Bruno *supra* note 10, 78.
21 Paul Edwards, The Encyclopedia of Philosophy Vol. 7, 504-505 (1967).
22 *Ibid.*
23 *Ibid.*

relating to the relinquished sovereign powers (such powers over foreign affairs).[24] Today, many European Union (EU) member states exhibit non-absoluteness.

From a political perspective, the principle of sovereignty was, in the age of the international law of co-existence, the ultimate foreign policy goal, and thus was intimately linked with the politics of power. A particularly dangerous development with regard to the effectiveness of international law was the attempt by states to increase their power through the completely rational planned utilisation of all means at of Machiavelli's new concept of *raison d'etat* which was closely allied to the principle of sovereignty. These theories were echoed in the American doctrine of 'national interest' which predicates national interests too one-sidedly upon power, reducing foreign policy to power politics.[25]

Limits on Sovereignty

The principle of external sovereignty determines the overall structure and virtually the entire substance of the international law of co-existence. This structure of the international legal order is expressed in the 'two states model', which is derived from the principle of sovereignty. In first instance, the principle of sovereignty provides a justification for comprehensive powers of the state, i.e. their 'general freedom of action'. As to whether states are limited *ab initio* to three areas of sovereign power (territorial, organisational, and personal sovereignty) or rather, on the basis of the principle of internal sovereignty, exercise complete sovereign power until they encounter the barriers created by subjective rights of other states, is disputed in the literature. Equally controversial is the problem of whether this sovereignty or these powers represent rights inherent in states or are derived from international law. However, it is certainly clear that the states' freedom of action is constrained by the subjective rights of other states which arise from their sovereignty.[26]

In international law, though, all states are sovereign and equal, yet, in the concept of absolute sovereignty is a thing of the past in this global world. Modern international law imposes many restrictions on the state sovereignty. It was in 1948 that the vast majority of states signed the 'Universal Declaration of Human Rights', committing themselves to respect over 30 separate rights for individuals. As it was not a legally binding declaration and contained no enforcement provisions, the declaration left states' sovereignty intact, but it was a first step towards tethering them to international, universal obligations regarding their internal affairs.[27] Over decades, these human rights would come to enjoy ever stronger legal status. One of the most robust human rights conventions, one that indeed curtails sovereignty, even if mildly, through its arbitration mechanisms, is the European Convention for the Protection of Human Rights and Fundamental Freedoms,

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[24] Bruno s*upra* note 10, 84.
[25] W. Friedman, Changing Structure of International Law 88-89 (1964).
[26] Bruno *supra* note 10, 81.
[27] The Universal Declaration of Human Rights, *available at:* http://www.un.org/en/ (Last visited on August 3, 2018).

formed in 1950.[28] Roughly contemporaneous, signed on December 9, 1948, was the Genocide Convention, committing signing states to refrain from and punish genocide.[29] Then, in the mid-1960's, two covenants — the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights — legally bound most of the world's states to respecting the human rights of their people.[30] Again, the signatories' constitutional authority remained largely intact, since they would not allow any of these commitments to infringe upon their sovereignty. Subsequent human rights covenants, also signed by the vast majority of the world's states, contained similar reservations. However, Morgenthau does not accept this contention. He argues that sovereignty is not freedom from legal restraint. The quantity of legal obligations by which the nation limits its freedom of action does not, as such, affect its sovereignty. A nation can take upon itself any quantity of legal restraints and still remain sovereign, provided those legal restraints do not affect its quality as the supreme lawgiving and law enforcing authority.[31]

Only a practice of human rights backed up by military enforcement or robust judicial procedures would circumscribe sovereignty in a serious way. Progress in this direction began to occur after the Cold War through a historic revision of the Peace of Westphalia, one that curtails a norm strongly advanced by its treaties — non-intervention. In a series of several episodes beginning in 1990, the United Nations or another international organization has endorsed a political action, usually involving military force that the broad consensus of states would have previously regarded as illegitimate interference in internal affairs.[32]

The episodes have involved the approval of military operations to remedy an injustice within the boundaries of a state or the outside administration of domestic matters like police operations. Unlike peacekeeping operations during the Cold War, the operations have usually lacked the consent of the government of the target state. They have occurred in Iraq, the former Yugoslavia, Bosnia, Kosovo, Somalia, Rwanda, Haiti, Cambodia, Liberia, and elsewhere. Although the legitimacy and wisdom of individual interventions is often contested among states — the US bombing of Iraq in December 1999 and NATO's intervention in Kosovo, for instance, failed to elicit the UN Security Council endorsement, as did the US invasion of Iraq in 2003 — the broad practice of intervention is likely to continue to enjoy broad endorsement within the UN Security Council and other international organizations.

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[28] Convention for the Protection of Human Rights and Fundamental Freedoms, *available at:* http:// conventions.coe.int/ (Last visited on August 3, 2018).

[29] Convention on the Prevention and Punishment of the Crime of Genocide, 1948, *available at:* http://www.oas.org/dil/ (Last visited on August 3, 2018).

[30] The Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, *available at:* http://www.ohchr.org/ (Last visited on August 3, 2018).

[31] Hans J. Morgenthau, politics among nations: the struggle for power and peace 332 (6th ed. 2007).

[32] *See* The year of 1990 is marked as end of the Cold War. Thereafter, many interventions were taken place in many countries such as Iraq, the former Yugoslavia, Bosnia, Kosovo, Somalia, Rwanda, Haiti, Cambodia, and Liberia.

An explicit call to revise the concept of sovereignty so as to allow for internationally sanctioned intervention arose with "The Responsibility to Protect", a document written and produced in 2001 by the International Commission on Intervention and State Sovereignty, a commission that the Government of Canada convened at the behest of UN Secretary General Kofi Annan.[33] The document proposes a strong revision of the classical conception by which sovereignty involves a "responsibility to protect" (also known as R2P) on the part of a state towards its own citizens, a responsibility that outsiders may assume when a state perpetrates massive injustice or cannot protect its own citizens. The R2P has garnered wide international attention and serves as a manifesto for a concept of sovereignty that is non-absolute and conditional upon outside obligations.[34]

The other way in which sovereignty is being circumscribed is through European integration. European integration began in 1950, when six states formed the European Coal and Steel Community in the 'Treaty of Paris'. The community established joint international authority over the coal and steel industries of these six countries, entailing executive control through a permanent bureaucracy and a decision-making Council of Ministers composed of foreign ministers of each state. This same model was expanded to a general economic zone in the Treaty of Rome in 1957. It was enhanced by a judicial body, the European Court of Justice, and a legislature, the European Parliament, a directly elected Europe-wide body. The European Court of Justice has ruled that European Union law is supreme over national law, and can have direct effect. Advisory Opinions of the European Court of Justice are routinely enforced by national courts.[35]

Over time, European integration has widened, as the institution now consists of twenty-eight members, and deepened, as it did in the 1991 Maastricht Treaty, which expanded the institution's powers and reconfigured it as the European Union. Far from a replacement for states, the European Union rather "pools" important aspects of their sovereignty into a "supranational" institution in which their freedom of action is constrained.[36] They are no longer absolutely sovereign. Today, European integration proceeds apace. On December 1, 2009, the Treaty of Lisbon came into full force, pooling sovereignty further by strengthening the Council of Ministers and the European Parliament, creating a High Representative of the Union for Foreign Affairs and Security Policy to represent a unified European Union position, and making the European Union's Charter of Fundamental Human Rights legally binding.[37]

Partial restrictions on external sovereignty, with more ambiguous implications for the Westphalian sovereignty, are found in the World Trade Organization, whose dispute

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[33] Responsibility to Protect, Report of International Commission on Intervention, *available at:* http://www.un.org/ (Las visited on August 5, 2018).

[34] *Ibid.*

[35] Robert O. Keohane, *Political Authority after Intervention: Gradations in Sovereignty*, in Humanitarian Intervention: Ethical, Legal, And Political Dilemmas 284 (J.L. Holzgrefe & Robert O. Keohane ed. 2003).

[36] R. O. Keohane, and S. Hoffmann, *Institutional Change in Europe in the 1980s*, in The New European Community: Decision Making And Institutional Change (R. O. Keohane & S. Hoffmann ed. 1991).

[37] The Treaty of Lisbon, *available at:* http://eur-lex.europa.eu/ (Last visited on August 6, 2018).

settlement provisions provide for binding settlement of disputes, without a state veto. Hence a panel, supported by the Appellate Body of the WTO, can legally interpret international law in a way that expands the obligations of members, without receiving their assent. However, unlike the rulings of the European Court of Justice, WTO rulings are not, in general, enforced by national courts. The WTO, therefore, cannot require a state to change its rules, but rather can only authorize states whose trading interests have been damaged by such a state's actions to retaliate.[38]

This circumscription of the sovereign state, through international norms and supranational institutions, finds a parallel in contemporary philosophers who attack the notion of absolute sovereignty. Their thought is not entirely new, for even in early modern times, philosophers like Hugo Grotius, Alberico Gentili, and Francisco Suarez, though they accepted the state as a legitimate institution, thought that its authority ought to be limited, not absolute. The cruel prince, for instance, could be subject to a disciplining action from neighbouring princes that is much like contemporary notions of humanitarian intervention.[39]

Morgenthau argues that division of the sovereignty among different organs of government is a device created for the limitation and control of personal power in spite of that, democratic constitutions, especially those consisting of a system of checks and balance, have purposely obscured the problem of sovereignty and glossed over the need for a definite location of the sovereign power. During the normal times, sovereignty remains dormant, yet in times of crisis and war that ultimately responsibility asserts itself and real sovereign comes in the picture. Morgenthau further argues, *"In federal states, monarchical or democratic, ideological satisfaction must be given to the individual States that, once having been sovereign, are so no longer, yet are loath to admit it. To that end political practice develops a whole system of constitutional flatteries which bestows upon the officials and symbols of the individual states the honours due the officials and symbols of the sovereign states, and which makes use of concepts and constitutional devices that have meaning only with reference to sovereign states."*[40]

Morgenthau takes this analogy in international law and holds that in international law, a similar need for building an ideological bridge between political realities and political preferences have felt and the doctrine of divided sovereignty has gained wide acceptance in the field of international law. On the one hand, the nation state is to a higher degree than ever before the predominant source of individual's moral and legal valuations and the ultimate point of reference for his secular loyalties. Consequently, its power among the other nations and the preservation of its sovereignty are the individual's foremost political concerns in international affairs. On the other hand, it is that very power and sovereignty, clashing under the conditions of the modern civilization with the power and

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38 John & H. J. Ackson, the world trade organization: constitution and jurisprudence (1998).
39 Sovereignty, *available at:* http://plato.stanford.edu/ (Last visited on August 2, 2018).
40 Morgenthau *supra* note 31, 344.

sovereignty of other nations, which imperils the existence of that civilization and, with it, of that nation states themselves. In order to save themselves from self-destructive war, states are willing to give up a slice of sovereignty for the sake of peace, yet, at the same time, they are anxious to preserve their sovereignty.[41]

Perhaps, the two most prominent attacks on sovereignty from political philosophers since the World War II come from Bertrand de Jouvenel and Jacques Maritain. In his prominent work of 1957, *"Sovereignty: An Inquiry into the Political Good"*, Jouvenel acknowledges that sovereignty is an important attribute of the modern political authority, needed to quell disputes within the state and to muster cooperation in defence against outsiders. But, he roundly decries the modern concept of sovereignty, which creates a power who is above the rules, a power whose decrees are to be considered legitimate simply because they emanate from his will.

To Jouvenel, sovereignty reached its peak in Hobbes, in whose *"horrific conception everything comes back to means of constraint, which enable the sovereign to issue rights and dictate laws in any way he pleases. But these means of constraint are themselves but a fraction of the social forces concentrated in the hand of the sovereign"*.[42] Despite their differences over the locus and form of sovereignty, subsequent thinkers like Locke, Pufendorf, and Rousseau *"were to feel the lure of this mechanically perfect construction"*.[43] This was *"the hour of sovereignty in itself,"* writes Jouvenel, the existence of which *"hardly anyone would thenceforward have the hardihood to deny"*. As his description of Hobbes intimates, Jouvenel views early modern absolute sovereignty with great alarm.

"It is the idea itself which is dangerous," he writes.[44] But rather than calling for the concept to be abrogated, he holds that sovereignty must be channelled so that sovereign authority wills nothing but what is legitimate. Far from being defined by sovereign, morality has an independent validity. He places his hope in the shared moral concepts of the citizenry, which act as a constraint upon the choices of the sovereign.[45]

Jacques Maritain in his work, *"Man and the State"* shows little sympathy for sovereignty. *"It is my contention that political philosophy must get rid of the word, as well as the concept, of Sovereignty: not because it is an antiquated concept, or by virtue of a sociological-juridical theory of "objective law"; and not only because the concept of Sovereignty creates insuperable difficulties and theoretical entanglements in the field of international law; but because, considered in its genuine meaning, and in the perspective of the proper scientific realm to which it belongs — political philosophy — this concept is intrinsically wrong and bound to mislead us if we keep on using it — assuming that it has*

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41 *Id.*, 345.
42 Bertrand De Jouvenel, Sovereignty: An Inquiry Into The Political Good 197 (1957).
43 *Id.* at 198.
44 *Ibid.*
45 *Ibid.*

been too long and too largely accepted to be permissibly rejected, and unaware of the false connotations that are inherent in it."[46]

Bodin's and Hobbes' mistake was in conceiving of sovereignty as authority that the people permanently transferred and alienated to an external entity, here the monarch. Rather than representing the people and being accountable to it, the sovereign became a transcendent entity, holding the supreme and inalienable right to rule over the people, independently of them, rather than representing the people, accountable to them. Like Jouvenel, Maritain rues the exaltation of the sovereign's will such that what is just is what serves his interest. This is idolatry. Any transfer of the authority of the body politic either to some part of itself or to some outside entity — the apparatus of the state, a monarch, or even the people — is illegitimate, for the validity of a government is rooted in its relationship to the natural law. Sovereignty gives rise to three dis-functionalities. First, its external dimension renders inconceivable international law and a world state, to both of which Maritain is highly sympathetic. Second, the internal dimension of sovereignty, the absolute power of the state over the body politic, results in centralism, not pluralism. Third, the supreme power of the sovereign state is contrary to the democratic notion of accountability.[47]

As a Catholic philosopher, Maritain's arguments run similar to Christian philosophers of early modern Europe who criticized absolute sovereignty. Witnessing the rise of the formidable entity of the state, they sought to place limits on its power and authority. They are the ancestors of those who now demand limits on the state's authority in the name of human rights, of the right to quell genocide and disaster and deliver relief from the outside, of an international criminal court, and of a supranational entity that assumes power of governance over economic, and now, may be, military affairs.[48]

The shift form co-existence of states to co-operation of states can be noted in the modern international law. The earlier concept of co-existence was based on this notion that the states would live side by side and would not interfere in each-other domestic matters. The role of international law was to protect the freedom of the states. But, new international law gives more emphasis on the co-operation of the states. Three significant factors have led to strengthened co-operation and finally to a transfer of state power to supranational bodies. In first place, new governmental tasks, which extend from the maintenance of public security to all welfare interests, can no longer be effectively accomplished by individual states, but only by the co-operation of all states in international community.

Secondly, in a world which has ever closer links between its parts, inter-dependencies are leading to a situation in which basically 'domestic' acts of one state are increasingly effective the legitimate interests of other states. Thirdly, the principle of equality requires

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[46] Jacques Maritain, Man and The State 29-30 (1951).
[47] *Ibid.*
[48] Sovereignty s*upra* note 39.

a harmonization of the legal status of individuals in the various member states of the international community. For unlike the international law of co-existence, the common interests of the international community are no longer directed purely towards protecting sovereignty, but also towards the welfare interests of their constituent people. Thus, the powers arising from the principle of sovereignty are in general no longer seen as being an end in themselves but rather as a means of achieving common goals and interests.[49] However, co-existence international law has not become obsolete. Even today, international law allows the right of self-defence under Article 51 of the UN Charter.[50]

Other factors such as bilateral legal relationships creating objective law in the common interests, multilateral treaties, international organisations and institutions, and many principles attaining the status of *ius cogens* of international law, are also responsible for this new shift in international law. In addition, international and municipal law are beginning to permeate one another in several ways. States are loosening the purely dualistic model of the relationship between international and municipal law through the introduction of monistic elements, thereby guaranteeing that international law may to a large extent be enforced automatically in the domestic context. [51]

Differences between Traditional and Modern Concepts of Sovereignty

The change in the way of understanding sovereignty can be described as a broadening of the concept of sovereignty up to encompass not only the rights, privileges and immunities of sovereign States (such as jurisdictional immunity) but also their responsibilities to protect the basic rights of the civilian population and to regulate political and economic affairs.

The concept of sovereignty as responsibility "is increasingly being codified in international human rights instruments and recognised in state practice. Since 1948, the adoption of several salient international human rights' instruments have established legal benchmarks for state conduct and erected the global legal regime that mandates national and international protection for and promotion of individual human rights".[52]

The definition of the notion of sovereignty that they provided while exercising their mandate, reflects a gradual change in the way of conceiving the principle of sovereignty. According to the former Secretary General B. B. Ghali, sovereignty is a contingent rather than an absolute concept. In his words*: "…sovereignty has never been inviolable either in law or in practice. Indeed, sovereignty may be limited by customary and treaty obligations in international relations and law may be violated by the powerful…"*[53] He further observes, *"The time of absolute and exclusive sovereignty, however, has passed;*

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49 BRUNO *supra* note 10, 85.
50 *See* Article 51 of the UN Charter gives the limited right of self-defence to every State.
51 Bruno *supra* note 10, 85-86.
52 Ramesh Thakur, Global norms and international humanitarian law: an Asian perspective, *available at* https://www.icrc.org/ (Last visited on August 5, 2015).
53 *See* B. B. Ghali, An Agenda For Peace (1992).

its theory was never matched with reality. It is the task of leaders of states today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world."[54]

The following differences between the traditional notion of sovereignty and notion of sovereignty as responsibility can be identified.

(1) The first difference between the two notions consists in the fact that while the traditional notion of sovereignty would be focused on the right of self-determination, the notion of sovereignty as responsibility would be focused on the human rights of individuals.

(2) The second difference consists in the way to conceive international society. On the one side, the traditional notion of sovereignty is based on the principle of equality among sovereign states. The corollary of this principle is that all the states are seen as equal and there are no states that have the right of oversight the behaviour of the others. On the other side, the notion of sovereignty as responsibility is based on the assumption that the international community can exercise the right to oversee the domestic behaviour of the other sovereign states in some specific circumstances, and particularly when these states are manifestly failing to fulfil their responsibilities towards their own people.

(3) The traditional concept of sovereignty came into existence on account of the Peace of Westphalia treaty in 1648. The predominant purpose of sovereignty was to limit the recourse to war, consolidate the realms of the existing hierarchy and facilitate economic growth. However, in the modern time, sovereignty is seen as a responsibility of the state to protect its citizens. Hence, predominant purpose of the modern sovereignty is altogether different than the traditional sovereignty. Now, citizens of particular state are centre to the concept of sovereignty.

(4) In the Westphalian sovereignty, no gradation in sovereignty is permitted. Morgenthau also argues that sovereignty is indivisible. However, Robert O. Keohane argues for unbundling of sovereignty and its distribution among different components for the purpose of more innovative institutional arrangements.[55] In international law, one can think about multilateral regional institutions that could make promises credible by limiting state power. Therefore, we can design *gradations of sovereignty* rather than treating it as an "all or nothing" proposition.

Sovereignty after 9/11

The concept of sovereignty has changed much since the terrorist attacks in the USA on September 9, 2001. The President Bush's declaration of 'war against terrorism' in any part of the world and subsequent invasions of Afghanistan and thereafter, of Iraq by the US-led coalition has challenged the concept of inviolable sovereignty of the state. Many scholars believe that sovereignty no longer exists in the post 9/11 scenario. The US-led

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[54] *Ibid.*

[55] Keohane *supra* note 35.

interventions in Afghanistan, Iraq, and Syria, and France-led intervention in Libya and Saudi Arabia-led intervention in Yemen and Russia annexation of Crimea fairly indicate that the sanctity of external sovereignty does not exist in the 21st century world since, all interventions do not only violate the UN Charter, but also age old norm of inviolability of sovereignty. Further, 'drone attacks' in Pakistan by the United States have extremely harmed sovereignty of Pakistan. Resultantly, in the post 9/11 scenario, only powerful states with US as boss are global sovereigns whereas, 'others' sovereignty could be assailed on the pretext of the 'war against terrorism', 'axis of evil' and 'failed States'.

The Bush's doctrine contradicted many of the core tenets of international politics including sovereignty and international agreements since 1945.[56] It set out a policy that was essentially 'hegemonic', that sought 'order through dominance', that pursued the 'pre-emptive' and 'preventive use of force', that relied on a conception of leadership based on a 'coalition of the willing' and that aimed to make the world safe for freedom and democracy – by globalizing American rules and conceptions of justice. The doctrine was pursued as the 'war on terror'.[57]

The doctrine of pre-emptive strikes even for the self-defence is against the UN Charter and international law. There is no place for pre-emptive strike and 'preventive use of force' under the Charter. Rather, the UN Charter makes the provisions for 'sovereign equality of all Members', 'preservation of territorial integrity' and 'political independence of any state'. These are core principles of the United Nations from where the derogation is not permitted. Hence, the Bush's doctrine violates the basic tenets of the UN Charter and the principle of sovereignty.

Conclusion

In signing the Charter of the United Nations, states not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of state sovereignty, today, it clearly carries with it the obligation of a state to protect the welfare of its own peoples and meet its obligations to the wider international community. Therefore, the modern concept of sovereignty accepts many limitations and differs from the absolute sovereignty.

The Charter of the United Nations seeks to protect all states, not because they are intrinsically good but because they are necessary to achieve the dignity, justice, worth and safety of their citizens. These are the values that should be at the heart of any collective security system for the twenty-first century, but too often states have failed to

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[56] *See also* Bush doctrine refers to 'pre-emptive strike for protection of inherent right of self-defence, 'evil and proliferation of Weapons of Mass Destruction (WMDs)', 'danger of rogue regimes' and 'apocalyptic threat posed by global terrorism particularly *al-Qaida*'.

[57] David Held, *Cosmopolitanism after 9/11,* 47 International Politics 52–61 (2010).

respect and promote them. The collective security asserts a shared responsibility on the part of all states and international institutions, and those who lead them, to do just that.[58] International law is a law among coordinated, not subordinated entities. States are subordinated to international law, but not to each other, that is to say, they are equal.

When, therefore, the Charter of the United Nations declares that *"The Organization is based on the principle of the sovereign equality of all its Members"*, its redundant language emphasizes the importance it attributes to the principle of sovereignty and its logical corollary, the principle of equality.[59] Sovereignty is not freedom from regulation by international law of all those matters which are traditionally left to the discretion of the individual states or, as Article 15, paragraph 8 of the Covenant of the League of Nations and Article 2, paragraph 7, of the Charter of the United Nations put it, are within the domestic jurisdiction of the individual States.[60]

The above discussion also reveals that sovereignty has many different aspects and none of these aspects is stable. The content of the notion of "sovereignty" is continuously changing, especially in recent years. Under international law, the sovereignty of states must be reduced. International co-operation requires that all states should be bound by some minimum requirements of international law without being entitled to claim that their sovereignty allows them to reject basic international regulations. Where national governments completely fail, the world community takes over sovereignty of territories since the national sovereignty has disappeared in those territories. The world community by now has sufficient means to step in with the help of existing states and has therefore the obligation to rule those territories where the governments fail."[61]

However, it has, in fact, become fashionable these days to dismiss the notion of sovereignty as an anachronism or to dilute it so greatly as to make its operation ineffectual when it suits major powers or important international constituencies. Both, the UN Secretary General, Kofi Annan, and his predecessor, Boutros Boutros-Ghali, have gone on record to declare that state sovereignty is not absolute and exclusive and can be circumscribed, even overridden, in special circumstances. Yet, one must remember that the respect for state sovereignty has been termed as 'global covenant' which is the corner stone of 'international order'.[62]

Benedict Kingsbury has rightly pointed out, "*The normative inhibitions associated with sovereignty moderate existing inequalities of power between states, and provide a shield for weak states and weak institutions. These inequalities will become more pronounced if*

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58 *Ibid.*

59 Hans J. Morgenthau, *The Problem of Sovereignty Reconsidered*, 48, No. 3 Columbia Law Review 341-365 (Apr., 1948).

60 *Id.*, at 347.

61 Henry Schermers, "Different Aspects of Sovereignty" in State, Sovereignty, and International Governance 185, 192 (Gerard Kreijen ed. 2002).

62 Mohammed s*upra* note 9, pp. 81-102.

the universal normative understandings associated with sovereignty are to be discarded."[63] The capacity of sovereignty to act as a normative barrier to unwanted external intervention should not be underrated. International society is based on a set of normative structures, with sovereignty being the foremost among them. If these structures are undermined, it may lead to either unadulterated anarchy or unmitigated hegemony or a combination of the two anarchy within and hegemony without.[64] In other words, sovereignty has been a source of stability for more than two centuries and it would remain a fundamental principle of inter-state relations and for the foundation of the world order.[65]

[63] Bendedict Kingsbury, *Sovereignty and Inequality*, in Inequality, Globalization, and World Politics 86 (Andrew Hurrell and Ngaire Woods eds., 1999).

[64] *Id.*, at 82-83.

[65] *See also* Richard N. Haass, former ambassador and director of Policy Planning Staff, U.S. Department of State, Sovereignty: Existing Rights, Evolving Responsibilities, Remarks at the School of Foreign Service and the Mortara Canter for International Studies, Georgetown University, 3 (Jan. 14, 2003) *available at:* http://www.georgetown.edu/ (Last visited on August 5, 2018).

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Child Care Legislation: With Special Reference to Street Children

Dr. Hemant Kumar Varun[1]

Introduction

In our country there are two classes of children first socially developed they are live with higher standard of living or above minimum standard of living. And second socially backward, they are abandoned. They do not get a chance to step in a school. They are left to fend for themselves on the streets. They suffer from many forms of violence. They do not have access to even primary healthcare. They are subjected to cruel and inhumane treatments every day. They are street children innocent, young and beautiful. There are so many laws for protection of children rights as well as constitution of India, however the condition of street children is very alarming and they are deprived of their all rights. They are need to right to granted benefits under the government program and policies.

In the history of human rights, the rights of children are the most ratified. The United Nations Convention on the Rights of the Child (UNCRC) defines Child Rights as the minimum entitlements and freedoms that should be afforded to every citizen below the age of 18 regardless of race, national origin, colour, gender, language, religion, opinions, origin, wealth, birth status, disability, or other characteristics.

These rights encompass freedom of children and their civil rights, family environment, necessary healthcare and welfare, education, leisure and cultural activities and special protection measures. The UNCRC outlines the fundamental human rights that should be afforded to children in four broad classifications that suitably cover all civil, political, social, economic and cultural rights of every child:

children are need to due care and protection so in international level and national level so many steps taken by the authorities. In international level UNO adopted many documents for right and protection of children. And in national level our parliament enacted so many laws for rights and protection of children as well as government took so many steps for betterment of children. So now I am going to discus some international and national provisions.

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International Instruments

Declaration of the Rights of the Child 1959

The U.N. Declaration of the Rights of the Child (DRC) builds upon rights that had been set forth in a League of Nations Declaration of 1924. The Preamble notes that children need "special safeguards and care, including appropriate legal protection, before as well as after birth," reiterates the 1924 Declaration's pledge that "mankind owes to the child the best it has to give," and specifically calls upon voluntary organizations and local authorities to strive for the observance of children's rights. One of the key principles in the DRC is that a child is to enjoy "special protection" as well as "opportunities and facilities, by law and by other means," for healthy and normal physical, mental, moral, spiritual, and social development "in conditions of freedom and dignity." The "paramount consideration" in enacting laws for this purpose is "the best interests of the child."

U.N. Convention on the Rights of the Child 1989

The most significant of all international laws for children is the UN Convention on the Rights of the Child, popularly referred to as the CRC. This, together with our Indian Constitution and Laws, determine what rights all children must have. Human rights belong to all people, regardless of their age, including children. However, because of their special status - whereby children need extra protection and guidance from adults - children also have some special rights of their own. These are called children's rights and they are laid out in the UN Convention on the Rights of the Child (CRC).

Significant features of the UN Convention on the Rights of the Child (CRC) is as follows:

- Applies equally to both girls and boys up to the age of 18, even if they are married or already have children of their own.
- The convention is guided by the principles of 'Best Interest of the Child' and 'Non-discrimination' and 'Respect for views of the child.'
- It emphasizes the importance of the family and the need to create an environment that is conducive to the healthy growth and development of children.
- It obligates the state to respect and ensure that children get a fair and equitable deal in society.
- It draws attention to four sets of civil, political, social, economic and cultural rights:
- Survival
- Protection
- Development
- Participation

Right to Survival includes

- Right to life.
- The highest attainable standard of health.
- Nutrition.
- Adequate standard of living.

- A name and a nationality.

Right to Development includes

- Right to education.
- Support for early childhood care and development.
- Social security.
- Right to leisure, recreation and cultural activities.

Right to Protection includes freedom from all forms of

- Exploitation.
- Abuse.
- Inhuman or degrading treatment.
- Neglect.
- Special protection in special circumstances such as situations of emergency and armed conflicts, in case of disability etc.

Right to Participation includes

- Respect for the views of the child.
- Freedom of expression.
- Access to appropriate information.
- Freedom of thought, conscience and religion.

National Instruments

Constitutional Provisions for Children

- All people under the age of 18 are entitled to the standards and rights guaranteed by the laws that govern our country and the international legal instruments we have accepted by ratifying them.
- The Constitution of India guarantees all children certain rights, which have been specially included for them. These include:
- Right to free and compulsory elementary education for all children in the 6-14 year age group (Article 21 A).
- Right to be protected from any hazardous employment till the age of 14 years (Article 24).
- Right to be protected from being abused and forced by economic necessity to enter occupations unsuited to their age or strength (Article 39(e)).
- Right to equal opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against exploitation and against moral and material abandonment (Article 39 (f)).

Besides these they also have rights as equal citizens of India, just as any other adult male or female:

- Right to equality (Article 14).
- Right against discrimination (Article 15).
- Right to personal liberty and due process of law (Article 21).

- Right to being protected from being trafficked and forced into bonded labour (Article 23).
- Right of weaker sections of the people to be protected from social injustice and all forms of exploitation (Article 46).

The State must

- Make special provisions for women and children (Article 15 (3)).
- Protect interest of minorities (Article 29).
- Promote educational interests of weaker sections of the people (Article 46).
- Raise the level of nutrition and standard of living of its people and the improvement of public health (Article 47).
- Besides the Constitution, there are several laws that specifically apply to children. As responsible teachers and citizens, it is advisable that you are aware of them and their significance. These have been described in different sections of this booklet along with the issues they deal with.

Government Policy on Children

Beside of legal provision the government made so many plans and policy for entitlement of children. The Government of India adopted National Policy for Children and introduced so many programs for children under this policy for their welfare.

Conclusion

So there are so many international provisions and national provision for betterment of children in India but still street children are unable to access entitlements, they are totally deprived. Street children need to Right to survival which includes Right to be born, Right to minimum standards of food, shelter and clothing, Right to live with dignity, Right to health care, to safe drinking water, nutritious food, a clean and safe environment, and information to help them stay healthy and Right to Protection its includes Right to be protected from all sorts of violence, Right to be protected from neglect, Right to be protected from physical and sexual abuse, Right to be protected from dangerous drugs. We must think about them. Now need to proper implementation of policies, laws and programs. And need to separate implementation mechanism for the street children.

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Making of Arbitral Award and Arbitration

Dr. Mayank Pratap[1]

Making of the Arbitral Award

Making of arbitral award is the last stage in the arbitral proceedings. The decision taken by the majority of the members of the tribunal will be expressed in the form of the award[2]. The tribunal can render the interim award [3]provided, if the tribunal deems it necessary, otherwise, the tribunal may render directly the final award[4]. The act permits the arbitral tribunal to encourage the parties to arrive at a settlement and if the parties have agreed for a settlement then, the same can be incorporated in the award by the arbitral tribunal[5].The act mandates the tribunal to specifically state that, it is an award made by the tribunal on the basis of the agreed terms of the parties.[6]

In the process of domestic arbitrations in India, the applicable law is the law of India. This is a mandatory requirement under the Indian Arbitration Act and cannot be contracted out of by the parties[7]. For international arbitrations with a seat in India, the arbitral tribunal shall follow the laws the parties have agreed to apply to the substance of their dispute.[8] The designated law or legal system applying to the substance of the dispute is to be construed, unless expressly agreed otherwise, as referring to the substantive law of that country and not its conflict of laws rules[9]. In the absence of any agreement between the parties as to the applicable law, the arbitral tribunal shall apply the laws that it considers to be appropriate and relevant to the dispute[10].

If the parties expressly agree, the arbitral tribunal may make a determination *ex aequo et bono*, deciding the dispute in light of general notions of fairness, equity and justice as opposed to the strict rule of law[11]. Furthermore, the arbitral tribunal may decide the applicable law by using the terms of any contract between the parties, taking into accounts the usages and trade practices applicable to that contract[12]. It is understood that

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[2] Refer S. 29 of Arbitration and Conciliation Act 1996.
[3] S 31 (6) *Ibid.*
[4] SS 35, 30 and 32 *Ibid.*
[5] S 30 *Ibid.*
[6]S 31, *Ibid*.
[7]S 28(1) (a), *Ibid*.
[8]S 28(1) (b) (i), *Ibid*.
[9]S. 28(1) (b) (ii), *Ibid*.
[10]S. 28(1) (b) (iii), *Ibid*.
[11]S. 28(2), *Ibid*.
[12]S. 28(3), *Ibid*.

such terms and usages are not in conflict with the mandate of the Indian Arbitration Act, India's public policy and the law applicable to the substance of the dispute.

Making of arbitral award is not solo process but it is the result of systematic arbitration procedure which stared from stay of legal proceeding by referring the dispute for arbitration by court if there is element of arbitration agreement exists. In domestic arbitration the courts can refer the parties to arbitration if the subject matter of the dispute is governed by the arbitration agreement. Section 8 of the Act provides that if an action is brought before a judicial authority, which is subject-matter of arbitration, upon an application by a party, the judicial authority is bound to refer the dispute to arbitration. It is important to note that the above application must be made by the party either before or at the time of making his first statement on the substance of the dispute and the application shall be accompanied by a duly certified or original copy of the arbitration agreement.

The amended section 8 narrows the scope of the judicial authority's power to examine the prima facie existence of a valid arbitration agreement, thereby reducing the threshold to refer a matter before the court to arbitration for purposes of arbitrations commenced on or after October 23, 2015. More importantly, taking heed from the judgment of the Supreme Court in Chloro Controls[13], which effectively applied only to foreign-seated arbitrations, the definition of the word 'party' to an arbitration agreement has been expanded under the Amendment Act to also include persons claiming through or under such party.

Thus, even non-signatories to an arbitration agreement, insofar as domestic arbitration or Indian seated ICA, may also participate in arbitration proceedings as long as they are proper and necessary parties to the agreement.[14]

Rules Applicable To Substance of Dispute [Section 28]

(1) Where the place of arbitration is situate in India,

(a) In an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) In international commercial arbitration,—

i. The arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
ii. any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
iii. Failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

[13]*Chloro Controls India (P) Ltd*. v. *Severn Trent Water Purification Inc*., (2013) 1 SCC 641.
[14]*Sukanya Holdings Pvt. Ltd.* v. *Jayesh H. Pandya*, (2003) 5 SCC 531.

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.
(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

Section 28 of the Arbitration and Conciliation Act, 1996 deals with the Rules applicable to the substance of dispute. Before amendment under Section 28(3), the Tribunal was bound to decide the dispute in accordance with the terms of contract and also take into account the trade usage applicable to the transaction. Now after the amendment to the section, the Tribunal while deciding and making an award will take into account the terms of the contract and trade usage applicable to the transaction.

Therefore, under the unamended Section 28(3), the scope for the Tribunal to make liberal interpretation of the Contract was unavailable. Resultantly, the scope of the Tribunal to interpret a term of the Contract, was also limited. The Tribunal could at best, interpret the terms of the Contract taking into consideration the intent of the parties and the trade usage applicable to the transaction. In *ONGC v. SAW Pipes*[15],, the Hon'ble Supreme Court held that any Award passed by the Tribunal which goes against the terms of the Contract are violative of Section 28(3) of the Arbitration and Conciliation Act, 1996, and was a ground to set aside the Award under section 34.To overcome this anomaly, the Law Commission, in its 246th Report, observed as follows:

The amendment to section 28(3) has similarly been proposed solely in order to remove the basis for the decision of the Supreme Court in ONGC v. Saw Pipes Ltd, (2003) 5 SCC 705. The Hon'ble Supreme Court in *HRD Corpn. v. GAIL (India) Ltd*[16]., held as follows:

"Shri Divan is right in drawing our attention to the fact that the 246th Law Commission Report brought in amendments to the Act narrowing the grounds of challenge coterminous with seeing that independent, impartial and neutral arbitrators are appointed and that, therefore, we must be careful in preserving such independence, impartiality and neutrality of arbitrators. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in ONGC Ltd. v. Saw Pipes Ltd. has been expressly done away with. So has the judgment in ONGC Ltd. v. Western Geco International Ltd. Both Sections 34 and 48 have been brought back to the position of law contained in Renusagar Power Co. Ltd. v. General Electric Co. where "public policy" will now include only two of the three things set out therein viz. "fundamental policy of Indian law" and "justice or morality". The ground relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in Renusagar. "Justice or morality" has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in Associate Builders v. DDA. Section 28(3) has also been amended to bring it in line with the judgment of this Court in Associate Builders, making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one."

Therefore, now the power of the Tribunal to interpret the terms of the Contract are widened and the Tribunal can interpret the terms not only taking into consideration the

[15] (2003)5 SCC 705.
[16](2018) 12 SCC 471.

intention of the parties but also looking into the trade usage and construe the same in a prudent and reasonable manner. The shift from 'in accordance with' to 'take into account' has provided certain flexibility to the Tribunal.

Decision Making By Panel of Arbitrators [Section 29]
(1) Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.
(2) Notwithstanding sub-section (1), if authorised by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.

Time limit for Arbitral Award [Section 29A]
(*1*) [17][The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (*4*) of section 23:

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavor may be made to dispose of the matter within a period of twelvemonths from the date of completion of pleadings under sub-section (*4*) of section 23].

(*2*) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(*3*) The parties may, by consent, extend the period specified in sub-section (*1*) for making award for further period not exceeding six months.

(*4*) If the award is not made within the period specified in sub-section (*1*) or the extended period specified under sub-section (*3*), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. For each month of such delay.

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application.

[17] Subs. by Act 33 of 2019, s. 6, for sub-section (*1*) (w.e.f. 30-8-2019).

Provided also that the arbitrator shall be given an opportunity of being heard before the fees are reduced.

(*5*) The extension of period referred to in sub-section (*4*) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(*6*) While extending the period referred to in sub-section (*4*), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(*7*) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(*9*) An application filed under sub-section (*5*) shall be disposed of by the Court as expeditiously as possible and Endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

Section 29A of the requires an arbitral tribunal to render an award within 12 months, which may be extended up to 18 months with the consent of the parties from the date on which the tribunal is constituted On a failure to do so, the tribunal loses its mandate and the parties are required to approach the courts for extension of the time limit beyond 12 months or 18 months, as the case may be. If the mandate of the tribunal is terminated in accordance with Section 29A, the tribunal becomes *focus officio* not only with respect to the claim filed.

This provision is the contribution of 246th law report but if one tries to trace, Rule 3 of the First Schedule[18] under the Arbitration and Conciliation Act, 1940 prescribed a time limit of 4 months to render the award, after the tribunal had entered into reference to render the award. The court had the discretion to extend this time, and no upper limit was prescribed for the same under the 1940 Act. No doubt that in the context of efficacy and to timeline the arbitration procedure it may be a good step but in authors opinion it oppose the fundamental concept of party autonomy and will invite controversy.

[18]Rule 3: The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

Commencement of Initial Period

The aforesaid period is to be calculated from the date of reference means when notice of appointment is received by the arbitrator. As per 2019 amendment said period shall be reckoned from the period of completion of the pleadings. Such period of 12 months can be further extended by the consent of both the parties for 6 months i.e. effectively 18 months.

Time Period for Moving To Court for Extension of Time

In case the award is not made within the abovementioned time period then both parties (through joint application) and either of the parties can file an application for extension of the time period for making or passing of award. Such an application can be filed within reasonable period from either before or after the expiry of 12 months (in case other party doesn't give consent for extension of the time period) or 18 months.

Section 29A uses mandatory terms such as an award shall be made, and mandate of the arbitrator shall terminate. The only semblance of party autonomy in this provision is sub-section (3) that allows the parties to extend the time period by 6 months, after the expiry of 12 months. Neither the parties, nor the tribunal, have the power to extend the time limit beyond the statutory period of 18 months. Hence, they are compelled to approach the courts to seek an extension. The wording of this section indicates that it is of a mandatory nature.

Consequences to Failure of Subsection (1) or (3)

Section 29A (4) provides that mandate of arbitrator shall terminate unless the period of delivery of award is extended by the court if the parties are able to show sufficient cause. In *Chinook Machineries v. SN Sanderson & Co*[19]., a valid award was challenged for being issued after the expiry of the 12 months limit. The petitioner had delayed the proceedings at various junctures and also refused to give consent for extension of time to render the award, under Section 29A (3).

The Delhi High Court laid to rest several important issues in this context. Even though there was no written application for extension of time under Section 29A, the court deemed it fit to exercise its powers under Section 29A(4) and place the burden on the petitioner to show why the time limit should not be extended by the court. The ambit of Section 29A(4) was expanded by ruling that such application need not only be in writing, but can also be made orally. Further, the court clarified that after extension of time by the court under Section 29A (4), any proceedings undertaken by the tribunal after the expiry of the statutory time limit, will stand validated.

Limited power of court

Section 29A(5) provides that the Court may only grant an extension of the time under Section 29(4) when it is satisfied that there exists sufficient causeand on such terms and

[19] 2018 SCC OnLine Del 11000.

conditions as may be imposed by the Court. Sufficient cause has also been used in Section 5[20] of the Limitation Act, 1963 given the similarity with the proceedings under this sub-section; Courts may turn to judicial decisions on S. 5 for guidance. Documents and evidences are in arbitration proceeding is voluminous is held sufficient cause in the case of *International Trenching Pvt. Ltd v. Power Grid Corporation of India*[21]. On the other hand *in Ratna Infrastructure Projects Pvt. Ltd. v. Meja Urja Nigam Private limited*[22] where it was argued that, arbitrator has deliberately decided to postpone the award to prevent any inconsistent award being passed if a similar arbitration proceeding is going on however the proceeding may be distinct and will have no bearing on the award not regarded as sufficient cause.

While extending the period under sub-section 4, it shall be open to the court to substitute one or all of the arbitrators. In *Olympic oil industries v. practical properties pvt ltd*,[23] where Arbitral tribunal were responsible for delay and in *FIITJEE Ltd.v. Dushyant Singh and anr*,[24] where the conduct of arbitrator was contrary to basic principles of law, the Courts have granted substitution of arbitrator. Enquiry under Section 29A is limited to examining the issue of expeditious hearing of arbitration and nothing more. It cannot be use for Section 12, 13 or for challenging the impartiality of the Tribunal[25].

Fast Track Procedure [Section29B]

1. Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).
2. The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.
3. The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):

(a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;
(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

[20]Extension of prescribed period in certain cases. —Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.
[21] 2017 SCC Online Del 10801.
[22] 2018 SCC OnLine Del 12466.
[23] 2018 SCC online Del 8887.
[24] 2018 SCC OnLine Del 13157.
[25]*Puneet solanki and another v. Sapsi electronics pvt ltd*, 2018 SCC OnLine Del 10619.

(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;
(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

4. The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.
5. If the award is not made within the period specified in sub-section *(4)*, the provisions of sub-sections *(3)* to *(9)* of section 29A shall apply to the proceedings.
6. The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties

The 2015 Amendment Act also introduces a fast-track arbitration procedure to resolve disputes provided that such option is exercised prior to or at the time of appointment of the arbitral tribunal. Section 29B has inserted to facilitate an expedited settlement of disputes based solely on documents subject to the agreement of the parties. The tribunal for this purpose consists only of a sole arbitrator who shall be chosen by the parties.[26] For this purpose the time limit for making an award under this section has been capped at 6 months from the date the Arbitral Tribunal enters upon the reference. [27] Parties can before constitution of the Arbitral tribunal, agree in writing to conduct arbitration under a fast track procedure.[28]

Under the fast track procedure, unless the parties otherwise make a request for oral hearing or if the arbitral tribunal considers it necessary to have oral hearing, the Arbitral Tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing.[29] In a fast-track proceeding under section 29B (6) the fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties. Whereas in ordinary proceedings according to section 11(14), the rules for the payment of costs to the arbitral tribunal, shall be determined by the High Court, as the rates are provided in the Fourth Schedule of the Act.

Settlement [Section 30]

(1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.
(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected

[26]Section 29B (2) of the Act.
[27]Section 29B (4) of the Act.
[28]Section 29B (1) of the Act.
[29]Section 29B (3) of the Act.

to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

Settlement during Arbitration

Section 30 confers on the arbitral tribunal the authority to encourage settlement of disputes with the agreement of the parties and for that purpose, it authorises the tribunal to use mediation, conciliation or other procedures during the arbitral proceedings for settlement of disputes. Where the settlement is reached during the course of arbitral proceedings, the arbitral award shall be made on the agreed terms and it shall have the same status as arbitration award on the substance of the dispute or the difference.

It is permissible for parties to arrive at a mutual settlement even when the arbitration proceedings are going on. In fact, even the tribunal can make efforts to encourage mutual settlement. If parties settle the dispute by mutual agreement, the arbitration *shall* be terminated. However, if both parties and the Arbitral Tribunal agree, the settlement can be recorded in the form of an arbitral award on agreed terms, which is called consent award. Such arbitral award shall have the same force as any other arbitral award[30].Under Section 30 of the Act, even in the absence of any provision in the arbitration agreement, the Arbitral Tribunal can, with the express consent of the parties, mediate or conciliate with the parties, to resolve the disputes referred for arbitration.

[30]Section 30 of the Act.

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Assessment under the Central Goods and Services Tax Act, 2017

Dr. Kabindra Singh Brijwal[1]

Introduction

The term Assessment means determination of tax liability. Under GST regime, a supplier is required to discharge his tax liability on a continuous and regular basis. He will come to know this tax liability only after assessment. Sections 59 to 64 of the CGST Act, 2017 contain provisions relating to 'Assessments'. "Assessment" means determination of tax liability under this Act and includes Self-Assessment, Re-Assessment, Provisional Assessment, Summary Assessment and Best Judgment Assessment.[2]

Types of Assessment

- Self Assessment
- Provisional Assessment
- Scrutiny of Return
- Assessment of Non-Filers of Return
- Assessment of Unregistered Persons
- Summery Assessment in Special Cases

Self-Assessment

Every registered person shall self-assess the taxes payable under this Act and furnish a return for each tax period as specified under Section 39.[3] As the name suggests, Self-Assessment is a process whereby a person first assesses the tax payable by him, pays the tax and then files the return furnishing the details of how he has arrived at the tax payable by him.

Normally, persons having GST registration file GST returns and pay GST every month based on self-assessment of GST liability. However, the Government at all times has the right to re-assess or perform an assessment by itself and determine if there is a short payment of GST. It may be noted that the assessment as made by the registered person would be treated as final.

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[2] Section 2 (11) of the Central Goods and Services Tax Act, 2017.
[3] Section 59 of the Central Goods and Services Tax Act, 2017.

Provisional Assessment[4]

Provisional Assessment provides a method for determining the tax liability in case the correct tax liability cannot be determined at the time of supply. The provisions of Section 60 read along with Rule 98 of the CGST Rule, 2017.

Situations Demanding Provisional Assessment

There might be situations when the two major determinant of tax liability i.e. tax rate and value, might not be readily ascertainable and may be subject to the outcome of a process that requires deliberation and time. The Provisional Assessment provides the solution. The Provisional Assessment of a person would be conducted on the requests of the registered person in either of two situation/circumstances:

a) He is unable to determine the value o goods or services or both or
b) He is unable to determine the rate of tax applicable to the goods or services supplies by him.

Procedure for Provisional Assessment (Filing of Application)

The following is the procedure of Provisional Assessment:

Filing of Application

Every registered person requesting for payment of tax on a provisional basis shall furnish an application along with the documents in support of his request, electronically in FORM GST ASMT-01 on the common portal, either directly or through a Facilitation Centre notified by the Commissioner.

a) **Issue of Notice by Officer & Reply by Application**

The Proper Officer, on receipt of the application, issue a notice in FORM GST ASMT-02 requiring the registered person to furnish additional information or documents in support of his request and the applicant shall file a reply to the notice in FORM GST ASMT-03, and may appear in person before the said officer if he so desires.

b) **Issue of Order By Officer**

The Proper Officer shall issue an order in FORM GST ASMT-04 allowing the payment of tax on a provisional basis indicating the value or the rate or both on the basis of which the assessment is to be allowed on a provisional basis and the amount for which the bond is to be executed and security to be furnished not exceeding 25% of the amount covered under the bond. The Proper Officer shall pass an order, within 90 days from the date of receipt of such request.

c) **Execution of Bond**

The registered person shall execute a bond in FORM GST ASMT-05 along with a security in the form of a bank guarantee for an amount as specified in order. The bond

[4] Section 60 of the Central Goods and Services Tax Act, 2017.

furnished to the Proper Officer under SGST or IGST Act shall be deemed to be a bond furnished under the CGST Act and the rules made there under.

d) **Calling for Information**

The Proper Officer shall issue a notice in FORM GST ASMT-06, calling for information and records required for finalization of assessment.

e) **Final Assessment**

The Proper Office shall issue a final assessment order, specifying the amount payable by the registered person or the amount refundable, if any, in FORM GST ASMT-07.

f) **Release of Security**

The applicant may file an application in FORM GST ASMT-08 for the release of the security furnished after issue of the order of final assessment. The proper office shall release the security, after ensuring that the applicant has paid the amount specified in Rule 98 (5) and issue an order in FORM GST ASMT-09 within a period of 7 working days from the date of the receipt of the application.

Finalisation of Provisional Assessment

The final assessment order has to be passed by the Proper Officer within 6 months from the date of the communication of the order of provisional assessment. However, on sufficient cause being shown and for reasons to be recorded in writing, the above period of 6 months may be extended:

a) by the Joint/Additional Commissioner for a further period not exceeding 6 months, and
b) By the Commissioner for such further period as he may deemed fit not exceeding 4 years.

Thus, a provisional assessment can remain provisional for a maximum of 5 years (6 Months + 6 Months + 4 Years).

Tax Liability as Per Final Assessment

There may be 3 alternative scenarios subsequent to finalization of the Provisional Assessment:

a) **Same Tax Liability**

Where the tax liability as per the final assessment is equal to the liability under provisional assessment, then the tax is neither payable nor refundable.

b) **Higher Tax Liability**

If the tax liability under final assessment is higher, then the tax becomes payable to the difference between the two assessments. The registered person shall be liable to pay interest on tax due but not paid, at the rate specified under Section 50 (1) from the date the tax was due to be paid originally till the date of actual payment.

c) **Less Tax Liability**

Where the tax liability as per the final assessment is less than Provisional Assessment i.e., tax becomes refundable consequent to the order of final assessment, the registered person shall be paid interest at the rate specified under Section 56 from the date immediately after the expiry of 60 days from the date of receipt of application in accordance with the provisions of Section 54 (1) till the date of refund of such tax. It means, in case any tax amount becomes refundable subsequent to finalization of the provisional assessment, then interest (subject to the eligible of refund and absence of unjust enrichment) at the specified rate will be payable to the supplier.

Scrutiny of Returns

Scrutiny by Proper Officer[5]

The Proper Officer may scrutinize the return and related particulars furnished by the registered person to verify the correctness of the return and inform him of the discrepancies noticed, if any, in FORM GST ASMT-10 and seek his explanation thereto, within specified time, not exceeding 30 days.

Commutation to Registered Person[6]

In case the explanation is found acceptable, the registered person shall be informed accordingly in FORM GST ASMT-12 and no further action shall be taken in this regard.

Action by Proper Officer[7]

In case no satisfactory explanation is furnished by registered person or where the registered person, after accepting the discrepancies, fails to take the corrective measure in his return for the month in which the discrepancies is accepted, the Proper Officer may take recourse to any of the following provisions, namely:

a) Proceed to conduct audit under Section 65 of the Act.
b) Direct the conduct of a special audit under Section 66 which is to be conducted by a Chartered Accountant or a Cost Accountant nominated for this purpose by the Commissioner. Or
c) Undertake procedure of inspection, search and seizure under Section of this Act. Or
d) Initiate proceeding for determination of tax and other dues under Section 73 or 74 of the Act.

Assessment of Non-Filers of Returns

Best Judgement Assessment of Registered Person[8]

The Proper Officer may proceed to assess the tax liability, where a registered person-

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[5] Section 61 (1) of the Central Goods and Services Tax Act, 2017.
[6] Section 61 (2) of the Central Goods and Services Tax Act, 2017.
[7] Section 61 (3) of the Central Goods and Services Tax Act, 2017.
[8] Section 62 (1) of the Central Goods and Services Tax Act, 2017.

a) Fails to furnish the return under Section 39 (Monthly/Quarterly) or under Section 45 (Final Return), and
b) A notice under Section 46 has been issued by Proper Officer to the defaulting taxable person requiring him to furnish the return within a period of 15 days and taxable person fails to file return within the given time.

The Proper Officer will proceed to the best of his judgement taking into account all the relevant material which is available or which he has gathered. The order of Best Judgement Assessment shall be issued by Proper Officer in the prescribed form.

Time Limit for Assessment Order
The assessment order shall be issued by Proper Officer within a period of 5 years from the date of specified under Section 44 for furnishing of the annual return for the financial year to which the tax not paid relates.

If, **X,** a registered person, defaults in filing of return for any tax period falling in Financial Year 2020-21, period of 5 years shall be reckoned from the due date of filing of Annual Return for Financial Year 2020-21 i.e., 31/12/2021. Accordingly, Best Judgement Assessment can be made by Proper Officer on or before 31/12/2026.

Withdrawal of Assessment Order[9]
Where the registered person furnishes a valid return for the default period (i.e., file the return and pays the tax as assessed by him) within 30 days of the service of the assessment order, the said assessment order shall be deemed to have been withdrawn but the liability for payment of interest under Section 50 (7) or for payment of late fee under Section 47 shall continue.

Assessment of Unregistered Persons
Best Judgement Assessment of Unregistered Person[10]
Notwithstanding anything to the contrary contained in Section 73 or Section 74, where a taxable person, who was liable to pay tax:
1. Fail to obtain registration even though liable to do so, or
2. Whose registration has been cancelled under Section 29 (2), for any of the following reasons, namely-
    a) A registered person has contravened such provisions of the Act or the rules made there under as may be prescribed. Or
    b) A person paying tax under composition levy under Section 10 has not been furnished returns for 3 consecutive tax periods. Or
    c) Any registered person, other than a person specified in Clause (b), has not furnished returns for a continuous period of 6 Months. Or

[9] Section 62 (2) of the Central Goods and Services Tax Act, 2017.
[10] Section 63 of the Central Goods and Services Tax Act, 2017.

d) Any person who has taken voluntary registration under Section 25 (3) has not commenced business within 6 Months from the date of registration. Or
e) Registration has been obtained by means of Fraud, Willful Misstatement or Suppression of facts.

Then the Proper Officer may proceed to assess the tax liability of said unregistered person to be best of his judgement for the relevant tax period.

Issue of Notice

Before making the assessment, Proper Officer shall issue a notice to a taxable person containing the ground on which the assessment is proposed to be made on Best Judgement basis and shall be given 15 days time to furnish his reply, if any. However, no such assessment order shall be passed without giving the person an opportunity of being heard.[11]

Time Limit for Assessment Order

The assessment order shall be issued by Proper Officer within a period of 5 years from the due date for furnishing the annual return for the financial year to which non-payment of tax relates.

If *X* an unregistered person, defaults in filing of return for any tax period falling in Financial Year 2021-21, period of 5 years shall be reckoned from the due date of filing of Annual Return for Financial Year 2020-21 i.e. 31/12/2021. Accordingly, Best Judgement Assessment can be made by Proper Officer on or before 31/12/2026. Best Judgement Assessment is one of the tools to harass taxable persons. Really, Best Judgement Assessment cannot be on basis of whims and fancies.

In *Raghubar Mandal v. State of Bihar*[12] case, it has been held that though best judgement assessment is an estimate and involves guess work, the estimate must relate to some evidence or material and it must be something more than mere suspicion. In *Kathyaini Hotels v. ACCT*[13] it held that even a best judgement assessment must be made reasonably and not surmises.

Summary Assessment in Certain Special Cases[14]

The Summary Assessment can be initiated to protect the interest of revenue with the previous permission of Additional Commissioner/ Joint Commissioner when:

1. The Proper Officer has evidence that a taxable person has incurred a liability to pay tax under the Act, and

[11] Section 63, Proviso of the Central Goods and Services Tax Act, 2017.
[12] (1957) 8 STC 770 (SC); AIR 1957 SC 810.
[13] (2004) 135 STC 77 (SC).
[14] Section 64 (1) of the Central Goods and Services Tax Act, 2017.

2. The Proper Officer has sufficient grounds to believe that delay in passing an assessment order may adversely affect the interest of revenue.

Withdrawal of Assessment Order

The Summary Assessment order may be withdrawn by Additional Commissioner/ Joint Commissioner –

a) On an application filed by taxable person for withdrawal of the Summery Assessment order within 30 days from the date of receipt of order, or
b) On his own motion.

Deemed Taxable Person in Case of Supply of Goods[15]

Where the taxable person to whom the liability pertains is not ascertainable and such liability pertains to supply of goods, the person in charge of such goods shall be deemed to be taxable person liable to be assessed and liable to pay tax and any other amount due under this section.

Conclusion

Assessment under the CGST Act, 2017 is an important procedure to be done by the assessee for computation of the tax liability. For computation various options are available to the assessee as per his or her requirement. With every option of assessment there are different regulations and procedures to be considered. Most of the provisions of assessment under the CGST Act, 2017 are similar to the current indirect tax system.

[15] Section 64 (2) of the Central Goods and Services Tax Act, 2017.

GST: A Study with Special Reference to the Constitution (One Hundred and First Amendment) Act, 2016

Mr. Sumit Gupta[1]

Abstract

Generally, there are two kinds of law in most of the countries, i.e. supreme law and ordinary law (which must conform to supreme law) In India the Constitution is the supreme law of the land and all the legislature, executive and judiciary get power from it. So, to enact a law like GST, legislature must have power to do so (there must be an entry in any of three lists union, state and concurrent under which it can be legislated).GST was passed by legislature in the year of 2017 but in the three lists of seventh schedule read with Article 246 of the Constitution no such powers are vested, neither in the union nor in the state. In order to give power to enact law on GST and to make some necessary changes after enactment of law on GST it became important to amend the Constitution prior to pass the GST. Constitution (One hundred first) Amendment Act 2016 was passed for this purpose and it has done so many changes in the Constitution, such as insertion of Article 246A,279A addition in Art 248, 249, 250 etc. This paper will discuss the reasons for which the Amendment have been done and also discuss about need of such Amendment with the help of relevant provision.

Introduction

Constitution of India is the supreme law of land and being the supreme law of land it confers power to all the authority exercising power within India. Our Constitution is federal in nature meaning thereby power is distributed between Union and States, GST Act was passed by parliament in 2017 but prior to passing the legislation an amendment has been made in Constitution of India, but the main question remains as to why there was a need of amendment in the Constitution? By the way of amendment a new taxing legislation article has been introduced in India and this was done for convenience of the people, for the purpose of distribution of tax a new council named GST council has been constituted by the Constitution through one hundred first amendment.

Constitution (one hundred first) Amendment Act, 2016 was passed by parliament for the purpose of making a path for the legislation of GST Act. In this paper we will discuss why there was a need to amend the Constitution and what changes has been done through this amendment?

Subject matter for Legislation

Union Parliament as well as state legislatures have power to enact laws under Article 246 read with entries of seventh schedule. In seventh schedule of Constitution subject matter are given for legislative purposes. Parliament may enact law on any of the subject matter given in Entry 1 to 97 of the union list or Entry 1 to 47 of the concurrent list whereas state legislatures have power to enact any law on the subject matter enumerated in State list

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from Entry 1 to 66 and subject to legislation of Parliament on any matter enumerated in concurrent list from Entry 1 to 47. But no where in the seventh schedule GST is given as a subject matter so the question arises how can legislature legislate a law on that matter for which subject matter is not enumerated in any of the three lists.

Entry 97 of Union list talks about residuary power of Parliament under which parliament may legislate law on any of the subject matter which is not enumerated in any of the three list. Article 248 also talks about residuary power, so the question is whether power given under Art 248 and subject matter given under entry 97 of Union list is same or different? Art 248 can't be regarded as an independent source of residuary power for that power had already been conferred on Parliament. Article 248 must be treated as declaring "in an article of the Constitution" a power already conferred by a legislative entry in a schedule read with Article 246(1). Article 248 does not provide for any express power of Parliament, but only for its residuary and, therefore Art 248 adds nothing to the powers conferred by Art 246(1) read with entry 97 of List 1[2].

There should be no serious objection in Entry 97 of List 1 and Art 248 being read together in so far as the two provisions supplement each other and lead to sound conclusion that interpretation has been affirmed by the court in *State of Karnataka v. Union of India*[3]

It's very clear from the above discussion that the power given in Art. 248 and power under Entry 97 read with Art 246(1) is not different so the next question is whether tax imposing legislation can be legislated on the name of residuary power?

The power of making any law, imposing a tax, is not mentioned in list 2 or list 3 and hence the said power vests in Parliament under its residuary power. If any power to impose tax is clearly mentioned in list 2 the same would not be available to be exercised by Parliament on the assumption of residuary power, which is evident from the language of Art 248(1) and (2) and of Entry 97 of list 1. Under the scheme of the entries in the lists taxation is regarded as a distinct matter and is separately set out. Hence power of taxation cannot be exercised as an ancillary power.[4]

When tax can't be imposed through Art 248 read with Entry 97 of List 1 then there is a need to amend the Constitution for passing GST. Article 246A has been added by the amendment which provide subject matter as well as for legislation of GST.

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[2]See H. M. Seervai, Constitutional Law of India, 4th Edn. 2007 reprint Vol. 3 at pp. 2432-2433.

[3] 1978 SCR (2) 1.

[4] "Distribution of Legislative Powers between Union and the States" by Justice Venkataramaiah and Prof M.P. Singh published in Constitutional Law of India Vol. 2 edited by M. Hidaytullah cited from Basu D. D. commentary on Constitution of India 8th edition 2007, p. 8989.

A question still remains at this point why an article is being inserted in stead of adding an entry as GST? It is very easy to understand that the problem is not only limited to subject matter but it also includes its effect upon Art. 248, Art. 249 and Art. 250 etc. Not only this but problem also arise in other process like composition of GST council as added in Art. 279A. So it is very clear that insertion of Art. 246A is sine qua non for legislation of GST.

Article 246A and its effect

Art. 246A[5] starts with non obstante clause which provides notwithstanding anything contained in Art. 246 and Art 254. It is very clear from these words that the procedure for legislation given in Art 246 not going to affect Art. 246A. Doctrine of repugnancy is also not applicable on GST related laws. Art. 248, Art. 249, Art. 250, and Art. 253 etc were not related to Art 246 and whenever Parliament enacts laws under[6] these articles, Art. 246 not comes into the picture because subject matter for legislation is under three lists of seventh schedule but when the subject matter will be GST it is not the three lists from where parliament get subject matter for legislation rather it is Art. 246A from where parliament gets the subject matter for legislation. Hence following amendments have been done through amendment:

In Article 248 of the Constitution, in clause (1), for the word "Parliament", the words,figures and letter "Subject to article 246A, Parliament" shall be substituted. In article 249 of the Constitution, in clause (1), after the words "with respect to", the wordsfigures and letter "goods and services taxprovided under article 246A or "shall be inserted. In Article 250 of the Constitution, in clause (1), after the words "with respect to", thewords, figures and letter "goods and services tax provided under Article 246A or" shall be inserted.

In Article 271 of the Constitution, after the words ‘‘in thosearticles, the words, figures and letter except the goods and services tax under Article 246A, shall be inserted.

Amendment in Financial matters

Article 269A[7] deals with such collection of taxes where the commerce or trade is inter state, in such cases tax will be collected by government of India and amount collected

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[5] See D.D. Basu Commentary on Constitution of India 8th Edn. 2007, p. 8990.

[6] 246A. (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.
(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.
Explanation.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.

[7] 246A. (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

apportioned between union and States in such manner which may be provided by parliament by law and such law must be made as per recommendation of GST council constituted under Article 279A.

Tax collected or distributed under Art. 269A are not considered as part of consolidated fund of India so the special expenses (which have been expended from consolidated fund of India) have not been expended from such collected tax.

By the addition of Article[8] 269A there is a need to amend certain provisions and for this Art 268A has been omitted and following changes has been made: In article 268 of the Constitution, in clause (1), the words "and such duties of exciseon medicinal and toilet preparations" shall be omitted. In article 269 of the Constitution, in clause (1), after the words "consignment ofgoods", the words, figures and letter "except as provided in article 269A" shall be inserted.

In Article 270 of the Constitution
(i) in clause (1), for the words, figures and letter "Articles 268, 268A and 269", the words, figures and letter "Articles 268, 269 and 269A" shall be substituted;
(ii) After clause (1), the following clauses shall be inserted, namely: — (1A) The tax collected by the Union under clause (1) of article 246A shall also be distributed between the Union and the States in the manner provided in clause (2).
(1B) The tax levied and collected by the Union under clause (2) of article 246A and article 269A, which has been used for payment of the tax levied by the Union under clause (1) of article 246A, and the amount apportioned to the Union under clause (1) of article 269A, shall also be distributed between the Union and the States in the manner provided in clause (2).

GST Council
By the one hundred first amendment of the Constitution a new Article numbered as Article 279A[7] has been inserted which talk about GST Council. GST Council consists of Union Finance minister as chairperson and the Union Minister of State in charge of Revenue or Finance as Member andthe Minister in charge of Finance or Taxation or any other Ministernominated by each State Government Members. Under Article 279A (4)

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[8] 269A. (1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.
Explanation.—for the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.
(2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.
(3) Where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under article 246A, such amount shall not form part of the Consolidated Fund of India.
(4) Where an amount collected as tax levied by a State under article 246A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.
(5) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

GST council shall make recommendation to the States on the matter of levied of tax , exemption from taxes, place of supply in case of interstate commerce etc. The quorum of the meetings of GST council shall be one half of the total no. of members and a new majority system (different from simple or special majority) has been introduced under clause 9 as Every decision of the Goods and Services Tax Council shall be taken at ameeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, namely:

(a) the vote of the Central Government shall have a weight age of one-third of the total votes cast, and
(b) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast, cast in that meeting.

Insertions in definition clause: - Some provisions have also been inserted in Article 366 which is a definition clause and those definitions gave meaning for whole of the Constitution following definition has been inserted:

(i) After clause (12), the following clause shall be inserted, namely:—

'(12A) "goods and services tax" means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption;

(ii) After clause (26), the following clauses shall be inserted, namely:—

'(26A) "Services" means anything other than goods;

(26B) "State" with reference to articles 246A, 268, 269, 269A and article 279A includes a Union territory with Legislature.

Amendment in Article 368

Article 368 provides power and procedure for the amendment in the Constitution of India. Amendment can be made in three ways:

1) Simple majority- This kind of amendment is not being done under Article 368.
2) Special majority- As per one of the author it is double majority under this amendment has been done by the way of half of the total members and not less than two third of members present and voting.
3) Ratification by states- If any changes have been proposed to amend the provisions related to change in the federal structure then along with special majority ratification of not less than one half of the States is also required to amend the Constitution.

One hundred first amendment acts proposed to make changes in chapter 1 of part 11 so it was necessary to pass it with ratification by States. GST is a matter related to both union as well as state hence in article 368 of the Constitution, in clause (2), in the proviso, in clause (a), for the words and figures "Article 162 or article 241", the words, figures and letter "Article 162, Article 241 or Article 279A" shall be substituted. It was done to make it clear that in future law related to GST council is legislated not only by parliament but also with the ratification of states.

Other Amendments

One hundred first Amendment Act inserted Art. 246A which is for subject matter, Art. 269A which is done for financial matter, Art. 279A which is about GST council, amendment in Art 368 for the future purposes. These insertions changed many thing and they are going to affect many other articles of the Constitution so for this purpose many other Article as 248, 270, 271, and 286 etc. has also been amended. Sixth schedule was amended and this was done in sub paragraph 3 of paragraph 8. In seventh schedule amendment was done in in lists also In Union list Entry 84 of list substituted and Entry 92 and 92 C shall be omitted, in state list Entry 54 and 62 shall be substituted and Entry 55 shall be omitted.

Conclusion

In conclusion it can be concluded as from GST Act, 2017 most of the indirect tax laws have been repealed and a new taxing system has been introduced which came into force on 1st July 2017 as we all remember the words of the politicians "it is a kind of second independence, it is a kind of economic freedom". From these words it can be understood that this legislation is going to change the taxing system as well as the fund generation system through the taxes.

Constitution is the supreme law of the land and all other general laws must conform to it so it was necessary to make certain changes in the supreme law itself because without amending Constitution it was impossible to think about such a vast change. GST is a new taxing system for India though it is implemented in some of the countries and gave good results too but the Constitution prior to thislegislation has a system of taxation so it was very necessary to amend the Constitution prior to passing of GST.

Challenging Dimensions of Right to Health: Need for Independent Effective Legislation

Dr. Pradeep Kumar[1]

Abstract

Health is a fundamental right of human beings without which they cannot enjoy other human rights. Medical professionals violate human rights and it is a clear cut violation of the right to life under Article 21 of the Indian Constitution, 1950. Access to appropriate health facilities as human rights is not only a human need as a matter of right of every human, but also is a necessity for all human beings without any discrimination. Every human has a right to health, a patient being human, is also entitled to it without any exception. Patients are extremely vulnerable at the point of receiving health care in various ways. Universal Declaration of Human Rights, 1948 Article 25 affirms, "Everyone has the right to a standard of living adequate for the health of himself and of his family". ICESCR, 1966 Article 12 provides the most comprehensive Article on right to health as a human right. This Article recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Right to health as human right is recognized, inter alia, in Article 5 (e) (iv) of the International Covenant on the Elimination of all forms of Racial Discrimination of 1965, Article 11.1 (f) and 12 of the Convention on the Elimination of all forms of Discrimination against Women of 1979 and Article 24 of the Convention on the Rights of the Child of 1989. The World Health Organization (WHO) Constitution was drafted in 1946, and Declaration of Alma-Ata was adopted in 1978. The Ottawa Charter for Health Promotion of 1986 and the Bangkok Charter for Health Promotion in a globalized view also reflect the connections between public health and human rights and they are indirectly related to the patients' health rights. Also the National Health Bill, 2009, offer for protection and fulfillment of rights in terms of fitness and wellness, fitness equity and justice, which consist of the ones related to all the underlying determinants of health further to health care and for engaging in the purpose of health for all. Right to get right of entry to, use and experience all the centers, gadgets, services, programmes and conditions important for the belief of the a preferred of fitness conducive to living a life in dignity shall recommend that centers, gadgets, services, programmes and situations presenting. This paper offers with the Challenging dimensions of Right to Health and need for unbiased powerful Legislation an evaluation with particular connection with proper to health care in India.

Keywords: Health, Human rights, Right to Health, Health care, Medical professionals,

Introduction

Every individual has the right to a widespread of bodily and intellectual fitness conducive to dwelling a existence in dignity[2]. The topic of this invoice primarily based on 'proper to fitness' it to be defining as means 'proper of absolutely everyone to a general of bodily and mental fitness conducive to residing a existence in dignity'[3]. Right to get admission to, use and experience all the facilities, items, offerings, programmes and conditions

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[2] Section 8, of The National Health Bill, 2009.

[3] Section 2 (hh), of The National Health Bill, 2009.

essential for the conclusion of the a popular of fitness conducive to living a life in dignity shall mean that facilities, goods, offerings, programmes and situations presenting.

The WHO Constitution, 1946[4] envisages "*the highest attainable standard of health as a fundamental right of every human being*." Right to Health is a basic right of human beings without which they cannot enjoy other human rights. The World Health Organisation prescribes a doctor population ratio of 1:1000. The doctor-population ratio of some of the countries are: Australia 3.374:1000, Brazil 1.852:1000, China 1.49:1000, France 3.227:1000, Germany 4.125:1000, Russia 3.306:1000, the USA 2.554:1000, Afghanistan 0.304:1000, Bangladesh 0.389:1000, Pakistan 0.806:1000.

India has one doctor for every 1,668 people.[5] According to the Planning Commission's draft (NITI Aayog), the country's government-run health-care system is hamstrung because the number of doctor is short of the target by a jaw dropping 76%, there are 53% fewer nurses, specialist doctor are short by 88%, radiographers are short by 85% and laboratory technicians are short by 80%. A large proportion of quacks or unqualified medical practitioners practice in the under-served rural areas. While there is a huge shortage of doctors, there are over one million 'quacks' practicing in India.[6] Unqualified medical practice is a big business in India.[7]

The Universal Declaration of Human Rights, 1948[8] Article 25 affirms, "Everyone has the right to a standard of living adequate for the health of himself and of his family". The International Covenant on Economic, Social and Cultural Rights, 1966 widely considered as the central instrument of protection for the right to health, recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[9]" This Article recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Right to health as human right is recognized, inter alia, in Article 5 (e) (iv) of the International Covenant on the Elimination of all forms of Racial Discrimination of 1965, Article 11.1 (f) and 12 of the Convention on the Elimination of all forms of Discrimination against Women of 1979 and Article 24 of the Convention on the Rights of the Child of 1989. The Ottawa Charter for Health Promotion of 1986 and the Bangkok Charter for Health Promotion in a globalized view also reflect the connections between public health and human rights and they are indirectly related to the patients' health rights.

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[4] The WHO Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States and entered into force on 7 April 1948.

[5] Available on //economictimes.indiatimes.com/articleshow/59697608.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst Access on 22/01/2019 at 03:20 pm.

[6] Available on https://www.livemint.com/Science/BFelCnQ2fp120Kf5dhBQZP/Why-do-quacks-function-freely-in-India.html access on 22/01/2019 at 03:29 pm

[7] Available on https://www.thehindubusinessline.com/opinion/indian-healthcares-inconvenient-truth/article22259516.ece access on 22/01/2019 at 03:34 pm.

[8] General Assembly resolution 217 A of 10th December 1948.

[9] Article 12 of the International Covenant on Economic, Social and Cultural Rights, 1966, General Assembly resolution 2200A (XXI) of 16 December 1966.

The Indian Constitution guarantees right to life under *Article 21* which lays down that "no person shall be deprived of his life or personal liberty except according to procedure established by law". Right to life would be meaningless unless medical care is assured to a sick person. Right to health care is a fundamental right interpreted by the Apex Court under *Article 21* of the Constitution of India. In the Constitution, there was not any clear cut provision on Patients' rights, *Article 21* of the Constitution casts a special obligation on the state to protect citizens' life from medical and other forms of negligence.

In the Directive Principles of State Policy (DPSP) provided under Part IV of the Constitution of India, the State is under an obligation, to eliminate inequalities in status, facilities and opportunities; to strive to provide to everyone certain vital public health conditions such as health of workers, men, women and children; just and humane conditions of work and maternity relief; raised level of nutrition and the standard of living and improvement of public health. Health is a subject matter of state so it can regulate medical profession with standard form of rules and regulations.

The obligation of the state to ensure the creation and to sustain the conditions congenial to good health is casted by the Constitutional directives contained in different Articles: *Articles 38*, State to secure a social order for the promotion of welfare of the people; *Article 39(e)*, the State shall, in particular, direct its policy towards securing the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; *Article 39(f)*, the state shall, in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment; *Article 42*, provision for just and humane conditions of work and maternity relief, and; *Article 47*, duty of the state to raise the level of nutrition and the standard of living and to improve public health.

The Constitution of India, 1950 guarantees the right to health as a human right and judicially interpreted to expand the meaning and scope of the right to life so as to include the right to health and make it enforceable by virtue of the constitutional remedies available under Article *32* and *Article 226* of the Constitution. Any person whose rights have been infringed can move the Supreme Court under *Article 32* of the Constitution. The Constitution of India under *Article 226* provides the right to move the High Court by appropriate proceeding for the enforcement of the rights conferred and guaranteed under the Constitution and other laws.[10]

[10] Prof. S.K. Verma, Prof. S.C. Srivastava and Sadiq Ahamad Jilani Syed, *Legal Framework for Health Care in India* (New Delhi: The Indian Law Institute, LexisNexis Butterworths, 2002), pp. 13-14.

Right to health and medical care thus being one of the most important fundamental rights of the Indian citizens and its guaranteed enforcement has also been assured. It is towards this end that the attitude of the hospitals, both Government and private was found grossly unsatisfactory as they refused to address medico-legal cases especially accident victims. Historical decision of the Supreme Court in *Parmanand Katara v. Union of India*[11] dealt on this point. In this case a petition was filed under *Article 32* on the refusal of medical practitioners at a private hospital to treat an accident patient for non-compliance of procedural formalities.

The court expressed deep concern on the plight of accident case where medical facilities are not provided until the procedural formalities are competent which sometimes results in worse consequences leading to the death of the accident victim. It directed the medical institutions to provide medical aid and treatment immediately irrespective of whether the procedural formalities have been complied with or not by imposing an obligation on the medical institutions, the Court has conferred a positive right on the citizens. The Court observed:

There can be no second opinion that preservation of human life is of paramount importance that is on account of the fact that once life is lost, the status quo ante cannot be restored as resurrection is beyond the capacity of man. It is the obligation of those who are in charge of the health of the community to preserve life so that innocent may be protected and the guilty may be punished. *Article 21* of the Constitution casts an obligation on the State wherein the State is duty bound to extend medical assistance for preserving life. Every medical practitioner whether at a government hospital or otherwise has the professional obligation to extend services with due expertise for protecting life.[12]

In *A. S. Mittal & Ors. v. State of Uttar Pradesh & Ors.*[13] the Supreme Court, while dealing with public interest litigation under Article 32 of the Constitution, alleging negligence on the part of the medical practitioners in providing services at an eye camp, the court held that maintenance of the highest standard of aseptic and sterile conditions at place where ophthalmic surgery or any surgery is conducted cannot be over emphasised. The court held that the state government should afford the victims some monetary relief, in addition to sum of ₹ 5,000 already paid by way of interim relief. The state government was directed to pay a further sum of ₹ 12,500 to each of the victims.

In *M/s Cosmopolitan Hospital & Anor v. Smt. Vasantha P Nair & Ors.*[14] the Supreme Court reiterated its stand towards the constitutional right of an employee, to health and medical aid, and safety from occupational health hazards. The above stand has been affirmed by the Supreme Court in *Consumer Education and Research Center v. Union of*

[11] A.I.R. 1989 SC 2039.
[12] Manoj Kumar Sharma, "Right to Health and Medical Care as a Fundamental Right," *AIR Journal*, 2005, pp. 256-257.
[13] A.I.R. 1989 SC 1571.
[14] (1992) 1 CPR 820.

India[15]. In this case Supreme Court went a step further by holding right to health and medical care a fundamental right under *Article 21* read with *Articles 39(c), 41 and 47* of the Constitution so as to make the life of workmen meaningful and purposeful. The right to life which includes protection of health and strength of workers is the minimum requirement to enable a person to live with dignity.

Under the Constitution of India, health is essentially a state subject. However, several provisions relating to the protection of the rights of patients are provided in the statute. Article 21, Right to life has been expended by the Supreme Court in several cases. The court has held that providing adequate medical facilities for people is an essential obligation undertaken by the Government in a welfare state. *Paschim Banga Khet Mazdoor Samity and others v. State of West Bengal and Another*[16], Article 47, Part IV DPSP direct state to protect the health of its citizens. Compensation in awarded under Article 32.

The Supreme Court held that the denial of emergency aid to the petitioner due to the non availability of beds in the Government Hospital amounts to the violation of the right to life under *Article 21* of the Constitution of India, 1950. The Court went on to say that the Constitutional obligation imposed on the State by *Article 21* cannot be abdicated on the grounds of financial constraint.

In *State of Punjab v. Ram Lubhaya Bagga*[17] Supreme Court observed that the right of one person is correlated to a duty upon another, individual, employer, government or authority. In this case the Supreme Court examined the issues of the constitutional right to health care under Arts. 21, 41 and 47 of the Constitution of India 1950.

In *Mr. 'X' v. Hospital 'Z'*[18] question arose regarding the privacy of AIDS patient. Supreme Court held that the 'right to privacy' is not absolute. Where there is a clash of two fundamental rights, namely the appellant's right to privacy as part of right to life and his fiancés right to lead a healthy life which is her fundamental right under *Article 21*, the right that would advance the public morality or public interest, would alone be enforced through the process of court. Thus, the hospital authorises could wave confidentiality in the public interest.

It is to note that AIDS patients are denied treatment and the health provider adopts a discriminatory attitude towards them. Therefore it should be obligatory on the part of the health provider to provide medical treatments to AIDS patients. Right to health care is a fundamental right of AIDS patients so there is a need for sensitive medical professionals.

[15] A.I.R. 1995 SC 922.
[16] A.I.R. 1996 SC 2426.
[17] (1998) 4 SCC 117.
[18] A.I.R. 1999 SC 495.

The National Consumer Disputes Redressal Commission (NCDRC) in *Pravat Kumar Mukherjee v. Ruby General Hospital & Others*[19] declared that a hospital is duty bound to accept accident victims and patients who are in critical condition and that it cannot refuse treatment on the grounds that the victim is not in a position to pay the fee or meet the expenses or on the ground that there is no close relation of the victim available who can give consent for medical treatment. Sumanta Mukherjee, a 20 year old student was injured when a Calcutta Tramway Corporation bus hit his motorcycle. The victim was taken to the nearest hospital, the Ruby General Hospital.

The victim was conscious when he reached the hospital and showed the Medical Practitioners his medi-claim policy insuring him for ₹ 65,000/-. He assured the hospital that all the bills would be cleared and requested that treatment be given. Those persons immediately pooled ₹ 2,000/- and informed that they had contacted the parents of the victim and the parents were willing to pay the balance. However, since the amount of ₹ 15,000/- was not arranged, the hospitals discontinued treatment. The victim died.

The NCDRC while imposing damages in a sum of ₹ 10 lakhs on the Hospital observed that Medical Practitioners at the hospitals cannot first demand fees before agreeing to treat the patient and they cannot also insist on consent of the relatives of the victim before starting emergency treatment. The National Commission relied on *Paramanand Katara* decided by the Supreme Court, referred to above. It held that the preservation of human life is of paramount importance. That is also in consonance with the Code of Medical Ethics. Recovery of fees can wait, but treatment cannot be denied.[20]

In *Air India Statutory Corporation v. United Labour Union and Others*[21], the Supreme Court observed that right to health and medical care to protect the health and vigour, while in service or after retirement, was held a fundamental right of a worker under Article 21 read with Article 39(e), 41, 43, 48-A and all related constitutional provisions and fundamental human rights to make the life of the workmen meaningful and purposeful with dignity of person. The right to health of a worker is an integral facet of meaningful right to life, to have not only a meaningful existence but also robust health and vigour without which the worker would lead a life of misery. Lack of health denudes him of his livelihood. Compelling economic necessity to work in an industry exposed to health hazards, due to indigence for bread-winning for himself and his dependents, should not be at the cost of the health and vigour of the workmen.

Hospitals and medical practitioners have to initially screen the persons to decide if the persons require emergency medical treatment. If they do not require such treatment, the further provisions of the Act will not apply. If it is determined that the persons require

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[19] II (2005) CPJ 35 NC.
[20] 201st Law Commission Report on "Medical Treatment after Accidents and During Emergency Medical Condition and Women in Labour," August 2006, pp.13-14.
[21] 1997 AIR SCW 430.

emergency medical treatment, first they have to be stabilized and thereafter, they must be given treatment.

If the hospital or medical practitioner does not have facilities for screening, stabilization or emergency medical treatment, the persons have to be transferred to another hospital or to a medical practitioner having facilities. As to what safeguards have to be taken while making the transfer, as to call for the services of an ambulance or other vehicle, as to how the persons should be taken care of during transit, all these matters are provided in detail in the Bill annexed to the Report.

The hospitals and medical practitioners have to maintain registers as to screening, stabilization, treatment or transfer. The States must publish a scheme for reimbursement of expenditure incurred by hospitals, medical practitioners or for ambulances and the States must allocate separate funds for this purpose. The duty of the States in this behalf can be traced to Article 21 as well as to DPSP enunciated in the Constitution of India.[22]

Conclusion

The Constitution of India, 1950[23] provides safeguards for the protection of existence and private liberty. Rights of patients need to be covered because they may be closely related to the proper to existence of the patients. Treatment and analysis associated information ought to be made available to every affected person. Every affected person has proper to health and safe remedy, without distinction of any type, consisting of race, colour, intercourse, language, faith, political or other reviews, national or social starting place, belongings, birth or other fame.

In the DPSP furnished below Part IV of the Constitution of India, the State is, below an responsibility, to take away inequalities in status, centers or opportunities coverage toward securing the fitness and strength[24] of people, man and ladies, and the tender age of kids[25] are not abuse and that residents aren't pressured via financial necessity to enter avocations unsuited to their age or electricity ; to strive to offer to all and sundry positive vital public health situations consisting of fitness of workers, guys, ladies and youngsters; simply and humane situations of labor and maternity comfort ; raised stage of nutrients and the usual of dwelling and improvement of public health. Health is a topic be counted of state so nation can regulate scientific profession with preferred form of policies or regulations. Right to fitness care is a fundamental right interpreted via the Apex Court.

Right to fitness is expressly transformed and declared as a fundamental proper, and a appropriate amendment to the Constitution is made to this effect like adding a new

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[22] *Ibid.*
[23] It was adopted by the Constituent Assembly of India on 26th November 1949 and became effective on 26th January 1950.
[24] Article 39(e) of Constitution of India, 1950.
[25] *Ibid.*

Article 21 (B) in the Constitution of India, 1950. The clinical practitioner is to serve humanity with full respect for the honour of sufferers. Human life is extra precious, it have to be preserved in any respect value and fitness specialists are ethically bound to provide vital hospital therapy to the patients.

In different hand Indian public health care gadget has collapsed to nothing or even poorer United States like Bangladesh and Kenya has advanced health signs. The 70 % of the fitness expenditure is met from private resources. This is a unmarried maximum essential cause for indebtedness in rural areas and can a part of India public health gadget really does now not exist. So how can we say that right to health care in India is fundamental rights? This assertion suggests stark fact given by using a union minister, the fall apart of fitness care gadget in India, who is liable for this? Now a day's query arises that how we can enforce the fitness care polices in efficacious manner. But it lack of political will and because of corruption implementation of fitness care polices in India absolutely failed. The National Health Bill 2009 is ready in 2008 but due loss of political wills this bill couldn't be enacted even after 11 years. Now there's need to unbiased powerful rules for health.

Media in Protection of Democratic Human Rights

***Mr. Gaurav Gupta*[1]**

"A responsible Press is the handmaiden of effective judicial administration. The Press does not simply publish information about cases and trials but, subjects the entire Justice – hierarchy (police, prosecutors, lawyers, Judges, Courts), as well as the judicial processes, to public scrutiny. Free and robust reporting, criticism and debate contribute to public understanding of the rule of law, and to a better comprehension of the entire Justice – system. It also helps improve the quality of that system by subjecting it to the cleansing effect of exposure and public accountability."[2]

….Mr. F. S. Nariman

Introduction

In recent years, it has become apparent to observers as well as practitioners of mass communications that human right is more newsworthy than it was. The media have become interested not only in violations of human rights, but in the institutional apparatus that has been designed to promote and protect human rights. Partly this is due to the fact that many governments and international institutions have integrated human rights principles into their policy frameworks. Formally, therefore, the human rights discourse and human rights law influence directly public policy and diplomatic relations in ways that was not the case until the end of the Cold War. Since 1945, but more especially in the last twenty five years, numerous international standards and conventions have been approved and ratified by governments and international organizations. They set out detailed guidelines on unacceptable and acceptable conduct in numerous areas of life.

The many humanitarian crises in the last decade have also caused media organizations to increase their coverage of human rights. Some of the most serious human rights violations have either taken place in the context of armed conflict, or have been the immediate cause of conflict erupting. One effect of this has been to muddy a distinction between human rights and humanitarian issues that was already none too clear in the minds of many journalists. Though journalists have expanded coverage of human rights issues into new areas, many human rights issues are under-reported. Issues that are less visible, or slow processes, are covered rarely. Human rights are still taken largely to mean political and civil rights, and the importance of economic, social and cultural rights is ignored widely by the media in their coverage of economic issues, including the international economy, poverty, inequity and social and economic discrimination. Section 2 (d) of Protection of Human Rights Act, 1993 defined human right as, "*Rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by court in India*."

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[2] Available on http://presscouncil.nic.in/speechpdf/speech6.htm

Human Rights in History

The concept of Human Rights has arisen from that of natural rights of all human. The belief that every person by virtue of his humanity is entitled to certain natural rights is a recurring theme throughout the history of mankind. It can be traced back thousands of years from the Vedas to the Hammurabai Code (1780 BC) to the Magna Carta, the French Declaration of Human Rights, and the American Bill of Rights. Time and again history shows that the existence of human rights has been recognised and accepted as a necessary component for the well being of civilisation at any given time.

Various rules and punishment on variety of matters including women's rights, children's rights and slave rights are mentioned in the code of Hammurabi. The Persian Empire (Iran) established unprecedented principles of human rights in the 6th century BC under the reign of Cyrus. Three centuries later, the Mauryan Empire established pri nciples of civil rights. Religious documents– the Vedas, the Bible, the Quran and Analects of Confucius also referred to the duties, rights and responsibilities of the citizens.

In 1222, the *Manden Charter* of Mali was a declaration of essential human rights including the rights to life, and opposed the practice of slavery. Several 17th and 18th century European philosophers developed the concept of natural rights, the notion that people possess certain rights by virtue of being human. The United States Declaration of Independence includes concept of natural rights and states "that all men are created equal, that they are endowed by their creator with certain unalienable rights that among these are life, liberty and the pursuit of happiness". The concept of human rights has undergone a revolutionary change since him Magna Charta of 1215 to the rights contained in the Unites Nation Convention. The charter of United Nations which came into force in October1945 begins with the determination of the people of member nations to save the succeeding generations from the scourage of war and to reaffirm their faith in the fundamental human rights and the dignity of human being.

Relation between Human Rights and Democracy

The values of freedom, respect for human rights and the principle of holding periodic and genuine elections by universal suffrage are essential elements of democracy. In turn, democracy provides the natural environment for the protection and effective realization of human rights. These values are embodied in the Universal Declaration of Human Rights and further developed in the International Covenant on Civil and Political Rights which enshrines a host of political rights and civil liberties underpinning meaningful democracies.

The link between democracy and human rights is captured in article 21(3) of the Universal Declaration of Human Rights, which states:

"The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

The rights enshrined in the International Covenant on Economic, Social and Cultural Rights and subsequent human rights instruments covering group rights (e.g. indigenous peoples, minorities, people with disabilities) are equally essential for democracy as they ensure inclusivity for all groups, including equality and equity in respect of access to civil and political rights.

For several years, the UN General Assembly and the former Commission on Human Rights endeavored to draw on international human rights instruments to promote a common understanding of the principles, norms, standards and values that are the basis of democracy, with a view to guiding Member States in developing domestic democratic traditions and institutions; and in meeting their commitments to human rights, democracy and development.

This led to the articulation of several landmark resolutions of the former Commission on Human Rights. In 2000, the Commission recommended a series of important legislative, institutional and practical measures to consolidate democracy (resolution 2000/47); and in 2002, the Commission declared the following as essential elements of democracy[3]:

- Respect for human rights and fundamental freedoms
- Freedom of association
- Freedom of expression and opinion
- Access to power and its exercise in accordance with the rule of law
- The holding of periodic free and fair elections by universal suffrage and by secret ballot as the expression of the will of the people
- A pluralistic system of political parties and organizations
- The separation of powers
- The independence of the judiciary
- Transparency and accountability in public administration
- Free, independent and pluralistic media

Media

Media is an all-encompassing term referring to the presentation and transmission of information by a multiplicity of outlets (radio, television, print and the Internet). In this report, we use the term to refer to the individuals and organisations that communicate with the public via print, radio, television and Internet broadcast, and video and film production. When human rights organisations put out reports, they are in effect participating in such media activity, as are government public affairs departments. News organisations are part of the media, but their mission, in principle at least, is to evaluate all information that is released, and to seek information that is relevant but not available

[3] Available on http://www.un.org/en/globalissues/democracy/human_rights.shtml

immediately. The term media, however, is widely understood to refer primarily to news, and unless otherwise stated it will be so used here. As I mention above that the free and independent media is essential of democracy so many international and national instruments who secures the freedom and independence of media is as below:

Instrument, securing the freedom of Media

Article 19[4] of Universal Declaration of Human Right, 1948

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19 of International Covenant on Civil and Political Rights, 1966[5]

(1) Everyone shall have the right to hold opinion without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in printing, in the form of art, or through any other media of his choice."

1st Amendment of U.S. Constitution[6] provides

"*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."*

Article 10 of European Convention of Human Rights[7]:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises"

The Madrid Principles on the Relationship between the Media and Judicial Independence 1994[8]

Freedom of the media, which is an integral part of freedom of expression, is essential in a democratic society. It is the responsibility of judges to recognize and give effect to freedom of the media by applying a basic presumption in their favour and by permitting only such restrictions on freedom of the media as are authorized by the International Covenant in Civil and Political Rights ("International Covenant") and are specified in precise laws. The media have an obligation to respect the rights of individuals, protected by the International Covenant, and the independence of the judiciary.

Preamble of Indian Constitution

…..… liberty of thought, expression, belief, faith and worship; Art. 19(1)(a): *All citizens shall have the right,……To freedom of speech and expression;*

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[4] Available on http://www.un.org/en/documents/udhr/index.shtml#a10

[5] Available on http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf

[6] Available on *www.ushistory.org/gov/10b.asp*

[7] Available on *www.echr.coe.int/Documents/Convention_ENG.pdf*

[8] Available on http://www.caluniv.ac.in/Global%20mdia%20journal/Commentaries/C%207.%20%20%20%20%20SOUMYA%20DUTTA.pdf

Role of Media in Democracy

The role of media has several facets. These facets indicate the function of the media and the reason to describe it as the "fourth estate". The three wings of the state—legislature, executive and judiciary are assigned by the constitution of India, distinct roles. All meant to sub serve a common constitutional purpose. This purpose is the common good of the people. Cicero said: "the good of the people is the chief law".

The role of the media as the watchdog in a democracy is to ensure that the constitutional purpose is served by the proper discharge of its constitutional obligation by each of the three wings. Proper discharge of its role by the media requires it to faithfully and objectively inform the people of the real state of functioning of each of the three wings, and to focus attention on the deficiency or deviation, if any, from the correct path to enable correction of the aberrations. The role of media is complementary, and, therefore, it is the 'fourth estate'. It is beyond controversy that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by freedom of circulation.

The democratic culture envisages an open society. The concept of an open government is derived from the right to know which is implicit in the freedom of speech guaranteed under article 19(1)(a) in the Constitution of India. This is necessary to enable the people to discharge their participatory role in the continuous process of the government, not confined merely to the sporadic exercise of voting periodically, dissemination of information or freedom of communication is a part of this exercise. Freedom of speech is meaningful only when it includes the right to know which in turn is effective only with 'freedom of communication'. The rights and obligation of the media in the context of its role are to be viewed in the perspective of its true function in a democracy as the medium for dissemination of information. Every right has a corresponding obligation. A right must, therefore, be viewed along with the attendant obligation in the context of its purpose.

Freedom of the press is not expressly mentioned in article 19 of the Constitution of India but has been held to flow from the general freedom of speech and expression guaranteed to all citizens under article 19(1)(a). By judicial construction it has been held to include freedom not merely to write and publish the views but also to carry on the business to disseminate the information to the people and to propagate one's views. The right includes freedom of communication not only through print but also the electronic media which has become a potent force in current time. This is implied from the constitutional provisions providing for a representative government. This freedom is subject only to reasonable restrictions imposed by law under article 19(2) in the interest of sovereignty and integrity of India, the security of the state, friendly relations with the foreign state, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. The extent and scope of freedom of the press are indicated in the decisions of the supreme court of India.

Media and Social Responsibility

The normative view of the press argues that the conduct of the media has to take into account public interests. The main public interest criterions that the media need to consider include freedom of publication, plurality in media ownership, diversity in information, culture and opinion, support for the democratic political system, support for public order and security of the state, universal reach, quality of information and culture disseminated to the public, respect for human rights and avoiding harm to individuals and the society.

The social responsibilities expected from media in the public sphere were deeply grounded with the acceptance of media as the fourth estate, a term coined by Edmund Burke in England. With the formation of the 1947 Commission on the Freedom of the Press the social responsibility of media became a strong debating point. It was formed in the wake of rampant commercialization and sensationalism in the American press and its dangerous trend towards monopolistic practices.

The report of the Hutchins Commission, as it was called, was path breaking on its take on social responsibility and the expected journalistic standards on the part of the press. The theory of social responsibility which came out of this commission was backed by certain principles which included media ownership is a public trust and media has certain obligations to society; news media should be fair, objective, relevant and truthful; there should be freedom of the press but there is also a need for self regulation; it should adhere to the professional code of conduct and ethics and government may have a role to play if under certain circumstances public interest is hampered.

Democracy, Media and the Public Sphere

Informing the citizens about the developments in the society and helping them to make informed choices, media make democracy to function in its true spirit. It also keeps the elected representatives accountable to those who elected them by highlighting whether they have fulfilled their wishes for which they were elected and whether they have stuck to their oaths of office. Media to operate in an ideal democratic framework needs to be free from governmental and private control. It needs to have complete editorial independence to pursue public interests. There is also the necessity to create platforms for diverse mediums and credible voices for democracy to thrive.

It has already been discussed that media has been regarded as the fourth estate in democracy. Democracy provides the space for alternative ideas to debate and arrive at conclusions for the betterment of society. The publicly agreed norms are weighed over that of actions on the part of economic organizations and political institutions. This is close in essence to the concept of public sphere where rational public debate and discourse is given importance. Individuals can freely discuss issues of common concern. Media plays one of the crucial roles behind the formation of public sphere (Panikkar, 2004). However, Barnett is of the opinion that in modern times the true sense of public sphere is getting eroded with the media of public debate getting transformed to mediums

for expressing particular interests rather than general interests which are universally accepted. This signifies that public sphere which is essential for a vibrant democracy can actually be channelized to serve vested interests rather than public good.

Media and Indian Democracy

The political system in India is close in spirit to the model of liberal democracy. In the constitution of India the power of the legislature, executive and judiciary have been thoroughly demarcated. The party system in operation is a competitive one with flexibility of roles of government and opposition. There is also freedom of the press, of criticism and of assembly. Indian democracy has always attracted attention worldwide and has made scholars to ponder over the secret of its success amidst considerable odds. In India diversity is almost everywhere and it is not a developed nation. The problems of poverty and inequality in distribution of income have been constant irritants. Nevertheless, till today democracy has survived in the country.

The role of media in India, the largest democracy of the world is different from merely disseminating information and entertainment. Educating the masses for their social upliftment needs to be in its ambit as well. In a country where there is large scale poverty, unemployment and underdevelopment media has a responsibility towards developmental journalism. It has a role to play behind formation of public opinion which can force the political parties to address the core issues haunting the country's progress. However, public opinion can be manipulated by vested interests to serve their own goals. Media can conceal facts and project doctored ideas to influence the electorate and thereby the voting outcome. Values like objectivity and truthfulness in presentation of news and ideas can be totally done away with.

In India public service broadcasting was given much importance after independence. It was used as a weapon of social change. AIR (All India Radio) and Doordarshan, the public service broadcasters in the country had the responsibility of providing educational programs apart from information and entertainment. However, it needs to be taken note of that the public service broadcasting system in the country was closely identified with the state. A monopolistic media structure under state control has the threat of becoming the mouthpiece of the ruling elite. The scenario was bound to change with the opening up of Indian economy in a bid to integrate with the global system. It signalled the emergence of a competitive market in the field of media with public service broadcasters getting challenges from private entities. This, however, had the seeds of a new problem of ownership.

Ownership pattern of media across the globe and in India is a cause for concern. There are big corporate houses who own newspapers and television networks. A higher concentration of ownership increases the risk of *captured media*. Media independence in such a scenario gives way to safeguarding the interest of the owners who may not serve social responsibilities. The space for plurality of ideas is eroded sending ominous signals for democracy. Bogart (1995) opines that in many democratic countries media ownership

has reached dangerous levels of concentration. He has cited the examples of News Corporation's (owned by Rupert Murdoch) 37 % share in United Kingdom's national newspaper circulation and *Silvio Berlusconi's* ownership of top three commercial television channels, three pay TV channels and various newspapers and magazine in Italy which act as his political mouthpieces. Transnational powerful media organizations are in operation in India post liberalisation. These are big multinational corporations who own a chunk of the mass media market ranging from newspapers, television, radio, book publishing to music industry.

In India there are big players like the Times Group and ABP who rule the roost in the media arena. The growth of media conglomerates and their powerful presence has raised fears of manipulation of ideas by a powerful few detrimental to the democratic fabric. The corporate giants have also engaged in severe competition among themselves dishing out news and content which is primarily dominated by sensationalization, sleaze and glitz to capture wider markets. The disturbing trend that has emerged in the present media scenario is the use of media in the battle between rival political groups. In fact, this new phenomenon is in operation in India with newspapers and news channels taking sides while presenting facts. The same event can be presented in two contrasting manners in two newspapers or two television channels. Promotion of hate speech in place of constructive debate and creating an atmosphere of suspicion rather than social trust has the danger of making people cynic about the democratic setup leading to its breakdown. While discussing the dangers associated with the developments in media it needs to be said that media in India has also undertaken roles which have strengthened democracy.

The complexity of the role of the media:
Guaranteed freedom of expression is the base for media to take a responsible role of protector, promoter and educator in human rights, and also to expose human rights violations while protecting the reporters. There is not just one role of the media. Media can take on many roles, which makes the discussion on how to link media with human rights very complex, depending on the question:

Media in the role of the agenda setter / gate keeper
The media has a lot of power to turn an issue into a public debate or to ignore it. That concerns national and international topics. Let’s take an example of Anna Hazare Andolan and see the difference between Delhi and Mumbai. Media supports Delhi Andolan that’s why it was converted into huge mass movement but in Mumbai it was totally flop from beginning. There can be a particular interest of the owner of a media, economical motives and also personal preferences and specialization of a journalist that influence what ends up on the agenda.

Media in the role of the entrepreneur
“Sex and crime” sell, as we know. It’s not only the responsibility of the media but ofcourse the one of the readers who influence the quality of a medium, supporting it’s existence as consumers. In times of economical crisis the competition factor is high,

cutting back jobs of journalists influence the quality and media don't want to take risk in their agenda setting.

Media in the role of the perpetrator

In many cases the media has an important role in heating up conflicts, using propaganda towards minorities. Also the use of language in terms of reproducing stereo types or the media violating the rights to privacy are important issues to consider.

Media in the role of the "amplifier"

If we think about that, we come across the problems of illiteracy, education, available technology (internet). A democracy needs a broad media landscape in order to enable public debates on relevant topics. In that sense the media is an important factor for a healthy immune system of every democracy. The media can "amplify" people's voice; it can make their positions, questions, needs or demands heard.

Media in the role of the educator

Media can be active in reporting on human rights issues, for example on the situation of minorities in a country in order to decrease stereo-types and increase understanding. A TV program can educate children on their rights, a TV soap can transport values through theirs characters. The choice of movies shown in TV and in cinemas can influence people's perspective uaranteed freedom of expression is the base for media to take a responsible role of protector, promoter and educator in human rights, and also to expose human rights violations while protecting the reporters A diverse media environment with independent media and no monopolization is crucial in avoiding media getting into the role of the perpetrator and limiting the effects of agenda setting.

Media as a watchdog

The media as a watchdog of the democratic system has unearthed its various shortcomings. Investigative reporting in print and television media has helped in exposing large scale corruptions which have robbed the nation. The *Commonwealth Games Scam*, the *Adarsh Housing Society Scam*, *Cash for Vote Scam* and *the Bofors Scam* are the highpoints of the Indian media. Across newspapers and television channels voices have been raised when the bureaucracy, judiciary or other public functionary have crossed the laxman rekha. There have also been initiatives to promote community media for the citizens to air their concerns. This is a significant leap towards alternative media usage which is distant from the dominant structure. Here the importance lies more in participatory communication right from the grassroots rather than communication which flows top down.

Various television channels have also given the space for ordinary citizens to air their views in the form of citizen journalists thereby promoting democratic participation. Newspapers have educated the masses by informing them of the developments in the field of science and technology. They have also expressed strong views against prejudices which harm the society. Much developmental news has also been aired through the

medium of radio. Its comparative low cost and wide acceptance among poorer sections have made it a potent tool for expressing ideas beneficial to the public. Internet, a relatively newer entrant in the field of mass media, has proved to be more democratic than newspaper and television. Internet has provided the opportunity for citizens who are conversant with the medium to express their views about a number of issues. In many cases groups have been formed by likeminded people who discuss and debate over a number of decisions on the part of the government and seek new ideas for way ahead. The power of the internet can be easily judged from the developments in Egypt in recent times. Social networking sites like *Facebook* and *Twitter* were used to garner support against the regime of President Hosni Mubarak (Kuwait). Now we can easily see the same in support of Narendra Modi and Congress party in India.

Internet has been used by various public service organizations and N.G.Os to inform people about their objectives and also to make them aware of various initiatives on the part of the government as well as non government organisations for social upliftment. In internet the barrier to communication is minimal which helps in the formation of a participative environment. There is also greater empowerment of the users through higher level of interactivity and flexibility in choice of media outlets. The potential of the medium lies in its ability to be more personalized by offering user-created content. Nevertheless, there is the threat of advertising revenues influencing media outputs. Those who control considerable wealth have the opportunity to sway public opinion in their favour with the help of mass media. In the 2G scam the Radia Tapes controversy brought in focus the journalist, politician and industrial conglomerate nexus. Developments like these are a threat to democracy and undermine the media fraternity. Advertisements in newspapers, television, radio and at times the internet have become a part of the present election campaigns. Candidates with better funds have the edge over others in being voted to office because they can buy newspaper space and considerable air time.

Human Rights and Media

Media has been entrusted with the responsibility of guarding the rights of the people in a democratic political system. This points towards the pivotal role that media can play in ensuring that the people who make a political system enjoy its positive outcome. However, it is important to come out of the visionary discourse of media and critically look at its role and function in our present socio-political context.

Media as the promoter of human rights in India

Since media are the eyes and ears of any democratic society, their existence becomes detrimental to the sustenance of all democratic societies. Unless a society knows what is happening to it and its members, the question of protecting or promoting rights does not emerge. Hence, it is in fulfilling this function that media justifies its existence. No doubt in India, media especially the print, has played an important role in *educating* and *informing citizens of their rights* as well as the violations of such rights. One cannot forget that the origin of newspapers in India itself lay in challenging the denial of rights. *Hicky's Bengal Gazette* was begun in 1780 to challenge the autocratic rule of the

East India Company. In South India, *The Hindu*, we are given to understand, constantly attracted the wrath of the then British government, because it drew attention of the readers to the gross violation of people's dignity and rights. In the post – independence India too the newspapers have constantly attracted the anger of and harassment by the governments for trying to take the truth to the people. Significant section of the national press has dared to oppose events that have changed the course of history in India – Emergency, Babri Masjid demolition, the Godhra carnage, Nandigram and recently Mujaffarnagar.

However, one cannot forget that for much of the press, the rights of the dalits, women, rural poor, urban poor, and workers in the unorganised sector increasingly remained outside the purview of human rights. Further, only the human rights violations by the state against the middle class became violations of human rights for media.

The Role of Media in Protection of Human Rights

Human society has developed from Stone Age to space age. But while some nations or societies have developed apace the others seem to be nowhere in the race. The rights which citizens enjoy vary depending upon the economic, social, political and cultural developments. In view of the fact that there is a revolutionary change and growth in every sphere of life and mainly in the communication and media world, media today, plays a decisive role in the development of society. Thus the role of media in protection of human rights cannot be ignored or minimized. Media is a communicator of the public. Today its role extends not only to giving facts as news, it also analyses and comments on the facts and thus shapes the views of the people.

The impact of media on society today is beyond doubt and debate. The media has been setting for the nation its social, political economic and even cultural agenda. With the advent of satellite channels its impact is even sharper and deeper. With twenty-four hours news-channels, people cannot remain neutral to and unaffected by what the channels are serving day and night. It is, therefore, of paramount importance that the media plays an important and ethical role at all levels and in all parts of the country and the world.

Media can play a major role in protecting and promoting human rights in the world. It can make people aware of the need to promote certain values in the cause of human rights which are of eternal value to the mankind. Peace, non-violence, disarmament, maintenance and promotion of ecological balances and unpolluted environment and ensuring human rights to all irrespective of caste, colour and creed should be the minimum common agenda for the media. The media can perform this role in different ways. It can make people aware of their rights, expose its violations and focus attention on people and areas in need of the protection of human rights and pursue their case till they achieve them. Media can also give publicity to the individuals and organisations, which are engaged in securing human rights. This will encourage as well as motivate others to do the similar work.

Media can inform and educate the people of their rights and suggest ways and means by which they can solve their problems and thus empowering them to protect their rights. Since media plays the role of communication between the state and the public, it can also play an effective role of making the authorities aware of their duties. Media's new role today is reporting, analysing and commenting. It faces a challenge in playing the role in protecting human rights in the world. While playing this new role, there is risk of its misuse. For that self-regulation is the need of the hour. Journalists should set 'Lakshman Rekha' while reporting human rights violations. The main aim before the journalists should be to give facts but not in a manner and with the purpose to create sensation and to arouse the sentiments of the people. Projection and language should be decent and civilised. Journalists should not add insult to inquiry. Media should refrain from giving statements and pictures that are flaring. Since media is the mirror of the society, care should be taken that the mirror is not hazy.

While reporting such violation media should not get influenced by authorities. It should look deep into the problem and provide solutions. Mere reporting of the facts is not enough. It should give reasons of the problem and the nature of the violations and then give solutions. Press has a sacred duty to focus human rights violations and then measures for protecting them.

Freedom of expression is a sacred right well accepted over the globe and journalists should respect this freedom. In Indian constitution, it finds place as a guaranteed fundamental right. The Government of India in tune with constitutional mandate professes its anxiety to protect and safeguard this fundamental right. But no right and for that matter the right to freedom of expression is absolute and unfettered in all circumstances but bound by duty to maintain peace and harmony of the body polity by exercising prudence and restraint in the exercise of right to freedom of speech. If exercise of this right is likely to inflame passion, the right to freedom of expression needs circumspection and consequent restraint for greater good of the society.

The apex court of the country in a watershed judgment in the case of *Olga Tellis v. Bombay Municipal Corporation*[9] declared that a man has not only a right to live but to live with human dignity. Consequently all attributes for living with the dignity of a human soul namely education, shelter etc. are to be guaranteed and welfare activities of the State must be directed to ensure socio-economic condition where no one in the country is deprived of the basic requirements to lead a dignified life. The Media being the watchdog of the nation must work for guiding the people and the government to move towards such goal relentlessly and in right direction.

Media is increasingly getting concentrated in the hands of a few. While such a concentration will reduce media spaces for plural voices, they also make such voices look non-significant. With media becoming and industry, and profits becoming a priority,

[9] AIR 1986 SC 180.

audience, who are increasingly referred to as 'eyeballs,' become merely numbers to determine the amount of advertisement revenue that will flow into the organisation.

Example cases in which Cognizance taken by NHRC on the ground of published news

- The Commission has taken cognizance of a press report captioned, "Kids thrashed for refusing insect-infested school meal" that appeared in 'The Hindustan Times' dated 16.7.2012. The Commission vide its proceedings dated 16.07.2012 issued notice to the Chief Secretary, Government of Bihar and the District Magistrate, Vaishali to submit a report in the matter within four weeks. The Chief Secretary, Government of Bihar was also directed to inform the Commission as to what steps are being taken by the administration for monitoring and supervision of mid day meal scheme in the schools including the quality of food being served to the school children in Bihar.[10]
- The Commission came across with a new item regarding missing children with a caption 'Chief Minister does not comment, Home Minister does not listen, DG is not available' appeared in the Gujarati Daily 'Sandesh', Ahmedabad dated 27.5.12. As per the report, a number of kids have been disappearing in the city of Ahmedabad in recent months and this number is increasing day by day. It has been alleged in the report that police is not taking appropriate action on the complaints made to them regarding disappearance of children. It has been further alleged that the parents of the missing children have approached various higher authorities but in vain. The newspaper also carries the photographs of the protest made by the family members of the missing children and other people. Taking cognizance of the press report, the Commission vide proceedings dated 13.6.12 directed the Chief Secretary, Govt. of Gujarat and DGP, Gujarat to submit detailed reports in the matter within four weeks.[11]
- Dr. Lenin, vide his e-mail letter dated 22.8.2012 forwarded a copy of the press report captioned, "Sare-aam Dikhi Police Ki 'Mardangi" that appeared in a local newspaper 'Jansandesh Times' dated 19.8.2012. The press report alleged that a police constable, Bechu Singh Yadav gave severe beating a fruit vendor when he expressed his inability to pay illegal gratification of Rs.50/- demanded by him. The incident took place in front of gate No.1, City Railway Station, Allahabad. The press report also shows a photograph wherein the constable is trying to overrun the victim under his motorcycle thereby subjecting him to torture. The Commission vide its proceedings dated 28.08.2012 issued notice to the Director General of Police, State of Uttar Pradesh as well as SSP, Allahabad to submit a report in the matter within four weeks.[12]
- The Commission has taken *suo-motu* cognizance of a press report captioned, "Tamil Nadu shocker Dalits lead isolated lives in enclosed fence" that appeared in 'Rediff news (www. rediff.com)' on 15.8.2012. The press report alleges that 50 houses in

[10] (Case No. 2432/4/39/2012 NHRC).
[11] (Case No. 654/6/1/2012 NHRC).
[12] (Case No. 28200/24/4/2012 NHRC).

village Velayuthapuram, Tuticorin district of Tamil Nadu belonging to Scheduled Caste Community are enclosed with a barbed fence that separate it from the other parts of the village. The members of the Scheduled Caste Community residing in these 50 houses have been leading isolated lives, besides having no basic facilities like sanitation and water. It has also been alleged that Rettiars, who own all the agricultural land in Velayuthapuram, do not employ the Scheduled Castes and hence they travel to other villages to find work. The Commission vide its proceedings dated 21.08.2012 issued notice to the Chief Secretary, Government of Tamil Nadu to submit a report in the matter within four weeks. Response received from the authority is under consideration of the Commission.[13]

Conclusion

Media is expanding its horizons each and every day and playing an important role in democracy and in protection of human rights. Media has largely become mass *information* rather than mass *communication*. But at same time it is diverting from its social responsibility to fair and proper news. Sometimes the commercialized media, by fake reporting or act as paid media, just for getting money and high TRP,s; do injustice instead of promoting justice.

Media needs to communicate with the governments, NGOs, human rights activists and the public the critical discourse of human rights and the violations. May be a paradigm shift is required to look at media communication as community interaction rather than *mass* communication. Such a shift would then justify the sacred role that media has been called upon to play. If the media does not take up the role of enabling protection of human rights of the citizens, then it would become an accomplice to the violation of human rights. I would like to conclude by quoting *Mahatama Gandhi:*

"One of the objects of a newspaper is to understand the popular feeling and give expression to it, another is to arouse among the people certain desirable sentiments, and the third is the fearlessness to expose popular defects."[14]

[13] (Case No. 2254/22/41/2012 NHRC).
[14] Available on http://presscouncil.nic.in/speechpdf/speech6.htm

National Commission for Protection of Child Rights: An Overview

Ms. Astha Misra[1]

Abstract

Children are the future of the country. The welfare of the entire community, its growth and development, depends on the health and well being of children. They need special protection because of their age, physical and mental status. Recognizing this fact, the Government has taken various executive as well as legislative steps to protect them. The employers take benefit of many loopholes in the law and exploit children. They cannot be developed as responsible and productive members of tomorrow unless an environment which is conducive to their social and physical health is assured. Every nation, developed or developing, links its future with the status of the children. Childhood holds the potential and also sets the limit to the future development of the society. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children lead to lose of the growth of the nation and society as a whole in several manners. If children are deprived of their childhood - socially, economically, physically and mentally - the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. This paper deals with National Commission for Protection of Child Rights an overview in Indian context.

Keywords: Child, Human rights, exploits children, Child Development, future development

The hallmark of culture and advance of civilization consists in the fulfillment of our obligation to the young generation by opening up all opportunities for every child to uphold its personality and rise to its full stature, physical, mental, moral and spiritual. It is the birth right of every child that cries for justice from the world as a whole.

…Justice V.R.Krishna Iyer

If we are to attain real peace in this world, and if we are to carry on a war against war, we will have to begin with the children this is said by *Mahatma Gandhi* our nation's father. This sentence has very long and immense importance, how ours hope, ours future linked with children. Children are happening to be physically and mentally the most vulnerable segment of human population. Till the child becomes independent, he or she is dependent upon their parents, teachers and society and development. There are a number of problems which a child is destined to face. There are problems which such child acquires genetically, such as physical disability, infantile polio and in certain unfortunate cases difficulties in life due to poverty illiteracy and ill health of the parents.

The Child has to suffer due to adult prejudice the quarrels between parents result in the running of the future of the child. The family quarrels affect his career so much that the child loses his future for no fault of his own. Children suffer in society in more than one way. They suffer in domestic field where crimes are committed against them; there are

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cases of neglect of their health, welfare and care. They are denied the love and affection they need when they are young. Then there are cases of sexual abuse even in the domestic area. Child labour, child prostitution, human trafficking in children, child marriage, sexual abuse infanticide, feoticide is major problem facing the humanity.

Promotion and protection of the rights of the children have long been a major concern of the international community in 1924, long before the United Nations was established, the Legal of Nations adopted the Geneva Declaration of the Rights of the Child, the need to extend international protection to the child was first recognized by the United Nations in 1948 in Article 25(2) of the Universal Declaration of Human Rights, 1948, Protection of Children Rights was further elaborated in the Declaration of the Rights of the Child, 1959. Later the concept was spelled out in two parts of the International Bill of Human Rights i.e. International Covenant on Civil and Political Rights (Art. 23 and 24) and International Covenant on Economic Social and Cultural Rights (Art. (6)). Most prominently the Convention on the Rights of Child was concluded by the UN General Assembly on 28 November 1989 (Resolution 44/25) and UN Committee on the rights of the Child was convened in Geneva for its opening session on 3 September 1991.

The Child Convention is an instrument of infinite significance which binds peoples everywhere to cooperate for improving the living conditions of children in every country in particular, the developing countries and to evolve a viable jurisprudence of '*juvenile justice*.' the Vienna Declaration and Programme of Action, 1993 emphasized the principle of first call for Children and underlined the importance of major national international efforts for promotion respect for the rights of the child to survival development and participation. The declaration specifically referred to female infanticide, child prostitution, child pornography as well as other forms of sexual abuse and enjoined the international community, the U.N. specialized agencies to take appropriate measure to ensure the effective protection and promotion of human rights of girl children. The Vienna Declaration also urged States to repeal existing laws and regulation and to remove customs and practices which discriminate against the cause harm to the girl child.

International standards on child protection have been further complemented by two optional protocols to the convention on the rights of the child. Which the U.N. General Assembly adopted in 1999, the U.N. Convention on Trans-national Crime against Organized Crime 2000 is also critical importance to the child as it beside other things, also deal with human trafficking.

India being party to various human right Conventions declarations and covenant particularly the convention on the Rights of Child, 1989 is under an international obligation to take appropriate legislative administrative and other measures to secure the implementation and enforcement of the rights of the child as set forth in the treaties ratified or acceded to by it.

There is around 250 child legislations but due to their poor implementation, the concept of the child rights remains an illusion. The ideal and goal projected in the U. N. instruments and the Indian Constitution demand shaping of children & future by law and by harmonizing their lives with the right to health and a happy environment. This is true requires suitable amendments in the existing legislation and enactment of new legislation in areas uncovered by existing laws.

According to child rights activists there is a need for a comprehensive law on children that integrate the CRC 1989 and the four sets of Civil political, social economic and cultural rights of every child – their right to survival protection development and participation. Very recently the central Government set up the National Commission on children to prevent the violation of child rights.

As well all know India participated in the in the United Nations Assembly Summit in 1990, which adopted a Declaration on Survival, Protection and Development of Children. India Also acceded to the Convention on the Rights of Child 1992 which makes it incumbent upon signatory states to take all necessary steps to protect children's rights enumerated in the convention. In order to ensure protection of rights of Children the idea of a children commission was proposed in 1998. The department of Women and child development prepared the draft National Commission for Protection of Child Rights Bill in 2001.

Parliament in 2003 The Government adopted the National Charter for Children 2003. To fulfill its international commitment an Act, the Commission for protection of child Rights Act, 2005 (Act 4 of 2006) was passed. It is an act to provide for the constitution of a National Commission and State commission for Protection of child rights and children's Court for providing speedy trial of offences against children or of violation of child rights.

The Commission works as a statutory body for the protection of children's rights and also as on independent ombudsman for children. The commission has seven member statutory bodies comprising specialists in the field of child welfare and headed by a person of eminence in the field of child rights. It is mandate to safeguard in the interest of children, guide Government policy on child related issues and review the law and programmes relating to the children's development.

The commission has same judicial powers. It has the power to inspect any juvenile custodial home or children's institution under the control of the Central or State Government or any other authority including social organizations where children are kept for the purpose of treatment, reformation or protection the commission can also take *suo-moto* notice of matters relating to the deprivation of children's rights and non-implementation of laws providing for the protection and development of children. Its primary objective is however to guide policy decisions on issue relating to children.

National Commission for Protection of Child Rights

As we all know India participated in the United Nations (UN) General Assembly summit in 1990, which adopted a Declaration on Survival, Protection and Development of Children, India also acceded to the Convention on the Rights of Child (CRC), 1992 which makes it incumbent upon signatory State of take all necessary steps to protect children's right enumerated in the Convention. In order to ensure Protection of Rights of Children, the Government has adopted the National Charter for children 2003. Pursuant to the constitutional mandate to protect child rights and in the fulfillment of its obligation under the CRC India enacted the Commission for Protection of Child Rights Act was enacted in 2005. This Act provides for the constitution of a National Commission and State Commission for Protection of Child Rights and Children's Courts. By the Commission for Protection of Child Rights (Amendment) Act-2006, in the proviso to section 4 for the words "Minister in charge of the Ministry of Human Resources Development" the words "Minister-in-charge of the Ministry or the Department of Woman and Child Development were substituted. This chapter deals with the organization, structure and functions of the National Commission for Protection of Child Rights (NCPCR).[2]

Constitution of National Commission for Protection of Child Rights

The constitution of National Commission is given under Section 3 of the Act. This body is constituted by the Central Government by notification. It exercises the powers conferred and to perform the functions assigned to it under this Act. The Commission consists of a chairperson and six members. The Commission also comprises six members out of which at least two must be women, from the following fields to be appointed by the Central Government form amongst persons of eminence, ability, integrity, standing and experience in

1. Education
2. Child health care, welfare or child development
3. Juvenile justice or care of neglected or marginalized children or children with disabilities.
4. Dimension of child labour or children distress
5. Child psychology or sociology and
6. Law relating to children[3]

The Chairperson is appointed on the recommendation of a three members selection Committee constituted by the Central Government under the Chairmanship of the Minister in charge of the Ministry of Human Resource Development. For being appointed the chairperson, the person should be a man/woman of eminence and should have done outstanding work for promoting the welfare of children.

The Chairperson and every Member hold office as such for a term three years from the date on which he assumes office. But no Chairperson or a member shall hold the office

[2] Mamta Rao, "*Law Relating to Women & Children*" (Lucknow: Eastern Book Company, 2008), p. 438.
[3] *Ibid* at p. 439.

for more than two terms. Again, no Chairperson or any other Member shall hold office as such after he has attained (a) in the case of Chairperson, the age of sixty-five years and, (b) in the case of Member, the age of sixty years.

The Chairperson or a Member may be writing under his hand addressed to the Central Government, resign his office of any time. Subject to the provisions of sub-section (2) of Section 7 the Chairperson may be removed from his office by an order of the Central Government on the ground of proved misbehavior or incapacity.

Notwithstanding anything contained in sub-section (1) of Section 7 the Central Government may by order remove from office the chairperson or any other member, if the Chairperson or, the case may be, such other member-

- Is adjudged an insolvent or
- engages during his term of office in any paid employment outside the duties of his office, or
- refuses to act or becomes incapable of acting or
- is of unsound mind and stands so declared by a competent court, or
- has so abused his office as to render his continuance in office detrimental to the public interest, or
- is convicted and sentenced to imprisonment for an offence which in the opinion of the control Government involves moral turpitude or
- Is without obtaining leave of absence from the commission absent from three consecutive meeting of the commission.

But no person shall be removed under Section 7 until that person has been given an opportunity of being heard in the matter. Coming to procedure for transaction business section 10 of the Act stipulates that the Commission shall meet regularly at its office at such time as the Chairperson thinks fit, but three months shall not intervene its last and the next meeting. All decisions at a meeting shall be taken by majority. In the case of equality of votes, the Chairperson or in his absence the person presiding shall have and exercise a second or casting vote. If for any reason, the Chairperson, is unable to attend the meeting of the commission, any member chosen by the members present from amongst themselves at the meeting, presides. The Commission shall observe such rules of procedure in the transactions of its business at the meeting, including the quorum at such meeting or may be prescribed by the Central Government. All orders and decisions of the Commission must be authenticated by the Member-secretary or any other officer of the Commission duly authorized by Member-Secretary in this behalf. While the Commission is headed by a Chairperson, it is assisted by Member, Secretary and other officers and employees in the discharge of its functions and duties.

Chairperson He/she is the head of the NCPCR and his/her appointment is made as per the provision of the CPCR Act, 2005. He/She ensures that Commission functions strictly as per the provision of the Act and discharges its functions as stipulated in the Act. He/She

is to ensure that the commission meets regularly at its office once in a period of three months. He/She is to ensure that for the purpose of meeting an agenda as provided in the Act is prepared at least two working days before the meeting and minutes are recorded immediately after the meeting. He/She is also to ensure that the decision taken in the meetings are in conformity with the CCR Act, and implementation is as per the decision taken by the Commission.

He/She is to ensure that all matters where a specific approval of the Central Government is required are referred to the Central Government well in time through self-contained notes. He/She is to ensure that all provisions of CPCR Act for enquiring into complaints on violation of Child rights are taken up by the Commission as per the provisions of the Act. He/She is also to ensure that effective measures are taken up for ensuring of the child rights and cases of violation of the child rights are taken up *suo-moto* for taking remedial measures. He/She is authorized to take decision on all financial matters subject to observance of the FR/SR/GFR etc. excepting those cases where specific approval of Central Government is required. Member Secretary is responsible for proper administration of the affairs of the Commission and its day to day management. He can take decision in all financial matters subject to observance of the provision of FR/SR/GFR etc. up to Rs. 1Lakh in each case.

All other officers are required to exercise such powers as are delegated to them by the Commission, Chairperson-Member Secretary from time to time. The NCPCR emphasizes the principle of universality and inviolability of child rights and recognizes the tone of urgency in all the child related policies of the country. For the Commission, protection of all children in the 0 -18 years age group is of equal importance. Its main focus is on the most vulnerable children. This includes focus on regions that are backward or on communities or children under certain circumstances and so on.

The NCPCR believes that while in addressing only some children, there could be fallacy of exclusion of many vulnerable children who may not fall under the defined or targeted categories. In its translation into practice the task of reaching out to all children gets compromised and a societal tolerance of violation of child rights continues. This would in fact have an impact on the program for the targeted population as well. Therefore it considers that it is only in building a larger atmosphere in favour of protection of children's rights those children who are targeted visible and gain confidence to access their entitlements. Likewise, for the Commission every right the child enjoys is seen as mutually-reinforcing and interdependent. Therefore the issue of gradation of rights does not arise. A child enjoying his rights at her 18^{th} year is dependent on the access to all her entitlements from the time she is born. The policies interventions assume significance at all stages. For the Commission all the rights of children are equal importance.

As above noted, NCPCR has been set up under the provision of the Commission for protection of Child Rights (CPCR) Act, 2005 by the Ministry of Woman and Child Development for protection of child rights and all matters connected with as incidental

thereto in the context of the United Nations Convention on the Rights of Child (CRC) as acceded to by India on 11th December 1992.

Before proceeding to discuss how the Commission has interpreted of mandate and what are its priority areas it is necessary to understand how the expression "Child Rights" is defined in the Act according to sec. 2(b) "Child Right" includes the children's rights adopted in the United Nations convention on the rights of the child on the 20th November, 1989 and ratified by the Government of India on the 11th December, 1992

Function and Powers of the Commission

Under Section 13 (Chapter- III) of the CPCR Act, the function assigned to the commission is as under:[4]

1. To examine and review the safeguard provided by or under any law for the time being in force for the protection of child rights and recommend measure for their effective implementation:
2. To present to the Central Government, annually and at such other intervals or the Commission may deem fit, reports upon the working of those safeguards.
3. To inquires into violation of child rights and recommend initiation of proceeding in such case;
4. To examine all factor that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster domestic violence, HIV/ AIDS, trafficking maltreatment torture and exploitation, pornography and prostitution and recommend appropriate remedial measures.
5. To look into the matters relating to children in need to special care and protection including children in distress, marginalized and disadvantaged children, children in conflict with law juveniles, children without family and children or prisoners and recommend remedial measures.
6. To study treaties and other international instrument and undertake periodical review of existing policies, programmes and other activities on child rights and make recommendations for their effective implementation in the best interest of the children.
7. To understand and promote research in the field of child rights.
8. To spread child rights literacy among various section of society and promote awareness of the safeguards available for the protection of these rights through publication the media seminars and other available means.
9. To inspect or cause to be inspected any juvenile custodial home, or any other place of the residence or institution meant for children, under the control of Central Government or any State Government or any other authority. Including any institution run by a social organization where children are detained or lodged for the purpose of treatment reformation or protection and take up with these authorities for remedial action. If found necessary.
10. To inquire into complaints and take *suo-moto* notice of the matter relating to

[4] Section 13 of the Commissions for Protection of Child Rights Act, 2005.

- Deprivation and violation of Child Rights
- Non-implementation of law providing for protection and development of children.
- Non-compliance of policy decision guidelines or instruction aimed at mitigating hardship to the ensuring welfare of the children and to provide relief to such children, or take up the issues arising out of such matters with appropriate authority and,

To discharge such other functions as it may consider necessary for the promotion of such right and any other matter incidental to the above functions. The Commission shall not inquire into any matter which is pending before a State Commission or any other commission duly constituted under any law for the time being enforce.

Powers

Under Sec. 14 of the CPCR Act the power assigned to the Commission are as under:
The Commission shall, while inquiring into any matter referred in clause (j) of sub section (1) of section 13 have all the powers of a civil court trying a wit under the code of civil procedure 1968 and in particular, in respect of the following matters namely:

A. Summoning and enforcing the attendance of any person and examine him an oath.
B. Discovery and production of any document
C. Receiving evidence on affidavits.
D. Requisitioning any public record or copy thereof from court or office: and
E. Issuing commission for the examination of the witnesses or documents.

The commission shall have the power to forward any case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as it the case has been forwarded to him under section 346 of the Code of Criminal Procedure, 1973.

Activities of NCPCR

The Vision of the NCPCR is to protect and defend child rights in the country in the context of the United Nations Convention on the Rights of Child (CRC) as acceded to by India. Its mission is to ensure that the right of all children irrespective of their gender religion, caste etc. are protected.

(1) To inquire into cases of violation of child rights and recommended action against violators of child rights.
(2) To examine factors which inhibit enjoyment of child rights and recommend appropriate remedial measures?
(3) To undertake research and studies in the field of child rights.

In order to attain the commission's mandate of ensuing that each and every child has an access to all entitlements and enjoys all her rights, the commission's focus is on the following tasks:

1) The first is to build public awareness and create a moral force in the country to stand children and protect their rights. A national Conscience has to be generated that captures the imagination of each citizen to take pride in the nation because it takes care of all its children.
2) Armed with this kind of a mood the Commission's task is to look at the gaps in the policy framework and the legal framework and make recommendation to see that rights based perspective is adhered to by the Government, while it makes its policies.
3) Thirdly, the task of the Commission is to take up specific complaints that come up before it for redressal of grievances and also take up *suo-moto* cases, summon the violation of child rights get them presented before the commission and recommend to the government or the judiciary action based on an inquiry.
4) Finally, the role of the commission is in arming itself with proper research and documentation. The legitimacy and credibility to what the commission says and does is based on solid research and data. Though everyone in the country knows that the predicament of the majority of the children in our country is vulnerable and that children are not treated well, this has to be substantiated by information; it cannot just be on emotional argument.

Complaints on Child Rights Violations

One of the core mandates of the commission is to enquire into complaints of violation of child rights. The commission is also required to take *suo-moto* cognizance of violation of child rights and to examine factor that inhibit the enjoyment of rights of children.

a) No fee shall be chargeable on such complaints.
b) The complaints shall disclose a complete picture of the matter leading to the complaints.
c) The commission may seek further information/affidavits or may be considered necessary.

Complaints can be made in any language included in Eighth Schedule of the Constitution. Complaints should be self contained and neatly written/typed. The Commission may ask for further information and affidavits to be filed in support of all whenever considered necessary. Application form there is no format prescribed for seeking information. Application can be made through a simple legible letter.

The complaints should be self-contained and specific. The nature of information and the purpose of seeking information should be clearly mentioned in the application. The application should also indicate his telephone No. if any.

Right of the Citizen in case of denial of information and procedure to appeal the complaining party should before making a complaint ensure that the complaint is:

1) Clear and legible and not vogue anonymous or pseudonymous

2) Genuine, not trivial or frivolous
3) Not related to civil disputes such as property rights contractual obligation and the like.
4) Not related to service matters.
5) Not pending before any other commission duly constituted under law or sub-judice before or court tribunal.
6) Not already decided by the commission
7) Not outside the preview of the commission on any other ground.

In cases which are taken cognizance of by the Commission on the basis of complaints received by it or *suo-moto*, the commission writes to the concerned authority/authorities to investigate/inquire into the matter and time limit. If there is no response reminder is issued to furnish report within a stipulated time. If still information not received notice is issued by the commission to the concerned authority if report/information is not received despite issue of notice, summons are issued to the concerned authority to appear before the commission to explain along with relevant record/documents.

The Commission may take any of the following steps after receipt of inquiry report/information from the concerned authority.

1) If a receipt of inquiry report/information the commission is satisfied that no further inquiry is required or that required action has been taken by the concerned authority. It may not proceed with the complaint further and inform the complaint accordingly.
2) Where the inquiry disclose the commission of violation of child rights or negligence in prevention of violation of child rights by a public servants. It may recommend to the Government as authority concerned to initiates proceeding for procession or such other action commission may deem fit against the concerned persons.
3) Approach the Supreme Court or the High Court concerned for such direction order as the court may deem necessary.
4) Recommend to the concerned government or authority for the grant or such immediate relief to the victim or the members of his/her family as the commission may consider necessary.

Recommendation made by NCPCR

The Commission has been made some recommendation which is given below:

Recommendations for Abolition of Child Labour

Any strategy for the elimination of child labour must have these two critical components: stringent laws and a strengthened school system where children removed from work can be sent. Given the varied situations in which children are working, strategies for the elimination of child labour need to be inclusive and non-negotiable. In order to effectively abolish child labour it is necessary to remove the artificial distinction between ‘child labour’ and ‘child works.

One of the major preventive strategies, which must feature in any national child labour eradication policy, is the role of social mobilization and community participation. If children can be prevented from joining the work-force through the counseling of parents, children and the employers, much of the task of various government departments and ministries would be reduced. To invoke public interest and large-scale awareness on this issue, there is a need for an extensive awareness generation campaign launched over a period of time at the Centre and State on a sustained basis.

Since the NCLP Scheme is proposed for expansion to all districts of the country, there is an immediate requirement for child labour survey in all these districts. There should be synergy between all concerned departments and ministries. Some of the ministries and departments that need to work together for abolition of child labour are: Department of Labour, Department of Education, Police department, Department of Youth Affairs, Department of Panchayat Raj, Department of Women and Child Development, Judiciary, Gram Panchayats.

The Labour Department should assist children who have completed Class X to get vocational training by linking them up to local ITIs, NGO run vocational training programmes and private sector initiatives. Youth volunteers, gram panchayats, school teachers, officers of labour department and so on must all be given training about child labour and their respective roles in abolition of child labour.

Phasing of reform recommendations for Juvenile Justice

The following is the plan to phase of key reform initiatives:
Short-term reform: should be focused on initiatives that will drive operational reform, improve implementation effectiveness and build capacity within the mandate of the existing policy and legislative framework:

1) Develop and utilize across the country JJB and CWC Bench Books by the High Court's Transform Children's and Observation Homes through the launch of pilot initiative with appointment of Special JJ Reform Commissioners to lead key reform initiatives in pilot sites nationally;
2) Create and support dedicated juvenile probation units nationally with requisite development of juvenile probation regulation, policies and guidelines;
3) Set-up independent expert-led social audit process nationally for government;
4) Launch a country-wide review to identify 'best practice' alternate care models and community based care and protection initiatives (based on their performance and impact on the child) for their replication and development through scalable government schemes;
5) Medium-term reform including legislative, policy and structural reform of existing operations;
6) Create a Law Commission with a special one year appointment based on the recommendations of the Law Commission Report on Juvenile Justice legislative

reform from child jurisprudential perspective, including addressing compliance with international human rights standards;

7) Transform existing institutional care based systems to a community based 'out1 icing' child protective services system with district and block level coverage;
8) Continue roll-out of non-institutional, alternate care schemes with the requisite infrastructure;
9) Develop a juvenile judicial academy through the development of dedicated juvenile jurists.

Recommendation of NCPCR to Abolish Corporal Punishment

The Committee on the Rights of the Child in the General Comment No. 8 defines 'corporal' or 'physical' punishment as, "any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. L/Lost involves hitting ("smacking", "slapping' "spanking") children, with the hand or with an implement. In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child." The Commission Recommend that corporal punishment should be abolish from school.

NCPCR Guidelines on Organizing Public Hearings

Public Hearings are gatherings where specific grievances are aired before a 'jury'. The concerned government officials are also present to present their status report with respect to the particular grievance. After hearing the grievance and the official action-taken report, the jury gives directions on the case.

Conclusion and Suggestion

Children and childhood across the world been construed in terms of a 'golden age' that is synonyms with innocence, freedom, joy, play and the like. It is the time when, spared the retours of adult life, one hardly shoulders any kind of responsibility or obligation. But, then it is also true that children are vulnerable, they need to be cared for and protected from 'the harshness of the world outside' and around. This being so, the adult child relation, parent in particular, is said to provide 'care and protection' serving thereby the best interest of the child and meeting their day-to-day needs of survival and development. The adult is presumed to be the guardian and in that respect expected to take the responsibility of child's welfare and development. Whether or not, the premise underlying this is correct or not, the childhood 'reality' on the whole is questionable demanding critical evaluation.

By adopting what one way call a protective and progressive approach it has expanded the meaning and scope of right already accepted under the Constitution. Besides, the SC and the HC have taken affirmative action to promote the implementation of the convention on the Rights of the Child. They have ensured the implementation of progressive laws and

the implementation of the restrictive laws in the best interests of the child[5] interestingly; the concept of PIL which is the brain child of the SC has played a pivotal role in the elaboration and implementation of child rights.

Accordingly to an estimate in India there are more than 250 federal and State legislations[6] that are some way or another relate to children. There are a number of provisions in general statutes that are relevant to the child in criminal law, employment law, laws covering different aspects of child care, welfare and family law. Adoption custody, guardianship and succession are governed by their personal laws.

An impressive number of policies, plans of action and programme of action relating to children have been created in India. These are in addition to the goals set out in the constitution and in earlier legislation. The National Charter for children, 2003 which replaced the long since outdated 1974 National Policy for children, for instance, enumerates a number of rights for children, including the right to survival, good health and adequate nutrition, proper protection with particular reference to the rights of this children, equality, freedom of expression and the right to a family. But the charter does not include any reference to the convention on the right of the Child, 1989.

The NCPCR has made an enquiry into hundreds of complaints of the violation of child rights and investigated a number of serious cases of child rights violation. But like the National Human Right Commission of which is simply a investigative and recommendatory body after conducting enquiry, make recommendation to the appropriate authorities to take action against the person who has violated the child rights. It may also recommend to the Government or appropriate authorities to provide interim relief to the victim. In other words the Commission has neither powers of prosecution nor it provides any remedy other than what has already been provided under the constitution of India and other legal framework.

The only benefit which the victim gets is that after the investigation by the Commission it is established that the violation of child rights has taken place, it can recommend to the courts to initiate proceeding. The above method provides relief to the victims or to the activist in the sense that in such cases they do not require the intervention of the courts to initiate investigation. Further the courts are more likely to look seriously at cases sent by the commission in comparison to victim or activist approaching directly.

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[5] *Laxmikant Pandey v. Union of India*, on Adoption of Children; *Shiela Barse v. Union of India*, on Trafficking of Children; *M.C. Mehta v. State of Tamil Nadu*, On problem of Child labour; *Vishal Jeet v. Union of India*, on problem of Child Prostiution; *Unni Krishnan v. State of Andhra Pradesh*, on Education of Children; *Gaurav Jain v. Union of India*, on problems of Prostitution and Children forced into Prostitution; *Gita Hariharan v. Reserve Bank of India*, on Guardianship.

[6] Factories Act, 1948; The employment of Children Act, 1938; The Child Labour (Prohibition and Regulation) Act, 1986; The Commission for protection of Child Rights Act, 2005; The infant Milk Substitutes Act, 2003; The Prohibition of Child Marriage Act, 2006.

It is the duty of Government to ensure the implementation of the basic rights of the child which are essential for the promotion of child dignity. Struggle for the child rights must continue with greater vigour. Problem like poverty, illiteracy, population growth, and law and order have over shadowed the goal of protection of child rights. Value resolution or these problems should certainly be the priorities of the government of the day, protection of child rights is no less important for making India a powerful and prosperous nations.

Suggestions

- As public awareness about child rights, and research on child rights are the two important objectives of the Commission, experienced academician should also be included in the membership of the commission.
- As the success of any human rights institution depends to a large extent on three elements – Transparency, accountability and autonomy. There is need for more Transparency and accountability in the functions of the Commissions. It is also necessary to bestow more autonomy on the Commission it has to enable it to discharge its functions and duties in effective manner.
- The Child Rights Courts should be established in all districts.
- The Child Rights News letter, frequently published in English, Hindi and other regional languages should be published in order to promote public awareness about these rights.
- The government should express the possibility of vesting the power of production in the National and State Commissions.
- The membership of the National Commission should be made broad based and should include persons Child Rights activists non-governmental organizations because they have been working since long for the cause of protection and promotion of child rights in India. Membership of the NGOs is also important because due to their grass-root contacts they have a practical knowledge and problems of the child rights.
- The NCPCR should begin a monthly “Child Rights Chronicle” and also encourage Telefilms and radio programmes on current problems i.e. child labour, bonded labour, female infanticide, child prostitution etc. so as to highlight and promote discussion and disseminations of ideas for improving the state of affairs.

Triple Talaq and Gender Justice under Islamic Law: A Judicial Approach

Mr. Dharmender Singh Yadav[1]

Introduction

According to the Prophet's sayings, giving talaq to a wife in a fit of rage or anger is strictly prohibited. The Quran advises the husband to settle the differences through a mutual conversation as the first step. This step is known as the *Fa'izu Hunna.* If the differences continue between the husband and the wife, the parties should refrain from any conjugal acts till they settle their dispute. This step of physical separation known as the *Wahjuru Hunna* is prescribed so that the couple re-unites.

However, even if this second step fails, it is recommended that the husband must attempt to talk to the wife, make peace with her and talk about the gravity of the situation. This third step is known as the *Wazribu Hunna.* However, Quran advises that even if the third step fails, the fourth step of 'arbitration' must be followed. In this step, a member from each of the spouses' family is present and the parties try to make amends in the strained relationship.

It is only after all these four steps have failed that a husband pronounces the first talaq. The husband has to compulsorily wait for a wife's *iddah* (menses) to complete before pronouncing another talaq. Not more than two *talaqs* can be pronounced during the course of *iddah. Iddahs* are considered to be the three monthly courses. During these three month cycles, a man cannot give his third talaq. This had been envisaged so that the couple sorts out their differences in this period.

Quran prescribes that if a woman has attained the age of menopause then the period of *iddah* is three months, whereas if a woman is pregnant, then the period of *Iddah* would be till the child is born or the termination of pregnancy. If the differences still persists then the third talaq is pronounced, after which the relations between the husband and the wife are severed. Hence, the women groups who are claiming to revive this practice are only vouching for the fact that they get the maximum time to sort out their differences which is often not possible in an 'instant talaq'.

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Types of Divorce under Islamic Law

Broadly the Muslim law provides the following way of divorce-

1. By the husband at his will, without the intervention of the Court.
2. By the wife**,** *Talak-e-Tafwid* (delegated divorce).
3. By the mutual consent of the husband and wife, without the intervention of a Court.
4. By a Judicial decree at the suit of the husband and wife.

By the Husband

The first form when the divorce proceeds form the husband, it is called Talaq. Talaq literally means to remove a restriction or to put an end to the marriage with immediate of deferred effect by using any of the special words meant for it, whether those words are used by the husband himself or by his representatives, or by the Qazi who in certain situations is regarded by the Shraiat as the husband's deputy and is empowered to pronounce a divorce on his behalf without his consent. A Talaq may be affected (1) orally (by spoken words) or (2) by a written document called a *Talaqnama*[2]. Husband may also renounce the Talaq in the way:-

Talaq-ul-Sunnat, which is again divided in two parts namely-

(a) ***Talaq-ul-Ahsan*** which consists of single pronouncement of divorce made during continuous three tuhrs (period between menstruations) followed by abstinence from sexual intercourse for the period of *Iddat.*

(b) ***Talaq-ul-Hasan*** which consists of three pronouncements made during successive tuhrs, no intercourse taking place during any of the three *tuhrs* (the first pronouncement should be made during a *tuhr,* the second during the next *tuhr,* and the third during the succeeding *tuhr*).

Talaq-ul-biddat or Talaq-i-baddai. This consists of (i) three pronouncement made during a single *turh* either in one sentence or a single pronouncement made during a *tuhr* clearly indicating an intention irrevocably to dissolve the marriage. This Talaq pronounce as "I divorce thee thrice, or in separate sentences e.g., "*I divorce thee, I divorce thee, I divorce thee*". It is also called Triple Talaq.

Illa (vow of continence)- it is also a form of divorce by husband. In this divorce, husband swears or taking oath that he will not have sexual intercourse with his wife and abstains from it for four months, the divorce is affected.

Zihar (injurious comparison)- it is also a form of divorce by husband. A Muslim marriage may be dissolved by Zihar if a hasband who is of sound mind and has attained puberty, compares his wife to a female within the degrees of his prohibited relationship e.g., his mother, mother in law and his real sister etc. In Zihar, the usual is "thou art to me as the back of my mother"

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[2] Badruddin Tayab Ji, *Mulsim Law: The Personal Law of Muslim,* (Bombay: N. M. Tripathi, Publisher, 1968), p. 194.

By the Wife

In Muslim law there has no independent right of divorce to the Muslim woman. She has only one right of divorce, which is called *Talaq-e-Tafwid or delegated divorc.* In this form of divorce a Muslim marriage may be dissolved if a husband who is of sound mind and has attained puberty, may, at the time of marriage of even afterwards, delegate his right to pronounce Talaq to his wife or to any person.

By Mutual Consent

In this form of divorce, the husband and wife mutually agreeing to dissolve his/her marriage. this form of divorce is devided in two types-

(a) ***Khulla-***khulla is a divorce by means "to put off", if the mutual relationship between the husband and wife is not good , the wife, if she so desires, may seek a khulla divorce, e.g. by relinquishing her claim to the dower. it, however, entirely depends upon the husband to accept the consideration of dower and to grant the divorce. A husband may similarly propose a khula divorce; the wife may accept or refuse it[3].

(b) ***Mubarat –*** it is a form of divorce by husband and wife based on mutual consent. It is known as Mubara'at (i.e. freeing one another mutually).

By the Judicial Divorce

In this way of divorce, divorce caused by Judicial pronouncement and intervention of Judiciary. It is also divided in two parts-

(a) ***Lian*** – A Muslim marriage may be dissolved by Lian. In this form of divorce, the wife is entitled to sue for a divorce on the ground that her husband has falsely charged her with adultery. "Lian"literally means imprecation. it is testimony confirmed by oath and accompanied with imprecation. Lian arises, when a false charge of adultery is made by the husband against his wife, then the wife asks the husband either to retract it or to confirm it by mutual imprecations.

(b) ***Faskh-*** Faskh means annulment. The law of faskh is founded upon Quran and Traditions, "if a women be prejudiced by a marriage , let it be broken off"*(Bukhari*). In India, such judicial annulments are governed by section 2 of the Dissolution of Muslim Marriages Act, 1939. Prior to the Act, the Muslim woman could apply for dissolution of marriage under the doctrine of faskh on four grounds:-

   (i) The marriage was irregular.
   (ii) in exercise of the right of option- *Khyar-ul-Bulugh.*
   (iii) The marriage was within the prohibited degrees of relationship.
   (iv) Post-marriage conversion of the parties to Islam.

Today Indian legislative and Justice Dispensation system is facing the following problems with respect to matrimonial faults:-

(i) The legal status of triple talaq, where it is in itself a issue between Shia and Sunni,

[3] Syed Kahlid Rashid's, *Muslim Law*, (Lucknow: Eastern Book Publication, 2010) at pp. 114-115.

(ii) Questions relating to fundamental rights ensured in Article 25 and Article 14.
(iii) Whether the three pronouncement is proper procedure for talaq.
(iv) Reforms needed in procedure of talaq.

Hon'ble *Justice V. R. Krishna Iyer ruled in the case*[4] that: the view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. Indeed, a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce. It is a popular fallacy that a Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage. Commentators on the Quran have rightly observed and these tallies with the law now administered in some Muslim countries like Iraq that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quran laid down and the same misconception vitiates the law dealing with the wife's right to divorce. He further observed;-

It is a popular fallacy that a Muslim male enjoys under the Quranic law an unbridled authority to liquidate the marriage. The words Quran expressly forbids a man to seek pretexts for divorcing his wife so long as she remains faithful and obedient to him. Indeed a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce.

The Supreme Court noted the views of Mulla (Mulla on Principles of Mahomedan Law, 19th Edn., 1990) that no particular form of words, no proof of intention, no presence of wife, no communication except for the purposes of dower were required; and of Tahir Mahmood (The Muslim law of India, 2nd Edn.) that the basic rule is that a Muslim husband under all schools of Muslim Law can divorce his wife by his unilateral action and without the intervention of the court. Both have cited cases supporting their views. The Supreme Court expressed disapproval and disagreement with the above views. Approving the decisions of *Guwahati High court in Jiauddin Ahmed v. Anwara Begum*[5] and *Rukia khatun v. Abdul khalik Lasker*, Justice *Baharul Islam* took the same view which has given by Justice Krishna Iyer in A.Yusuf Rawther case:-

Justice Baharul Islam further said, In my opinion the correct law of Talaq as ordained by the Holy Quran is that Talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters one from the wife's family, the other from the husband's. If the attempts fail, Talaq may be affected.

In *Shamim Ara's v. State of U.P.*[6] the Highest Court held: "The correct law of Talaq as ordained by the holy Quran is that Talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbitrators one from the wife's family and the other from the husband's; if the attempts fail, Talaq may

[4] *A. Yusuf Rawther v. sowramma* AIR 1970 AP 298 AIR 1971 Kerl. 261.
[5] (1981) 1 GLR 375.
[6] (2002) 7 SCC 518.

be effected. We are also of the opinon that the Talaq to be effective has to be pronounced. We are very clear that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot the by itself be treated as effectuating Talaq on the date of delivery of the copy of the written statement to the wife. The husband ought to adduce evidence and prove the pronouncement of Talaq.[7]

Prime Minister *Mr. Narendra Modi* in his speech[8] said that justice demands that the government works as per the Constitution and provides gender justice for everyone. He further said that Triple Talaq should not be seen from political prism. Prime Minister urged Muslim to keep the debate over triple Talaq away from politics, saying that he hoped efforts to reform the controversial Islamic practice will come from the community. This is the second time in a fortnight that Modi has reached out to Muslim women. He criticized Triple Talaq and saying the practice was destroying Muslim women's lives.

The hon'ble member of All India Muslim Personal Law Board and former advocate General of Uttar Pradesh *Mr. Zafar Yab Jilani* said[9] that Prime minister has no Right to intervene in Muslim law. He further said that triple talaq a religious issue and the BJP is trying its best to politicize the issue. He said it is a religious matter and will be solved within the realms of our religion. Mr Jilani accused the PM of trying to "shroud his hidden agendas behind a political speech by making it look diplomatic". He said that let the Supreme Court decide the issue.

This matter may be studied in the spirit of legal ideology and in the verdict of different High Courts and Hon'ble Supreme Court. Supreme court finally decided on 22/08/2017 by the Constitutional bench with the ratio 3:2 that triple talaq is a unconstitutional and clearly said the correct law of talaq as ordained by the Holy quran is that talaq must be for a reasonable cause and preceded by attempts at reconciliation between the husband and the wife by two arbiters one from the wife's family and other form the husband's; if the attempts fail, talaq may be effected. In *Rukia khatun case* (1981) 1 Gau LR 375, the Division bench stated that the correct law of talaq as ordained by the Holy quran is:-

(i) that talaq must be for a reasonable cause; and
(ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, on chosen by the wife from her family and the otherby the husband from his.

Conclusion

The debate over Muslim personal law has taken a serious turn over the matter of triple Talaq. The government of India is looking for its reform. While the All India Muslim Personal Law Board is being blamed for all the regressive provisions of Muslim Personal Law, in operation in India for about 1000 years. The *Bharatiya Muslim Mahila Andolan*,

[7] *Supra Note* 3 at pp.125-126.
[8] The Times of India Published on dated 17 April, 2017.
[9] The Indian Express published on dated 17-04-2017.

formed in 2007, is aggressively initiated the debate to reform Muslim Personal Law. The prime minister himself spoke of the plight of Muslim women and has appealed to bring an end to what he called the tyranny of triple talaq.

Triple talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters form their families, which are essential to save the marital tie, cannot ever take place. In such matters it is clear that this form of triple talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it, this form of Talaq must therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India and against the rule of law and gender equality.

Cyber Crime: An Analytical Study of Cyber Crime Cases at the Most Vulnerable States and Cities in India

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Dr. Jageshwar Nath Singh[2]
Mr. Chandan Sharma[3]

Abstract

In this age of information and technology, Internet plays the pivotal role for the exchange of huge amount of information. It influences not only all spheres of human life but also all age groups of man. Even if the internet has changed our society fundamentally, the information over internet is not free from any illegal access or harm. Thus the security and safety of information has become the major challenge of the present time. With the rapid growth of users, the cyber crime cases are also increasing and are not restricted by any geographical limitations or national boundaries in the world. Information technology deals with information system, data storage, access, retrieval, analysis and intelligent decision making. Information technology refers to the creation, gathering, processing, storage, presentation and dissemination of information and also the processes and devices that enable all this to be done. The misuse of the technology has created the need of the enactment and implementation of the cyber laws. Over the past few years India has witnessed many cyber crime cases.

And it is a matter of great concern as it has direct negative impact on economic and social lives of people. Today, computers play a major role in almost every crime that is committed. Citizens should not be under the impression that cyber crime is vanishing and they must realize that with each passing day, cyberspace becomes a more dangerous place to be in, where criminals roam freely to execute their criminals intentions encouraged by the so-called anonymity that internet provides. Our research work is based on the quantitative analysis of cyber crime cases under the IT Act and Indian Penal Code in top vulnerable states and cities in India. Further the cyber crime cases committed by the people of different age group have been analyzed. And along with the description of different motives of cyber crime activities and the offences, the important remedial measures have been suggested that need to be taken to minimize the cyber crime cases. The Paper focuses also son new legislation which can cover all the aspects of the Cyber Crimes should be passed so the grey areas of the law can be removed.

Keywords: *Cyber Law, Information Technology, Cyber Crime, Computer, Enforcement, Data storage, Internet, Cyber crime, IT Act, Indian Penal Code, Offences.*

Introduction

Today's world is an information rich world and thus computer has become a necessity for every field of human life. In this age of information and technology, internet plays the pivotal role for the exchange of huge amount of information. But the information over internet is not free from any illegal access or harm. It is found that in the current decade, there is a remarkable increase of crime rate on internet. Thus the security and safety of information has become the major challenge of the present time. The crime on internet is termed as cyber crime and in simple meaning. Cyber crime is unlawful acts wherein the computer is either a target or a tool or both. And in other words cyber Crime as-Criminal

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activity directly related to the use of computers, specifically illegal trespass into the computer system or database of another, manipulation or theft of stored or on-line data, or sabotage of equipment and data[4]. In the current era of online processing, maximum of the information is online and prone to cyber threats [5].Cyber crime is regulated by cyber laws or internet laws. Cyber law is a term which refers to all the legal and regulatory aspects of Internet and the World Wide Web. Anything concerned with or related to, or emanating from, any legal aspects or issues concerning any activity of natives and others, in cyber space comes within the ambit of Cyber law[6].The criminal activities that are traditional in nature such as theft, fraud, forgery, defamation and mischief are subject to the Indian Penal Code whereas the abuse of computers such as hacking, phishing, Email Spoofing, Email spamming, Email bombing etc. are addressed by the Information Technology Act 2000.

Cyber Laws: IPC and IT Act, 2000

Cyber law is important because it touches almost all aspects of transactions and activities on and concerning the internet, the World Wide Web and Cyberspace. Cyber laws are meant to set the definite pattern, some rules and guidelines that define the different business activities going on through internet and categorize the activities as legal and illegal. The activities which are illegal are punishable as per the laws. Cyber crimes can involve criminal activities that are traditional in nature such as theft, fraud, forgery, defamation and mischief, all of which are subject to the Indian Penal Code. In the Year 2000, India enacted its first law on Information Technology which is called Information Technology act 2000.The IT Act, 2000 attempts to change outdated laws and provides ways to deal with cyber crimes. The preamble to the IT Act, 2000 indicates three fold objectives.

Firstly, to provide legal recognition for transactions carried out through electronic means. Secondly, to facilitate the electronic filing of documents with government agencies, and thirdly, to amend certain Acts, inter alia ,the Indian Penal Code 1860,Indian Evidence Act 1872. The IT Act 2000 provides legal validity and recognition to electronic documents and digital signatures and enables to draw conclusion of legally valid and enforceable e-contracts. It also provides a regulatory regime to supervise the certifying authorities issuing digital signature certificates and created civil and criminal liabilities for contravention of the provisions of the IT Act 2000. It also conferred the power on the central government to appoint Adjudicating Authority to adjudge whether a person has committed a contravention within the meaning of the Act. But with the advancement of technology, many loopholes of the Act were noticed that led to the passage of the

[4] Wow essay (2009), Top Lycos Networks, Available at: http://www.wowessays.com/dbase/ab2/nyr90.shtml
[5] H. Saini, Y.S. Rao, T.C. Panda, Cyber crime and Their Impacts: A Review, International Journal of Engineering Research and Application, vol.2, Issue2, pp.202-209, 2012
[6] R.S. Patel, D. Kathiria, Evolution of cyber crime in India, International Journal of Emerging Trends and Technology in Computer science,vol.2,issue 4,pp.240243,2013.

Information Technology (amendment) Act 2008 which was made effective from 27 October 2009[7].

Offences and Punishments

There are different types of cyber crime activities and offences and therefore, the punishment given to the criminal also differ as per the crime committed. The following table shows the offences under the IT act 2000 and the respective punishments[8] .

S.No.	Offences	Punishments
1	Tampering with computer source documents	Imprisonment up to 3years, fine up to 2 lakh rupees
2	Hacking with computer system	Do
3	Failure to comply with direction of the controller	Do
4	Breach of confidentiality or privacy	Imprisonment up to 2 years, fine up to one lakh rupees
5	Publishing false digital certificate	Do
6	Publishing digital certificate	Do
7	Misrepresentation or suppression of material facts	Do
8	Failure to assist to decrypt information	Imprisonment up to 7 years and fine
9	Securing access to protected system	Imprisonment up to 10 years and fine
10	Publishing information which is obscene	1st conviction- imprisonment up to 5 years and fine up to one lakh rupees. 2nd conviction- imprisonment up to 10 years and fine up to two lakh rupees.

Types of cybercrime most prevalent in India The following table show the most prevalent cyber crime in India[9] .

Types	Example
Financial crimes	Cheating credit card fraud, money laundering etc.
Cyber pornography	Pornography websites

[7] K. Seth, IT Act 2000 vs. 2008-Implementation, Challenges, and the Role of Adjudicating Officers, National Seminar on Enforcement of cyber law, New Delhi,8th may 2010

[8] R. Dubey, Cyber Crime "an unlawful act where in the computer is either a tool or a target or both", in Indian legal perspective, Sept 24, 2004.

[9] Z. Mohiuddin, Cyber laws in Pakistan-a situational analysis and way Forward Ericsson Pakistan (Pvt.) Ltd, June 24, 2006.

Sale of illegal articles	Sales of narcotics, weapons, wild life etc. through websites or email communication
Intellectual property crimes	Software privacy, copyrights infringement, trademarks violations, theft of computer source code etc.
Email spoofing	Sending email that appear to originate from one source but actually has been sent from another source
Forgery	Counterfeit currency notes, postages and revenue stamps, mark sheets etc.
Cyber defamation	Publishing /distributing defamatory matter about someone
Un- authorized access to computer system or network	Hacking
Cyber stalking	Victimizing someone online
Theft of information contained in electronic form	Stealing information on computer hard disks, removable of storage media etc.
Email bombing	Sending a large number of emails crashing email accounts.

Preventive Measures to Handle Cyber Crime

Despite of the cyber laws and government policies, we can take several measures to avoid cyber crime in our society. The followings[10] are few suggestions:

1. Personal information like name, mail id, password, telephone no, etc should not be displayed on websites
2. Photograph should not be posted on social networking sites.
3. Mysterious mails and users should not be responded.
4. Alphanumeric high strength password with special symbols should be used.
5. Latest and updated antivirus should be used to secure the system and data.

Statistics of Cyber Crime in India

[10] N. Nain, S. Batra, Preliminary study of Cyber Crime, its impact and Remedial Acts in India, International Journal of Computer Science and Communication Engineering, Special Issue 2013, pp.223-227.

Table no. 1

Table no. 2

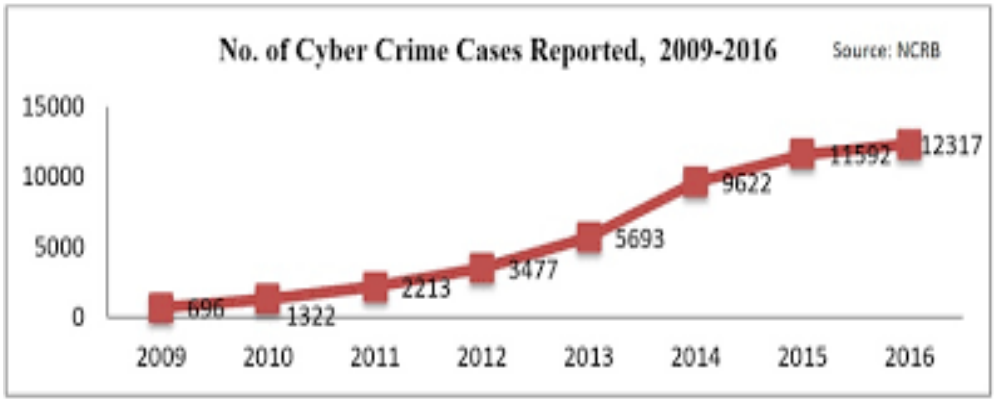
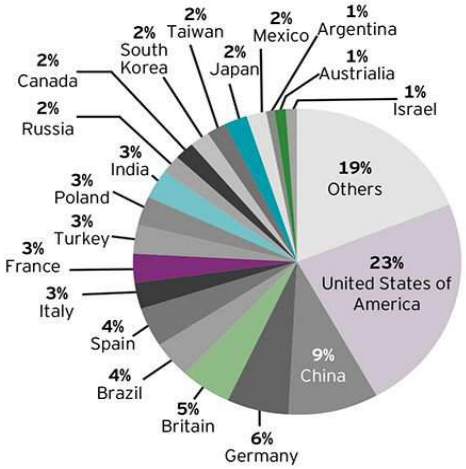


Table no.3

Top 20 countries impacted by cybercrime



Bengaluru registered the most number of cybercrime cases in 2018. The country's technology capital saw a whopping 5,035 FIRs registered at the lone cybercrime police station in the city. A city-wise comparison of cybercrime cases indicates the figure is a lot more than in other big cities in the country. As per a written reply in the Maharashtra Assembly by chief minister Devendra Fadnavis, 2,945 cases were registered in the state till September 2018 and most of them were in Mumbai.

In Delhi, in 2017, as per the Delhi police, only 84 FIRs were registered at the cybercrime cell. Until April 2016, 110 complaints were lodged, but only 26 FIRs were registered. In Chennai, as per reports, 5,703 complaints have been received by the cybercrime cell in the past five years. According to the annual report released by the National Crime Records Bureau (NCRB) in 2016, with 762 cases, Bengaluru had the second-highest number of cybercrime cases among the metros, behind Mumbai with 980 cases. Other metros in the list were far behind, with Hyderabad recording 291 cases, Kolkata 168, Delhi 90 and Chennai 36. From 762 to 5,035, the number of cases has seen a sharp increase in Bengaluru.

The increase in Mumbai is not so pronounced. Experts and officials have attributed the high reporting of cybercrimes in Bengaluru to higher incidences and greater awareness among residents, among other factors. Former DG and IGP of Karnataka ST Ramesh said Bengaluru was the first Indian city to get an exclusive cybercrime police station way back in 2001. "In the other metros, such a step was not even considered. The station also had all the powers of other stations and a wide jurisdiction. Secondly, Bengaluru is an IT hub and the number of IT companies here is very high, even by global standards. Therefore, people with awareness on filing complaints against cybercrimes are also high in number. In short, there are a greater number of cyber literates in Bengaluru," he said. A senior IPS officer who has worked in Bengaluru attributed it to the city being the country's 'silicon valley'. "However, the numbers are more to do with increased reporting of such cases," he noted. Hyderabad-based data security researcher Srinivas Kodali said statistics also depend on how a city's police are registering cases.

"For example, some cases of sim cloning in Hyderabad were not registered as cybercrime cases. Some might even be wrongly charged with IT Acts, like how Section 66A of the IT Act was abused. The standardization of FIRs itself is a complex exercise," he pointed out. In Bengaluru, the high reportage of cases coupled with a lone and understaffed cybercrime police station has led to poor disposal rate of such cases. While the number of cases more than doubled from 2017 to 2018, the number of charge-sheets filed dropped marginally. A proposal to have eight more stations in the city, if approved, is expected to improve the disposal rate[11].

[11] Available on https://economictimes.indiatimes.com/tech/internet/bengaluru-is-indias-cybercrime capital/articleshow/67769776.cms?from=mdr

Analysis of Data

We have collected statistical data from the National Crime Records Bureau, Ministry of Home Affairs, and Government of India. We have analyzed the data and determined the most vulnerable states, cities and four metropolitan cities of India in accordance with the cyber crime cases registered and persons arrested under both Information Technology Act and Indian Penal Code.

The results analyzed from figure-1 to figure-3 show that the cyber crime cases registered in the year 2016 is more than the cases registered in 2015 and hence it can be observed that the cyber crime cases increasing in different states and cities in India. Further we found that Maharashtra, Bengaluru and Mumbai are the most vulnerable state, city and metropolitan city in India as per the cyber crime cases registered in year of 2015 and 2016. The figure shows that the persons arrested in Maharashtra in 2016 is more than the cases registered in 2016 because the persons arrested in 2016 are from the cases registered till 2016.Othewise the figures show that the persons arrested against the cyber crime cases registered are significantly less in the year 2016 .The persons arrested in Assam and Bengaluru are very less as compared to the cases registered in 2016.

Conclusion

The primary objective of the research undertaken has been to shed light on the evolution of the dominance of cyber crime cases throughout India. This paper concludes that many types of cyber crime prevailing in this technology based age. It is analyzed that in the current decade there is a steady increase in the number of cyber crime cases in different states and cities of India. The number of persons arrested against the cyber crime cases registered is remarkably less. So, it becomes clear that our cyber frameworks as well as Indian cyber laws have still some issues to be solved as our Information Technology Act is unable to provide complete protection to our cyber world. Thus it requires proper implementations of cyber laws combined with the awareness and proper policy making.

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An Overview of Hostile Witnesses in India

Mr. Gaurav Yadav[1]

Introduction

The term "Hostile witness has Hostile has its genesis in the common law". The word Hostile has to be interpreted in a comprehensive manner. The function of the word Hostile under Common Law was to provide safeguard against the contrivance of an artful witness who willfully by hostile evidence ruin the cause of party falling such witness. Common law laid down certain peculiarities of a hostile witness such as not desirous of telling the truth at the instance of the party calling him or the instance of a hostile animus to the party calling such a witness. Indian law also derives the meaning of Hostile witness from the common law.[2]

According to Bentham, witnesses are the eyes and years of justice. Their each and every statement is very important as it has a magic force to change the course of the whole case. Therefore, their presence in the court is quite necessary. But unfortunately in our country, the trend is such that the witnesses do not wish to come to the courts to give their statements and pieces of evidence because of the fact that they feel unsafe. Even if they come to the court, they tend to turn hostile, thereby opening avenues for the accused to be acquitted. In India, there is no law relating to the protection of witnesses. So their problem gets doubled since they feel unsecured and at the same time having no remedy for the injuries caused to them because of that insecurity.

The domestic law differs to a significant degree in this respect. Firstly, the provision (S.154 of the Indian Evidence Act, 1872) only talks about permitting "such questions as may be asked in cross-examination. Secondly, the law nowhere mentions, the need to declare a witness as 'hostile' before the provision can be invoked. Thirdly, the judicial consideration (under S.154) is only to be invoked, when the Court feels that "the attitude disclosed by the witness is destructive of his duty to speak the truth.

From the above, we can conclude that whereas the Common Law seeks to categorize witnesses as "hostile" or "adverse", for the purpose of cross-examining, the Indian law endeavors not to make such a distinction. All that the law seeks to do is elicit hidden facts from the witnesses for the sole purpose of determining the truth. In the backdrop of the above analysis, it would be pertinent to examine the reasons behind the upsurge of the

[1] ***Assistant Professor, SRMS College of Law, Bareilly.***
[2] *available at* http://www.legalservicesindia.com/article/1692/Hostile-Witnesses-and-Efficacy-of-Law.html.

problem of hostile witnesses in India and also to find out ways and means to tackle this problem with an iron-fist.

Origin

The rule and its originality of non-impeachment of a party of his witnesses find its probable base from trial by compurgation as the roots cannot be determined with certainty. This mode of trial was in vogue during the middle ages both on the continents and in England, where it becomes known as trial by wager of law. A party, by taking oath, could establish his plea of defense if compurgators swore that they believed he spooked the truth. "As the compurgators testified only to the verity of the party's oath, they were little more than character witnesses they were selected by the party himself from among his immediate kinsmen in early times and later "The credence of the rule is in probability of the ancient times in England, where impeachment of a party's on witness was unheard of on the basis that a party's witness would be given favorable and truthful statement for the party calling him as a witness. The judge would then decide the credibility of the said witness on the basis of evidence deposed in a case.[3]

The Indian Ancient texts provide certain antiquated views prevalent during those times and were applied in ancient societies. The Dharamshastras have condemned false testimony during trial pragmatically binding individuals towards his duty of speaking the truth which bound the society.[4] "The admonition given by the judge to witnesses is a peculiarity of the Hindu legal system."[5] They gave a prior warning to the witness of the truthful statement as his dharma and to stand its dignity based on morality prevalent in those societies.[6]

Causes for turning a witness Hostile

Hostile witness can demolish the most painstakingly constructed of cases, it can waste the time of courts, and it can allow criminals to walk free, making a mockery of the investigative process. It's the problem of a witness turning hostile. There are following causes for turning a witness hostile

1. Disinclination to get involved with court proceedings.
2. Fear of criminals or goondas. A witness turning hostile is either due to allurements or threats to witnesses. Commonly threats play a part in forcing a witness to retract from his statements. This also reflects our criminal justice system and how it treats victims and witnesses.
3. Sympathetic attitude toward the accused.
4. Lack of civilized sense in the public.

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[3] Dr. Shabnam Mahlawat, *Hostile Witnesses and Evidentiary Value of their Testimony Under the Law of Evidence*, Vol. II, Winter Issue 2017, ILI Law Review, New Delhi.

[4]Irma Piovano, Some Reflections about False Witnesses in Ancient Indian Law, *available at:* http://www.asiainstitutetorino.it/Indologica/volumes/vol23-24/vol23-24_art40_PIOVANO.pdf.

[5]*Ibid.*

[6]*Ibid*.

5. A high rate of Bribes and corruption has been observed that while offenders have a range of rights (both constitutional and legal). The victims and more particularly witnesses have limited range privileges and protection accorded to them through the judicial or discretions of the judges.

6. Threats of retaliation and actual Physical violence intimidate many victims and witnesses into not co-operating criminal proceedings.[7]

The threat to the lives of witnesses is one of the primary reasons for them to retract their earlier statements during the trial. Apart from these sections, there is nothing in the law to protect witnesses from external threats, inducement or intimidation. Political pressure, self-generated fear of police and the legal system, absence of fear of the law of perjury, an unsympathetic law enforcement machinery, and corruption are some of the other reasons for witnesses turning hostile in the course of trial.

New Reasons for turning witness hostile

1. **New to Court Atmosphere:** Most of witnesses, who are laymen, are scared of embarrassing themselves by not knowing courtroom procedures. They know not who's who; who does what; who asks what; what things are called; and what's what in the Court hall.
2. **No Protection:** There are no 'witness protection schemes'.
3. **Threat and Intimidation:** Some witnesses are being intimidated and threatened by criminals; and some are strapped for money, owing to their poverty.
4. **Delayed Trial:**-Delay in disposing of criminal cases.[8]
5. **Stock Witnesses:** A stock witness is a witness is often appeared in police cases to speak as if he was present at the time of confession of accused. For inexplicable reasons scored out, a stock witness easily denies the case of prosecution. As was pointed out in *Prem Chand v. Union of India and Ors*.[9] a stock witness admits as follows "dubbed as a stock-witness and often disbelieved by the courts. Despite severe strictures passed by the courts, the Police did not give him up."
6. **In-adequate payment to witness:** Although section 312 of Cr.P.C permits the Court to order payment to witness, in most of the cases, witness could not even get to and fro charges.
7. **Illiteracy:** Some witnesses are innocents, illiterates, and timid.
8. **Lack of Responsibility:** Lack of responsibility for the welfare of Society; and lack of legal awareness.[10]

The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny[11]. Merely because a witness is declared hostile it does not make him unreliable

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[7] *Available at* http://www.legalservicesindia.com/article/1692/Hostile-Witnesses-and-Efficacy-of-Law.html
[8] *Available at* http://www.legalserviceindia.com/legal/article-537-hostile-witness-jeremy-bentham.html
[9] 1981 AIR 613, 1981 SCR (1)1262.
[10] *Available at* https://www.studocu.com/en/document/guru-gobind-singh-indraprastha-university/law-of-evidence/other/hostile-witness-short-notes/3452726/view.
[11] *Zahira Habib Ulla H Sheikh and Anr v. State of Gujarat and Ors,* (2004).

so as to exclude his evidence from consideration altogether. As was held in *Rabindra Kumar Dey v. State of Orissa*[12], Section 154 of the Evidence Act confers discretion on the court to permit a witness to be cross-examined by a party calling him. The section confers judicial discretion and must be exercised judiciously and properly in the interest of justice. The court will not normally allow a party to cross-examine his own witness and declare the same hostile unless the court is satisfied that the statement of the witness exhibits an element of hostility.[13]

Effects of witness Turning Hostile

The social and legal consequences of witnesses turning hostile are:

(a) Perjury

Under S.191 of the Indian Penal Code (IPC), "A person is legally bound to answer a question truly, not only on oath, but also on being bound by some law, and if he makes some statement which he knows or believes to be false, he may be giving false evidence under S.191 and may be punished under section 193". Similarly, if a person makes a statement under S.164 of Cr.P.C. and contradicts himself during the trial, he may be convicted of giving false evidence intentionally. S.164 explains in detail the procedure of recording of confessions and statements before the magistrate outside the Court and at any time other than the trial proceedings. In other words, it talks about the phenomena of making "Extra-judicial Confessions and Statements" before any Magistrate. There are high chances that statements made before a magistrate under S.164 may be totally changed by a witness during trial proceedings. As a result of external factors like fear of harm being caused, two different versions may be given outside the Court and then during Court Proceedings. In Jennison v. Backer[14], "The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope".

In all the above cases of contradictory statements and confessions, S.191 acts as a safeguard against retracted statements and confessions given by witnesses who may have turned hostile at some point in the trial. They may be convicted of the offense of perjury.

(b) Decline in Conviction Rates:

The caliber of a Criminal Justice System is ascertained by the rate of conviction in criminal offenses, which implies the percentage of cases that resulted in conviction of the accused to the number of cases in which trials were completed during a particular year. The National Crime Records Bureau reveals that the Conviction rate which was 36.2% in 2004 went down to 26% by 2007, because of the problem of hostile witnesses. This means that along with other reasons, the problem of hostile witnesses is also one of the major reasons for which there has been a decline in conviction rates. Very often, the truth

[12]1977 AIR 170, 1977 SCR (1) 439

[13] *Available at* https://www.studocu.com/en/document/guru-gobind-singh-indraprastha-university/law-of-evidence/other/hostile-witness-short-notes/3452726/view.

[14](1972 (1) All E.R. 1006).

remains uncovered and the accused are acquitted due to lack of evidence available against them.

(c) Cross-examination by the Party who called the witness:

When the prosecution Counsel feels that the witness is making statements against the interest of his party, he may request the Court to term that witness as Hostile. A court may permit a party to cross-examine his own witness, when his temper, attitude, demeanor, etc., in the witness-box shows a deliberately hostile or antagonistic feeling towards the party calling him, or when hiding his real sentiments, he does not exhibit any hostile feeling but makes a statement contrary to what he was called or expected to prove or what he had purposely said previously.

(d) Entire evidence of a hostile witness not discarded:

The entire evidence of a hostile witness needs to be discarded and reliance may be placed on any part of the statements of such a witness for the strengthening of the arguments of either side. The 185th Law Commission Report suggested the inclusion of Clause (2) in S.154 of Evidence Act to put questions which might be put in Cross-examination to a witness called by him, may rely on any part of the evidence of such witness.[15]

(e) Loss of faith in the judiciary:

The large number of acquittals in criminal trials will seriously erode the faith imposed on the judiciary by the common man. Judgments have been influenced in the past as a result of witnesses turning hostile at crucial points in Criminal Trials, especially in cases where there has been involvement of high profile parties. There is a common feeling among the legal fraternity that this has led to unwanted acquittals in many cases, where the verdicts could have gone in favor of the victims, save for the witnesses turning hostile. This signifies a dangerous trend, for it results in tendencies to take the law into one's own hands. It is also pertinent to note that even though there may be vested interests involved against the enactment of a separate Witness Protection Legislation, it should not act as a hindrance against the betterment of the condition of witnesses. If this kind of legislation comes into existence, it will obviously have an overriding effect over the other witness protection measures that are in operation at this moment.

Judicial Approach on Hostile Witness

Section 154 of The Indian Evidence Act 1872 The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.[16]

Under section 154 of Evidence Act, permission may properly be granted to a party to cross-examine a witness of his over if the witness has given evidence unfavorable to the party, calling him, is correct there can be no stronger case of witness being unfavourable

[15]Law Commission of India, 185th Report on "Review of the Indian Evidence Act, 1872", 2003, p.486.
[16]Section 154 of Evidence Act 1872.

to a party than where the witness, by previously making a statement in favor of the party, has induced him to call him as his witness.

The Law Commission in its 14th Report (1958) referred to 'witness-protection' in a limited sense and the main feature with respect to this was the provision for adequate arrangements for the convenience of the witness within the court premises and provision of allowance enabling them to arrive for testimony promptly and thus avoiding delay. There was no mention of the provision of any physical protection for the witness within this report.[17]

The 154th Report of the Law Commission contains a chapter on Protection and facilities to Witnesses. One of the recommendations was: "Witnesses should be protected from the wrath of the accused in any eventuality", but the Commission did not suggest any measures for the physical protection of witnesses. This Report suggested to prevent witnesses from turning hostile by taking the signature of the witness, if he is literate, on his statement, giving a copy of the statement to the deponent under acknowledgment and to send copies of the statements to the appropriate magistrate as well as to the superior Police office.[18]

The role of a witness is paramount in the criminal justice system of any country. The malady afflicting our criminal justice system is much more deep-rooted. Cosmetic changes just won't do much to deliver justice. The system requires a comprehensive revamp. The *V.S. Malimath Committee* on reforms of the criminal justice system prepared an outline for such a wide-ranging correction in 2003. For a situation like the Jessica Lal case, where witnesses refused to support the prosecution's case, the committee has suggested the following measures: -

1. Holding in-camera proceedings,
2. Taking measures to keep the identity of the witness's secret,
3. Ensuring anonymity, and
4. Making arrangements to ensure their protection.
5. Witnesses in court should be treated like guests of honour;
6. They should be adequately compensated for spending money on travel and accommodation;
7. Comfort, convenience and dignity of witnesses while deposing in the court of law should be ensured; and
8. A law for protection of witnesses should be enacted as there is no such law in India.
9. Constitution of a National Security Commission at the national level and a state security commissions at the state level.

[17]The Law Commission in its 14th Report.

[18] *Available at* https://www.lawctopus.com/academike/witness-protection-problems-faced-and-need-for-a-protection-programme-in-india/ see also The 154th Report of the Law Commission.

In *Sat Paul v. Delhi Administration*[19], the Supreme Court of India defined a Hostile Witness as "one who is not desirous of telling the truth at the instance of the party calling him and an unfavorable witness is one called by a party to prove a particular fact, who fails to prove such a fact or proves an opposite fact".

The most historic and relevant case that brought witness protection into focus was the *Zahira Habibulla Sheikh v. State of Gujarat*[20]. In this case, the Supreme Court decided to shift the venue of the case from Gujarat to Maharashtra since the Court felt that the witnesses would not be able to depose their statements freely in the said state. The Supreme Court reiterated "legislative measures to emphasize prohibition against tampering with witness, victim or informant, have become the imminent and inevitable need of the day."

In *Appabhai v. State of Gujrat*[21], the Hon'ble Apex Court has observed as under: "The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. Basically, the signature of the witness in section 161 of the Cr.P.C statement is not necessary. However, it is not the law that whenever the signature of the person is obtained in his statement recorded in the course of an investigation that statement should be ignored. The law on the point informs me that in such a situation the Court must be cautious in appreciating the evidence that the witness who gave the signed statement may give in Court.

Conclusion

Thus we conclude all that we need to enact strict laws on witness protection keeping in mind the needs of the witnesses in our system.[22] So to conclude it may be said that the problem of hostile witnesses is not a new phenomenon to the judiciary but that does not necessarily mean that we have nothing to do against it. The ever-changing legal scenario demands for effective measures to curb this menace. A properly planned set of legislations and their effective implementation would surely bring worthwhile results. It is therefore not a question of funds, as they could be generated in due time by some means or the other; but a question put to the integrity of the system upon which drives the sustainability of the witness protection program as well as the life of the witness and his family.

Suggestions

The following are the suggestions for stopping witness in turning hostile witness-

1. The process of investigation must be fair. As was observed in *Ram Bihari Yadav v. State of Bihar and Ors.*[23] If primacy is given to such a designed or negligent

[19] AIR 1976 S.C. 294.
[20] AIR (2004) 4 SCC 158.
[21]AIR 1988 S.C. 696.
[22] *Available at* http://www.legalserviceindia.com/articles/hostile_w.htm
[23](1998 (4) SCC 517).

investigation, to the omission or lapses by perfunctory investigation or omissions, the faith, and confidence of the people would be shaken not only in the Law enforcing agency but also in the administration of justice in the hands of Courts.

2. Punishment should be given to the witness who turns hostile.
3. Testimony of eyewitnesses should be recorded first in the presence of a magistrate.
4. In India, "Witness Protection Programmes" must be established. Protection for witnesses during and after trial of a case must be provided.
5. Remuneration must be provided to the witnesses who would lose a day's wage.
6. Witness awareness camps must be conducted in order to know that cogent evidence is the primary need either to acquit or to convict an accused as to the facts and circumstances of each case.
7. Witness must be respected and honoured as a 'guest of the Court' because witnesses are the eyes and ears of Justice.
8. Police protection for the witness and their family members should be compulsory from day one to deposition of statement.
9. The pending bills should be passed immediately.

By making a few changes in law be can protect the witness from turning hostile. And for the sake of natural justice also it's important for the judiciary and lawmakers to protect the witness.

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Fintech- Comparison of Regulatory Regime of India and U.K.

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Abstract

Due to the impact of financial crisis of 2008, there have been dramatic changes in the way of regulation of finance. The regulation of financial services failed to take into account the impact of rise in financial technology firms, change in the working patterns of banks, etc. Therefore, these changes require reconceptualization of the regulation of financial services. The challenges to the fintech firms are (i) they are more affected to due adverse economic shocks because of their size and this shock spreads to the other industry which uses fintech in their business; and (ii) it is difficult to monitor the fintech firms than a traditional financial institution due to lack of information about the structure and operations of fintech market. Against this background, the paper aims to analyse the regulatory and non – regulatory aspect of fintech firms. The paper discuses about the regulation of fintech firms in India and the United Kingdom including the data privacy laws pertaining the customer in both the jurisdiction. The paper does a comparative analysis of the regulation of fintech market in both the countries which includes the lessons that India can take from US. Finally, the author concludes the paper by identifying the way ahead.
Keywords: Fintech, Financial Crisis, Regulation of Financial Services, SEBI, IRDA, RBI

Introduction

FinTech is a rapidly evolving segment of the financial services sector where tech-focused startups and other new market entrants are changing the way that markets are structured and services are delivered. From simple money transfer to complex trading systems built around artificial intelligence and machine learning, technology is making financial services more accessible, cheaper, more innovative and more efficient. Since the onset of the financial crisis, investment into fintech businesses globally increased from $930 million in 2008 to $22.3 billion in 2015[2].

In India as well, Fintech is on the rise. In the developing world, India is overtaking early leaders like Kenya and the Philippines as a centre for financial service innovation and experimentation. Fintech is a relatively new industry in India, but its rapid growth and potential impact both on the financial sector and on the general population mean that it has garnered a lot of attention. Moreover, the demonetization policy announced in November 2016, which explicitly aims to push consumers away from cash towards digital transactions, has laid a platform for even faster growth.

Given the importance of Fintech firms in the present times and considering that Indian Fintech is still at its nascent stage, it is important to strengthen the macro level of policies

[1] ***BA.LL.B, 4th Year, National Law University Jodhpur.***
[2] Accenture, The Boom in Global Fintech Investment A new growth opportunity for London, Accenture, (2014) Available at https://www.cbinsights.com/research-reports/Boom-in-Global-Fintech-Investment.pdf, Accessed on 1st August, 2018.

and regulations, and also the meso level of support functions and infrastructure for further growth of fintech businesses. Here the UK experience is instructive as UK has successfully emerged as the Fintech Hub and several lessons can be taken from UK.

Regulatory and Non – Regulatory Aspect of Fintech in India

In India, the fintech businesses are regulated or governed by the Reserve Bank of India, Security and Exchange Board of India, the Insurance Regulatory and Development Authority which deals with the implications of fintech in the businesses related to insurance.

Regulatory Aspect of Fintech in India

Regulation under SEBI Law

With regard to the securities market, the fintech technology is relevant because in security settlements, due to differences in the timing between the delivery of securities and the delivery of funds, there are problems in the settlement of risks between counterparts and/or their intermediaries.[3] Thus, fintech helps in removal of 'traditional reliance' on the intermediaries which ensures elimination of risk of settlement.[4] Fintech affects the securities market by easing the process of fund raising through Peer to Peer lending and crowd funding, and it also provides online access to investment products through online portfolio management.[5] Currently, there is no express law with regard to the regulation of fintech in SEBI and a hence a Committee has been established to look into it.

SEBI (Investment Advisors) Regulations, 2013 ["Regulations, 2013"] regulate investment advisors. Due to robo – advisors, there will be significant disruptions in the investment space.[6] "*Robo Advisors are financial advisors or wealth management companies, which offers automated investment advice based on the pre-set algorithms*". Fintech is a "*wide spectrum of technological innovations which impact a broad range of financial activities, including payments, investment management, capital raising, deposits and lending, insurance, regulatory compliance, and other activities in the financial services space*".[7]

Thus, the issue is whether the robo advisory should be registered under the Regulations, 2013 and treated like an independent advisors.[8] SEBI issued a consultation paper which

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[3] Patrick Armstrong, *Financial Technology: Applications within the Securities Sector, Oslo Børs ASA: Stock exchange and Securities Conference*, (18 January 2017), https://www.esma.europa.eu/sites/default/files/library/esma71-844457584-330_speech_fintech_and_asset_management_by_patrick_armstrong.pdf, Accessed on 1st August, 2018.

[4] *Id*.

[5] Shweta Modgil, *SEBI Constitutes CFRT Committee to Study Impact of Fintech on Financial Markets*, (9th August, 2017), https://inc42.com/buzz/sebi-fintech-financial-markets/, Accessed on 1st August, 2018.

[6] *Fintech Policy Roundtable on SEBI's Investment Advisers Regulation*, (23 January, 2018), https://blog.indiafintech.com/2018/01/23/fintech-policy-roundtable-on-sebis-investment-advisers-regulation/, Accessed 1st August, 2018.

[7] White House, National Economic Council, *A Framework for FinTech*, (2nd Jan. 2017), https://obamawhitehouse.archives.gov/sites/
obamawhitehouse.archives.gov/files/documents/A%20Framework%20for%2OFinTech%20 FINAL .pdf.

[8] Regulation 3, Regulation 4, SEBI (Investment Advisors) Regulations, 2013.

suggests compliance requirements for robo – advisors.[9] In the USA, the regulation of robo – advisors is done similar to that of independent advisors. The robo – advisors must register with United States security Commission. In India, there is no express law regulating the robo – advisors. But, under Regulation 3(1), every 'person' need to be registered. Since, a 'person' includes non-living entity, robo-advisors can be governed under the Regulations, 2013. Apart from these, SEBI's consultation deals with certain provisions for robo – advisors.

First, an investor must get risk profiling.[10] *Second*, the investment related advices must be appropriate to the risk profile of the client.[11] *Third*, all the records which relates to the profiling of the risk and the assessment of the risk of the client and "suitability assessment of the advice being provided" must be maintained by the investment advisors for five years period.[12] *Fourth*, fit automated tools should be used for the accomplishment of such purpose.[13] *Fifth*, "*robust systems and controls should be in place to ensure that any advice made using the tool is in the best interest of the client and suitable for the clients*".[14] *Sixth*, disclosures should be made to the client pertaining to the working of the tool and limitation on the output.[15] *Seventh*, there must be comprehensive system audit requirements which should be in place.[16] *Eighth*, the investment advisors using the tools have the responsibility.[17] *Ninth*, the automated tools used by the advisers are also subject to audit and inspection.[18]

Regulation under IRDA

Under IRDA, fintech is applicable as web aggregators are regulated by IRDA. Web aggregators are companies with their own website on which it provides information on insurance products of different insurers.[19] They can functions only if they approved by IRDA.[20]

Regulation under RBI

With regard to RBI, fintech is important in two aspects, *first*, under Payment and Settlements Systems Act, 2007 and *second*, under RBI on Non – Banking Financial Companies – Peer to Peer Lending Mater directions. Further, Payment and Settlements

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[9] *Do Robo-Advisors need to register with SEBI?*, http://www.cskruti.com/robo-advisors-sebi-registration/, Accessed on 2nd August, 2018.
[10] 4.1.2, Consultation Paper on Amendments/Clarifications to the SEBI (Investment Advisers) Regulations, 2013 ["CP"] (2016).
[11] 4.11.2(iii), CP.
[12] 4.16.4, CP.
[13] 4.16.5, CP.
[14] 4.1.6.5, CP.
[15] 4.1.4, CP.
[16] 4.16.5, CP.
[17] 4.6.2, CP.
[18] 4.16.5, CP.
[19] *Do you know who web aggregators are?*, (5th January, 2017), https://www.shriramgi.com/news-events/do-you-know-who-web-aggregators-are/, Accessed on 2ND August, 2018.
[20] Regulation 3, Regulation 4, Insurance Regulatory and Development Authority of India (Insurance Web Aggregators) Regulations, 2017.

Systems Act, 2007 along with Payment and Settlement System Regulations regulates fintech as the Act regulates ATM networks, card payment networks and pre-paid payment instruments.[21]

"*Peer to Peer Lending Platform*" means an intermediary providing the services of loan facilitation via online medium.[22] An NBFC acts as intermediary provision online marketplace or platform to the participants involved in Peer to Peer lending.[23] Thus, a fintech company must comply with the above regulations.

Indian Government support to Fintech Innovation

India has taken lot of initiatives for the friendly environment of fintech.

Unified Payment Interface

United Payments Interface is a payment system which has been developed by National Payment Corporation of India which facilitates the transactions between two banks, and it works on mobile platform.[24] For instance, PhonePe, a fintech company which "*allows all kind of digital transactions and payments such as UPI, recharges, money transfers, online bill payment and much more*"[25].

Bharat Bill Payment System

National Payment Corporation of India introduced Bharat Bill Payment System ["BBPS"]. It is enables convenience for the consumers so as to pay the bills. It facilitates payments either online or through a network of agents. It allows the consumers to pay the bills without physical movement of money.

RBI Peer to Peer lending

RBI Peer to peer lending, a P2P entity requires registration[26], they have to become member of all Credit Information Companies and submit data to them,[27] they have to comply with transparency and disclosure requirement,[28] etc. But, the environment for the progress of fintech is visible from the fact that the RBI can exempt the entity from complying with these requirements if the circumstance exists.

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[21] Form A, Regulation 3(2), Payment and Settlement System Regulations, 2008 ["Regulations, 2008"].
[22] Regulation 4(v), REGULATIONS, 2008.
[23] Regulation 6(1)(i), REGULATIONS, 2008.
[24] *What is UPI*, https://razorpay.com/upi/, Accessed on 2nd August, 2018.
[25] *How can UPI help to take fintech to the Masses*, https://inc42.com/resources/how-can-upi-help-to-take-fintech-to-the-masses/, Accessed on 2nd August, 2018.
[26] Regulation 5, Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ["RULE, 2011"].
[27] Regulation 9, RULES, 2011.
[28] Regulation 11, RULES, 2011.

Non – Regulatory Aspect of Fintech in India

In cases of financial transaction, the key element is the security and confidentiality of the transaction and information or data of the consumer. It enhances the confidence of the consumer in digital transactions and hence drives a country towards a cashless economy.

Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011

The Department of Information Technology notified Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ["Rules, 2011"].

The Rules, 2011 applies only to the body corporates and the persons located in India.[29] Thus, entity involved in fintech business is governed by the Rule, 2011. The Rules, 2011 stipulates list of data which can be considered as 'sensitive personal data' which fintech entities must protect. The 'sensitive personal data' includes information related to passwords, credit/debit card information, biometric information (such as finger prints, DNA, voice patterns, etc which are used for the purpose of authentication processes), etc.[30] For instance, in case of UPI, which contains password, the Rules, 2011 applies to it.

Further, fintech entities which deal with business which requires personal sensitive data are obliged to draft a privacy policy which must be accessible to the customer providing information.[31] They are also required to publish this information on their website. For instance, the web aggregators are required to put privacy policies in their website.[32]
A fintech entities collecting information are imposed with certain duties.

First, they must obtain the consent of the person providing information in writing or email or fax or any other electronic mode[33] prior to the collection of such data. The entity cannot use that information for unlawful purpose. If the information is collected for lawful purpose, then, only the required information and not all the information should be obtained.[34] A fintech entity or a company using financial technology can obtain information only when the person providing the information is aware of the fact that the information is collected, the purpose of the collection of information and also the name and address of the agency revealing the information.[35] The entity cannot retain

[29] Press Note, *Clarification on Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 under Section 43A of the Information Technology ACT, 2000*, Issued on 24th August, 2011.
[30] Rule 3, RULES, 2011.
[31] Rule 4, RULES, 2011.
[32] Rule 4, RULES, 2011.
[33] http://pib.nic.in/newsite/erelcontent.aspx?relid=74990
[34] Rule 5(2), RULES, 2011.
[35] Rule 5(3), RULES, 2011.

information longer than the purpose for which the information has been obtained.[36] The entity collecting information must have requisite arrangements with regard to the security of the information[37] and prevent it from leak. A fintech entity must have a grievance officer and his details must be mentioned in the website of the entity. For instance, web aggregators must state all such things in their website.

A fintech entity must obtain prior permission of the customer who provides the information before disclosing such information to the third party. But, the rule does not apply in cases when the information is obtained by the government. In this regard, Paytm, a fintech leaked the information of some of its users to the Prime Minister.[38] But, this action cannot be challenged under the Rules, 2011 as the information was obtained in the governmental capacity but the action of obtaining such information was hidden from public. A fintech entity must need to comply with International Standards such as IS, ISO or IEC 27001 of maintaining data security.[39]

Information Technology came up with Information Technology (Security of Prepaid Payment Instruments) Rule, 2017

Therefore, it shows that Indian law is settled with the regard to protection of information of customer who gives their information to the entity involved in fintech business.

Further, the Ministry of Electronics and Information Technology came up with Information Technology (Security of Prepaid Payment Instruments) Rule, 2017 ["Rules, 2017"] but it has not been notified and open for comments. The Rules, 2017 provides for the security practices for electronic prepaid payment instruments.[40]

Under Payments and Settlements Act, prepaid payment instruments are "*payment instruments that facilitate purchase of goods and services, including funds transfer, against the value stored on such instruments"*.[41] A mobile wallet is an example of prepaid payment instruments. Electronic prepaid payment instrument issuer is a person who operates a payment which issues prepaid payment instruments to the individual or the organization where the payment account is accessed through electronic means. They are obliged to protect the customer's personal information.[42] A fintech entity must public its privacy policy in the website or mobile application.[43] In case, when a fintech entity fails to protect data, it is obliged to pay compensation to the injured party.

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[36] Rule 5(4), RULES, 2011.
[37] Rules 8(1), RULES, 2011.
[38] *Cobrapost Paytm Investigation claim about PM Office*, 27th May, 2018, https://www.thequint.com/news/politics/cobrapost-paytm-investigation-claim-about-pm-office, Accessed on 3rd August, 2018.
[39] Rule 8(2), RULES, 2011.
[40] *Release of Draft Rules for Security of Prepaid Payment Instruments*, 4th May, 2017, http://www.mondaq.com/india/x/591228/fin+tech/Release+of+Draft+Rules+for+Security+of+Prepaid+Payment+Instruments, Accessed on 3rd August, 2018.
[41] Master Directions on Issuance and Operation of Prepaid Payment Instruments in India, 20th March, 2017, https://www.rbi.org.in/Scripts/bs_viewcontent.aspx?Id=3325, Accessed on 3rd August, 2018.
[42] Rule 8, RULES 2017.
[43] Rule 16, RULES 2018

Regulation of Fintech in United Kingdom

The fintech sector of the United Kingdom is one of the world's leading fintech sectors. In 2015, the UK Fintech sector accounted for c. £6.6b revenue and attracted c. £524m in investment[44]. Due to such success of the fintech businesses in the United Kingdom, it is now becoming the destination of choice for fintech firms. It is the fintech sector friendly policies that have led to UK becoming the leading fintech sector in the world. The regulatory framework of UK is very supportive of the Fintech sector and encourages innovation and competition.

Regulatory framework in U.K.

In UK, there is no specific and separate regulatory framework for fintech businesses. The fintech businesses, just like traditional financial services are subject to the existing body of UK financial regulation. The policy makers in the UK have been very receptive of Fintech businesses. The government has, in order to promote the fintech industry, given special focus on developing the digital infrastructure of the country. Other benefits such as tax exemptions have also been provided to startups. Recently, the government is thinking of launching global fintech regulatory sandbox after the success of its 2016 UK sandbox[45].

A fintech firm in order to begin business in the UK requires authorization from the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA). Fintech businesses in the UK are regulated by the FCA, the Prudential Regulation Authority, the Payment Systems Regulator and the Bank of England.

The UK's Financial Conduct Authority (the FCA) has been a pioneer amongst its peers globally[46]. It is regarded as one of the most forward-thinking regulators in the world in this area. The FCA supports the suggestion that *"rules should accommodate and not prevent the use of on-line services and channels, and should support the development of financial technology solutions"*.[47] Certain regulations which are applicable to Fintech firms are as follows:

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[44] EY&HM, TREASURY, *UK Fintech on Cutting Edge*, (2016), Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502995/UK_FinTech_-_On_the_cutting_edge__Full_Report.pdf.

[45] MOLLY JANE ZUCKERMAN, UK Financial Regulator introduces global fintech sandbox, '90%' success rate domestically, 19th March, 2018, Available at: https://cointelegraph.com/news/uk-financial-regulator-introduces-global-fintech-sandbox-90-success-rate-domestically.

[46] Guide to Promoting Financial & Regulatory Innovation Insights from the UK, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701847/UK_finanical___regulatory_innovation.pdf

[47] FINANCIAL CONDUCT AUTHORITY, *The FCA's February 2016 Response to the Commission's Call for Evidence on the EU regulatory framework for financial services*, https://www.fca.org.uk/publication/corporate/eu-regulatory-framework-call-for-evidence-response.pdf, Accessed on 3rd August, 2018.

Regulation relating peer to peer and market place lending

"Peer-to-peer lending refers to loan-based crowdfunding. In the UK, the FCA regulates loan-based crowdfunding platforms. These regulations came into force on 1 April 2014. Under article 36H of the RAO[48], operating an electronic system that enables the operator ('A') to facilitate persons ('B' and 'C') becoming the lender and borrower under an article 36H agreement is a regulated activity (and a firm will require FCA authorization) where the following conditions are met:

- the system operated by A is capable of determining which agreements should be made available to each of B and C;
- A (or someone acting on its behalf) undertakes to receive payments due under the article 36H agreement from C and make payments to B which are due under the agreement; and
- A (or someone acting on its behalf) takes steps to procure the payment of a debt under the article 36H agreement and/or exercises or enforces rights under the article 36H agreement on behalf of B."

Regulation Relating to Payment Services

Payment services are regulated in the UK by the Payment Services Regulations 2009, which implemented the Payment Services Directive in the UK. To provide payment services in the UK, a firm must fall within the definition of a 'payment service provider'. Payment service providers include 'authorised payment institutions', 'small payment institutions', credit institutions, electronic money institutions, the post office, the Bank of England and government departments and local authorities. A firm that provides payment services in or from the UK as a regular occupation or business activity must apply for authorisation or registration as a payment institution.

Regulation Relating to Data Protection

With regard to data protection in UK, General Data Protection Regulation has been applicable since May 25, 2018. It applies to Fintech firms established in the UK which process personal data. Processing is defined widely to cover any operation performed on personal data including collecting, storing or destroying that data. Those firms processing personal data must comply with a set of principles (for example, personal data must be processed fairly, lawfully, transparently and securely) and needs a 'lawful basis' for the processing (for example, consent). This new data protection law is more restrictive than the law it replaces. For example, it includes mandatory breach notification provisions and high monetary sanctions, and imposes obligations on both controllers and processors.

Certain initiatives taken by the U.K. Government to Promote Fintech Businesses:

In UK fintech businesses have benefitted from a lot of key policy and regulatory initiatives, both at the national and EU level.

[48] THE FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED ACTIVITIES) ORDER, 2001 (SI 2001/544).

Project Innovate

Project Innovate is a landmark policy initiative by the UK government. The aim of the project is to assist both new and established businesses to introduce innovative financial products and services in the country. This Project was introduced by the Financial Conduct Authority (the FCA) and is a big boost to the new fintech firms. The project has three major components:

Innovation Hub

An "Innovation Hub" is nothing but a platform where the Financial Conduct Authority interacts with innovative businesses and the UK government in order to obtain a better understanding of the "needs of fintech businesses and possible benefits and risks of their fintech products and services; and identify areas in the existing regulatory frameworks that need modification and structural barriers that need to be eliminated so as to benefit consumers. In addition to this, the Innovation Hub also assists in preparing authorization applications of the qualifying firms."

Out of the initial requests received for support by fintech firms, 52 percent of the firms have been reported to have been supported by the UK government[49]. This "Innovation Hub" is thus evidential of the progressive and supportive nature of the Financial Conduct Authority towards promoting innovation in the financial services sector. Christopher Woolard, Director of Strategy & Competition at the Financial Conduct Authority stated that "the Innovation Hub was set up by the FCA to do two main things. Firstly, it provides direct support to innovative firms who are trying to launch new products into the market that we think might benefit consumers, and the second thing is it's the centre for our innovation policy."[50]

Regulatory Sandbox

Another part of Project Innovate by the FCA is the regulatory sandbox which provides participants with a range of options including authorization for testing, no enforcement action letters, individual guidance, and waivers. Under the programme, the FCA also tests the fintech firm's products in a controlled and safe environment in order to verify their feasibility before permitting them to enter into the market[51]. Thus, it gives an opportunity to the fintech firms to test the products before incurring any regulatory consequence of engaging in it. It is thus, best known as "safe space".

Advice Unit

Advice Unit is another initiative by the FCA. This provides support to firms that aim to provide low-cost advice to investors by developing robo-advice models. Through this

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[49] Harriett Baldwin, Eileen Burbridge, *Facilitating the UK's FinTech growth – Innovation in Regulation*, http://www.ukfintech.com/security-regulation/facilitating-the-uks-fintech-growth-innovation-in-regulation, Accessed on 3rd August, 2018.

[50] *Id*, 5.

[51] *Regulatory Sanbox*, https://www.fca.org.uk/firms/regulatory-sandbox, Accessed on 3rd August, 2018.

initiative, individual regulatory feedback will be given to those firms and the unit will also undertake the activity of publishing resources for the help of such firms[52].

Fintech Bridges

'Fintech Bridges' is an initiative by the FCA to make it easier for fintech firms and investors to have access to the relevant markets[53]. As per this arrangement, the FCA refers fintech firms to regulators in other jurisdictions and also help provide how the regulators of other jursidictions will share and use financial services information. UK has already opened fintech bridges with other countries such as Australia, China, Canada, Belgium, Japan, South Korea, Hong Kong and Singapore.

Cooperative Agreement on Fintech

The UK government is now entering into cooperative agreements with other countries to encourage Fintech businesses. It has very recently on February 19, 2018 entered into cooperative agreement with the United States Commodity Futures Trading Commission (CFTC) to help fintech firms in both the countries[54].

Guidance on Cloud Data Storage

The FCA issued the finalized guidance on cloud data storage and the use of third party providers in FG 16/5 in July 2017. It was recognized that the use of cloud data storage through third party providers is a key factor in many firms' plans to develop and innovate. This also gave a boost to the fintech firms.

Feedback statement on RegTech

The Feedback Statement on RegTech was issued by FCA in July 2017 (FS 16/4). "It concerns the subset of FinTech which focusses on technologies that may facilitate the delivery of regulatory requirements more efficiently and effectively so reducing the regulatory burden on firms and driving costs savings. The FCA issued feedback statement on RegTech with the view to free up large sums of operational and capital expenditure currently spent by financial companies on compliance.

Seed Enterprise Investment Scheme

The SEIS is a scheme which has been established by the UK government[55]. It aims to provide assistance to early-stage companies looking to raise equity finance. It provides for tax relief to individual investors, who purchase new shares in startups, it has also helped to develop the investment ecosystem around startups and allow for greater tolerance of risk by investors. This comes in as another boost for fintech firms. While financial activities are an excluded activity for the SEIS, EIS and VCT schemes, as long

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[52] Advice Unit, https://www.fca.org.uk/firms/advice-unit, Accessed on 3rd August, 2018.

[53] *Fintech Sector Strategy launched at International Fintech Conference,* https://www.gov.uk/government/news/fintech-sector-strategy-launched-at-international-fintech-conference, Accessed on 3rd August.

[54] *FCA and CFTC enter into Cooperation Agreement on Fintech,* https://www.lexology.com/library/detail.aspx?g=44c24c48-dcc8-4612-985a-12fb4d952a6b, Accessed On 3rd August, 2018.

[55] *Seed Enterprise Investment Scheme,* http://www.seis.co.uk/, Accessed on 3rd August, 2018.

as a fintech company is only providing a platform through which financial activities are carried out, such a fintech company should still qualify for those schemes. Thus, even though there is no specific legislation governing fintech company, it can be seen through these initiatives taken by the UK government to promote Fintech firms that the UK government has been very receptive and supportive of fintech business and has tried to create a suitable infrastructure to support their growth and progress.

Analysis of Regulation of Fintech in the United Kingdom and India

The fintech sector in India initially adopted a very cautious approach towards innovation, given the uncertainty in the regulatory space. However, in recent times, realizing the need of innovation and technology, the regulators have been very perceptive to change and are working towards creating a fintech ecosystem which is beneficial to both the market participants and the customers. 'Demonitization' and 'Digital India campaign' launched by the Govenment are a few such positive steps towards strengthening the fintech sector in India.

Through our research and analysis, we have found that in the process of strengthening and promoting the fintech sector in India, there is a lot that India can learn from the UK experience, where the Financial Conduct Authority (FCA) through its projects around innovation and sandboxing has developed an effective model for balancing innovation and regulation.

India already has strong many innovation systems that are supporting fintech's growth but the enablers of an effective ecosystem can also be enhanced. There is lack of aid and assistance for early stage fintech ideas, in particular those looking to serve poorer markets. Though linkages do exist to universities and academia for a good pipeline of ideas, these can be strengthened. While there are a number of investors looking at the sector, there is a lack of high quality investors with the knowledge and expertise to add significant value through mentorship and advisory services. Industry coordination is also weak and nobody is effectively playing the role of an industry body (as is played by Innovate Finance in the UK). This weakens the networks and the collaboration that can be important drivers of innovation and growth.

There is also a fear among Indian policy makers that Fintech firms will replace the traditional banking system and a very few traditional banks will emerge. However, the authors feel that even in this aspect, the Indian regulators can learn from UK. In UK, the fintech firms have not replaced the traditional banking system but have instead filled the gaps which were lacking in case of traditional and other banking systems. In UK, the model followed is more in the way of partnerships, where links between old and new financial sector players are forged in mutually beneficial arrangements. On one hand, fintechs can be quick, customer-centric and innovative, banks can provide capital, data and customer relationships. Thus, it can be seen that enormous synergies exist, and these relationships will be key to the further development of Indian fintech. Therefore, there are a few lessons that Indian can take from UK such as cooperative agreements, innovation

hub which provides aid to startups, regulatory sandbox which enables firms to test their products before entering into the activity etc.

Suggestions

The authors would like to make certain suggestions based on our research and analysis and like to enumerate certain initiatives that India can borrow from UK. Firstly, a "fintech bridge" as was established by UK with several countries, needs to be established between India and the UK so as to facilitate peer to peer relationships and cross-border transactions between companies and investors. Secondly, functionally-equivalent institutions such as the Reserve Bank of India and the Financial Conduct Authority of UK must involve themselves in sharing knowledge and experience. Thirdly, the RBI and others will need to play a more proactive role in fintech. As the sector grows and business models become even more complex and inter-linked, regulations need to keep ahead of the industry.

Regulations need to be conducive and not restrictive to innovation. Fourthly, the FCA's Innovation Hub provides a good example of how a regulator can positively engage with the private sector by providing direct support to innovative fintechs who are looking to develop new products and services, the regulator can keep track of where the innovation frontier lies. The regulator can also use this to identify where current policies and regulations are obstructive to innovation, and remedy these before they have a larger effect on the market. Fifthly, Policy initiatives like a simplified visa process for tech talent, and fintech bridges with other countries, helped to establish London as a global leader in fintech with an international workforce and reach well beyond the UK's financial sector. India has potential to be a major exporter of fintech businesses, and Indian fintech should adopt a similar outward looking approach.

Lastly, UK banks are playing a key ecosystem role by supporting and developing new incubators and accelerators, such as Barclays Rise, and supporting for fintech-focussed hackathons. This often provides the seed for longer term relationships, and can provide fintechs with critical insights and data as they attempt to scale their ideas. Indian banks must also be supportive and building strong partnerships instead of fearing competition.

Conclusion

The regulation of fintech from financial as well as legal perspective raises number of difficulties. The fintech regulation can be adequate only when a clearly defined regulatory strategy and set of priorities are considered while making the regulation. There is increase in attention from regulators across the globe towards fintech because of its unique features. But, the regulatory impact pertaining to fintech is contained in domestic laws of the country.

Thus, there is lack in co-operation at full scale at international level. The closer look into the developments in the field of fintech such as crowd funding, cryptocurrency, etc shows the regulation for all these things needs to be required in future. The challenge lies in the

resolution of tension between the fact of having a flexible and forwards looking framework which enable or promotes innovation, and the framework which maintains market, investor and consumer confidence. Therefore, a fintech regulation must be flexible and adaptable. If the regulators are able to fashion smart and efficient rules and regulations in order to guide the industry, more revenue and innovation will be there in this area.