ISSN 2321-1059

Journal of Legal Studies

International Refereed Peer-Reviewed Legal Journal

MANAVTA SAMAJIK SANSTHA
MUGHALSARAI CHANDAULI U.P.

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

Cite this Volume as *JLS* Vol. 7, Issue II, July, 2019

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journaloflegalstudies.co.in

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Dr. Pradeep Kumar
Executive Editor & Managing Director
Journal of Legal Studies

Crypto-assets and its Inclusion in Indian Economy: Techno-legal Perspective

Dr. Atul Kumar Pandey[1]

Abstract

The Proliferation of distributed ledger (BlockChain) Technology is highly pervasive. There stands no rubric control of government bodies or private financial institutions on the use of independent computers to record, share and synchronize the crypto transactions. Government Agencies like Securities and Exchange Board of India (SEBI) and Reserve Bank of India (RBI) are still organizing research on evaluating the accountability and feasibility of the system. Private financial institution likeYes Bank, AXIS Bank & ICICI bank are exploring the potential of block chain for fast transaction settlements. In recent span of time, tech savvy researchers have identified many advantages of block chain technology in real-estate sector and financial institutions but adversaries on the other hand are using technology to evade taxes or launder the money.

The problem which is identified by researchers regarding the block chain technology is overseas countries like Australia, Canada, Finland and Germany have legalized the use of Block Chain and as per Australian Anti-Money Laundering and Counter-Terrorism Financing Amended Act, 2017,technology is taken under the definition of 'e-Currencies' which makes it apply to normal income tax rules on Bit coin. On contrary, Countries like China and Japan permit trading of crypto currency but they have not defined whether block chain is Commodities, Securities or legal currency. Thailand has declared it as illegal transactions.As per the Indian legal regime, the use of Block chain, Crypto currencies and Digital Assets are still unregulated. After scrutinizing all the implications given by overseas law agencies, researchers have proposedregulations for Crypto Assets to benefit the Indian Economy.

Keywords: Crypto Assets, Blockchain, Indian Economy

Introduction

Blockchain (Decentralized Technology) at its core is the sequence of blocks holding complete list of records like a ledger holding the transactions records. Block inside the chain contains aggregated set of information which is collected and processed after solving the cryptic puzzle known as mining process. Each block is uniquely identified by a hash and to maintain a synchronization of chain the new formed block contain the hash of previous header block, so the blocks can form a chain from the Genesis block (first block). In a linked list structure block header includes the Block version, parent block hash, merkle tree root hash, timestamp, nonce and the transaction details. To validate the authentication it uses a digital signature based on asymmetric cryptography. Technology enthusiasts are touting the power of the

[1] ***Assistant Professor (Cyber Law) and Chairperson, Rajiv Gandhi National Cyber Law Centre (Established by MHRD, GOI, New Delhi), National Law Institute University, Bhopal.***

Blockchain: a new invention that, like the internet, could bring about massive industry revolution.[2]

It's all started back in 2008 after the release of 'BITCOIN: a peer to peer electronic cash system' which has created buzz in financial sector is an entry of Blockchain technology in the market. A pair of telecom researchers first described the blockchain platform in 1991 in their effort to satisfy "*a need to certify the date a document was created or last modified*" such as when an inventor puts a patentable idea into writing.[3] Although so far Cryptocurrencies are the heaviest implemented blockchain use cases, which is about to change soon according to IBM (Hooper,2018) due to greater transparency, enhanced security, improved traceability, increased efficiency and speed, the cost factor attracts most of the companies looking for expansion. Consensus Algorithm and proofs-of-concept is major focus of organisation to implement Application based on blockchain. As the Proliferation of distributed ledger (BlockChain) Technology is highly pervasive, there stands no rubric control of government bodies or private financial institutions on the use of independent computers to record share and synchronize the crypto transactions. Regulation on many matters like taxation, smart contracts and applications became a necessary requirement and a need to protect the privacy of customer is also the duty of organization.

Crypto assets as currency have been around since three decades, the Bitcoin became the first decentralized currency in 2009 solving the double spending problem via distributed peer to peer network called BlockChain technology. BlockChain stores and records the transaction done over cryptographically linked blocks containing the proof of transactions in which sequential linking and chaining is maintained by Digital Signature.Network of blockchain is controlled by consensus of nodes and this attracts a lot of industries from finance to real estate. Initial coin offering and FINTECH are the famous exploration of technology. Assets connected to the Blockchain network are known as 'miners'. Mining is confused with the process of creating new Bitcoin, though it's a process that helps blockchain to be a decentralized security.

Mining in Blockchain

Miner's verify new transactions and record them on blockchain by solving the problem based on cryptographic hash algorithm. Proof of work confirms and authenticates your work, merkle tree structure confirms security and consistency in the transaction. The blockchain is neither created nor managed by the federal body, so the problem of every node agreeing on new transaction is always challenging. Blockchain addresses this issue, suppose a miner is mining block number #1000297 (random number) the lifecycle of this block from creation to final validation starts with the creation of candidate key after getting the proof of work of previous block say #1000296. After that node creates a coin base transaction on which every node send

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[2] See generally Maximilian Friedmaier et al, *Disrupting Industries with Blockchain: TheIndustry, venture Capital Funding and Regional Distribution of Blockchain Ventures*, Proceeding of the 51st Annual Hawaii International Conference on System Sciences(Sept. 22, 2017) https://core.ac.uk/download/pdf/143481280.pdf

[3]Stuart Haber &W.ScottStornetta, How a Time Stamp a Digital Document, Journal Of Cryptography, Jan 1991.

its confirmation updating their existing ledger. Merkle tree framework defines the set of information contained in the block header. The Meta data contains version, timestamp, target and a NONCE. The target field defines proof of work making it a valid block.

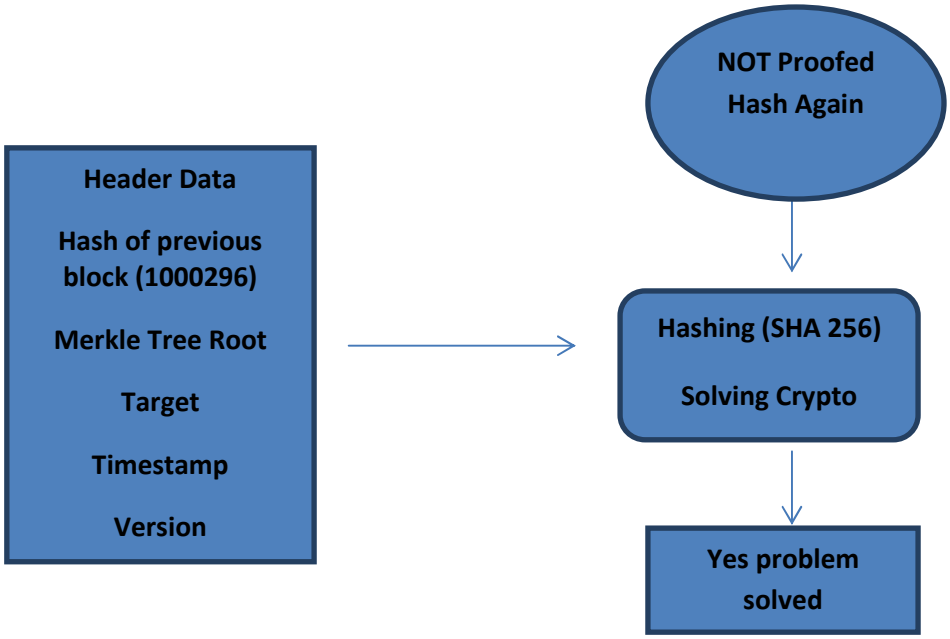

Figure: Block Chain Meta Data Proof of Work

Block chain Working Technical Perception:

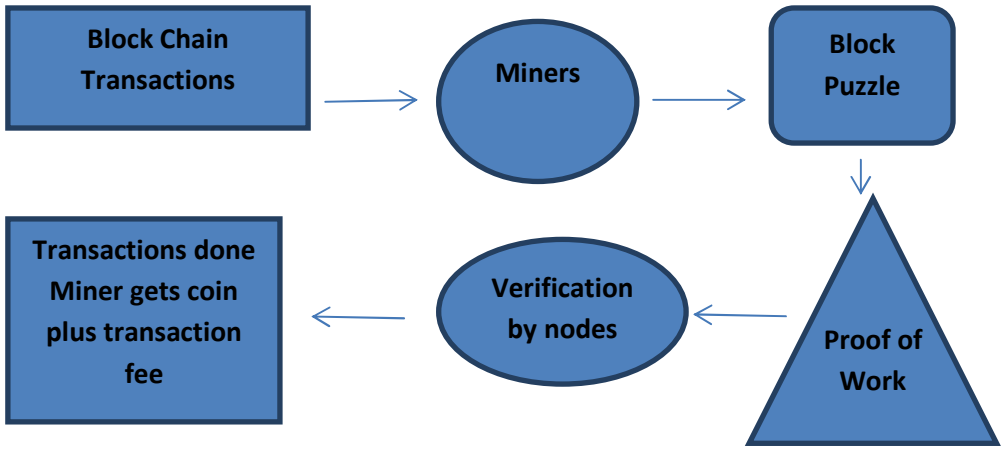

Figure : Technical Insights of Blockchain

Problem Areas

India has number of laws that currently can be applicable on Blockchain technology. Only to crypto asset a famous use case of blockchain if they are deemed as 'Securities', the Securities Contracts (Regulation) Act 1956 may be applicable. Securities and Exchange Board of India (SEBI) says some tokens may also fall within the purview of collective investment schemes which can possibly regulate it. On the other hand for all token types, the regulation under the Companies Act, 2013 and rules there under can trigger. Payment tokens may also be subject to the Payments and Settlements Systems Act 2007 (PSSA). There is also the Banning of Unregulated Deposit Schemes Bill 2018 which has been tabled in parliament to prohibit all unregulated deposits which could apply on Initial Coin Offerings. Securities and Exchange Board of India (SEBI) and Reserve Bank of India (RBI) are still organizing research on evaluating the accountability and feasibility of the system. Private financial institution like Yes Bank, AXIS Bank & ICICI bank are exploring the potential of block chain for fast transaction settlements.

Blockchain at globe, countries like Australia, Canada, Finland and Germany have legalized the use of Block Chain and as per Australian Anti-Money Laundering and Counter-Terrorism Financing Amended Act, 2017, Bitcoin is taken under the definition of 'e-Currencies' which makes it apply to normal income tax rules. On contrary, Countries like China and Japan permit trading of crypto currency but they have not defined whether Bitcoin is Commodities, Securities or legal currency. Thailand has declared it as illegal transactions.

Legal structure overseas

The regulatory framework around the world is accepting trading and doing transactions with virtual currency but they are very silent on controlling it. Decision on defining it as securities or commodities or just a currency is still in chaos. The irony in case of creating a framework in blockchainis that a Centralized authority has to regulate the decentralized technology.Few countries have shown positive attitude towards regulating the currency, Japan's Payment Service Act based framework allows trading of crypto currency, and United State government accepted Bitcoin as decentralized virtual currency in 2013 and classify it as commodity in 2015 making it a taxable property. US Securities and Exchange Commission released a framework for digital assets but were talking more about investment contract and a launch of Orange chain as a process is mentioned that fall under the securities law. SEC quoted that they want to protect investors and mentioned selling blockchain tokens will lead to information asymmetry which creates confusion between buyer and sellers.

Germany is actively involved in the development of applications of blockchain and Bitcoins are purely legal and citizens are allowed to do transactions. France regulatory body issue a regulation note on 11th July 2014 for legalized operation of Bitcoin. The cabinet of Malta approved bills regarding the regulation of the e-currency.

In august 2017 Canadian government accepted IMPAK coin as its first legalized currency. Holland and Vietnam has shown positive attitude in trading and doing business using crypto assets. In case of Singapore government doesn't control the prices or the operations of these

currencies. Federal Tax service of Russia declared Bitcoin as 'NOT ILLEGAL'. On the other hand countries like Algeria, Bolivia Bangladesh, Nepal and Macedonia have declared crypto assets as Illegal. The best definition in terms of Legal regime is defined by Australian where it fall under the definition of E-currency and should be treated as property, and subject to capital Gains Tax. In 2018, Australian Transaction Reports and Analysis Centre (AUSTRAC) declared that it's a mandatory requirement for crypto assets exchanges operating in Australia have to register with AUSTRAC, identify and verify users, maintain records, and comply with government Anti Money Laundering and countering Financial of Terrorism Act 2009 reporting obligations.

Regulatory Position in Indian Legal Regime

Most of the Regulatory bodies overseas don't recognize Bitcoin as currency. In fact, most governments don't even classify at all. It can be considered as computer code or as a digital commodity is still in dilemma. Indian government has constituted a committee to draft crypto law under the chairmanship of Subhash Chandra Garg, Secretary of the Department of Economic Affairs, to draft the regulatory framework for crypto currencies. Representatives from the Ministry of Electronics and Information Technology (Meity), the Reserve Bank of India (RBI), the Securities and Exchange Board of India (SEBI), and the Central Board of Direct Taxes (CBDT) were also included as the members. The major focus is on banning/regulating the currency rather than just allowing it for trading perse. Recently the bill entitled **"Banning of Crypto currencies and Regulation of Official Digital Currencies Bill 201**9" has already been circulated to relevant ministries for discussion.

Ministry of Finance report reads ***"various options for treating virtual currencies and crypto assets including banning/regulating are being examined by the committee".***[4]The report states that Indian Revenue department is working with Financial Action Task Force (FATF) ***on various issues (such as virtual currency, proliferation financing among) which will act as guidance for the member countries***[5]**.** The G20 international forum countries including India have shown their support for FATF as ***"the global anti-money laundering, counter terrorist financing, and proliferation financing standard-setting body,"***[6]

According to the recent report submitted to get a clarification on applicability of standard on crypto assets for which the FATF has quoted ***Jurisdictions should apply a risk-based approach to virtual assets, virtual asset financial activities, and virtual asset service providers.***[7] The final decision related to regulation is still not announced.

Inclusions in Indian Economy

The Zebpay and the UniCoin are two application based companies that provides the trading facilities of crypto currency in India. Investors and traders are still actively doing transactions

[4]Available at https://www.finmin.nic.in/
[5] Available at https://www.fatf-gafi.org/about/
[6] *Ibid.*
[7] *Ibid.*

with crypto currency. Many of the companies have started giving gift bounties as digital currencies. Reserve Bank of India has given several risk warnings against the trading as they have issued a circular prohibiting regulated entities from dealing in crypto currencies or providing "*services for facilitating any person or entity in dealing with or settling*" crypto currencies. Services include maintaining accounts, registering, trading, settling, clearing, giving loans against virtual tokens, accepting them as collateral, opening accounts of exchanges dealing with them and transfer/receipt of money in accounts relating to purchase/sale" of crypto currencies.[8]

The banking restrictions are against many local crypto businesses, some have found a solution to the ban in the exchange-escrowed peer-to-peer crypto trading model. Meanwhile, the Indian crypto community has been actively campaigning to end the ban. Initial Coin Offering (ICO) and FINTECH are best initiative that was close to reach to the regulation in India.

Initial Coin Offering

Initial coin offerings (ICOs) work as a financing entrepreneurialventures. Through an ICO, an organization offers a list of specialized crypto tokens for sale with thepromise that those tokens will operate as the medium of exchange when accessing services on a digital platform developed by the organization. The sale of tokens provides capital to fund the initial development of the digital platform, although no commitment is made as to the price of future services.[9]

An Initial Coin Offering (ICO) is a crypto currency tokens act as fundraisers of sorts; a company looking to create a new coin, app, or service launches an ICO. It allows any start up idea to pitch online and seek investors buy in to the offering. In exchange for their support, investors receive a new cryptocurrency token specific to the ICO. Investors hope that the token will perform exceptionally well into the future, providing them with a stellar return on investment.

Legal systems overseas are struggling to find the way to regulate it. The U.S Securities and Exchange Commission (SEC) recently addresses Ethereum DAO ICO as securities offering subject to securities laws Indian government also initiated on Block chain Summit that they can declare any instruments as "securities". It is proposed to regulate the ICO subject to Indian securities laws under Security Exchange Board of India.

FINTECH

Bank chain Initiative led by State Bank of India, including 20 other renount national banks created a community of banks for exploring, building and implementing blockchain solutions. FinTech applications of blockchain technology usually rely on its ability to execute "smart contracts". Smart contracts work a great deal like candy machines. You simply drop a

[8]Available at https://www.rbi.org.in/

[9] In this respect, token sales have a pre-sale aspect similar to crowd funding, but differ in that there is no pre-sale 2 price commitment to token holders (cf: Agrawal, Catalini and Goldfarb, 2013).

required measure of digital money into the smart contract, and your escrow, house possession right, driver's permit, or whatever else drops into your record. Every one of the principles and punishments are pre-characterized by smart contracts as well as authorized by them. Community demanded certainty on smart contracts adjudications.

After all discussion related to Regulation of official Digital currencies, Indian governing bodies states that A final bill will be proposed to the next government that takes charges after elections at the end of May, 2019.

Conclusion

As a researcher we concluded that government should regulate crypto assets in stages taking care of all the possible impacts on economy. Banning them is not a solution, it will be more like taking defensive approach not exploring the possible challenges, but at the same time it's an economy of a country on stake.

India's crypto assets industry has long tried to popularize currency with strategies that include conducting security checks, requesting identification from users, such as governmentverified address documents, Permanent Account Numbers (PAN) or Aadhaar IDs, and sometimes even checking bank details. Private Bitcoin companies have also launched an association, called the Digital Assets and Blockchain Foundation India (BFI), to educate lay people on Bitcoin benefits and usage.

India's government seems to be looking at the possibility of less prohibitive crypto assets regulations. In 2017, the Special Secretary of Economic Affairs formed a committee to suggest ways of dealing with the potential AML/CFT and consumer protection issues related to cryptocurrencies.

In 2018, reports suggested that a government committee was drafting new legislation which introduced greater cryptocurrency protections for "the common man". In any case, some say talk of a ban is greatly exaggerated. It can be argued that the bill proposal relates to the implementation of a regulatory framework within India and is something to welcome, in the sense that the Indian authorities have opened dialogue on how to move forward with crypto.

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Food Deprivations as Crimes against Humanity

Dr. Ajay Kumar[1]

Abstract

The pervasive starvation constitutes a serious human rights violation. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both enshrine the right to food, thereby committing signatories to ensure that this right is realized for all within their borders. Acute malnutrition, starvation that results from chronic hunger and famine constitute clear violations of State obligations under these conventions. In spite of these perpetual failures, the international community has been reticent to hold governments accountable for their complicity in starvation. While a number of regional courts have jurisdiction over right to food violations, this has proven slower to translate to the international arena.

Introduction

The right to adequate food is a human right just like any other human right. These words exist on paper but the guarantee they represent has not yet made a real difference in the lives of millions of hungry and oppressed people. Availability of food is not the issue. Food surpluses coexist with hunger and malnutrition. It is not the availability of food, but access to food for the vulnerable and deprived people who lack it that is the real issue. People are deprived of food, because they have no opportunity to produce it or because they cannot earn a sufficient income to buy the food they need or because they are unable to work at all.

Lack of access to food is almost never the result of a general scarcity of food. It results instead because people are deprived of access to food-producing resources and income as a result of their marginalization. Our planet contains enough food and food-producing resources to enable all of us to feed ourselves, now and in the future. Access to these resources is an issue of social and economic rights. Human rights are not realised as a result of quoting them. They need to be operationalized in terms of obligations and remedies for victims of violations. Considerable progress has been made in this direction during the past two decades. This manual assesses past achievements, current perspectives and future challenges. It should be read as an invitation and guidebook for building on the achievements, contributing to the perspectives and taking up the challenges.

Crimes Against Humanity

Understanding the roots of crimes against humanity will help elucidate their application to right to food violations. The term “crimes against humanity” grew out of the Ottoman Empire’s methodically charted destruction of the Armenian population in 1915. Turkish authorities created a blueprint so detailed that authorities even dictated particular methods of execution, commanding soldiers to kill in inexpensive ways like stabbings, drowning, and burning so that military resources would not be wasted. An estimated 1.5 million Armenians

[1] ***Assistant Professor of Law, CMP Degree College, University of Allahabad, Allahabad.***

died. Russia, England, and France decried "these new crimes of Turkey against humanity and civilization" in a joint declaration issued May 2 8, 1915.

Reviewing the current state of the relationship allows us to draw several conclusions:

1) Omissions are firmly entrenched as an acceptable actuaries under crimes against humanity, meaning that omitting to procure food, medical care, or other life necessities can amount to a crime against humanity;
2) While intent or knowledge have traditionally served as the mensrea requirement for crimes against humanity, there is an emerging recklessness standard in international criminal law; and
3) Right to food violations that do not amount to famine but cause widespread death or suffering should be criminalized as Crimes against humanity, assuming other requisite elements have been met.

The UDHR serves as the foundational document for international human rights. In addition to "negative" civil and political rights, broadly translated as freedom from government intrusion, the UDHR affirms the inviolability of a host of "positive" economic and social rights that obligate state action.18 Article 25(1) states, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care. The ICESCR, drafted eighteen years later in 1966, expands upon these commitments. Article 11 establishes the right to food20 and details States' obligations: "The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed to ensure an equitable distribution of world food supplies in relation to need. Signatories thus bind themselves to taking affirmative steps to prevent starvation

Legal Status of Right to Food

Combating hunger and malnutrition is more than a moral duty or a policy choice in many countries to be a legally binding human rights obligation. Right to food is recognized in the 1948 UDHR Rights as part of the right to an adequate standard of living, and is enshrined in the 1966 International Covenant on Economic, Social and Cultural Rights. It is also protected by regional treaties and national constitutions. Furthermore, the right to food of specific groups has been recognized in several international conventions. All human beings, regardless of their race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status have the right to adequate food and the right to be free from hunger.

The necessity of providing access to land in order to facilitate the realization of human rights has been considered in several international principles and interpretive documents.[2] But the obligation of states towards individuals and the right to food has not been given adequate

[2] Vancouver Declaration on Human Settlements, UN Conference on Human Settlements, Adopted June 11, 1976, General Principles: Land.

attention. However, a review of the international human rights framework as it stands makes clear that while not wholly defined the right to food is invoked in a number of key areas, suggesting that further consideration by the international community is necessary. The right to food has essentially been developed as a treaty right; it is embodied mainly in the two International Covenants and has been refined by the open subtle and creative work of the committees set up by States to monitor the implementation of the Covenants.

International Instruments

International Humanitarian Law

International humanitarian law preceded the Covenants. It is fascinating to watch the birth of a new and original norm in the collective consciousness of nations. The ICRC was the first organization to systematically defend and develop the concept of humanitarian law: founded in the aiermath of the Battle of Solferino in 1859, it is today the promoter and guardian of this law. Consciousness of identity is the foundation of humanitarian law. The first Geneva Convention of 1864, put forward for signature by Henry Dunant, was based on the following principle: The life of a wounded man must be saved; he is your adversary but he is also your fellow-man, he is like you; prisoners must be given food and water.

The "consciousness of the world", which comes from the spontaneous perception of the identity of all beings, requires it.[3] The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed & conflicts, "Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foods agricultural areas for the production of foodstuff crops, livestock, drinking water installations and supplies and irrigation works." [4]

International humanitarian law protects the access of civilians and prisoners of war to food and water during armed conflicts and prohibits the deliberate starvation of civilians as a method of warfare.[5] Under international criminal law, violations of such protection constitute war crimes. Deliberate starvation, whether in war or peace, may also constitute genocide or a crime against humanity.

The Universal Declaration of Human Rights (1948)

The right to food was recognized for the first time at the international level in the 1948 UDHRs. In this document, the countries of the world proclaimed "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or

[3] Sergio Vieira de Mello, "Consciousness of the world: the United Nations faced with the irrational in history". Geneva, 2000.
[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed & conflicts (Protocol II art 14).
[5](Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed & conflicts (Protocol I), Art. 54.

other lack of livelihood in circumstances beyond his control." [6] The importance of the Universal declaration of Human Rights lies in its being accepted today by all countries though it is a non-binding document.

The International Covenant on Economic, Social and Cultural Rights (1966)

In 1966, almost twenty years the UDHRs, the International Covenant on Economic, Social and Cultural Rights was adopted.[7] In this treaty, governments recognized several economic, social and cultural human rights, among which the right to food, the right to health, the right to education, the right to adequate housing and the right to work. In Article 11, governments committed themselves to taking all measures necessary to ensure:

"The right of everyone to an adequate standard of living for himself and his family, including adequate food… and to the continuous improvement of living conditions" Also it recognizes "the fundamental right of everyone to be free from hunger".[8] The International Covenant on Economic, Social and cultural Rights are treaty, legally binding for the 151 countries that have ratified it. The right to food, recognized in the UDHRs and the ICESCRs, applies to everybody, without exception. The meaning of these provisions has been clarified by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 12 of 1999. Other General Comments are also relevant to the right to food (e.g. General Comments 3 of 1990 and 15 of 2000). While not binding per se, General Comments constitute the authoritative interpretation of legally binding treaty provisions, issued by the UN body responsible for monitoring the application of the treaty.

Conventions on Vulnerable Groups

In order to protect particularly vulnerable groups, other international treaties have been agreed by the governments of the world. Some of them are:

Convention on the Rights of the Child

It was established in 1989 and with the exception of two states (USA and Somalia) all states of the world are members to this convention. This recognizes "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development".[9] The CRC requires states to combat child malnutrition[10] to "take appropriate measures" to assist parents in fulfilling their primary responsibility to implement children's right to an adequate standard of living, "particularly with regard to nutrition".[11]

Convention on the elimination of all forms of discrimination against women (CEDAW)

This also requires states to ensure that women have "adequate nutrition during pregnancy and lactation"; and to "take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate

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[6]UDHR Article 25, Paragraph 1.
[7] Entered into force on 3 January 1976 and has been ratified by 151 countries to date.
[8]ICESCR article 11.
[9]CRC Art. 21(1).
[10]Ibid Art. 24(2)(c).
[11]Ibid Art. 27(3).

in and benefit from rural development and, in particular to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications" [12]

International convention on the protection of the rights of all migrant workers and members of their families

This instrument was adopted in 1990. It recognizes equal treatment for nationals and migrant workers and their families with regard to the enjoyment of economic, social and cultural rights; in particular, it establishes the right of migrant workers to "transfer their earnings and savings, in particular those funds necessary for the support of their families, from the State of employment to their State of origin or any other State".[13]

Legal Mechanism in India

The Indian Constitution recognizes the right to life, and contains a specific provisions related to food. The right food is stated as a fundamental right and under the directive principles of state policies. Therefore, the constitution states that: "No person shall be deprived of his life or personal liberty except according to procedure established by law."[14] In this case therefore the right to food which is the base for the fundamental right to life is recognized as a fundamental right of the people.

The constitution also imposes a duty for the state to raise the level of nutrition and the standard of living and to improve public health. The state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the state shall endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health.[15]

The Supreme Court has thus formally recognized the right to food, and has ordered the central and state governments to take a number of measures to improve the situation. The justifiability of this right is therefore confirmed and the Court has issued a number of orders to government, entailing expenditure of resources.

Public distribution system in India

India's public distribution system was introduced during the Second World War to address food security concerns in the face of scarcity, with the intention of maintaining price stability and checking dishonest practices in private trade.[16] The scheme was initially heavily dependent on imported food. The green revolution, coupled with favourable weather, led to

[12]CEDAW Art. 12(2).
[13]International Convention on the Protection of the Rights of All Migrant Workers and Members of Heir Families, art 47 (1).
[14]Article 21 of the Constitution of India.
[15]Ibid Article 47.
[16]D. Chakraborty, Food Security in India: Policy Challenges and Responses (Rajiv Gandhi Institute for Contemporary Studies, New Delhi).

the growth of comfortable buffer stocks in the 1980s, through the procurement operation of the Food Corporation of India (FCI), which in turn expanded the volume of food grain provided through the Public distribution system.

However, Swami Nathan committee report concludes, in a country like India where the target group is very large, and where it is clearly important to focus on ensuring that the malnourished are reached, a universal scheme is better than a narrowly targeted scheme. India has still a low calorie intake compared to other countries. The objective of self-sufficiency for India is therefore worthwhile. The nation can ill-afford to give up its emphasis on continued increase in food production. Ensuring reasonable and stable pan-national prices through minimum support price operation will have to remain an important element of the food security system.

The Indian Constitution does not expressly recognise the fundamental right to food. However, the cases brought before the Supreme Court alleging violations of this right have been premised on a much broader ground, the right to life and liberty , enshrined in article 21 of the Constitution. The apex court reiterated in the Chameli Singh case[17] that the right to life guaranteed in article 21 of the Constitution in its true meaning includes the basic right to food, clothing and shelter. In the *Kishen Pattnayak case*.[18]

A landmark case related to the right to food was filed by the *People's Union for Civil Liberties*[19] (PUCL) in May 2001 in the Supreme Court. The case revealed that over 50 million tonnes of food grains were lying idle in the premises of the FCI, although there was widespread hunger and starvation deaths taking place in the country, especially in the drought-affected areas of Rajasthan and Orissa. Initially, the case was brought against the Government of India, the FCI, and six state governments. Subsequently, the list of respondents was extended to include all states and union territories.

Conclusion

Realising the human right to adequate food today presents some formidable challenges, and meeting them will require extraordinary efforts on the part of civil society, states, and the international community. First, the human right to food continues to be marginalised, in spite of the progress charted in this manual. Seriously addressing the issue of endemic hunger and malnutrition will entail mainstreaming the human right to food, including the right to feed oneself.

The right to food and other economic, social and cultural rights must assume their proper place in politics, in the human rights system, and, not least, in people's minds. Only then will the rights to freedom from hunger and to adequate food be made operational and justiciable.

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[17] *Chameli Singh v. State of Uttar Pradesh*, AIR 1996 SC 1051.

[18] *Kishen Patnaik v. State of Orissa*, AIR 1989 SC 677.

[19] Y.P. Chhibar, PUCL petitions Supreme Court on Starvation Deaths PUCL Bulletin, July 2001, available at: http://www.pucl.org/reports/Rajasthan/2001/starvation_death.htm.

Realisation of the right to food faces two important additional challenges: neo-liberal globalisation and the destruction of ecological resources. The right to food for the poor of and tomorrow must be safeguarded in the face of these challenges. International and national human rights law can be an important asset in this context, if full mainstreaming of human rights does, indeed, succeed.

Right to Food: As a Human Rights

Dr. Satish Kumar Vishwakarma[1]

Abstract

The right to food is closely related to and dependent upon the realization of other rights. For a dignified life, food is an important component, for which individual health is promoted with food security in global era. Individual health is directly related to the enjoyment of all other human rights and is a full participation in social and economic life. Recognizing right to food as human rights demonstrates health as a special importance to the life and survival of an individual. This is a way to win over all diseases. The food is helpful in prolonging life and promoting physical and mental health. The multinational companies, industries and other food organization claim that they provide to society healthy and hygienic articles of food but it is a big question that how many claims of their are tenable?. At the conceptual level, the understanding of food is the basis of all human rights. A right perspective transforms the development discourse, food security for the poor is no longer a charity or benevolence or a question of purchasing power. Instead, it is an entitlement of everyone by virtue of being born as human.

Introduction

At the overall macroeconomic picture, the country may be food sufficient or surplus but from the human rights perspective, what is important is whether the individual of the country is food secure or not. Despite tremendous increase in agricultural production, reaching adequate standards of food security and nutrition at the household level is still a milestone to be achieved.[2] Food is the cornerstone for survival, health and development for current and succeeding generations. Well-nourished children perform better in school, grow into healthy adults and in turn give their children a better start in life. Well-nourished with healthy food women face fewer risks during pregnancy and childbirth and their children set off on firmer developmental paths, both physically and mentally.

What is essential for the maintenance of the human life is primarily the physiological and social requirement of the body and mind, and these bodily needs are based on physical functioning; and moreover, for this the life supporting relations with the environment are need to food and water, need to excrete, need to periodic rest, need to keep the body in other ways[3]. Human Right is very wide and exhaustive aspect of modern society. After the Second World War protection of human resources and their rights in the LPG (Liberalization, Privatization and Globalization) era is a big challenge. The welfare state concepts are changed on the place of police states. International Community under the banner of United Nations Organization (UNO) takes many steps for the protection of human rights. Human Right's main aspect is

[1] ***Assistant Professor (Guest Faculty) University of Allahabad, Allahabad.***
[2] Dreze and Sen, *"Hunger and Public Action"* (1999) Oxford University Press, New Delhi, cited in National Human Rights Commission (Training Division2007-08) Selected Reading Material on Human Rights, New Delhi, p. 26.
[3] B.B. Pandey, "Reorienting the Right Discourse", M. P. Singh (Ed.), Human Rights and Basic Needs, New Delhi, Universal Law Publishing Co. Pvt. Ltd., 2009), Ed. 1, at P. 151.

right to life and life includes the rights to food, therefore food is an essential for human life. Thus the every country endeavours to eradicate hunger death in their countries.

The first task of the Constituent Assembly (as per Mr. J. L. Nehru) was to free India through a new Constitution, to feed the Starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity[4]. The choice of India is between rapid evolution and violent revolution, because the "Indian masses cannot and will not wait for a long time to obtain the satisfaction of their minimum needs"[5].

Food security to all must be recognized has been evident from way back in 2003 in response to the Supreme Court remitting *Indian Council of Legal Aid and Advice vs. Union of India*[6] to the National Human Right Commission. The Commission in their order underscored freedom from hunger as: "The citizens right to be free from hunger enshrined in Article 21 is to be ensured by the fulfillment of the obligation of the State set-out in Articles 39(a) and 47, place the issue of food security in the correct perspective, thus, making the right to food a guaranteed Fundamental Right"[7].

Food need is not only one of the most vital human needs that ensure human survival, but a need that impairs human capacities diversely. David Miller describes such need statements as "intrinsic needs", which primarily relate to human food need[8]. Miller goes on to explain intrinsic needs as those which lead to harm if not met, therefore they have the consequentialist import[9].

Human rights and basic needs for most people in poor countries are less a matter of theory than of practice this specially applies to food in India. Food security is less a question of harvest and quantities rather than of entitlement and deprivation. During the Bengal famine of 1943, which have cost three million lives, but not so much because of lack of food but because of short sighted policies, lack of insight and mismanagement? The analysis of the Bengal and other twentieth century famine shows that 'starvation is the characteristics of some people not having enough food to eat'. It is not the characteristics of there being not enough food to eat'[10].

What is essential for the maintenance of the human life is primarily the physiological and social requirement of the body and mind, and these bodily needs are based on physical functioning; and moreover, for this the life supporting relations with the environment are need

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[4] Constituent Assembly Debate III, 316, Quoted in, Granville Austin, The Indian Constitution: Cornerstone of a Nation, New Delhi, Oxford University Press, 2008, Ed. 1, P. 26.
[5] Ibid.
[6] (2000) 10 SCC 542.
[7] Order of the NHRC on Case No. 37/3/97-LD, 17.01.2003. Coram: J. S. Verma, J. (Chairperson), Sujata Manohar, Virendra Dayal, JJ.
[8] David Miller, Social Justice, London, Clarenden Press, 1979, Ed. 1, Reprint 2011, p. 127.
[9] *Ibid.*
[10] Amartya Sen, "Poverty and Famine: an essay on entitlement and deprivation", Oxford: Oxford University Press, 1981 quoted in Mahendra P. Singh, (ed.), "Human Rights and Basic Needs, Theory and Practice", New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2008, Ed. 1, p. 221.

to food and water, need to excrete, need to periodic rest, need to keep the body in other ways.[11] Human Right is very wide and exhaustive aspect of modern society. After the Second World War protection of human resources and their rights in the LPG (Liberalization, Privatization and Globalization) era is a big challenge. The welfare state concepts are changed on the place of police states. International Community under the banner of United Nations Organization (UNO) takes many steps for the protection of human rights. Human Right's main aspect is right to life and life includes the rights to food, therefore food is an essential for human life. Thus the every country endeavours to eradicate hunger death in their countries.

In global perspective the right to food has been guaranteed in several international instruments. The Preamble of WHO offer most comprehensive definition of the right to health include right to food. The Universal Declaration of Human Rights provides under Article 25 that everyone has the right to food, health etc. The human rights norm under Universal Declaration of Human Rights was legally enforced by Article 11 of the International Covenant on Economic, Social and Cultural Rights. United Nations World Food Conference 1974 in Rome Conference 22 resolution was adopted and Declaration was made for the Eradication of Hunger and Malnutrition. World Food Programme is a joint programme of the United Nations and Food and Agricultural Organization. The aim of World Food Organization provided food aid to support development projects and to meet emergency needs. In Beijing Declaration of the World Food Council in 1987, states members resolved to join together and with united strength to eliminate the scourge of hunger forever.

The WHO both independently and in association with such other UN agencies as FAO, UNESCO and UNICEF, has been active in seeking to attain to the objective set out in provisions together with and on behalf of govt. Nevertheless, despite great improvement in agricultural techniques and extension of knowledge of nutritional physiology and pathology it is probable that at least one half of the world's population still suffers from undernourishment or malnutrition. World food council, the food and agriculture organization of the United Nation, the United Nation conference on Trade and development and non-governmental organization in the field was further instructed "to give special attention to the normative content of the right to food and its significance in relation to establishment of new integration order. The food is an essential right which should be respected and protected all circumstances. In view of the urgent need to respond to hunger and malnutrition in the world problem, it is necessary to consolidate and further develop existing law through the drafting of an appropriate instrument on the right to food.

India is a starving country. The food and Agricultural Organization report on Hunger 2006 pegs the number of malnourished in India at 121 million and estates that between 20 and 34 per cent of our population is malnourished.[12] Constitution of India casts an obligation on the

[11] B.B. Pandey, "Reorienting the Right Discourse", M. P. Singh (Ed.), Human Rights and Basic Needs, New Delhi, Universal Law Publishing Co. Pvt. Ltd., 2009), Ed. 1, at p. 151.
[12] K. Sandeep, "*Local Solutions to Conquer Hunger*" The Hindu, New Delhi, Thursday, March 29, 2012 p. 8.

State to take necessary measure to protect and improve the healthy food, though our constitution does not expressly provide right to food. It has now been well settled through series of case laws that right to life in Article 21 of Indian constitution include right to food that includes healthy food. Article 38 requires the state to secure a social order for the promotion of the welfare of the people, in which justice social economic and political shall in form all the institutions of the national life. Also, 39 (a) requires the state to direct its policy towards securing that all individuals have the right to an adequate means of livelihood.

First time in Indian history the Supreme Court recognized Right to food as Right to life in a significant judgment of the *PUCL vs. Union of India*[13.] Supreme Court held that every person who is starving because of his or her inability to purchase food grains have right to get food under Article 21. It is the duty of state to provide to all those who are aged, infirm, disable, destitute women and men, pregnant and lactating women and destitute children and therefore court directed top all states to distribute food grains immediately though PDS shops. The petition pointed out two aspects of the state's negligence in providing food security: the breakdown of the public distribution system (PDS) and the inadequacy of government relief works. The breakdown of the PDS occurs at various levels: its availability has been restricted to families living below the poverty line (BPL), even as the monthly quota per family cannot meet the nutritional standards set by the Indian Council of Medical Research (ICMR). Even this is implemented erratically: a survey in Rajasthan indicated that only one third of the sample villages had regular distribution in the preceding three months, with no distribution at all in one sixth of them. The identification of BPL households is also highly unreliable. All in all, the assistance provided to BPL households through the PDS amounted to less than five rupees per person per month.

The effort of Indian government draft Right to Food (Guarantee of Safety and Security) Act insists on "the physical, economic and social right of all citizens to have access to safe and nutritious food, consistent with an adequate diet necessary to lead an active and healthy life with dignity…" The proposed law offers a quantity of cereal at a modest cost each month to a broad range of beneficiaries: in principle, all those living under the poverty line and a range of others.[14]

One of the primary factors regarding the right to food is justiciability. A justiciable right is one that can be enforced and adjudicated by courts of law, just as other civil and political rights. Justiciability is essential in the fight for the right to food as making the right to food justiciable means that people can seek remedy and accountability, if their right to food is violated. If Governments are to be properly held to account for not meeting their obligations under international law, then justiciability of the right to food must be fully established. Accountability requires justiciability.[15]

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[13] AIR 2001 SC 196.
[14] The Hindu, New Delhi, Tuesday, July 28, 2009.
[15] Asian Legal Resource Center, "*Reports of the Special Reporters on the Right to Food*", Article2, vol. 2, no. 2, April 2003, p. 22.

In *Kishen Pattanaik vs. State of Orissa*[16], for the first time the Supreme Court has taken up the issue of starvation and lack of food. This case was initiated by writing a letter to Supreme Court judge where prayer was that the state government should be directed to latter immediate steps in order to ameliorate the miserable conditions of the people of Kalahandi.

One of the most momentous developments in the enforcement of the right to food was brought about by the Bombay HC in an order dated 8 July 2004. Where a division Bench found that state sponsored schemes, such as the Matrutva Anuadan Yojna and Nav Sanjivani Yojna were not being implemented with the effectiveness as required of these schemes. The Bombay HC issued the directives. In *Shantistar Builders v. Narayan Khimalal Totame*[17] the SC held that basic needs of man have traditionally been accepted to be three- food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its seep the right to food, right to clothing, the right to decent environment and a reasonable accommodation to live in. In *Francis Coralie Mullin v. Administrator Union Territory of Delhi*[18] Supreme Court held that the right to life includes the right to live with human dignity and the base necessities of life such as adequate nutrition clothing and shelter.

The human rights as right to food have been made the concern of justice under the continuously expanding horizon of human rights jurisprudence of Article 21 of the Indian Constitution. In *Munn vs. people of Illinois*[19], Field J.; gave the meaning of the term life that, "life means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. Adopting the same stand, the Supreme court of India in *Francis Coralie vs. Administrator, Union Territory of Delhi*[20] held that, "right to life means right to live with human dignity and all that goes along with it", so, it includes the necessities of life such as adequate nutrition etc. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.

The interpretation of statutes has to change from time to time. It s well settled that interpretation of the constitutions of India or Statutes would change from time to time. Being a living organ; as it is ongoing; with the passage of time, law must change. New rights may have to be found out within the constitutional scheme. Horizons of Constitutional law are expanding. In *CERC v. Union of India*[21], the judicial approach adopted by Supreme Court has led two very spectacular results within the last two decades:

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[16] 1989 AIR S.C. 677.
[17] (1990) 1 SCC 520.
[18] AIR 1981 SC 746.
[19] (1877) 94 US 113, cited in M. P. Jain, Constitutional Law of India, Haryana, Lexis Nexis Butterworths Wadhwa Nagpur, 2012, Ed. 6, p. 901.
[20] (1981) 1 SCC 608.
[21] (1995) 1 SCC 547.

1. Many Directive Principles which ,as such, are not enforceable have been activated and have become enforceable.
2. The Supreme Court has implied a number of fundamental rights from Article 21.

Over time since Maneka Gandhi[22], the Supreme Court has been able to imply, by its creative interpretation, several fundamental rights out of Article 21. This has been possible by regarding Article 21. Article 21 has thus emerged into a multi- dimensional fundamental right. The concept of accountability arises out of power conferred on an authority. The power of the State in the sphere of exercise of its constitutional power including those contained in Article 298 of the Constitution inheres in it a duty towards public, whose money is being invested. Article 298 confers a prerogative upon the State to carry on trade or business. While doing so the state must fulfill its constitutional obligations. It must oversee protection and preservation of the rights as adumbrated in Article 14, 19, 21, and 300A of the constitution. Therefore, in the matter of enforcement of human rights and /or rights of the citizen to life and liberty, the State has also an additional duty to see that the rights of employees of corporations are not infringed, and that is why Article 21 read with Article 23 enables the court to pierce the corporate veil[23].

Combining part IV and Part IVA of the constitution imply that State is bound to preserve the practice to maintain the human dignity. If it is considered to be the duty of a citizen to remind itself of the aspirations of the Constitution makes, the State also cannot be permitted to say that it has no such a duty towards its own citizens.

Human rights, under the Protection of Human Rights Act, 1993, means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in ECCPR and ICESCR adopted by the UN General Assembly on 16th of December, 1966. The said Act was enacted by the Indian Parliament 'having regard to the changing social realities and growing concern in India and brought about issues relating to human rights with a view to bring about greater accountability and transparency in enforcement of the laws of the nation. Part III to the Indian Constitution read with Part IV of the same, and also ICCPR, 1966 and ICESCR, 1966 oblige that state shall take appropriate steps to ensure the realization of the rights. That is why in *Chameli Singh and others v. state of U.P. and another*[24], the Supreme Court refereed Article 11 of ICESCR, 1966 and held that, under Article 21 of the Indian constitution the need for a decent and civilized life includes the right to food, water and decent environment. In *Jagadish Saran and Others vs. Union of India*[25], it was held that social development of the nation and inspirational imperatives of the people are the inarticulate major promise of our constitutional law and life. Professor Upendra Baxi says that "the construction of progress is animated by a post-Fukuyama world in which there is no other to capitalism, writ globally large. Of course, the contradictions between democracy and capitalism are once again recognized, but these two are reconstructed, for example, as

[22] *Maneka Gandhi vs. Union of India*, (1978) 1 SCC 248.
[23] *Kapila Hingorani vs. State of Bihar*; (2003) 6 SCC 1.
[24] (1996) 2 SCC 549.
[25] (1980) 2 SCC 768.

follows; first, it is counterbalanced by "war against hunger got transformed is the Rome Declaration, 1998 on the right to food into the free market oriented State and international management of food security system, and secondly the UN Social Summit, 1998 at Istanbul."[26]

Sustainable development becomes an instrument of policy for the promotion and protection of corporate governance. The UNDP inspires "mainstreaming of human rights" in its mission under Global Sustainable Development Facility. Articles 39 (a), 37, 41 and 47 read with Article 21 of the Indian Constitution obligate State to secure its citizens an adequate means of livelihood. The central concept for human rights is the concept of violation, referring to the suppression of vulnerable groups and individuals, whereas the concepts of good governance often deal with political theory and statistical indicators. Good governance is negotiable, human rights are not. If a country has the resources, but people get marginalized or continue in deprivations, this is oppression. The right to food means not only that hunger and malnutrition are eradicated, but that future malnutrition can be eradicated by court's action or other comparable mechanisms holding the state accountable on its obligations under the right to food. Right to food means the right to feed oneself, which emphasizes dignity and self-reliance, very different from command economics of a big government[27]. Therefore, it needs to increase or create the income of every individual, since distributing 5-2 or 25-35 kg of food grains under the food Security Act, 2013 will not suffice.

The Supreme Court of India, while issuing guidelines regarding right to food, in *PUCL vs., Union of India*[28] held that, 'what is important is that the food must reach the hungry' and 'for that the gates of overflowing government granaries must be opened; Right to life includes the life free from exploitation and protection of health and strength of workers. A State Government has right to organize fair price shops for distribution of food stuffs under its executive power derived from entry 33 (b) of list III, and no statutory power need be vested in the government for this purpose[29]. The State government can make appointments under its executive power without there being any law or rule for the purpose[30]. Supreme Court of India has done the constitutionalization of the 'right to food' as a fundamental right. The court had shown the deep concern for the socio-economic rights and distributive justice.

In 1986 in *Kishen Pattnayak v. State of Orissa*[31]; which highlighted the extreme poverty of the people of Kalahandi in Orissa where hundreds were dying because of starvation and where several people was forced to sell their children; this was prayed in the PIL that court should direct the state government to take immediate steps in order to uplift their miserable

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[26] *Ibid.*
[27] Supra, Note. 7.
[28] (2004) 2 SCC 476; *Kishen Pattnayak vs. State of Orissa*, 1989 (Supp) 1 SCC 258.
[29] *Sarkari Sasta Anaj Vikreta Sangh vs. State of M.P.*, AIR 1981 SC 2030.
[30] *Sikkum vs. Dorjee Tshering Bhutia*, AIR 1991 SC 1933; Entry 33(b) of List III of Seventh Schedule to the Indian Constitution says about "Trade and commerce in, and production, supply and distribution of:… (b) food-stuffs, including edible oilseeds and oils". This entry can be added under the "Economic Power and Planning", as per M.P. Jain; Constitutional Law; (Haryana India; Lexis Nexis Butterworths Wadhwa Nagpur; 2012); Ed. 6; at P. 792.
[31] AIR 1986 SC 677.

condition, this was actually the first case were where issue of food and starvation was raised upon, but supreme court gave direction in this case to take micro level measures to address this problem such as be implementing irrigation project, measures to ensure fair selling prices of paddy and appointing of natural calamities but unfortunately none of them directly hit the bull's eye and right to food was not directly recognized.

The social movement and the right to food campaign take a new turn in 2001, as the Union for Civil Liberties (PUCL) follows the example set by Kishen Pattnayak and approaches the Indian Supreme Court. Again, the legal basis established of the petition was straight forwarded as the right to food had been established as a part of the right to life (Article 21) by numerous decisions.

In *Centre for Environment and Food Security v. Union of India and Others*[32], the Supreme Court held that, the law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at this instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the backdoor[33]. The obligation cast on the State under Article 39(a) of the Constitution is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognise that an appointment to a post in government service or in the service of its instrumentalities can only be by way of a proper selection in the manner recognised by the relevant legislation in the context of the relevant provisions of the Constitution[34].

"In the name of individualising justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The directive principles of State policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution[35]. Thus, in the present petition, this Court has to examine the relief claimed within the provisions of the Act and the principles of law stated by the Court in the referred judgments.

In *PUCL v. Union of India*[36], as on April 16, 2001, the PUCL submitted a "writ petition" to the Supreme Court of India asking three major questions:

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[32] OderissuedonDecember16,2010,http://www.advocatekhoj.com/library/judgments/index.php?go=2010/december/49.php, accessed on 31.03.2014.
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*
[36] Writ Petition (civil) 196 of 2001.

A. A starvation death is a natural phenomenon while there is a surplus stock of food grains in the Government godown. Does the right to life mean that people who are starving and who are too poor to buy food grains ought to be given food grains free of cost by the State from the surplus stock lying with the State, particularly when it is reported that a large part of it is lying unused and rotting?
B. Does not the right to life under Article 21 of the Constitution of India include the right to food?
C. Does not the right to food, which has been upheld by the Hon'ble Court, imply that the State has a duty to provide food especially in situations of drought, to people who are drought affected and are not in a position to purchase food?

The emphasis was, while contending for social justice, on Article 21 of the constitution, entitled "Protection of life and personal liberty", says, in its entirety, "No person shall be deprived of his life or personal liberty except according to procedure established by law"[37].

Other noteworthy cases where various courts have promoted the right to food as a constitutionallyprotected human right for specific vulnerable and deprived groups are G.K. Moopanar[38], *M.L.A and Others v. State of Tamilnadu, Bandhua Mukti Morcha v. Union of India*,[39] and *Gaurav Jain v. Union of India*[40], dealing with the right to food of prisoners, underage bonded carpet-makers and children of prostitutes respectively.

The Supreme court of India, in *Centre for Public Interest Litigation v. union of India and Others*[41], laid down the general principles to be followed in administration of a food security and health securing Act as that, the Central Government, the State Governments, the Food Authority and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following principles, namely:-

a) endeavour to achieve an appropriate level of protection of human life and health and the protection of consumers' interests, including fair practices in all kinds of food trade with reference to food safety standards and practices;
b) carry out risk management which shall include taking into account the results of risk assessment, and other factors which in the opinion of the Food Authority are relevant to the matter under consideration and where the conditions are relevant, in order to achieve the general objectives of regulations;
c) where in any specific circumstances, on the basis of assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure appropriate level of health protection may be adopted, pending further scientific information for a more comprehensive risk assessment

[37] Article 21 to the Indian Constitution, known as life clause.
1. 1990 Ind law MAD 76
2. 1997 Ind law SC 1024
3. 1997 indl aw SC 2520
4. Writ Petition (Civil) No. 681 of 2004, Decided on October 22, 2013.

d) the measures adopted on the basis of clause (c) shall be proportionate and no more restrictive of trade than is required to achieve appropriate level of health protection, regard being had to technical and economic feasibility and other factors regarded as reasonable and proper in the matter under consideration;
e) the measures adopted shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health being identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment;
f) in cases where there are reasonable grounds to suspect that a food may present a risk for human health, then, depending on the nature, seriousness and extent of that risk, the Food Authority and the Commissioner of Food Safety shall take appropriate steps to inform the general public of the nature of the risk to health, identifying to the fullest extent possible the food or type of food, the risk that it may present, and the measures which are taken or about to be taken to prevent, reduce or eliminate that risk; and
g) where, any food which fails to comply with food safety requirements is part of a batch, lot or consignment of food of the same class or description, it shall be presumed until the contrary is proved, that all of the food in that batch, lot or consignment fails to comply with those requirements.

In *Kapila Hingorani v. State of Bihar*[42] the matter of denial of human right to food and means of livelihood was brought to the attention of the Supreme Court by way of PIL. The Court came to a finding that food, clothing, and shelter are core human right in a civilized society and the State of Bihar made itself liable to mitigate the suffering of the employees of the public sector undertakings and government companies. The Supreme Court directed the State Bihar to deposit 50 crores with the High Court for disbursement of salaries to the employees of the corporations. The Court recognized that hunger was a violation of human rights and the State has an obligation to satisfy basic human needs.[43]

Even after the Court's outlining of specific steps to ensure that the right to food is protected, there has been little improvement in the food situation of most people. This is because the state governments have not taken those steps and there is no accountability to ensure that they do so. This lack of accountability in fact, is the reason for India's existing food and employment schemes being so ineffectual and chaotic. According to *Colin Gonsalves,* "most officials do not know of the schemes in their own jurisdiction. There is no way for people in a village to know what schemes they are entitled to As long as priorities do not change, half of India's population will be kept deliberately hungry by State policy.[44]

In a country that has close to 50 million tons of surplus food grain, there is no reason for its citizens to go hungry, let alone die of starvation. Similarly, in demarcating who fell below the

[42] 2003 (9) SCALE 835 and 840 at 836.
[43] Parmanand Singh, *Protection the right of the disadvantaged groups through Public Interest Litigation*, Human Rights and Basic Needs Theory and Practice, (2008) Universal Law Publishing Co. Pvt. Ltd., New Delhi.
[44] Colin Gonsalves, "*The Specter of Starving India*?", Combat Law, vol. 1, no. 3, August-September 2002, p. 6

poverty line and who did not, an arbitrary and irrational system was used, leading to the current situation of most poor people not falling below the poverty line.

Government has primary duty to realize right to healthy food as human right. In developing and democratic country like India, the different organ of govt. has been assigned specific role in regard to healthy food. The formal declaration of healthy food as human right found place in Universal Declaration on Human Rights recognizing everyone the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing etc. However, the Universal Declaration on Human Rights does not make the holder of rights alone responsible for the quality of his life, since it explicitly recognizes in the right to social security, thereby constituting a debt vis-à-vis the society of which the holder of right is a member. To the extent that social security includes an extensive range of healthy food protection measures and that it encompassed food care and food services programme. It is certainly not forcing the meaning of the Declaration to read in it the intention of protecting healthy food.

India as a whole produces enough food to allow a decent food supply for all if evenly distributed. Witch population growth slowing down we have to expert a much larger population but not a population 'explosion' as we feared previously; but India has, fortunately, the production positional for a much larger population. There are legal provisions to guarantee a right to food, which has to be put into practice more efficiently.[45]

Food security needs to be institutionalized and implemented at various levels.[46] There needs to be effective flow of information across all levels especially in form of regular feedback and appraisal. The goal is to establish a forum for advocacy of right to food in a public context. For this to be successful, the need for participatory from of governance at the grassroots level is crucial. The people need to be sensitized toward the fact that food is their basic right, and they need to take full advantage of all government support available to them[47].

The right to food is closely related to and dependent upon the realization of other rights. For a dignified life, food is an important component, for which individual health is promoted with food security in global era. Individual health is directly related to the enjoyment of all other human rights and is a full participation in social and economic life. Recognizing right to food as human rights demonstrates health as a special importance to the life and survival of an individual. This is a way to win over all diseases. The food is helpful in prolonging life and promoting physical and mental health. The multinational companies, industries and other food organization claim that they provide to society healthy and hygienic articles of food but it is a big question that how many claims of their are tenable?. At the conceptual level, the understanding of food is the basis of all human rights. A right perspective transforms the

[45]Wolfegang-Peter Zingel and Alexander Fischer, *"Food Security and the Right to Food in India: For Whom, How and Why?"* Human Rights and Basic Needs Theory and Practice, (2008) Universal Law Publishing Co. Pvt. Ltd., New Delhi.
[46] National Human Rights Commission (Training Division 2007-08) Selected Reading Material on Human Rights, New Delhi, p 41.
[47] *Ibid.*

development discourse, food security for the poor is no longer a charity or benevolence or a question of purchasing power. Instead, it is an entitlement of everyone by virtue of being born as human.[48]

At the overall macroeconomic picture, the country may be food sufficient or surplus but from the human rights perspective, what is important is whether the individual of the country is food secure or not. Despite tremendous increase in agricultural production, reaching adequate standards of food security and nutrition at the household level is still a milestone to be achieved.[49] Food is the cornerstone for survival, health and development for current and succeeding generations. Well-nourished children perform better in school, grow into healthy adults and in turn give their children a better start in life. Well-nourished with healthy food women face fewer risks during pregnancy and childbirth and their children set off on firmer developmental paths, both physically and mentally.

In global perspective the right to food has been guaranteed in several international instruments. The Preamble of WHO offer most comprehensive definition of the right to health include right to food. The Universal Declaration of Human Rights provides under Article 25 that everyone has the right to food, health etc. The human rights norm under Universal Declaration of Human Rights was legally enforced by Article 11 of the International Covenant on Economic, Social and Cultural Rights. United Nations World Food Conference 1974 in Rome Conference 22 resolution was adopted and Declaration was made for the Eradication of Hunger and Malnutrition. World Food Programme is a joint programme of the United Nations and Food and Agricultural Organization. The aim of World Food Organization provided food aid to support development projects and to meet emergency needs. In Beijing Declaration of the World Food Council in 1987, states members resolved to join together and with united strength to eliminate the scourge of hunger forever.

The WHO both independently and in association with such other UN agencies as FAO, UNESCO and UNICEF, has been active in seeking to attain to the objective set out in provisions together with and on behalf of govt. Nevertheless, despite great improvement in agricultural techniques and extension of knowledge of nutritional physiology and pathology it is probable that at least one half of the world's population still suffers from undernourishment or malnutrition. World food council, the food and agriculture organization of the United Nation, the United Nation conference on Trade and development and non-governmental organization in the field was further instructed "to give special attention to the normative content of the right to food and its significance in relation to establishment of new integration order. The food is an essential right which should be respected and protected all circumstances. In view of the urgent need to respond to hunger and malnutrition in the world problem, it is necessary to consolidate and further develop existing law through the drafting of an appropriate instrument on the right to food.

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[48] *This is revised version of the paper, presented at the Rajiv Gandhi Chair in Contemporary Studies, University of Allahabad, Allahabad on 17 - 18 September 2010.*

[49] Dreze and Sen, *"Hunger and Public Action"* (1999) Oxford University Press, New Delhi, cited in National Human Rights Commission (Training Division2007-08) Selected Reading Material on Human Rights, New Delhi, p 26.

India is a starving country. The food and Agricultural Organization report on Hunger 2006 pegs the number of malnourished in India at 121 million and estates that between 20 and 34 per cent of our population is malnourished.[50] Constitution of India casts an obligation on the State to take necessary measure to protect and improve the healthy food, though our constitution does not expressly provide right to food. It has now been well settled through series of case laws that right to life in Article 21 of Indian constitution include right to food that includes healthy food. Article 38 requires the state to secure a social order for the promotion of the welfare of the people, in which justice social economic and political shall in form all the institutions of the national life. Also, 39 (a) requires the state to direct its policy towards securing that all individuals have the right to an adequate means of livelihood.

First time in Indian history the Supreme Court recognized Right to food as Right to life in a significant judgment of the *PUCL vs. Union of India*[51.] Supreme Court held that every person who is starving because of his or her inability to purchase food grains have right to get food under Article 21. It is the duty of state to provide to all those who are aged, infirm, disable, destitute women and men, pregnant and lactating women and destitute children and therefore court directed top all states to distribute food grains immediately though PDS shops.

The petition pointed out two aspects of the state's negligence in providing food security: the breakdown of the public distribution system (PDS) and the inadequacy of government relief works. The breakdown of the PDS occurs at various levels: its availability has been restricted to families living below the poverty line (BPL), even as the monthly quota per family cannot meet the nutritional standards set by the Indian Council of Medical Research (ICMR). Even this is implemented erratically: a survey in Rajasthan indicated that only one third of the sample villages had regular distribution in the preceding three months, with no distribution at all in one sixth of them. The identification of BPL households is also highly unreliable. All in all, the assistance provided to BPL households through the PDS amounted to less than five rupees per person per month.

The effort of Indian government draft Right to Food (Guarantee of Safety and Security) Act insists on "the physical, economic and social right of all citizens to have access to safe and nutritious food, consistent with an adequate diet necessary to lead an active and healthy life with dignity…" The proposed law offers a quantity of cereal at a modest cost each month to a broad range of beneficiaries: in principle, all those living under the poverty line and a range of others.[52]

In *Kishen Pattanaik v. State of Orissa*[53], for the first time the Supreme Court has taken up the issue of starvation and lack of food. This case was initiated by writing a letter to Supreme

[50] K. Sandeep, "*Local Solutions to Conquer Hunger*" The Hindu, New Delhi, Thursday, March 29, 2012 page 8.
[51] AIR 2001 SC 196.
[52] The Hindu, New Delhi, Tuesday, July 28, 2009.
[53] 1989 AIR S.C. 677.

Court judge where prayer was that the state government should be directed to latter immediate steps in order to ameliorate the miserable conditions of the people of Kalahandi.

One of the most momentous developments in the enforcement of the right to food was brought about by the Bombay HC in an order dated 8 July 2004. Where a division Bench found that state sponsored schemes, such as the Matrutva Anuadan Yojna and Nav Sanjivani Yojna were not being implemented with the effectiveness as required of these schemes. The Bombay HC issued the directives. In *Shantistar Builders v. Narayan Khimalal Totame*[54] the SC held that basic needs of man have traditionally been accepted to be three- food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its seep the right to food, right to clothing, the right to decent environment and a reasonable accommodation to live in. In *Francis Coralie Mullin v. Administrator Union Territory of Delhi*[55] Supreme Court held that the right to life includes the right to live with human dignity and the base necessities of life such as adequate nutrition clothing and shelter.

Article 21 includes the right to live with dignity and all that goes along with it, including the right to food [56] The Court's judgment in its very essence recognizes the justiciability of the right to food, and the protection of this right under the Constitution. The Supreme Court affirmed that where people are unable to feed themselves adequately, governments have an obligation to provide for them, ensuring at the very least that they are not exposed to malnourishment, starvation and other related problems. The court also ordered that the Integrated Child Development Scheme (ICDS) be extended to provide universal coverage for all children below the age of six. The court has made numerous other orders, all focusing on alleviating the plight of those denied their right to food and towards improving the access to food within the country.

In *Kapila Hingorani v. State of Bihar*[57] the matter of denial of human right to food and means of livelihood was brought to the attention of the Supreme Court by way of PIL. The Court came to a finding that food, clothing, and shelter are core human right in a civilized society and the State of Bihar made itself liable to mitigate the suffering of the employees of the public sector undertakings and government companies. The Supreme Court directed the State Bihar to deposit 50 crores with the High Court for disbursement of salaries to the employees of the corporations. The Court recognized that hunger was a violation of human rights and the State has an obligation to satisfy basic human needs.[58]

India as a whole produces enough food to allow a decent food supply for all if evenly distributed. Witch population growth slowing down we have to expert a much larger

[54] (1990) 1 SCC 520.
[55] AIR 1981 SC 746.
[56] PUCL petition made to Supreme Court of India, April 2001.
[57] 2003 (9) SCALE 835 and 840 at 836.
[58] Parmanand Singh, *Protection the right of the disadvantaged groups through Public Interest Litigation*, Human Rights and Basic Needs Theory and Practice, (2008) Universal Law Publishing Co. Pvt. Ltd., New Delhi.

population but not a population 'explosion' as we feared previously; but India has, fortunately, the production positional for a much larger population. There are legal provisions to guarantee a right to food, which has to be put into practice more efficiently.[59]

Food security needs to be institutionalized and implemented at various levels.[60] There needs to be effective flow of information across all levels especially in form of regular feedback and assessment. The goal is to establish a forum for advocacy of right to food in a public context. For this to be successful, the need for participatory from of governance at the grassroots level is crucial. The people need to be sensitized toward the fact that food is their basic right, and they need to take full advantage of all government support available to them[61].

In the light of concluding remarks right to food has gained tremendous momentum in recent years. The objective of food security laws and policies that seeks to enhance the food security of the poor, but provides for measures that are grossly inadequate.[62] A number of initiatives have taken place at national and international level to effectuate right to food. Universal coverage and access to food for all is ultimate goal. The importance of addressing human right universally means that countries in north need to be accessed on equal footing with the south. The effectiveness of human right as a tool for improving food hinges on political frame work on which it is applied. Moreover, the link between human right, democracy and development is a complex phenomenon.

[59]Wolfegang-Peter Zingel and Alexander Fischer, "*Food Security and the Right to Food in India: For Whom, How and Why?"* Human Rights and Basic Needs Theory and Practice, (2008) Universal Law Publishing Co. Pvt. Ltd., New Delhi.
[60] National Human Rights Commission (Training Division 2007-08) Selected Reading Material on Human Rights, New Delhi, p 41.
[61] *Ibid.*
[62] Supera Note 3.

Precautionary Principles and Role of the Supreme Court of India

Dr. Kiran Sharma[1]

Introduction

In history, a point has been reached, where we must shape our actions throughout the world, with a more prudent care for their environmental consequences. Through ignorance or indifference, we can do massive and irreversible harm to the earthly environment on which our life and well being depends. Conversely, through fuller knowledge and wiser action, we can achieve for ourselves and our posterity, a better life, in an environment more in keeping with human needs and hopes.

Stockholm Declaration, 1972[2]

The wellbeing and enjoyment of human rights are dependent on a pollution free environment. Peace, development, prosperity, happiness and standard of living, are all dependent on sustainable development and its implementation is not possible without proper effective measures for the enforcement and incorporation of precautionary principles in all projects or activities. Precautionary principle is accepted in India as a part of fundamental laws. Our judiciary believes in, 'prevention is better than cure' and has played a very vital role, relating to the precautionary principle for achieving the environmental goals. The role of the Judiciary, pertaining to this principle, becomes more important due to the fast scientific and technological developments which pose a lot of threats for human health and affects our ecology. As per the researchers view, this principle is fundamental and most essential for the survival of the human being and the protection of inter-generational rights. This is an essential part of sustainable development. This research paper would suggest various measures to develop a framework of guidelines that would provide an effective roadmap for decision-makers in applying the precautionary principle.

Rio Declaration, 1992[3]

As per Principle 15, of the Rio Declaration 1992, "in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall

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[1] ***Assistant Professor, K.C. Law College, Mumbai.***

[2] Stockholm Declaration was adopted on June 16, 1972 by the United Nations Conference on the Human Environment at the 21st plenary meeting as the first document in international environmental law to recognize the right to a healthy environment.

[3] A/CONF.151/26 (Vol. I) Report of the United Nations Conference on Environment and Development Rio de Janeiro, 3-14 June 1992.

not be used as a reason for postponing cost-effective measures to prevent environmental degradation". The Supreme Court of India in its various judgments has accepted principle 15 as a preventive measure and accepted it as a part of Indian Laws. There are various Provisions under the Indian Constitution, that include the precautionary principle in its ambit, such as Article 21[4], 47[5], 48-A[6] and 51 A (g)[7] .

In a very significant judgement[8] on the precautionary principle, where the Court focuses on the need for a balance between economical development and protection of environment. In the case of *S. Jagannath v. Union of India*[9], the Supreme Court directed the Central Government to constitute an authority under section 3 of the Environmental Protection Act, 1986[10] and it was also directed that such an authority shall implement the Precautionary Principle and Polluter Pays Principle.

In *Vellore Citizens Welfare Forum v. Union of India and Ors.*[11] case the court considered precautionary principle as an essential feature of the sustainable development and declared three conditions which are involved in the precautionary principle, which are as follows –

1. State government and statutory authorities must anticipate, prevent and attack the causes of environmental degradation;
2. Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
3. The 'onus of proof' is on the actor or developer or industrialist to show the actions are environmentally benign.

   As per the above conditions laid down by the Supreme Court, the State governments and all the statutory authorities must take precautionary measure in order to control environmental degradation. No defence can be claimed on the basis of lack of scientific certainty for not taking precautionary measures in the cases of irreversible damage and the person responsible for doing the act has to prove that his action was environmentally sound.

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[4] Article 21 of the Constitution of India states: 'no person shall be deprived of his life or personal liberty except according to procedure established by law'.

[5] Duty of the State to raise the level of nutrition and the standard of living and to improve public health The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

[6] Article 48A obligates the state to 'protect and improve the environment and to safeguard the forests and wildlife of the country'.

[7] Article 51A (g) places a duty on 'every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures'.

[8] *Rural Litigation Entitlement Kendra, Dehradun v. State of U.P.,* A.I.R. 1985 S.C.

[9] 1972 SCC.

[10] Act No.29 of 1986.

[11] AIR 1996 SC.

It was held by the Supreme Court in *A.P. Pollution Control Board v. M.V. Naidu and others*[12] that Precautionary duties must not be taken only at the time of great danger, but also by justified concern or risk potential.

The main purpose of the precautionary principle is to ensure that degradation or threat to degrade the environment by any activity or development is prevented by taking proper measures. There was a time, when the Supreme Court refused to take precautionary measures including the case of *Narmada Bachao Andolan v. Union of India and Ors*[13]. *M.C. Mehta v. Union of India*[14], it is another important case where the Supreme Court applied precautionary principal to protect the Taj Mahal.

Our judiciary is applying this principle to protect our ecology from further degradation. Environmental Impact Assessment has been accepted as an important tool for the precautionary approach by the Court. The Court has taken the right approach towards access to information for implementing this principle. In the researcher's view, the role of the Supreme Court in mitigating , and controlling environmental damage is very effective and has accepted this principle as an integral part of sustainable development and also part of Indian Laws.

For making precautionary approach more fundamental, environmental expertise judges should be appointed. There is lack of proper implementation of the precautionary principle judgements and therefore measure should be taken for implementation in minimum time bound period and if failing to do so, punishment, suspension of job and personal liability should be imposed. Still, the internal essentials of precautionary principles such as Environmental Audit, Eco Mark and Green product have not been taken much into consideration by the Supreme Court.

Conclusion

As per the researcher's view the precautionary principle must have a holistic approach and the Court must take Environmental Impact Assessment, Environmental Audit, Eco Mark, Access to Information, Public Participation and Awareness together for a proper application, adoption and implementation of this principle. In the times when we have more advanced science and technological development, this principle has the potential to protect and improve our environment. The Government must prepare guidelines and make this principle compulsory for all the proposals and activities and EIA should be compulsory for all the projects.

[12] AIR 1999 SC.
[13] SCC 2000.
[14] AIR 1988 SC.

Role of Serious Fraud Investigation Officer (SFIO) in Promoting Corporate Governance

Ms. Soumya Dwivedi[1]

Introduction

It is well established that corporate governance encompasses usual relationships among a company's board of management, its securities holders, and other stakeholders[2]. Corporate governance also provides "the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined." In other words, "Corporate Governance is about promoting corporate fairness, transparency, and accountability."[3]

However, around the globe, a number of corporate failures have been witnessed, prominent among them are Enron, WorldCom in the U.S.A., Satyam Scandal in India, and Maxwell in the U.K. These corporate frauds to the forefront reflect the need of effective Corporate Governance mechanism. The most alarming features of these corporate frauds have been the active involvement of the promoters, senior corporate officials, and Board members in collusion with the auditors.

In India, the Naresh Chandra Committee was set – up in 2002 to study Corporate Governance. Out of the several recommendations made by the Committee, the establishment of a 'Corporate Serious Fraud Office' was predominant. Later, the Companies Act 2013, bestowed statutory status to the SFIO. Under the provisions of the Act, the SFIO has been empowered to investigate serious cases of 'fraud', as defined under the Act. Furthermore, as per ***Companies (Arrests in Connection with Investigation by Serious Fraud Investigation Office) Rules, 2017***[4], the SFIO has been granted the power to arrest any person on the ground of being guilty of fraud. The grant of such a wide and discretionary power to the SFIO becomes thus quite evident from these legislative actions of the parliament.

Global Development Scenario- U.S.A. and Great Britain

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[1] ***B.A. LL.B. 4th Year, NLU, Jodhpur.***

[2] Stijn Claessens and Burcin Yurtoglu, *'Corporate Governance and Development—An Update', (Global Corporate Governance Forum, 2012, Focus 10). Available at: http://www.ifc.org/wps/wcm/connect/518e9e804a70d9ed942ad6e6e3180238/Focus10_CG%26Development.pdf?MOD=AJPERES.*

[3] KARTIKEY KOTI, *'Corporate Governance in India: An Impression' 1 (2) International Journal of Research in Management & Business Studies 66(2014). Available at: http://ijrmbs.com/vol1issue2/1/kartikey_koti.pdf*

[4] Companies (Arrests in Connection with Investigation by Serious Fraud Investigation Office) Rules, 2017.

The rise of corporate governance in the western jurisdiction can be traced after the very famous Watergate scandal, which involved bribing high government officials by the big corporations of the U.S.A. The scandal resulted in the initiation of impeachment of President Nixon and paved the way for the United States adopted Foreign and Corrupt Practice Act, 1977 and Securities and Exchange Commission in 1979, aiming to set in place an internal regulatory mechanism to detect financial frauds. However, even after these legislations, major financial frauds and scandals came into light, which caused the establishment of Tradway Commission by the government to ascertain the reasons behind such acts and recommend the solution regarding the same. TheCCommitteethus came out with a recommendation for stronger corporate governance norms involving better transparency, independent audit committees, and placing an internal check mechanism for the corporations.

In Great Britain also such fraud and financial failures become rampant in the last few decades. The scandals of Bank of Credit and Commerce International (BCCI), British & Commonwealth Barings Bank scandal, Maxwell scandal, etc. are few of the examples.[5] These scams demanded the significance of corporate governance. In the early Nineteen Nineties, a revolution turned into started beneath Sir Adrian Cadbury to stop monetary reporting irregularities, which culminated in the publication of 'Cadbury Report'[6] in the year 1992, popularly known as 'Cadbury Code'. The Cadbury Report recommended the adoption of corporate governance norms regulating the ethics and corporate behaviors of the companies. Again in the year 1996, another committee named as as 'Hampel committee' was established to review the earlier committee report, the 'Cadbury Report' and 'Greenbury Report.'[7]

In 1998, this Committee submitted its file, particularly 'Combined Code of Corporate Governance,' which recommended overhauls in the structure and operations of the board, directors' remuneration, responsibility and audit, members of the family with institutional shareholders, and the responsibilities of institutional shareholders. Likewise, in 2001 'Myners Review'[8] and in 2002 the Directors' Remuneration Report Regulation', recommended for a good relationship among institutional investors and companies and emphasized the role of shareholders when it comes to directors' pay, etc. The Sarbanes-Oxley Act[9] became brought in the year 2002, therefore laid emphasis on the roles and responsibilities of auditing companies to stay objective and unbiased to ensure good corporate governance and achieve investor's confidence. Till 2003, only a few amendments dealing with remuneration, audit committees, internal risk management, etc. have been added.

However, again in 2008, after the global financial crisis, Great Britain Government

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[5] Financial Reporting Council, The Great Britain Approach to Corporate Governance, October 2010. Available at *https://www.frc.org.Great Britain/getattachment/1db9539d-9176-4546-91ee-828b7fd087a8/ The-GREAT BRITAIN-Approach-to-Corporate-Governance.aspx.*

[6] *See also Cadbury A, Committee on the Financial Aspects of Corporate Governance: Compliance with the Code of Best Practices (London: Gee Publishing 1995).*

[7] Available at: *http://www.ecgi.org/codes/documents/greenbury.pdf.*

[8] Available at*: http://www.kingstoncitygroup.co.Great Britain/.../Corporate%20governance%20develop.*

[9] Sarbanes Oxley Act of 2002 passed by the congress of the United States of America on 23rd January, 2002.

requested Sir David Walker to look specifically into the difficulty of corporate governance in banks and other large financial institutions. The Walker Review[10] , after analyzing the corporate failure, came out with 39 recommendations to ensure good corporate governance in banks and financial institutions. The recommendations can also be made applicable to the listed companies. Meanwhile, Financial ReportingCouncil's "F.R.") Report has also been published at the same time, which took into account the various aspects of the Walker Review and recommended for the Great Britain Corporate Governance Code, which got enacted in the year 2010.

OECD & World Bank

Organization for Economic Co-operation and Development (OECD) turned into the primary non- governmental organization to take initiatives for promoting good corporate governance through its corporate governance principles in 1999. The OECD, again released in the year 2004, revised the model of corporate governance principles for OECD and non-OECD countries" The OECD principles are making sure the premise of a good corporate governance framework, the equitable treatment of shareholders, the rights of shareholders, the function of stakeholders in company governance, disclosure and transparency, and the duties of the board.[11]

In 1999, the World Bank and OECD came collectively with an MoU, to reform and to reply to the need of nations to improve corporate governance via negotiation and co-operation. The co-operation among World Bank and OECD turned into dependent in conjunction with main initiatives; a Global Corporate Governance Forum (GCGF) [12] and a chain of Regional Policy Dialogue Round Tables.

Development of Structures to Combat Corporate Fraud In India

In India, the Securities Contracts Regulation Act, 1956 and the Companies Act, 1956 was enacted by the parliament after independence. During the Nineteen Seventies to Eighties, the banking institutions advanced rapidly, which resulted in the framing of numerous legal guidelines and regulations to regulate those institutions. Predominantly after the Indian economy was opened during the 1990s, which resulted in India entering the era of globalization, privatization, and liberalization, the need to strengthen corporate governance and boost investor confidence were felt. This finally led to the establishment of the Securities and Exchange Board of India (SEBI) in 1992.[13]

Phase one of India's corporate governance reforms majorly focused on ensuring the independence of the board and the audit committee, empowering shareholders, placing internal check mechanisms, and better risk management. The Government of India has also come up with several committees to review the laws relating to companies and corporate governance.

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[10] Available at*: http://www.frc.org.Great Britain/corporate/Great Britaincgcode.cfm.*
[11] Available at*: http://www.oecd.org/corporate/ca/corporategovernanceprinciples/33977036.pdf.*
[12] Available at*: www.worldbank.org/html/fpd/privatesector/cg.*
[13] DR. QAZI MOHD. USMAN, *Corporate Governance and its efficacy in present era, Jamia Law Journal , Vol 2 , 2017).*

The government has thus attempted to incorporate those recommendations by means of bringing legislative reforms to the current legislative framework. The Confederation of Indian Industry (CII), in 1998, proposed primary code for corporate governance, dealing with legal guidelines, regulations, practices, and implicit policies that determines a business enterprise's potential to take managerial choices with shareholders and creditors and clients. The CII code also accentuated on ensuring better transparency in the working of the internal management of the listed companies.[14] In 1999, SEBI set up a Committee under the chairmanship of Kumar Mangalam Birla[15] to study to the menace of insider trading and to suggest ways to protect the interest of the shareholders. TheCCommitteethus recommended for annual disclosures to be made by the companies and better corporate governance norms for the companies. SEBI incorporated and implemented Birla Committee's report on corporate governance and enforced Clause 49[16] in its listing agreement phase-wise.

The Indian Code of Corporate Governance was thus sanctioned by the Securities and Exchange Board of India (SEBI) in the year 2002. The significant amendment has also been made in the Companies Act 1956 in 2002 and 2004 to include provisions enhancing the greater role of shareholders through postal ballots and independent audit committees. The J.J Irani Committee also reviewed the Companies Act 1956 and recommendations for a new Companies Bill of 2008[17].

The Narayana Murthy Committee[18] under the chairmanship of Mr. N R Narayana Murthy was then established by the SEBI to analysis the Clause 49 of the listed agreements and make a suggestion to the Companies Act, 1956 and The Indian Partnership Act 1932. Accepting the recommendation by Narayan Murthy Committee, the SEBI made specific changes to Clause 49 of the listing agreement and the Companies Act, 1956. The Committee, therefore, recommended for the independent role of Audit Committee, Non-executive directors, whistle Blower Policy.

The Indian legislative framework had undergone a significant reform after the 2008 Satyam debacle. The SEBI in 2009, therefore, brought certain new amendments that obligated the companies to ensure greater disclosure regarding any changes in the share of the promoter group. The Ministry of Corporate Affairs (M.C.A.) also came with "Corporate Governance Voluntary Guidelines 2009," laying down corporate governance practices and norms for the companies such as transparency in board decisions, role, and appointment of auditors, and

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[14] Confederation of Indian Industry, (March 1998) Desirable corporate governance: A Code (Based on recommendations of the national task force on corporate governance, chaired by Shri Rahul Bajaj)

[15] REPORT OF THE KUMAR MANGALAM BIRLA COMMITTEE ON CORPORATE GOVERNANCE (1999) Available at: *http://www.sebi.gov.in/commreport/corpgov.html.*

[16] Clause 49 of the Listing Agreement, which deals with Corporate Governance norms that a listed entity should follow, was first introduced in the financial year 2000-01 based on recommendations of Kumar Mangalam Birla.

[17] JAMSHED J. IRANIET al., Expert Committee on Company Law, Report of the Expert Committee to Advise the Government on the New Company Law 3 (2005), available at *www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf*.

[18] N. R NARAYANA MURTHY, 'Report of the SEBI Committee on Corporate Governance', p.5. Available at: *http://www.sebi.gov.in/commreport/corpgov.pdf.*

proper whistleblowing mechanism in place.

The Serious Fraud Investigation Officer (SFIO)

Recommendations of the Naresh Chandra Committee

The Naresh Chandra Committee[19] established under the Chairmanship of Shri Naresh Chandra by the Government of India made the following recommendations:

1. A Corporate Serious Fraud Office (CSFO) to be established under the Ministry of Corporate Affairs dealing with the crimes relating to corporate frauds. The office to be comprised of experts.
2. The office shall be multidisciplinary and equipped to expose frauds and empowered to legally deal with the cases of frauds taking help from courts and other agencies.
3. The office to have a special Task Force for each case with an appropriate leader.
4. To supervise the functioning of the office, a committee headed by a Cabinet Secretary shall be appointed.
5. The legislation specifying the roles and responsibilities of CSFO has been to be brought up by the parliament. The reference can be taken from the role and duties of S.F.O. in the U.K.

Based on the recommendation of Naresh Chandra Committee and the unearthing of several stock market scams led the government of India to come up with a resolution dated 2nd July 2003, which constituted the office of SFIO in India. A charter of Serious Fraud Investigation Office dated 21st August 2003 was also framed by the government which laid down the roles, responsibilities, and functions of the SFIO, which includes:

(i) The SFIO is an established to be a multidisciplinary organization which consists of experts from a wide variety of field such as accounts, law, consulting, audits, information technology, capital market, etc. which are well equipped to deal with white-collar crimes.

(ii) The SFIO will deal with frauds characterized by following features:

a) Complex, interdepartmental, and multidisciplinary consequences.
b) Involvement of public interest in terms of amount misappropriated or the number of persons affected
c) The opportunity of investigations leading to or contributing in the direction of a clear development in structures, the law of process.

The other experts are appointed via the Central Government from among persons of capability, integrity, and revel in within the area of banking, Corporate Affairs, Taxation, Forensic audit, Capital Market, Information Technology, Law, or Other fields as required. The working of SFIO was thus incorporated under section 235 to 247 Companies Act 1956. Although there's no unique mention of SFIO in the 1956 Act. Therefore, the 2013 Companies Act explicitly incorporates the provision of dealing with SFIO.[20]

SFIO- New Developments Under the Companies Act, 2013.

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[19] NARESH CHANDRA, Report of the CII Task Force on Corporate Governance 2 (November 2009), available at *www.mca.gov.in/Ministry/latest news/Draft_Report_NareshChandra_CII.pdf.*

[20] *See*., Sections 211 and 212, the Companies Act 2013.

Section 211 to 217 of the Companies Act, 2013 deals explicitly with SFIO [21]. The definition of Fraud under Companies Act, 2013, is a broad one that provides for the liability of people involved as several. Fraud is defined as, "*Fraud in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss*." 'Wrongful gain' means "the gain by unlawful means of property to which the person gaining is not legally entitled" and 'wrongful loss' means "the loss by unlawful means of property to which the person losing is legally entitled." The Act thus, for the first time, defines fraud and provides for civil and criminal liability on the person committing frauds.

The section prescribes that the persons and every other officer of the company involved in the fraud shall be jointly and severally liable. Therefore, unlike the Companies Act, 1956, the scope of fraud under the Companies Act, 2013, is extensive.

The usage of the term 'person' while defining the fraud under the Act also extends the application of the section on directors, key managerial personnel, managers, officers, employees, or any other person responsible for the affairs of the company. Consequently, auditors, independent directors, consultants, experts, advisors, non-executive directors who are not promoters or key managerial personnel, can also be held liable for the Act of Fraudor omissions occurred within their knowledge. Not only this, the directors who have resigned can also be held accountable, even after resignation, for offenses committed during their tenure.

Criminal Liabilities of Company in cases of fraud

Section 447 of the Companies Act, 2013 provides for the acts and activities falling under the category of frauds and which can be regarded as a cognizable non-bailable offense:

(a) Providing false or incorrect information during registration of a company- **[s. 7(5)]**
(b) Incorporation of a company by fraudulent means- **(s. 7(6)**
(c) Untrue or Misleading Prospectus-**.[s 34]**
(d) Inducing a person to enter into the financial matter- **[s.35]**
(e) Any person who makes or abets making of an application in a fictitious name to a company for acquiring, or subscribing for, its securities; or makes or abets making of multiple applications to a company in different names or in different combinations of his name or surname for acquiring or subscribing for its securities; or otherwise induces directly or indirectly a company to allot, or register any transfer of, securities to him, or to any other person in a fictitious name. **[s. 38(1)]**
(f) If a company with the intent to defraud issues a duplicate certificate of shares**.[s. 46(5)]**

[21] *Ibid.*

(g)Any depository or depository participant, with an intention to defraud a person, has transferred shares**.[s. 56(7)]**
(h) Knowingly concealing the name of any creditor**.[s 66(10)]**
(i) When the auditor of the company has acted fraudulently or abetted or colluded in any fraud. **[s. 140(5)]**
(j) Where the business of a company has been or is being carried on for a fraudulent or unlawful purpose, or if the grievances of investors are not being addressed, every officer of the company who is in default shall be held liable for fraud**.[s. 206(4)]**
(k) if after investigation, it is proved that the business of the company is being conducted with the intent to defraud its creditors**.[s. 213]**
(l) Furnishing false statement mutilation, destruction of documents- **[s. 229]**
(i) Destroys mutilates or falsifies, or conceals or tampers or unauthorisedly removes, **[s 251]**
(m) Fraudulent application for removal of the name- **[s 339]**
(n) Fraudulent conduct of business-
(o) False Statement**.[s 448]**

Punishment for Fraud
Section 447 to 451[22] prescribes punishment for the commission of fraud.

Prominent Cases Investigated by SFIO
SFIO is a professional organization that undertakes the investigation of only the most serious type of corporate fraud. Some of the major cases of frauds investigated by SFIO are:

(i) **SATYAM COMPUTERS SCAM:** The inquiry in the matter of Satyam Fraud was conducted by the office of SFIO in a matter of three months' time period. The scam is estimated to be worth Rs.7,200 crore, causing loss of around Rs. 14,162 crores in the year 2009. The fraud was pulled off by the B.Ramalinga Raju with the help of audit firm PricewaterhouseCoopers which fudged the accounts of the company. The eminent independent director on the board of the company was also unable to detect the illegal activity undergoing under their nose. The SFIO found that there is a falsification of the accounts and overstatement of profits by the company and held the main accused B.Ramalinga Raju liable for theFraud. However, the independent directors were not held liable due to the absence of knowledge about the alleged scam.

(ii) **DECCAN CHRONICLE HOLDING LTD (DCHL):** The case involved the default of loan amounting to Rs. 1,230 crore (approx.). The company was under investigation for the alleged financial irregularities and the inability to pay its loan during the years between 2009-11. The SFIO found out the violation of major provisions of the Companies Act, 1956, and confirmed that the management of the company availed loans from several sources. However, the company later declared itself sick and was referred to the Board for Industrial and Financial Reconstruction (BIFR).

[22] Section 447 to 451, Companies Act, 2013.

(iii) **SARADHA CHIT FUND SCAM:** The Sharda Chit Fund of West Bengal has currently been investigated by the SFIO for the alleged financial fraud committed. The Ministry of Corporate Affairs has ordered the SFIO to start the investigation against the company's aftermath the scam came into light in the public domain. Around 60 companies registered in the eastern states has been alleged to have cheated the public money. The interim report prepared by the SFIO points out the alleged companies have exploited the regulatory gaps to siphon off the public money.

Challenges Faced by SFIO

There are several challenges which are faced by the SFIO. Firstly, the SFIO has very limited or more precisely no power to settle the fraud cases on its own. The Office of SFIO deals with corporate fraud investigations, which are complex, involves various government departments and encompasses a multidisciplinary approach. These cases involve misappropriation of substantial public money and which affects a large number of people at large. The detailed and final report prepared by the SFIO is then submitted to the Central Government. The Central Government on examination of the report and after taking proper legal advice then may direct the SFIO to initiate prosecution against the company and its officers or employees, who are or have been in the employment of the company.

Therefore, though the definition of Fraud and SFIO under the Companies Act, 2013 is wide. But the same is not as wide as compared to the S.F.O. in U.K. The S.F.O. in the U.K. is an independent body that has the power to prosecute the fraud cases without requiring any authorization from the government. The principal enforcer of the new U.K. Bribery Act, 2010, is the SFIO, which empowered to prevent fraud and improve corporate governance.

That's to say; the Indian SFIO has is not independent and does not have much power as compared to the S.F.O. in the U.K. The following are the major issues:

1. The jurisdiction of SFIO is limited to only fraud-related cases
2. The central government, under Section 210 and court under Section 213 of the Companies Act, 2013, is empowered to direct the investigation. The SFIO does not have any suo moto power to initiate and conduct the investigation.
3. No acknowledgment of the role whistleblower under the current provisions relating to the SFIO.[23]
4. The arrest in the matter relating to the fraud as per Section 212(8) of the Companies Act, 2013 shall only be made on the authorization by the central government.
5. The report prepared by the SFIO under Section 212(12) of the Companies Act, 2013, has to be submitted to the central government. And, thus, it is the central government which after examination of the report, shall direct the SFIO to commence any prosecution against the alleged offenders.
6. The nature of measures under the Act is not pre-emptive.

[23] 13th Report: Standing Committee on finance on Demands for Grants see page no. 18, (Ministry of Corporate Affairs 2015-16).

7. Major reliance and predominant role of central government for ensuring accountailty and initiation of the investigation.
8. The lack of resources and manpower also affects the working of SFIO.[24]

Therefore, to provide teeth to the SFIO in India, the SFIO should be given more power in terms of initiation of investigation independently by them and to penalize the same. Such a measure will ensure investors' confidence and also reduce the burden of the court too.

Conclusion

Considering the latest banking and other scams scam in our country involving reputed private banks like ICICI and Axis bank, Mr. Nirav Modi and Mr. Mehul Choksi, etc., it can safely be said that SFIO in its present form is ill-equipped to deal with frauds of this nature and magnitude. Moreover, unless pre-emptive powers are given to SFIO, it will remain an organization that can at best post-mortem any fraud case and endeavor to book the culprits rather than prevent corporate frauds. There is a need to reform the SFIO through legislative enabling provisions providing it with more teeth. Only then will it transform as the faithful watchdog of corporate governance.

[24] 17th Report: Standing Committee on Finance see; Para no. 40, (Ministry of Corporate Affairs 2014-15).

The Muslim Women (Protection of Rights on Marriage) Act, 2019: A hope of emancipation for the Indian Muslim Women

***Anju Devi*[1]**

Introduction

'Triple *talaq*' also known as instant and irrevocable form of *talaq*, which has been a nightmare for the Muslim women including the Indians who are approximately 7% of the entire population. On 31st day of July 2019, Indian Parliament enacted Act no 20 of 2019, which can also be referred as an end to the "archaic and medieval practice" forcing the women to lead a life depending on the sweet will of their male counterparts. The enactment has been widely lauded as a socialistic effort of correcting a historical wrong been prevalent for more than 1400 years. Prior to any deliberation and discussion on the burning problem of 'triple *talaq'*, the Muslim women are facing, it would be apposite to trace out the social status of women in pre-Islamic era in the Arabian countries *viz-a-viz* in the contemporary context. Methinks that without having a comparative discussion on the marginal condition of the Arabian women before the advent of the last Prophet of Islam and the rights Islam has given to them in respect of their marital status, any study on the point of 'triple *talaq'* will be a futile exercise.

'Triple *talaq*' also known as *talaq-e-biddat* (instant divorce)[2] and *talaq-e-mughallazah* (irrevocable divorce) is the most controversial and misunderstood[3] form of divorce been practised by Muslims, wherein a Muslim man can dissolve his marriage unilaterally and arbitrarily by pronouncing the word *talaq* thrice in one go, either orally, or in writing, or through any electronic means, which shall be irrevocable after the women undergone the period of *iddat*. The biggest setback of this form of *talaq* is that the male should not have to assign any cause or reason before the pronouncement[4].The research is meant for finding the evolution of this sinful practise in Muslim Law in the light of judicial pronouncements and the relevant codified laws. It is also equally of paramount importance that at the time of discussing the topic of *talaq*, it is seminal to glance at the actual provision of Islam and the way of *talaq* being practised by Indian Muslims.

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[1] ***Research Scholar, Baba Mastnath University, Rohtak.***
[2]"Triple talaq verdict: What exactly is instant divorce banned by court" Hindustan Times 22nd August 2017.
[3]"The different methods of Islamic separation- Part 2: The different types of Talaq" 3rd July 2015 by Siddique Patel, solicitor, www.familylaw.co.uk, visited at 09:51 on 24/05/2019.
[4]Available on https://en.wikipedia.org/wiki/Triple talaq in India, visited at 08:01 pm on 23/05/2019.

Without having the deep insights of all the above noted situation nobody can have the actual sights of the Muslim Women in respect of their marital status and the actual norms of *talaq* that Islam has ordained to mankind can't be understood to its right prospective.

Social life of Arabian Women in Pre-Islamic Era[5]

The Arabian society prior to the advent of the prophet of Islam presented a social medley of different indigenous social strata. In majority of ethnics, cultural groups of Arabian people, prostitution and indecency were rampant and in full operation. Women were merelythe commodities of pleasure and pleasure only at the hands of the savage ethnic Arabic men, which can be perceived from the fact that during wars women always accompanied their husband. The winners would have freely sexual intercourse with the women of losers but there was no specific guideline to decide the fate of the children conceived due to the cohabitation after such war and disgrace was bound to follow them. Pre-Islamic Arabs had no limited number of wives.

They could marry the sisters at the same time or even the wives of their father, if divorced or widowed. Divorce was to the great extent a power to a husband. The obscenity of adultery prevailed among all social classes and the female slaves were condemned to forebear the greatest calamity of the society. The pitiable and horrible condition of the women can be demonstrated from the fact that most of the Arabs used to bury their female children alive because an illusion of poverty and shame weighed heavily on them.

During this period there was no limitation to *talaq* and an Arab man can divorce his wife at any time and can took her back even without waiting for the period of *Iddat*, there was no restriction as to the number of times of divorcing and taking his wife back, which led the life of a woman pitiable[6].In short we may sum up the social situation in a pre-Islamic Arabia by saying that they had been living in utter mark of ignorance entangled in the *hotch-potch*of superstition, which led them to an animal like life, in which the woman was almost a marketable commodity meant only for calming down the unbridled carnal lust of the wild beasts under the skin and mien of homo sapiens.

Emancipation of women with the advent of Islam

It is the belief of the followers of Islam that the holy Quran was sent down upon Mohammad through his messenger by Almighty God and it took near about twenty three years of time. The Prophet of Islam was given birth in the sands of Arabia where the women were not more than anything, meant for the pleasure and fulfilment of carnal lust of the uncontrolled and savage male dominated society. In this backdrop Islam ordained people to follow certain principles and mandates of God to build up the best possible ideal society of that time

[5] Pg. 46-48, AR-RAHEEQ AL-MAKHTUM (THE SEALED NECTAR) Biography of the Noble Prophet, Safi-ur-Rahman al-Mubarakpuri, Maktaba Dar-us-Salam Publishers and Distributors.

[6] "Triple Talaq in the light of Quran and Sunnah", Sheeba Khalid, Available on https://www.academia.edu/34755546/TRIPLE_TALAQ_IN_THE_LIGHT_OF_QURAN_AND_SUNNAH: visited at 10:34 on 24/05/2019.

securing safety, security and social dignity to the human being of every rank and file. In this regard we find various commandants of almighty giving solace to the ever weeping human hearts and the women at that time took a sigh of relief under the umbrella of Islam. Verse 2.223 of The Holy Quran ordains the men to treat his wife as tilth and has been translated as "Your women are a tilth for you (to cultivate) so go to your tilth as ye will, and send (good deeds) before you for your souls, and fear Allah, and know that ye will (one day) meet Him. Give glad tidings to believers, (O Mohammad)".[7]

Thus the verse no 223 of Holy Quran postulates that sex is as solemn and pious as any other aspect of human life. The fair sex has been compared to a husbandman's tilth, to illustratively depict that in the same manner as a husbandman sows his fields in order to reap a harvest by choosing his own time and mode of cultivation by ensuring that he does not saw out of season or cultivate in a manner which will injure or exhaust the soil.

Undoubtedly a landed property fit for cultivation is the most precious and beloved thing to a husbandman and thus directly or indirectly the Holy Quran commands the men to love their wife in the way a farmer loves his land and in no way he is ready to part with the same unless and until unavoidable and insurmountable circumstances compels him to do so. Verse 2:226 and 227 ordains for dissolution of strained relationship between husband and wife only after exhausting the reconciliation period of four months.

At present two modes of *talaq* finds recognition among the Muslim worldwide. The first kind of *talaq* is *'talaq-e-ahasan'* and the second form is *'talaq-e-hasan'*. It is necessary to have a look on these forms of *talaq*, which have been approved by Quran and Hadith. In *talaq-e-ahasan*, which is considered to be most reasonable form of *talaq*, a single pronouncement of "*talaq*" by the husband followed by a period of abstinence which has been described as period of *Iddat*,which is ninety days or three menstrual cycles (in case where the wife is mensurating) and alternatively the period of *Iddat* is a period of three lunar months (if wife is not mensurating).It is ordained in the Quran that if the couple resumes physical relation and intimacy within the period of *Iddat*, the pronouncement of divorce gets revoked i.e. to say in all probable situations after the pronouncement of *talaq* if the couple expiates for their wrong and resumes intimacy, the *talaq* is revoked, but on the other hand if there is no resumption of cohabitation or intimacy during the period of *Iddat* then the divorce becomes final on the expiry of that period.

In *talaq-e-hasan,* which again is a reasonable form of *talaq*, but not as reasonable as *tala-e-ahasan*,there are three successive pronouncements. Subsequent to the first pronouncement of *"Talaq"*, if there is resumption of cohabitation and intimacy within a period of one month, the *talaq* gets revoked. If there is no resumption the same procedure has been ordered to be followed after the expiry of the first month durries which marital ties has not been resumed

[7]Pg. 39 (part-2) The Holy Quran, Transliteration in Roman Script with Arabic Text &English Translation: Transliteration by M. Abdul Haleem Eliyasee and English Translation by M.M. Pickthall: Published by Abdas Sami for Islamic Book Services (P) Ltd. Darya Ganj, New Delhi.

and *"Talaq"* has to be pronounced again. After the second pronouncement of *"Talaq"*, if there is resumption of cohabitation during the period of second month again the divorce is treated as having been revoked. By resuming conjugal relations, *"Talaq"* pronounced by husband becomes ill effective, as if no *talaq* has ever been expressed. If there is no resumption during the second month also after the second declaration and the husband makes the third pronouncement in the third *Tuhar* (in a period of purity), as soon as third declaration is made, divorce becomes irrevocable and the contract of marriage get discharged, where after the wife has to observe the required *Iddat* (a period after divorce during which a woman cannot remarry)[8].

The above noted modes of *talaq*get the final support and approval of Holy Quran vide verse no 1 and 2 of sura 65 as *AT-TALAQ*, which reads as under:-[9]
In the name of Allah, Most Gracious, Most Merciful.

1. O prophet! When you do divorce women, divorce at their prescribed periods, and count (accurately), their prescribed periods: and fear Allah your Lord: and turn them not out of their houses, nor shall they (themselves) leave except in case they are guilty of some open lewdness, those are limits set by Allah: and any who transgresses the limits of Allah, does surely wrong his (own) soul: you know not if perchance Allah will bring about thereafter some new situation.
2. Thus when they approach their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you, endued with justice, and establish the evidence (as) before Allah. Such is the admonition given to him who believes in Allah and the Last Day. And for those fear Allah, He (ever) prepares a way out.

The third form of *talaq* i.e *talaq-e-biddat* is the most sinful and hateful form of talaq prevalent among Muslims, but unrecognised by the Holy Quran and is popularly known as 'triple *talaq*'. In this form husband used to pronounce the word *"Talaq"* thrice in one sitting, whereafter it becomes irrevocable. It has its origin in the second century of the Islamic era. According to Jurist Ammer Ali (1849-1928), this form of *talaq* was introduced by Omayad Kings, because they found the checks in the Prophet's formula of *talaq* inconvenient to them.[10]This form has been declared unconstitutional and unreasonable by the Supreme Court of India vide judgment dated 22 August 2017[11] and made penal by legislative mandates after enacting The Muslim Women (Protection of Rights on Marriage) Act, 2019.

Verse No.2:231 of the Holy Quran God ordains, when you divorce women and they fulfil their term of *Iddat*, either take them back on equitable terms or set them free on equitable terms, but do not take them back to injure them.

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[8]Available on https://www.ndtv.com/india-news/triple-talaq-and-other-forms-of-muslim-divorce-explained, visited at 11:50 pm on 24/05/2019.
[9] The Qur'an; Translated by Abdullah Yusuf Ali: Al-Qur'an Institute, Lucknow, p. 365.
[10] Available on https://www.dnaindia.com/india/report-three-types-of-talaq, visited at 12:45 am on 25/05/2005.
[11]*Shayra Bano v. Union of India* writ petition (C) no 118 of 2016.

To prevent erratic and whimsical repeated pronouncements of *talaq* and again resumption of cohabitation and intimacy resulting in revocation of *talaq*, a limit of two pronunciations has been prescribed. In other words, reconciliation after one divorce in the case of *talaq-e-hasan* and after two divorces in the case of*talaq-e-ahasan* is allowed. After the first or second divorce, as the case may be, the parties must demonstrably make up their mind, either to dissolve their ties permanently or live together honourably with all possible mutual love and affection. From the Holy Quran and Hadees, it appears that though divorce is permitted in Islam, yet the right has to be exercised in exceptional circumstances. The Holy Prophet is reported to have said "Never did God find anything more hateful to him than divorce". According to a report of Ibn Umar, the Prophet said "with Allah the most detestable of all things permitted is divorce". [12]

Once the Prophet of Islam was informed about a man who pronounced three divorces at one time,he got up in anger saying "Is spot being made of the book of Allah while I am yet among you" (Hadees Abu Nasai).

Abdullah Ibne Abbas reported that the three divorces during the life time of God's apostle and that of Abu Bakar and except two years of the Caliphate of Umar was treated as one (Sahi Muslim Hadees No.3491 source) .

There is another tradition reported by Abu Rukana. He reported that he gave his wife Sahalmus an irrevocable *talaq* and he conveyed it to the messenger of God and said by God "I have not intended but one divorce". Then messenger of God asked, "have you not intended but one divorce". Rukana said. By God, "I did not intend but one divorce". The messenger of God returned his wife back to him afterward he divorced his wife for second time at the time of second *Khalipha* of Islam Hazrat Umar and third time at the time of Hazrat Usman, the third *Khalipha*. (Abu Daud Hadees).

Once we glance through the above mandates of God, we fail to understand how a religion which directs the male society to love and respect their women to their level best can simultaneously allow the men to break and spoil all relations with a woman in a jiffy by pronouncing the most hateful word *"Talaq"* thrice. At least I am convinced from the above verses of Quran and *ahadees* (to quote a few among several) that in the religion of Islam provision of separation by way of *talaq* has been made to meet out the exceptionally strained relation both husband and wife and a sufficient cooling period has been ordained to be observed by the couple, which may range from a period of ninety days to the end of life of either spouse.
But unfortunately at the time of passing of Sariyat Act 1937, the majority of Islamic theologists born and brought up in India having a distorted angle of vision on this issue would not understand the actual provisions of *talaq* provided in Islamic Sariat, and consequently

[12] Religion Book of Islam' by Maulana Mohammad Ali at Pg 671, vide Book No.6 Sunan Abu Daud Hadees No.191.

they recognized the mode of *Talaq-e-biddat* as a valid and legal mode of *talaq*. It is not that prior to the enactment of Sariat Act, this illegal mode of *talaq* had not been invoked in Muslim Society. It is not that the Indian Islamic the ologists were not aware of the fact that they were introducing a new provision of chapter of *talaq*, but the question arises, why knowing it full well that *talaq-e-biddat* had neither been in practice during the period of Prophet of Islam nor during the period of his direct followers, they have introduced this unethical and unsocial practice which have put thousands of couples at unbearable hardships resulting in another anti Islamic social practice of *Halala*.

The answer to this simple question can be traced in the evolution of different schools of Islamic jurisprudence. Undoubtedly, it was not the Prophet of Islam, nor his disciples who have introduced this unethical practice rather it was Imam Abu Hanifa the founder of Hanafi School of Mohammadan Law. Followers of Hanafi School of Mohammadan Law dominates the Muslim populous in India and they are about 80% of Muslim population. According to Hanafi School of law, the disapproved form of divorce is *talaq* by triple declaration in which three pronouncements are made in a single *tuhr*, either in one sentence e.g. I divorce thee thrice or in three sentences, I divorce thee, I divorce thee, I divorce thee is a lawful mode of *talaq* in Hanafi Law and still all the Hanafi Ulemas are not in a mood to say good bye to the above noted procedure of *talaq*, only due to the fact that though their Prophet had forbidden to adopt this practice, their Imam had consented to its validity long before the enactment of Sariyat Act in India.

Judicial Pronouncements

The dissolution of Muslim marriage through triple *talaq* finds judicial pronouncements basing on the concept of *talaq-e-biddat*, even though the courts passing judgments criticized the concept mainly of its devastating effect on Muslim women. Justice Khalid of Kerala High court while passing judgment in *K C Moyin v. Pathumal Beevi*[13]criticizing the arbitrary practised by male while pronouncing triple *talaq*,has observed "my judicial conscience is disturbed at this monstrosity of the law". The High Court of Madhya Pradesh in the case of *Saleha v. Sheikh*[14]refused to grant decree in favour of destitute wife who sought either separate maintenance or restitution of conjugal rights after failure of reconciliation for years, by accepting the plea of husband of divorcing his wife a long back ago.

The Supreme Court of India in *Shah Bano case*[15]ruled that Sec 125 of CrPC meant for maintenance of wife, children and parents shall also apply to Muslim women, whereas under Muslim personal law a divorced Muslim woman is entitled for maintenance only during her *iddat* period. The landmark verdict of Supreme Court was negated by the Parliament after deep protest from orthodox Muslims by enacting The Muslim Women (Protection of Right on Divorce) Act in 1986, whereby the divorced Muslim women were taken out from the perview of sec 125 of CrPC. Subsequently The Muslim Women's (Right to protection on Divorce)

[13]1972 KLT 512.
[14]AIR 1973 MP 207.
[15]*Mohd. Ahmed Khan v. Shah Bano Begum* AIR 1985 SC 945.

Act 1986was under challange before Supreme Court in *Danial Latifi Case*[16]on the ground of it being violative of Article 14, 15 & 21 of The Constitution of India and the Supreme Court vide its pronouncement held the act as constitutional on the ground of personal law, but harmonised it with sec 125 of CrPC by observing that the maintenance to be awarded to a divorced Muslim women during *iddat* period should have to be sufficient enough to cater her future needs.

On the point of religious mandates of Muslims as of mandatory reconciliation efforts, the Supreme Court of India in *Shameem Ara v. State of UP*[17] observed that the Muslim law indeed prescribe the detailed procedure for *talaq* including the sufficient efforts of reconciliation, and thus the prayer of husband for seeking divorce can be struck down if he fails to prove that he diligently followed those. This observation has been reiterated by the Supreme Court of India in the case of *Iqbal Bano v. State of UP*[18].

The controversy over the legality of practising triple talaq has been set at rest by the Supreme Court of India through landmark judicial verdict dated 22 August 2017 passed in *Sharaya Bano*[19] case. The court while examining the legality of sec 2 of The Muslim Personal Law (Shariat) Application Act 1937 recognizing the practise of *talaq-e-biddat* among Sunni Muslim guided by Hanafi School and reciting and relying on the relevant ordains of the Holy Quran and Hadits observed:

"This form of talaq must, therefore, be held to be violative of the fundamental rights contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression "law in force" in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces triple talaq. Since we have also declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in theses case, as was argued by the learned Attorney General and those supporting him."

Even prior to this most applaud able verdict of Supreme Court, the Single bench of Keral High Court in December 2016 in a writ petition filed in the year 2003, *Ooyor Nazeer v. Shameema* held the practice of triple *talaq* as invalid. The court discussed Quranic verses and hadith and pointed out that the practice was allowed by an executive order during the period of Caliph Uner. The aim was to alleviate the grievances of women during that period and not as right conferred upon the husband. The action was exercised under particular circumstances and hence cannot be applied as a general law.[20]

The Allahabad High court has set aside the decree passed by Family Court of Barelly granting the decree of divorce in favour of husband on the basis of pronouncement of talaq thrice in

[16] *Danial Latifi & Anr v. Union of India*, writ petition (C) No 868 of 1986 decided on 28 September 2001.
[17] (2002) 7 SCC 518.
[18]AIR 2007 SC 2215.
[19]*Shayara Bano v. Union of India* writ petition © No 118 of 2016.
[20]Available on https://newsable.asianetnews.com/kerala/triple-talaq-supreme-court-kerala-high-court, visited at 05:03 PM on 25/05/2019.

the presence of witness and later communicated to the wife through registered letter. The Allahabad High court basing its decision on the verdict of Supreme Court in *Sharaya Bano* case declared the instant talaq as null and void.[21]

Legislative Mandates

Subsequent to the verdict of Supreme Court in *Shayara Bano case*, the parliament passed The Muslim Women (Protection of Rights on marriage) Act, 2019 (Act No 20 of 2019), which obtained the assent of the President of India on 31st day of July 2019 and by virtue of sec 1(3) of the Act it has been retrospectively effected from the 19th day of September, 2018. Definition clause defining the term *talaq* under section 2(c) of the Act means *talaq-e-biddat* or any other similar form of instantaneous and irrevocable *talaq*.

The legislative intent by making the application of the act not only to the *talaq-e-biddat*, but also any other form of instant and irrevocable *talaq*, is very clear to protect the Muslim women from the vagrancy of being left destitute on the whimsical decision of their husband taken in haste. Section 3 of the act makes such *talaq* as null and void, whereas section provides for imprisonment upto three years and shall also be liable to fine. Section 5 entitled such women of maintenance as subsistence allowance, whereas section 6 provides for her entitlement of custody of minor child. However the offence under the Act has been made cognizable and compoundable at the instance of the wife.

The Act is a way forward towards emancipating the Muslim Women of getting prey to the most sinful practice of triple *talalq* among Sunii Muslims of India. It can also be referred to as the beginning of status of equality and providing social security to such women by declaring any form of instant and irrevocable divorce as null and void. Penal provision has been made to put fear among the males. The whole act seems to propagate the idea of enforcing the true efforts of reconciliation before ending the marital ties between husband and wife.

Effects of the Act

1. The first case of triple *talaq* has been filed in the state of Karnataka after the passing of The Muslim Women (Protection of Rights on marriage) Act, 2019 at Savadatti Police Station.[22]
2. Two weeks after the passing of the Act, Nagpada Police station lodged the first case under the act when a 37 years old lady was given *talaq* thrice by her husband.[23]
3. A man in Bihar at Patna was arrested after his wife lodged a police case under The Muslim Women (Protection of Rights on marriage) Act, 2019 for giving her triple *talaq*.[24]

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[21]Available on https://www.newindiaexpress.com/nation/2017/dec/21/allahabad-hc-annuls-decree-of-divorce-based-on-triple-talaq, published on 21st December 2107 11:32 PM, visited at 04:25 PM on 25/05/2019.

[22]https://timesofindia.indiatimes.com/city/hubballi/karnatakas-first-triple-talaq-case, visited at 06:13 PM on 25/05/2019.

[23]Available on https://m.timesofindia.com/city/mumbais/first-triple-talaq-case-after-act, visited at 06:20 on 25/05/2019.

Conclusion

Apart from the above noted cases, there are several other cases been lodged by a Muslim woman against their husband alleging the pronouncement of triple *talaq*and several others which even has never been reported because of unawareness amongst the victims. The lodging of cases filed under The Muslim Women (Protection of Rights on marriage) Act, 2019 can be looked into two prospective. On one side it is indicative of the fact that a Muslim male, even after passing of the Act and declaration of triple *talaq* as null and void are adamant to stick with the long precedence of the sinful practice, presuming themselves to be in dominating position, whereas on the other hand the lodging of FIR is also indicative of the fact that Muslim women are now much aware of their rights and they are striving enough to establish themselves at par with others to bloom out their image as of a tool in the hands of male.

There is definitely a need to propagate the significance of the Act to each and every women in need thereof, so as to extinguish the sinful act of triple *talaq* from its very root and till then the strive must go on flawlessly. National Legal Services Authority with the aid of its subordinate State Legal Services Authority and District Legal Services Authority must induct the enactment in its legal awareness programmes meant for armouring the common people at their very grass root with their legal rights. The victims of these cases should also be awarded with compensation under the Victim Compensation Scheme.

Besides the various NGOs should also be instigated for shouldering their resources towards making the enactment reach to its objective, until the prolong existing practice gets extinguished. Some financial assistance must also be made available to meet the expenses in making the enactment been known to the last person of the society.

[24]Available on https://m.timesofindia.com/city/patna/man-arrested-for-divorcing-wife-through-triple-talaq-in-bihar, visited at 06:28 pm. on 25/05/2019.

Journal of Legal Studies, International Refereed Peer-Reviewed Journal
ISSN 2321-1059, Vol. 7, Issue II, July 2019
www.journaloflegalstudies.co.in

Religion and Politics

Chandrika Sharma[1]

Abstract

Mixing of religion with politics is a dangerous trend because religious attitude is diametrically opposed to democratic feelings. Religion encourages fanaticism and suspends our reasoning power and we repose full faith in leaders. We are prepared to make sacrifice because sacrifice will be considered martyrdom. This mental attitude is directly opposed to democratic spirit. Democracy demands open mindedness, universal brotherhood and thinking based upon reason and capable of taking its own decision. In such cases, there is no herd tendency and the person is liberal in attitude.

Introduction

The common conception about the religion and politics under the secular set-up is that religion and politics are different aspects. Religion is the matter of private affairs, and therefore it should not be allowed to enter into public domain. The reasons for keeping religion out of politics under the secular set-up have been explained by *Safina Ali* in the following terms:[2]

Mixing of religion with politics is a dangerous trend because religious attitude is diametrically opposed to democratic feelings. Religion encourages fanaticism and suspends our reasoning power and we repose full faith in leaders. We are prepared to make sacrifice because sacrifice will be considered martyrdom. This mental attitude is directly opposed to democratic spirit. Democracy demands open mindedness, universal brotherhood and thinking based upon reason and capable of taking its own decision. In such cases, there is no herd tendency and the person is liberal in attitude.

Similarly, In *S.R Bommai* v. *Union of India*[3], K. Ramaswami J. observed that:[4] Article 25 inhibits the government to patronize a particular religion as state religion overtly or covertly. Political party is, therefore, positively, enjoined to maintain neutrality in religious beliefs and prohibit practices derogatory to the constitution and the laws. Introduction of religion into politics is not merely in negation of the constitutional mandates but also positive violation of the constitutional obligation, duty, responsibility, and positive prescription or prohibition specifically enjoined by the constitution and the ROPA. A political party that seeks to secure power through a religious policy or caste orientation policy disintegrates the people on grounds of religion and caste. It divides the people and disturb the social structure on ground of religion and caste which is obnoxious and anathema to the constitutional culture and basic features.

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[1] ***Research Scholar, Shri Venkateshwara University, Gajraula, Uttar Pradesh.***
[2] Safina Ali, Essay on Religion and Politics in India, *available at* www. preservearticles.com.
[3] AIR 1994 SC 1918.
[4] *Ibid.*

Appeal on grounds of religion offends Secular Democracy. Perused of the above discussion, it would not be inappropriate to say that religion has no place in politics. And if religion would be allowed to have any place then it would affect the very spirit of the democratic functioning. But if we look into the recent trends then will find that almost all political parties are engaged in doing vote bank politics in the name of religion or caste. These political parties are more concerned about capturing power rather than securing the just social order for the people at large. In this context, R. Upadhya has rightly observed that:[5]

The political balance sheet of India since independence shows that both the ruling Congress and the opposition barring the *Bhartiya Jana Sangh* and its subsequent incarnation the *Bhartiya Janta Party*, which exploited the issue for consolidation of Hindu votes- accepted the legacy of communal divide as bonanza and kept its spirit alive in the country only for their vote-seeking politics. They committed blunder after blunder like providing special privileges to Muslims, compromising with Muslim orthodoxy in Shahbano case and stretching a none-issue like Ayodhya beyond a point, which only aggravated the communal polarization in the country. They did not formulate any consistent national policy to transform the medieval psyche of the Muslims into national current of political mainstream but encouraged this demoralized social group to maintain its separate national identity. By creating fear psychosis of Islamic identity, they promoted the mullahs for leading the Muslim mass in the country and kept them away from any meaningful contribution in national re-construction programmes.

R. Upadhaya further writes that since independence no attempt was made by congress to integrate Muslims in the culture of secular tradition of Indian society. Congress, with the support of regional and casteist parties had aggravated the communal temper in the country for the same Muslim votes. Congress and other political parties treat the Muslims like political commodity. Unfortunate but the harsh reality is that not even single political parties have ever thought of integrating the Muslims into political current of national mainstream, he adds.[6]

The BJP has recently issued its Manifesto[7] for 2014 election campaign. In page 41, BJP is retreating its stand on the construction of *Ram Mandir* within the constitutional framework, and on the same page it provides for the establishment of uniform civil code. The purpose behind framing of UCC is to eliminate gender inequality and accords better protection to the rights of the women. The drafting of UCC shall be done on the basis of keeping in view best traditions and harmonizing them with the modern times. The incorporation of the issue of *Ram Mandir* and UCC at the same time represents real paradox. However, the pursued of the manifesto has raised an important issue, the issue of *Ram Mandir*, as we all know that *Ram Mandir* was the root cause of communal violence in the early 90's and on this issue, several state governments were dismissed, the states had also witnessed emergency in the form of imposition of president rule. Therefore, the taking up of the issue of *Ram Mandir*, by the BJP, as a part of their political

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[5] R. Upadhaya, Indian Muslims -Victims of vote-baiting attitude of political parties, *available at* www.southasiananalysis.org.

[6] *Ibid*.

[7] BJP election Manifesto-2014, *available at* www.bjpelectionmanifesto.com.

governance, in the opinion of the researcher is no way justified. Further, under the secular set-up, where political parties play important role in forming the government, manning the parliament, and influencing the governmental decision making process, require being neutral in the matter of religion. Therefore, the very incorporation of the issue of *Ram Mandir*, somehow depicts the picture of vote bank politics on the basis of policy of appeasement and also gives severe blow to the secular fabric of the constitution. In this context, Supreme Court of India in *S.R Bommai* v. *Union of India*[8], has held that:

We hold that no one religion should be given preferential status, or unique distinction, that no one religion should be accorded special privileges ….*for that would be a violation of the basic principles of democracy*)

Therefore, keeping in view the above discussion, it would not be inappropriate to say that political parties are doing politics in the mane of religion. They are more oriented towards capturing the power. They are least concerned about the well being of the citizens and development agenda. And in the process they are even ready to compromise with the constitutional norms and basic feature doctrine.

Garry Jeffery Jacbshon while deliberating upon the statement of Parbbhoo observed that the provisions of ROPA are in consonance with the secular fabric of the constitution of India. He further asserts that the purpose of enacting the provisions [in ROPA] is to ensure that no candidate at an election gets votes only because of his religion and no candidate is denied any votes on the grounds of his religion.[9] In this context Beg J. in *Ziyauddin Burhanuddin Bukhari* v *Brijmohan Ramdass Mehra*[10] observed that:

No Democratic political and social order, in which the conditions of freedom and their progressive expansion for all make some regulation of all activities imperative, could endure without an agreement on the basic essentials which could unite and hold citizens together despite all the differences of religion, race, caste, community, culture, creed, and language.

The court further stated that:[11]
Our democracy can only survive if those who aspire to become people's representatives and leaders understand the spirit of secular democracy for such a spirit to prevail, candidates at election have to try to persuade electors by showing them the light of reason and not by inflaming their blind and disruptive passions.

With the passage of time, the decision of the court or rather the articulation about secularism did not get much attention. In this context, Garry Jeffery Jacobson writes that in its rulings, the

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[8] AIR 1994 SC 2260.
[9] Gary Jeffrey Jacobson, *The Wheel of Law: India's Secularism in Comparative Constitutional* Context 166 (Oxford University Press, New Delhi 2003).
[10] (1975) 2 SCC 260.
[11] *Ibid.*

court held that *Balasaheb K.Thackrey*, the leader of an extreme Hindu Nationalist party (*Shiv Senea*), could be barred from electoral competition on the basis of intemperate campaign rhetoric, including a reference to Muslims as "snakes". His remarks were found to be in clear violation of RPA's second corrupt practice category. But in companion cases the court reversed finding against several other Hindu nationalist politicians, one involving a campaign pledge to turn Maharashtra (where Gandhi was from) into India's first *Hindu* state, and another concerning appeals to voters on the basis of candidate's support of *Hindutava*, a term widely held to signify the religious faith of *Hindus*, but which the court choose to interpret as referring to the culture and ethos of the people of India.

Conclusion

Perused of the above discussions it would not be inappropriate to say that mixing of religion and politics would result into poison, the effect of which would be the incurable disease. Therefore, religion being private affairs must not be allowed to become a political tool.

Journal of Legal Studies, International Refereed Peer-Reviewed Journal
ISSN 2321-1059, Vol. 7, Issue II, July 2019
www.journaloflegalstudies.co.in

Cleansing Black Politics: An Analysis of the Challenges to Transparent Political Financing in India

Dr. Sanjay Kumar[1]
Ms. Ayushi Kushwaha[2]

Abstract[3]

The unprecedented rise in the prevalence of black money in the Indian political sphere is alarming. The existing legislative framework meant to govern black money remains shrouded by superficial limitations and ineffective mandates that allow political parties to escape accountability to the State and the citizenry, and hinder the development of a transparent and responsible governance system in the country. Robust disclosure mechanisms encouraging parties to report their income to the authorities have gained traction across the world, and it is the need of the hour to implement such mechanisms in India as well. It is impossible to seek to weed out black money from politics unless the State is aware of where it comes from in the first place. Identification of the source of income and areas of expenditure are vital in the fight against black money. Hence, systematic overhaul of India's legislative framework in relation to black money and re-fashioning of it into relatively workable disclosure frameworks should be the top priority.

Keywords: *Black Money, Political Financing, Transparent, Accountability, Politics.*

Introduction

Political parties are representatives of the views, aspirations and interests of the masses. They have been empowered to integrate citizens, assist in the formation of policies, provide leadership to the masses, and act as inspectors of the existing governmental regime.[4] The very nature of these functions requires not only moral considerations but also heavy financial considerations, and hence, money is important. However, despite the idealistic picture one might paint regarding India's electorate democracy being a global aspiration, realistic introspection would reveal that there remain many problems embedded in its functioning.

Unsurprisingly, the key players in Indian democracy political parties have long admonished the noble ideals of accountability, fairness, and transparency. Money has taken center-stage in Indian politics, and political financing is no longer merely a mechanism for funding internal party operations and electioneering activities. Instead it has now taken the form of a tool to channelize black money, thereby becoming a serious menace for the political fabric of the country.

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[1] ***Assistant Professor (Law), The West Bengal National University of Juridical Sciences (WBNUJS).***
[2] ***Student, LL.M., 2018-19 (Corporate & Commercial Law), the West Bengal National University of Juridical Sciences (WBNUJS).***
[3] This paper has been proofread by Amrita Ghosh, B.A. LL.B. (Hons.), WBNUJS (2020). She is currently an Associate at Shardul Amarchand Mangaldas. The proofreading exercise has been undertaken in her personal capacity and does not constitute any advice or opinion on behalf of the firm.
[4] M. V. Rajeev Gowda and E. Sridharan, 'Reforming India's Party Financing and Election Expenditure Laws' (2012) 11 Election Law Journal: Rules, Politics, and Policy.

The permeation of black money in political financing has become more rampant than ever, considering figures which show that hundreds of crores were spent by contesting political parties and candidates in the 2014[5] despite the existence of much lower prescribed expenditure ceilings. However, the case of black money and politics (which the authors here prefer to call '*black politics*') is not as straightforward as it is made out to be—there is more to it than we understand because of the methodological yet abusive approach of political parties and candidates of bypassing existing laws, rules, regulations and orders to keep themselves and their interests afloat.

This may perhaps give rise to the impression that the Indian governance system lacks sufficient knowledge and means to curb black politics and to infuse a transparent and accountable framework to counter the same. However, notably in India, there are various institutions dedicated to imparting wisdom and knowledge on these matters to the policy-makers and the electorate such as the Election Commission of India (ECI), Income Tax (IT) Commission, the Supreme Court and the Chief Information Commission (CIC). There is also a wide network of laws, rules, and regulations, directly or indirectly concerned with political financing.

However, politics in India is called "dirty business" for myriad reasons, and hence, mere institutional and legislative frameworks cannot effectively deal with the problems associated with it. Other factors which are relevant and complementary in combating black politics include robust implementation of existing frameworks, comprehensive surveillance, political will and public awareness. Most importantly, it is imperative that we shed our conventional perspective on 'cleansing the politics' through utopian means and instead consider inspecting the feasibility of various unconventional yet practical means to handle the problem. It is now that time we realize that while it is nearly impossible to stop the inflow of money in politics, what can be done is institutionalizing transparent disclosure mechanisms that allow the State to know where the source and destination of money circulating in Indian politics.

Problems in the Current Legislative Framework on Political Financing

1. Representation of People Act, 1950

a) De-registration of political parties

Section 29A of the Representation of People Act, 1950 (RPA 1951) authorises the ECI to register political parties. However, there is no constitutional or statutory provision that enables the ECI to withdraw or suspend the registration of political parties.[6] The ECI has tried to fill in the void by making a major amendment[7] in the Election Symbols (Reservation and Allotment) Order, 1968, by introducing Order 16A. Order 16A enables the ECI to "suspend

[5] Lok Sabha 2014 Election Expenditure: An Analysis Of Declaration Of Lumpsum Amounts By Political Parties To Their Mps' (*ADR*, 2015) <https://adrindia.org/content/lok-sabha-2014-election-expenditure-analysis-declaration-lumpsum-amounts-political-parties> accessed 9 December 2018.

[6] 'Proposed Electoral Reforms' (Election Commission of India 2016) <https://eci.gov.in/files/file/9236-proposed-election-reforms/> accessed 27 April 2019.

[7] The Representation of the People (Second Amendment) Act 1994.

or withdraw recognition"[8] of any recognised political party which fails to observe the Model Code of Conduct (MCC) or any lawful instructions or directions issued by the ECI, with the aim to ensure the organisation of free, fair and harmonious elections or to protect the interests of the electorate.[9]

De-recognition is different from de-registration which only strips political parties of their symbols. However, the fact that despite being derecognised, such political parties may still end up receiving donations and enjoying tax exemptions clearly shows that a major problem has not yet been remedied. The use of these unrecognised political parties as 'sinks' is evident from the fact that only 5 percent of the 2,044 unrecognised political parties furnished reports to the ECI in the period between FY 2013-2014 and 2015-2016.[10] The concern is exacerbated by the fact that there are many unrecognised political parties with little political activity, which receive donations from sources located in areas where the respective party has little to no presence.[11]

b) Maintenance and Submission of Financial Accounts

Under Section 29C of RPA 1951, read with the Guidelines under Section 29A,[12] political parties are required to furnish a report on donations received to the ECI, prior to submission to the IT department.[13] However, these parties are not required to furnish details of donors when donations do not exceed INR 20,000. Consequently, many parties underreport their donations.[14] These provisions are supplemented by Rule 85B of the Conduct of Election Rules 1961 that provides for the form in which the contribution report has to be furnished to the ECI.

In addition to these guidelines and rules, the Institute of Chartered Accountants (ICAI), at the behest of the ECI, has framed accounting formats particularly for political parties. These Accounting Guidelines[15] are aimed at guiding political parties in the preparation of their financial statements and provide for accounting principles and methods with respect to recognition, evaluation and disclosure of income, assets, liabilities and expenses.[16] The ECI has over the decades routinely recommended political parties to follow the prescribed formats, but these recommendations have never been implemented.

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[8] The Election Symbols (Reservation and Allotment) Order 1968, Order 16A.
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] Guidelines and Application Format for Registration of Political Parties under section 29A of The Representation of the People Act 1951.
[13] *Ibid.*
[14] *Ibid.*
[15] 'Guidance Note on Accounting & Auditing of Political Parties' (*ADR India*, 2012) <https://adrindia.org/sites/default/files/Guidance_Note_on_Accounting_Auditing_of_Political_Parties.pdf> accessed 27 April 2019.
[16] *Ibid.*

The ECI also issued the Transparency Guidelines[17] under Article 324[18] of the Constitution in 2014. Through these guidelines, the ECI desired to make political parties observe accountability and transparency in relation to funds collected and money expended. The guidelines state, *inter alia*, that political parties must submit to the ECI a copy of the audited Annual Accounts with a report of the Auditor before 31st October of every Financial Year (FY).[19] Further, where a political party wishes to provide financial assistance to its candidate(s) during electioneering, the said expenses are to not exceed the expenditure ceiling prescribed under Section 77(3) of the RPA 1951, and such expenditure must not happen in cash.[20] However, the mandate of the ECI has been flouted with impunity over the years, and accounts are severely under-prepared largely because of the non-enforceability of these guidelines and rules.

c) False Statements and Declarations

One of the rights of an elector is to make an informed decision about his democratic representatives, and therefore, it becomes critical to have correct data on the antecedents of the candidates. In *Krishnamoorthy v. Siva Kumar,*[21] the Supreme Court stated that non-disclosure of correct or complete information about political candidates may result in undue influence and interferes severely with the exercise of right of citizens to vote in an informed and effective manner.[22] Moreover, this indicates that candidates do not reveal their antecedents, particularly assets and liabilities, to be on the safe side in terms of electoral chances these observations resonate with the observations in the 2002 Supreme Court judgment in *Union of India v. Association of Democratic Reforms.*[23]

In the aftermath of the 2002 judgment, the Parliament made a major amendment to the RPA 1951 that required a contesting candidate to furnish information relating to only certain criminal antecedents, namely whether he stands accused or convicted of an offence which is punishable with at least two years of imprisonment (Section 33A) and made it optional for candidates to furnish any additional information in relation to, *inter alia*, assets, liabilities and educational background regardless of any Court ruling or ECI's directions or orders (Section 33B). Clearly, the purpose behind this amendment was to nullify the Supreme Court ruling—and inevitably, it was challenged.

Considering the challenge in *People's Union for Civil Liberties v. Union of India,*[24] the Supreme Court reaffirmed the findings in *Union of India v. Association of Democratic*

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[17] 'Guidelines On Transparency And Accountability In Party Funds And Election Expenditure Matter- Regarding.' (*Election Commission of India*, 2014) <https://eci.gov.in/files/file/867-guidelines-on-transparency-and-accountability-in-party-funds-and-election-expenditure-matter-regardingdated-29082014/> accessed 27 April 2019.

[18] Superintendence, direction and control of elections to be vested in an Election Commission.

[19] *Ibid.*

[20] *Ibid.*

[21] *Krishnamoorthy v. Siva Kumar,* (2009) 3 CTC.

[22] *Ibid.*

[23] *Union of India v. Association of Democratic Reforms,* AIR 2002 SC 2112.

[24] *People's Union for Civil Liberties v. Union of India,* (2003) 4 SCC 399.

Reforms and observed that Article 19(1) of the Indian Constitution includes the right of voters to be informed of the necessary antecedents of a contesting candidate and hence, is a fundamental right.[25] Moreover, the argument of the respondents that the disclosure of assets, liabilities etc., amounts to invasion in respect of the right to privacy of contesting candidates was held to not stand as these candidates are anyway required to disclose such information under the Income Tax Act 1961 (IT Act, 1961) and other similar legislations. Thus, Section 33B of RPA 1951 was declared null and void.

Presently, a candidate participating in General or state elections is mandated to produce an affidavit, as per the Conduct of Election Rules 1961,[26] enumerating the details of his criminal history, educational qualification, and assets and liabilities. Unfortunately, political unwillingness manifests in the poor disclosure history of candidates with respect to their antecedents, despite the catena of judicial precedents and statutory mandates prescribing otherwise.

d) Failure to Maintain Separate Bank Accounts

Every contesting candidate is required to maintain a separate bank account with respect to election expenditure under Section 77 of the RPA 1951. In *Shri KanwarLal Gupta v. Amar Nath Chawla,*[27] the Apex Court noted that if there is no maintenance of separate bank accounts for this purpose, then the whole purpose of putting expenditure limits on candidates would become redundant. As per the court, when a political party spends money for the candidate and the candidate takes advantage of the same, it would be reasonable to infer that the candidate had "impliedly authorised"[28] the political party for these expenses. The same logic is extended to the expenditure made by supporters of the candidate.[29] The authors have a differing opinion regarding the case of expenditure limits; however, they acknowledge the importance of separate bank accounts in the determination of the nature of expenditure being made by political parties and candidates respectively.

The Supreme Court's observations hold great impetus, but they were sidestepped with the 1974 Amendment to RPA 1951, which added an Explanation to Section 77, providing that any expenditure which a political party or supporter incurred with respect to a contesting candidate would not be covered as expenditure incurred or authorised by the contesting candidate. While the said amendment came under the severe criticism, its constitutionality was upheld by the Apex Court in *P. Nalla Thampy Terah v. Union of India*.[30]

It was through electoral reforms in 2003 that the effect of the said Explanation was watered down, as a consequence of which any expenses incurred by political parties or supporters of

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[25] *Ibid.*
[26] All matters relating to the actual conduct of elections are governed by the provisions of the Representation of the People Act 1951 which have been supplemented by the Conduct of Elections Rules 1961.
[27] *Shri KanwarLal Gupta v. Amar Nath Chawla,* [1955] 1 SCR 671.
[28] *Ibid.*
[29] *Ibid.*
[30] *P. Nalla Thampy Terah v. Union of India,* 1985 Supp SCC 189.

the candidates in relation to the candidate's election campaign are to be considered as expenditure of the candidate.[31] There is a catch, however. So long as a party or any third party incurs expenditure for the promotion of the party's programme and does not directly promote the candidate, the expenditure will not be covered within the expenditure ceiling.[32] In addition to this, any expenditure incurred by the chiefs of political parties with respect to travel by any means of transportation shall not be regarded as expenditure incurred or authorised by a contesting candidate under Section 77.[33]

e) Expenditure Limits

Section 77 of the RPA 1951, read along with the Conduct of Elections Rules 1961, stipulates limits on the total expenditure that a contesting candidate can incur or authorise during parliamentary and state elections. The current expenditure ceiling on Lok Sabha candidates falls between INR 50 lakhs and INR 70 lakhs, depending on the constituency from which he is contesting. With respect to State Assembly elections, the cap usually falls between INR 20 lakhs and INR 28 lakhs.

One of the reasons which is said to have contributed to the increased use of unaccounted money in carrying out political activities is low expenditure limits. Experts[34] reportedly believe that expenditure ceilings contribute greatly to dishonesty, resulting in furnishing of inaccurate or incomplete statements on expenditure.[35] Political parties falsely declare expenditure incurred on the election campaign of their candidates as expenditure incurred on general party promotion.[36] Hence, the pressure resulting from low ceilings leave political parties and candidates with enough room to play unfairly and amass as much money as they possibly could.

2. The Income Tax Act, 1961

a) Tax Exemption to Political Parties

In recent years, there has been a marked increase in the number of dummy political parties which are used solely for the purpose of diverting black money and seeking tax exemptions. There exist no conditions under law requiring disclosure of previous election records of parties such as whether they have contested in the past and/or won seats in Parliament or State Assemblies. Technically, this situation provides room to political parties to avail benefits without having to contribute to the political spectrum of the country.

The conditions for availing tax exemptions, are provided under Section 13A of the IT Act 1961. This section requires registered parties to furnish an annual report to the ECI, following which they must file their income tax returns along with their income and expenditure details,

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[31] The Election Laws (Amendment) Act 2003.
[32] *Ibid.*
[33] *Ibid.*
[34] M. V. Rajeev Gowda and E. Sridharan, 'Reforming India's Party Financing And Election Expenditure Laws' (2012) 11 Election Law Journal: Rules, Politics, and Policy.
[35] *Ibid.*
[36] *Ibid.*

audited accounts and balance sheet with the IT department.[37] Any failure to submit the annual report to the ECI will render political parties without tax exemptions.

Political parties are further required to maintain proper and correct accounts of income and expenditure under Section 13A (a) which are to be audited by an accountant, as provided for in the Explanation appended to Section 288(2). Moreover, in their accounts, parties must disclose any contribution which is more than INR 20,000 along with details of the donor.[38] However, the Finance Act, 2017 effectuated an amendment to the IT Act 1961, wherein the earlier limit of INR 20,000 has been amended to INR 2,000. Similar change has not been reflected in the RPA 1951, and hence, there remains a problem requiring urgent remedial measures.[39]

3. The Foreign Contribution Regulation Act, 2010

Countries generally prohibit foreign contributions in the electoral process, though the nature and degree of these prohibitions may differ. While the treatment differs, the rationales behind the prohibitions are quite similar. Firstly, foreign political contributions are commonly used as means of money laundering. Secondly, foreign contributions, if allowed to be unrestrained, can unduly influence domestic policy-making. To put it simply, the fate of Indian democracy should be left to be determined by its people as far as possible. In furtherance of this understanding, the Foreign Contribution Regulation Act 2010 (FCRA 2010) was enacted to serve as a statutory vanguard; though its effect has been clouded in recent years.

A recent amendment to the FCRA 2010 has become a cause of concern as it could potentially throw open doors to foreign contributions in the Indian political sphere. Clause 217 of the Finance Bill 2018 brought an amendment to Section 2(1) of FCRA 2010 by inserting a proviso to sub-section (j) clause (vi), which created an exception to "foreign source".[40] It stated that where the nominal value of share capital of a company falls within the limitation of the Foreign Exchange Management Act 1999, regardless of whether the said nominal value exceeded one-half of the share capital at the time contribution was made, the company shall not be regarded as a foreign source (as otherwise would have been the case prior to the amendment).[41] This amendment took effect retrospectively from the date on which the FCRA 1976 came into existence, which was later repealed and re-shaped into what we now have as FCRA 2010.

It is interesting to note that this amendment followed a 2014 Delhi High Court judgment.[42] In *Association for Democratic Reforms v. Union of India,* a Public Interest Litigation (PIL) was filed in which the petitioner asserted that there were marked violations of the FCRA 1976 bythe Bhartiya Janta Party (BJP) and Indian National Congress, which had been taking

[37] The Income Tax Act 1961, Section 13A.
[38] The Finance Act, 2017.
[39] *Ibid.*
[40] The Foreign Contribution (Regulation) Act 2010, s 2(j) (vi).
[41] *Ibid.*
[42] *Association for Democratic Reforms v. Union of India,* WP(C) 131/2013.

donations from a foreign source, namely Vedanta Resources through Sesa Goa Ltd and Sterlite Industries India Ltd.[43] The Court had observed that about one-half of the nominal value of the total share capital of Sesa and Sterlite was held by Vedanta. Vedanta being a corporation incorporated in a foreign territory falls squarely within the ambit of Section 2(e)(vi)(c) of the FCRA 1976.[44] Consequently, the High Court found BJP and Congress guilty under the 1976 Act. This decision was challenged in the Supreme Court but appeals were withdrawn in 2016.

4. The Companies Act, 2013

Section 182 of the Companies Act 2013 provides for conditions, fulfilment of which enables a company to donate to a political party or electoral trust. It, however, prohibits a company in existence for less than three financial years and government companies from making such donations.[45] The provision states that a company may donate, provided that there is a resolution passed at a meeting of the board of directors sanctioning such contribution.[46] In addition to this, there are other conditions, compliance with which is to be ensured before the authorization is deemed to be a legal justification for the company making contribution. These conditions require the company to disclose the amount contributed in its profit and loss statements furnished every financial year[47]; and mandate that the contributions should not have been made in cash.[48] It is important to note that by virtue of a 2017 amendment, an earlier condition that provided that the amount contributed in a FY shall not go beyond 7.5 percent of the average net profits accrued to a company in the three immediately preceding FYs, has been omitted. As a consequence of this omission, there is no cap on the amount a company can donate.

It has been argued that removal of the cap on contribution is dangerous and has wide-scale implications. It is true that all business groups cannot be treated as vying to exploit political sphere to their advantage. However, as aptly observed by the Supreme Court in *Kanwar Lal Gupta v. Amar Nath Chawla*,[49] an often neglected implication of political contributions from corporates without any expectation of returns is that it can still create pressure on elected persons because the latter cannot completely disregard the corporates providing funds, in the course of their policy-making.[50]

This may, as the Law Commission puts it, create a "deep capture" resulting in corporates exercising influence in the determination of what is good for public. However, the real question is whether it is possible to regulate corporate lobbying, and whether caps on corporate donations serve this purpose.

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[43] *Ibid.*
[44] *Ibid.*
[45] The Companies Act 2013, s 182 (1).
[46] *Ibid*, proviso to sub-sec (1).
[47] *Ibid*, sub-sec (3).
[48] *Ibid*, sub-sec (3A).
[49] *Kanwar Lal Gupta v. Amar Nath Chawla,* (1975) 2 SCR 259 : (1975) 3 SCC 646.
[50] *Ibid.*

Meeting the Challenges in Political Financing

1. There Should Be Full State Subsidy or No State Subsidy

Experts around the world have contemplated on the effectiveness of state subsidy as a means to establish a workable political financing framework. Many countries such as Israel and Germany have even experimented with it. In a 2008 study,[51] it was found that countries where there has been a longstanding operation of public financing schemes such as Israel and Finland show no significant reduction in the total election expenditure.[52] There are only a few countries where such a system has been reasonably successful such as Germany[53] one of the key reasons behind the success being political will. On the other hand, in countries such as the United States of America, state subsidies have not curtailed the reliance of parties and candidates on corporate donations.[54]

So far as India is concerned, there have been mixed opinions on the issue of state subsidy. For example, the report of the Indrajit Committee[55] and the 1999 Law Commission Report[56] stood in favour of direct state funding, with the latter extending support only on the ground that political parties should then not be allowed to raise funds from other sources. Both reports recommended only partial state funding. However, partial state subsidy means there shall remain a certain degree of flexibility in political financing that can offer leverage to political parties to flout transparency norms. The authors assert that if at all state subsidy is to be implemented; it should be absolute in nature.

It is imperative to be able to trace the source and target of political financing through accountable and transparent measures. Partial state subsidy will offer room to resort to channels other than those of state financing risking in-flow of unaccountable funds. Full state subsidy, on the other side, shall plug in all other channels of political financing through the allocation of funds based on State policy. As a result, it shall be less challenging to track political expenses and to hold accountable parties for the same.

This being said, it is a humungous task to implement full state subsidy in a country such as India, where election expenditures reach skyrocketing levels. The 2014 General Elections witnessed the second most financially intensive election campaign in the world, second to the

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[51] Dr. Kevin Casas-Zamora, 'Political Finance And State Funding Systems: An Overview' (*International Foundation For Electoral Systems*, 2008) <https://ifes.org/sites/default/files/politicalfinanceandstatefundingsystems_english_0.pdf> accessed 26 April 2019.

[52] Ibid.

[53] 'Checkbook Elections' (*Carnegie Endowment for International Peace*, 2015) <https://carnegieendowment.org/files/Checkbook_Elections_brief.pdf> accessed 27 April 2019.

[54] Ibid.

[55] 'Indrajit Gupta Committee On State Funding Of Elections' (Legislative Department, Ministry of Law and Justice, Government of India 1998) <https://adrindia.org/sites/default/files/Indrajit_Gupta_Committe_on_State_funding_of_Elections.pdf> accessed 27 April 2019.

[56] 'Law Commission Report On Reform Of The Electoral Laws' (Law Commission of India 1999) <http://www.lawcommissionofindia.nic.in/lc170.htm> accessed 27 April 2019.

2012 U.S. elections. As per a study conducted by the Centre for Media Studies, the mammoth election witnessed the government, candidates, and political parties spending more than INR 30,000 crores.[57] If at all full state subsidy is to be realised, then it must be preceded by two major overhauls in the political financing system: firstly, fund allocation should be in alignment with the *actual* necessities of the political sphere, which presumes that the State must have massive fund reserves dedicated for this; secondly, political parties and candidates must be cut off from other sources of income. Clearly, and practically speaking, full state subsidy is a Herculean challenge for a country bearing dynamics like ours. So, we need to consider workable alternatives—robust disclosure mechanisms being key, with the Right to Information Act 2005 as the first step forward.

2. Making Political Parties "Public Authorities" under The Right to Information Act, 2005

Accountability and transparency are underpinning principles of the Right to Information Act (RTI Act), and achieving these milestones could be regarded as a major step in strengthening the existing structure on political funding. The essence of the RTI Act lies in the acknowledgment and realisation of the freedom of speech and expression, which includes the right to be informed of every public act done by public functionaries.[58] This was affirmed in the famous *S.P. Gupta v. Union of India*[59] case in which the Supreme Court said that the "right to know" is inherent in the freedom of speech and expression.[60] Further, the Apex Court has reiterated on a number of occasions that a democracy can only function when there is participation from the general public, and such participation can be encouraged and bolstered only when there is openness in the governance system of the country. In keeping with this logic, the nature of functions performed by political parties mandate that they should be subject to the RTI Act. Yet, unfortunately the task to include political parties within the purview of the RTI Act has faced and is still facing obstacles.

The case of *Ms. Anumeha, C/o Association for Democratic Reforms v. Commissioner of Income Tax*[61] is the first major decision towards inclusion of political parties under the RTI Act. The case dealt with an RTI application before the Central Board of Direct Taxes, Government of India seeking information on the IT returns filed by political parties in a number of years, Permanent Account Number (**PAN**) allotted to them, and copies of the aforesaid returns along with assessment orders.[62] The main response from political parties

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[57] SushmitaSamaddar and others, 'Impact Of Black Money In Elections And Political Activities' (*ADRIndia*, 2014).<http://adrindia.org/sites/default/files/Impact_of_Black_Money_in_Elections_and_Political_Activities.pdf> accessed 25 April 2019.

[58] *State of UP v Raj Narain* 1975 AIR 865.

[59] *SP Gupta v. Union of India*, AIR 1982 SC 149.

[60] *Ibid.*

[61] *Ms. Anumeha, C/o Association for Democratic Reforms v. Commissioner of Income Tax* (Central Information Commission, 2008) <https://ciconline.nic.in/rti/docs/cic_decisions/AT-29042008-01.pdf> accessed 27 April 2019.

[62] *Ibid.*

was that a political party is not a "public authority" as required under Section 2(h) of the RTI Act, and on this ground the application should be dismissed.[63]

The Central Information Commission (CIC) primarily stressed on the sacrosanct nature of information in a democratic society. It went on to state that public interest was involved as knowledge of the sources of political funding would enable citizens to make an informed decision about whom to vote. It further noted that given the kind of influence political parties exercise on political dynamics, transparency in their organisation and functioning is part of a democratic process and hence, in public interest. Additionally, it observed that the general rule is that information should be provided under the RTI Act and information can be denied only under exceptional circumstances. Drawing support from previous decisions of the CIC, it was held that while the IT returns of an assessee are confidential in nature, the Chief Income Tax Commissioner is empowered to make disclosure of any information which is in public interest as per Section 138(1)(b) of the IT Act 1961. The CIC, thus, allowed the disclosure of the IT returns of political parties, though it disallowed the disclosure of PAN details.

While the *Anumeha* case did not explicitly bring political parties under the RTI Act, it laid the foundation for the landmark CIC order in 2013. The order in *Mr. Anil Bairwal v. Parliment of India,*[64] which ensued following the refusal to furnish information to Association of Democratic Reforms by political parties with respect to, *inter alia,* donations and modes of contribution. To arrive at its conclusion, the CIC perused the nature of political parties and declared them to be "public authorities" under Section 2(h) of the RTI Act. The CIC based its order on answers to three major questions: whether there existed substantial State financing, discharge of public duty, and a constitutional and legal framework with respect to political parties. Answers found were affirmative.

However, in the aftermath of the aforesaid 2013 order, all the six political parties involved in the case showcased blatant disregard to its mandate. On March 16, 2015 the CIC admitted that it did not have enough tools at hand to ensure compliance of its 2013 order.[65] However, it stated that the 2013 order remains final and binding on the respondent political parties since it has not been taken to the court.

Subsequently, a PIL was filed before the Supreme Court on the issue of inclusion of political parties under the ambit of RTI, which has named the ECI, the six national parties and the Union of India as respondents. The matter is *sub judice*, though the Union of India has cleared its stand that it opposes the inclusion of political parties within the ambit of the RTI Act on the ground that there are necessary safeguards already existing in the form of the IT Act 1961 and the RPA 1951. As of now, the CIC order remains valid which means that political parties are public authorities; the only obstacle is the lack of political will to comply with it.

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[63] *Ibid.*
[64] *Mr. Anil Bairwal v. Parliment of India,* CIC/SM/2011/001386; CIC/SM/2011/000838.
[65] Ibid.

3. Statutory Ceiling On Election Expenditure Should Be Removed

The ECI,[66] Law Commission[67] and the National Commission to Review the Working of the Constitution[68] (National Commission) have suggested that expenditure limits in relation to elections should be rationalised over time and should be determined on the basis of data on total expenditure incurred or authorised by candidates and political parties with respect to elections. The National Commission recommends another alternative—removal of the expenditure limit altogether and placing prohibitions on certain forms of expenditure.[69] However, the authors argue that putting selective prohibitions will not solve the problem of unwarranted expenditure. This is because political parties and candidates can easily show expenditure under the other allowed categories and keep spending as much as they want and without disclosing the actual sources of funds.

Moreover, these suggestions envisage an ideal environment of elections where the exact estimate of expenditure is known. In the present Indian scenario, the available figures show that election expenditure incurred by the ECI towards the conduct of elections is in itself gigantic, coupled with the expenditure incurred by political parties and candidates. Today, electioneering has transcended the traditional boundaries; there is an increased involvement of social media and technology for the dissemination of information and conduct of affairs. Political parties incur hundreds of crores as election expenditure, though on paper the expenditure is represented to be at unbelievably low levels.

Presently, due to the expenditure ceilings in place, candidates underreport their expenditure, and their respective political parties take care of the additional expenditure without any accountability. Even if sanctions were to be provided, such sanctions can only be imposed provided the accounts maintained by candidates and political parties indicate the breach of the expenditure limits. In absence of full state subsidy, it is impossible to adequately determine the accuracy of the accounts furnished by candidates or their political parties. It is, therefore, recommended that the said expenditure ceilings should be completely removed and an effective disclosure mechanism should be put in place. This is owing to the fact that these ceilings, in reality, have been counter-intuitive and have done more to increase expenditure than to curtail it.

4. There should be Strict Implementation of Uniform and Transparent Auditing and Accounting Practices

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[66] 'Proposed Electoral Reforms' (Election Commission of India 2016) <https://eci.gov.in/files/file/9236-proposed-election-reforms/> accessed 27 April 2019; 'Election Commission Of India – Proposed Electoral Reforms (2004)' (*India Prospect*, 2019) <http://indiaprospect.org/Blog/?p=19> accessed 27 April 2019.

[67] 'Law Commission Report on Reform of the Electoral Laws' (Law Commission of India 1999) <http://www.lawcommissionofindia.nic.in/lc170.htm> accessed 27 April 2019.

[68] 'National Commission to Review the Working of the Constitution' (Department of Legal Affairs, Ministry of Law, Justice and Company Affairs 2002) <https://www.thehinducentre.com/multimedia/archive/03091/ncrwc_3091109a.pdf> accessed 27 April 2019.

[69] Ibid.

In furtherance of the *PUCL* judgment[70] and the recommendations of the ECI, the 2nd Administrative Reform Commission[71] and National Commission, auditing should be conducted by a special authority, and there should be a mechanism in place that enables cross-checking of IT returns of political parties, candidates and their supporters. Cash transactions should be restricted as much as possible. For example, the ECI revised the threshold of election expenditure through cash in a single day by political parties or candidates to INR 10,000, beyond which the transaction must be by cheque, RTGS or other form of electronic mode.[72] This way, any transaction beyond INR 10,000 will go into the bank's official records and cannot be disregarded during accounting.

There are standard guidelines, as already mentioned, on the accounting practices of the political parties but they are seldom observed. This impedes the whole task of establishing a transparent disclosure framework. It is, therefore, suggested that the recommendations of the ICAI should be given statutory force such that they are binding on political parties. These recommendations include the establishment of principles of income, expenditure, assets and liabilities; maintenance of accounts using accrual methodology; disclosure of income generated from the sale of coupons and publications in accounts among many other things.[73]

5. There should be Strict Criteria for Extension of Tax Exemption to Political Parties

One of the fundamental purposes of disclosure mechanisms is to eliminate illegitimate beneficiaries of political funds. Dormant political parties or "sinks" create a big gap in the institutionalisation of an accountable and transparent framework for political financing. Hence, it is also imperative that conditions for tax exemptions should be strengthened. It is recommended that the IT Act should be amended to include an additional condition that extends exemption only to those parties which have contested elections and won seats in those elections in the past. Such conditions are in place in many developed legal jurisdictions such as Japan and have been effective in curbing the growth of dummy political parties and increasing the engagement of parties in the political sphere.

6. The Election Commission of India should be given mandate to De-Register Political Parties

Talking about de-registration of political parties, it is imperative for the ECI to be empowered to de-register political parties. While the *L. R. Shivaramagowda v. T M Chandrashekar*[74]

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[70] *People's Union for Civil Liberties v Union of India,* (2002) 3 SCR 294.

[71] 'Ethics in Governance' (The Second Administrative Reform Commission 2008) <https://darpg.gov.in/sites/default/files/ethics4.pdf> accessed 27 April 2019.

[72] 'Clarification - Revision Of Threshold Election Expenditure/Donation Through Cash Transaction In A Single Day By The Candidates/Political Parties Above Rs. 10,000/- By Cheque, DD, RTGS/NEFT Or Other Electronic Mode Etc.' (*Election Commission of India*, 2018) <https://eci.gov.in/files/file/9345-clarification-revision-of-threshold-election-expendituredonation-through-cash-transaction-in-a-single-day-by-the-candidatespolitical-parties-above-rs-10000-by-cheque-dd-rtgsneft-or-other-electronic-mode-etc/> accessed 27 April 2019.

[73] 'Guidance Note on Accounting & Auditing of Political Parties' (*ADRIndia*, 2012) <https://adrindia.org/sites/default/files/Guidance_Note_on_Accounting_Auditing_of_Political_Parties.pdf> accessed 27 April 2019.

[74] *L. R. Shivaramagowda v. T M Chandrashekar,* Appeal (civil) 4272 of 1991.

provides for certain grounds on the basis of which the ECI can cancel the registration of a political party, lack of an explicit provision in regards to the same creates a lot of confusion and encourages non-compliance from the end of political parties. Therefore, the MCC should be given statutory force and its violation must be made a ground of de-registration.

7. There should be a Complete Ban on Anonymous Donations from Individuals

Donations coming from individuals are mostly anonymous, and this helps political parties hoard black money with impunity. Political parties sell coupons of multiple amounts to individuals who use them to stash black money and evade responsibility under law. It is recommended that there shall be no permissibilty for anonymous donations from individuals in the political financing mechanism and this could be realized through institutionalizing channels of political financing.

The introduction of electoral bonds has been a step forward. The scheme of electoral bonds was introduced in the Finance Act, 2017, leading to major amendments in the RPA 1951, the IT Act, 1961, and the Reserve Bank of India Act 1934. It became effective through a notification dated 2 January 2018 released by the Ministry of Finance.[75] The purpose of the scheme is to limit donations in cash and create a systematically channelized and institutionalized method of donation.

In this scheme, an electoral bond is a bearer banking instrument to be used for contributing to those political parties which satisfy a certain criteria for eligibility. An eligible political party is the one which, by virtue of Clause 3 of the notification,[76] is registered under Section 29A of the RPA 1951 and had secured at least 1 percent of the total votes polled in the last elections for Legislative Assembly or Lok Sabha.[77] These electoral bonds can be purchased by any "person",[78] who is a Citizen of India or established or incorporated in India. Eligible persons can donate to eligible political parties through these bonds issued in multiples of INR 1000, INR 10000, INR 1 Lac, and INR 1 crore, and the amount goes into the verified account of the political party.[79]

There is a minimum limit of INR 1000 but no maximum limit. Only the State Bank of India is authorized to issue electoral bonds.[80] Further, it is to be noted is that electoral bonds will not contain the name of the donors; however, the details, as required under the scheme, will be maintained with the authorized bank. The amount donated through electoral bonds will be

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[75] 'Notification' (*Income Tax India*, 2018) <https://www.incometaxindia.gov.in/communications/notification/notificationso29_2018.pdf> accessed 26 April 2019.
[76] *Ibid*,cl 3.
[77] *Ibid.*
[78]"An individual, a Hindu Undivided Family (HUF), company, firm, an association of persons or a body of individuals, any other artificial juridical person, any agency, office or branch owned or controlled by such person."
[79] *Supra* note 72. cl 5.
[80] *Ibid.*, cl 2(b).

considered as income by way of voluntary contributions and will be extended exemption subject to the IT Act 1961.[81]

The scheme has, however, been challenged for protecting anonymous donations rather than identifying them. It is to be noted that the scheme does not protect the anonymity of donors in the way it has been argued. Rather, it limits the disclosure to the authorised bank. The bonds can be purchased only by those who have validated Know Your Customer (KYC) and auditing practice.

Any donations made through electoral bonds will be reflected in the accounts of the donors. Political parties which receive donations through bonds must also account for these donations for availing tax exemptions. Thus, admittedly, there is a reasonable standard of anonymity maintained, however, without making it absolute.

Moreover, the scheme is likely to encourage donors to take the cashless route through banks, resulting in the authorised bank recording their identity since the purchaser of the bonds under the scheme is required to furnish a range of information.[82] Such information is treated confidential and shall only be disclosed upon a demand from a competent court or registration of a criminal case.[83] Thus, the scheme does not aim to, and as otherwise claimed by its opponents, discourage transparent behaviour; rather it drives towards cashless financing of political parties.

8. Foreign Contributions to Political Parties and Candidates should be Prohibited

The Finance Act 2017 provides for an indirect route to foreign companies to provide funds to political parties and candidates. The said move can effectively allow foreign powers and businesses to exercise undue influence on policy-makers. This raises alarms, as India has marked a major shift to privatisation and economic liberalisation, and multinational businesses have a lot of stakes involved in India, which they see as a potentially profitable market. It is, therefore, recommended that foreign contributions should not be allowed into the political sphere in any manner possible.

9. Removal of Limit on Corporate Donations should be accompanied by Adequate Disclosure Norms

The Finance Act 2017, as noted earlier, scrapped the ceiling of corporate donations to political parties, and corporates are required to ensure that donations are not made in cash and that they are reflected in the profit and loss statement of the company.[84] Having a ceiling does not actually make a difference when it comes to curbing inflow of black money into the system. In the contemporary world, it is nearly an impossible task to contain donations from companies. However, what can be feasibly done is to allow companies to donate so long as

[81] *Ibid*, cl 13.
[82] *Ibid*.
[83] *Ibid.*
[84] Companies Act, 2013, s 182.

there are adequate disclosure measures which encourage them to resort to legitimate routes of donation-making.

10. Independent Candidates should not be Allowed to Run for Elections

There have been calls for prohibition on independent candidates from competing in elections, especially from the Law Commission and ECI in their respective reports. These calls are based on sound reasons with which the authors share agreement. There is no doubt that the number of independent candidates has increased. In 2014, there were total 3234 independent candidates for the General Election. However, it is to be noted that the rate of forfeiture of security deposits was at a staggering 99.5 percent. More surprisingly, there have been 97.92 percent independent candidates who forfeited their security deposits from 1951 to 2014.[85] Adding to this, the rate of success is dismal, and the facts show that barring a few early elections there has been no substantial success of independent candidates in the political field ever since the 1989 General Elections. In 2014, the number of victorious independent candidates stood at 3.[86]

Independent candidates are often bogus candidates or party defectors.[87] Quite often, they are those candidates who were previously affiliated with political parties and were denied tickets. Lately, there has been rise of the unscrupulous practice of political parties pitting independent candidates against candidates from competing parties.[88] This is particularly problematic as political parties fielding an independent candidate, use their unaccounted money in supporting the latter's campaign, and they do not have to account for these expenses ultimately.

Considering the aforesaid problems with independent candidates, it is recommended that independent candidature should not be allowed. Only political parties should be allowed to field candidates in the elections. It may be argued that such recommendation will disturb the level playing field, as political parties usually field rich candidates. However, it is to be noted that the recommendation is to disallow independent candidature, not formation of political parties.

Independent candidates, practically, stand on an unequal footing with candidates affiliated with political parties. Political parties do not have to pay taxes on the donations they receive, and there is virtually no limit on how much they can spend on elections. It appears to be a feasible option to form a party and fight on its strength since there will be added advantages which independent candidates do not get. Moreover, if such change were implemented, it will assist in monitoring election expenditure in a relatively more accountable fashion.

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[85] Alia Chughtai and Saif Khalid, 'India Elections: All You Need to Know' (*Aljazeera*, 2019) <https://www.aljazeera.com/indepth/interactive/2019/04/indian-elections-190410185739389.html> accessed 27 April 2019.

[86] *Ibid.*

[87] 'Electoral Reforms' (Law Commission of India 2015).

[88] *Ibid.*

Conclusion

India has had a history marked by oppression and lack of representation in the governance system. People of India come from myriad backgrounds differentiated on the basis of a number of factors such as age, race, creed and caste, and this mandates that their voices are heard by those who are at the helm of public affairs. However, in a country as enormous as India and with people having disproportionate access to education and resources, the framers of the Indian Constitution felt the need to introduce a representative form of parliamentary democracy which enables everyone, even those from the lowest rungs of social and economic class, to come forward and represent their views. Hence, a multi-party system was understood to be the best option available.

To secure the aforesaid diversity in the political sphere, it was imperative to remove restrictive constitutional and statutory limitations on the creation and operation of political parties. In the current legislative framework, it is easily noticeable that the constitutional framers and initial legislators of independent India wanted to ensure that political parties can perform at their highest capacity and also wished to help in greater mobilisation and encouragement of the public in the governance of the country. One such area where legislators intentionally relaxed the grip of law was political financing. The idea was to enable political parties to secure funds as unrestrictedly as possible so that they can contribute greatly to the development of a conscious electorate. Therefore, there are many benefits which are offered to political parties such as tax exemption on income, non-disclosure of sources of income up to a certain limit, non-restriction to receive contributions beyond conventional methods such as membership fees, lack of limitations on corporate funds, indirect state subsidy and minimal intervention in internal organisation.

There is no denying the fact that in the contemporary world, political parties cannot effectively operate with excessive restrictions on their sources of income. Electioneering has become expensive, especially in a country like India where the burgeoning population among many other things poses great pressure on the ECI to conduct elections properly. However, the cost of electioneering is one thing, and inducing opacity in political financing is another thing.

Black money has become a menace to the legitimacy of democracy. Money gives power, and this power is displayed through many material representations such as public meetings, rallies, transportation, gun-show, paid news among other forms. The laxity with which the existing legal framework treats political financing allows black money to remain shrouded in mystery—this only doubles the task of unearthing unaccounted money and imputing liability to those responsible for black politics. Many have considered the potential benefits of introducing state subsidy but in absence of complete state subsidy, it is impossible to identify the flow of unaccounted money in politics.

There is also political unwillingness to effectively combat black politics which is evident from a series of incidents and representations before courts. One glaring example concerns bringing political parties within the purview of the RTI Act 2005. Following the 2013 order

of the CIC declaring political parties as "public authorities" under the RTI Act, there was a show of blatant disregard to its mandate. In 2015, when the CIC was hearing on a non-compliance application, political parties concerned did observe the notices it had sent them repeatedly.

Bringing political parties within the purview of the RTI Act will ensure transparency with respect to the manner in which political parties operate and provide sufficient tools to voters to exercise their voting rights in an informed manner. Political parties, however, have evidently not considered the right to make informed decision fundamental to ensuring transparent and accountable democracy. Another glaring example concerns the discreet amendment made to the FCRA 2010, which provides for an indirect route to foreign sources to fund political parties in the country and was aimed at nullifying the 2014 Delhi High Court judgment against Congress and BJP.

The aforesaid discussion only leads us to one conclusion: we need to immediately overhaul the entire governance framework with respect to political financing. Instead of containing the in-flow of unaccounted money through superficial methods, it is preferable to implement disclosure mechanisms that allow the State to know the sources of funds and areas of expenditure. There is enough evidence to prove that excesses in arresting the flow of money in political financing have only encouraged opacity.

The point is to accept that it is impossible to completely plug in funds in the political sphere. Instead, if we recede on the front of restrictions and step up on the front of disclosure, political parties and candidates will be motivated to disclose their sources. Once that is accomplished, a transparent network is put in operation that will be of great assistance in tracking down black money because the whole problem lies in the fact that the State does not know how much black money there, which is the most crucial aspect for initiating any action.

Journal of Legal Studies, International Refereed Peer-Reviewed Journal
ISSN 2321-1059, Vol. 7, Issue II, July 2019
www.journaloflegalstudies.co.in

Domestic Worker's Protection under the Social Security Agreements: An International Perspective

Prerna Gulati[1]
Prof. (Dr.) Arvind P. Bhanu[2]

Introduction

It is pertinent to mention that the NCW draft of 2010 and Delhi draft Bill of 2012 are not extended to domestic workers employed outside India. Issues pertaining to protection of migrant domestic workers outside India are regulated by the agreements based on the instruments of the UN and ILO. The ILO Convention No. 97, 143, 189 and the UN Convention of 1990 on protection to migrant workers and their family's members, have suggested that member nations may enter into any agreements with recruiting states for the provisions of such social security protection, recruitments, placement, *etc.*[3]

International Perspective

India has created eight social security agreements (hereinafter, SSAs) with Belgium, Germany, Switzerland, Denmark, Luxembourg, France, South Korea and the Netherlands for the purpose of social security protection to Indian workers employed in those countries. It is seen that the SSAs are bilateral mechanisms to guard the social security interests of workers working in another country. Being a reciprocal arrangement, it generally provides for equality of treatment and avoidance of double coverage. Generally, the SSA applies to employees sent on posting in another country, provided they are complying under the social security system of the home country.[4]

It also provides for stipulation of payment of pensionary benefits, directly without any reduction, to the beneficiary choosing to reside in the territory of the home country and also to a beneficiary choosing to reside in the territory of a third country. Further the period of service rendered by an employee in a foreign country is counted for determining the eligibility for benefits, but the quantum of payment is limited to the length of service, on pro-rata basis.

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[1] ***Research Scholar, Mewar University, Rajasthan.***
[2] ***Professor, Amity Law School, Noida.***
[3] *Available at* https://www.jstor.org/stable/44782502?seq=1 (last visited on 14th May, 2019).
[4] *Available at* http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Social%20Security%20Agreements.pdf (last visited on 21st March, 2019).

It is also pertinent to mention that the scope of most of SSAs, to which India is one of the signatories, is limited to old age pension or survivor's pension and permanent total disability insurance only. It is important to mention that the SSA with the Netherlands covers additional social security protection benefits in the form of maternity benefits, unemployment benefits, and children allowances. Social security protection such as minimum rate of wages, employment injury, maternity benefits, and other welfare measures like housing facilities, recreational facilities, medical facilities, and working conditions, are beyond the scope of these SSAs. It is felt that the jurisdiction and amplitude of the SSAs are required to be enhanced to cover the Indian migrant workers against any exploitation at the hands of employers in the host countries.[5]

It is very difficult to discover the effectiveness of these SSAs and whether the parties to these SSAs have been able to provide any protection to workers in their respective countries or not. This is a matter of further research.

The domestic workers are recognized as servants or maids by their so called masters, leading to feelings of lack of self-confidence and inferiority. Such below dignity approach and living and working conditions of these workers have led to extensive dishonor perpetrated upon domestic workers and their work. It is important to unearth that the terms and conditions of employment contract of domestic workers are drafted in such a way that it enhances the scope of exploitation by employers. The classification of such workers into documented (legally employed, with proper authorized documents) and undocumented (illegally employed, without any authorized documents) domestic workers is important for the purpose of extending protection.

Living and working conditions of skilled workers are better as compared to manual workers such as domestic workers. This is due to the fact that there is a wide gap between demand and supply of unskilled workers. Bargaining capacity of manual workers such as domestic work force, against their employers, is not as sound as compared to skilled workers. Migrant domestic workers are not treated at par with native domestic workers in respect of remuneration, social security protection and worker's welfare. Guaranteed minimum rate of wages, which is considered a fundamental right by the UN and the ILO, is not paid to migrant domestic workers.[6]

No respect for human rights of domestic workers

It has also been noticed that living and working conditions of domestic workers are pathetic all over the world. Like an ordinary human being, a domestic worker is entitled to all the human rights, like equality, life with dignity, social security, right to freedom of expression, associations, and profession, protection against exploitation, health and safety protection of

[5]*Available at* https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/migrant-workers/lang--en/index.htm (last visited on 8th Feb, 2019).

[6]*Available at* https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_378058.pdf (last visited on 1st June, 2019).

workers, and labour welfare measures, under municipal law and international instruments. Lack of enforcement of the international instruments and municipal laws on the subject negates the existence of some vital human rights to domestic workers.[7]

Sexual Harassment of Domestic Workers at Workplace

The most severe forms of abuse faced by female domestic workers include sexual, psychological and physical abuse, including violence, food deprivation and confinement. The ILO Convention No. 189 explicitly calls for the effective protection of domestic workers against such conducts. It is observed that few countries have provided for the protection against sexual harassment at workplace. In New York, the Domestic Workers Bill of Rights, 2010,[8] recognizing the employment rights protection deficit for these workers, announced certain protections in the form of protection from sexual harassment and harassment based on gender, race, national origin and religion. In Singapore, the Employment of Foreign Manpower (Work Passes) Regulations, 2012,[9] emphasizes the compliance of conditions of employment to be complied with by employers of foreign domestic workers.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 has included domestic workers within its ambit of protection. Under the Act, for the purpose of redressal of grievances, an employer is under obligation to constitute, an internal complaint committee (ICC), which shall be composed of a woman senior employee, two other employees, and a social worker. In case the ICC is not constituted or grievances are against employer, then the complaints can be filed before the district committee headed by the district magistrate. It is not quite practicable for an employer employing a domestic worker to constitute the ICC consisting of some specified people under the Act.

Working Hour for a day or week for Domestic Worker under Domestic Legislations

The ILO Forty-Hour Week Convention, 193578 has introduced the limit of 40 hours per week, which was endorsed by the Convention of Reduction of Hours of Work Recommendation, 1962,[10] as a social standard to be reached in stages, if necessary. In an

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[7] The Universal Declaration of Human Rights, 1948; Convention on the Elimination of All Forms of Racial Discrimination, 1965; Covenant on Civil and Political Rights, 1966; Covenant on Economic, Social and Cultural Rights, 1966; Convention Concerning Decent Work for Domestic Workers, 2011 and Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 2000 and Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live, 1985.

[8] The Domestic Workers Bill of Rights 2010, s. 296-B.

[9] Employment of Foreign Manpower (Work Passes) Regulations, 2012. Reg. 10 reads:
The employer shall not ill-treat the foreign employee, and shall not cause or knowingly permit the foreign employee to be ill-treated by any other person. A foreign employee is ill-treated if:
(a) the foreign employee is subjected to physical or sexual abuse, or to criminal intimidation:
(b) the employer or other person does, or causes the foreign employee to do, any act which causes or is likely to cause injury to the health or safety of the foreign employee;
(c) the employer or other person neglects or abandons the foreign employee in circumstances which cause or are likely to cause injury to the health or safety of the foreign employee; or
(d) the employer or other person commits an act detrimental to the welfare of the foreign employee.

[10] ILO Convention No. 116.

analogous essence, article 24 of the Universal Declaration of Human Rights recognizes that everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.[11] "The Domestic Workers Recommendation, 2011,[12] gives some guidance on how this determination could be made, recommending that working hours should be recorded and that governments should regulate various aspects (*e.g.*, quantity and remuneration) of stand-by periods, night working, daily and weekly rest and paid annual leave".[13]

ILO in 2019 report, 20.9 million domestic workers (about 39.7 percent of the total domestic work force) are permitted to some limitation of their normal weekly hours as compared to other workers. Further, around 1.9 million (3.6 percent) have some limitation of normal weekly hours, although on less favourable terms than other workers. It is also observed that no upper limit exists on normal weekly hours in national legislation for more than half (29.7 million total domestic workers, or 56.6 percent) of the world's domestic worker's population. "This low level of working time protection is primarily caused by the exclusion of domestic workers from existing national standards on normal hours at work. Only in a minority of cases is it due to the absence of any standard on weekly working hours for all types of workers. At a regional level, the coverage is weakest in Asia and the Middle East, where as statutory limitations on the normal weekly working time of domestic workers are almost universally absent."[14]

Weekly rest for Domestic Workers under Domestic Legislations

According to the ILO conventions such as the Weekly Rest (Industry) Convention, 1921 and the Weekly Rest (Commerce and Offices) Convention 1957, workers are entitled to at least 24 consecutive hours of rest per week. Sufficient relaxation periods and sleep have substantial effects on a worker's mental and physical health and work performance. The necessity of weekly rest under municipal laws has also been reiterated by the Domestic Workers Convention, 2011.

Bye-laws of many countries have already provided domestic workers with the provision of weekly rest. For instance, the labour legislations in both Uruguay and South Africa originate an uninterrupted weekly rest period of 36 hours for domestic workers. In Uruguay, the specified weekly rest period includes the whole day on Sunday, while in South Africa it may be converted, by agreement, to a minimum of 60 consecutive hours every second week.[15]

Annual leave for Domestic Workers under Domestic Legislations

The issue of annual leave acquires particular importance for migrant domestic workers who have family members in their country of origin, and so depend on their paid holidays to be

[11] *Ibid.*
[12] ILO's Recommendation no. 201.
[13] *Ibid.*
[14] ILO's Recommendation no. 201.
[15] Uruguay's Law No. 18,065: Domestic work, 2006 regulates the working condition of domestic workers, *available at:* http://www.parlamento.gub.uy/leyes/ley18065.htm (last visited on 27 May, 2019).

able to reunite with them. The Holidays with Pay Convention (Revised), 1970,[16] establishes the right to annual paid leave of a minimum of three weeks per year. This convention applies to all employed persons including those employed by private households[17] and virtually all countries have a universal statutory minimum entitlement to paid annual leave. The Domestic Workers Convention, 2011[18] also provides for annual leave at the prescribed rate to domestic workers.

Domestic workers across the world, get equal entitlements to annual leave. Around 23.3 million workers, who are mostly employed in Asia and the Middle East, are not entitled to any benefits of annual leave due to the lack of domestic legislations and lack of enforcement of labour laws. In the case of *"No Annual Leave Category"* leave arrangements largely depend upon the discretion of the employer and holidays are often only granted for national festivals.[19]

Lack of social security protections and welfare measures for domestic workers

The report of the Channel 4 of UK reveals that "Domestic Migrant workers work up to twenty hours a day for little pay in one of the nation in the Europe. Around fifteen thousand migrant workers are living as slaves, being abused sexually, physically and psychologically by employers".[20] The investigation report has narrated the real life of a domestic worker in one of the nations in the Europe. One female domestic worker from west Africa, whose former employer was a solicitor, used to work 120 hours a week for little money during the stay of three years with him. She was treated like a slave. A neighbor helped her escape from the wrongful confinement by her employer.[21]

Minimum rates of wages for domestic workers under domestic laws

Guaranteed minimum rates of wages is a classic tool for overcoming irregularities in bargaining power. The Minimum Wage Fixing Convention, 1970 and the Domestic Workers Convention, 2011[22] unambiguously endorse minimum wage coverage for domestic workers. Indian Constitution under article 23 provides for guaranteed minimum rate of wages to all workers. If minimum rate wage is not paid, then it would amount to beggar (bonded labour) resulting in violation of article 23 of the Constitution. The Minimum Wages Act, 1948 has been implemented to enshrine the value of article 23, but unfortunately the said Act is hardly made available to domestic workers by some state governments in India.

Maternity Leave for Domestic Workers under Domestic Laws

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[16]ILO Convention No. 132.
[17]Convention No. 132 applies to all employed persons, with the exception of seafarers, whose paid leave is regulated by the Seafarers' Annual Leave with Pay Convention, 1976 (No. 146).
[18]ILO Convention No. 189.
[19]Decree No. 40/2008 of 26 Nov. 2008, *Regulamento de TrabalhoDomestico*, art. 22.
[20]Amelia Hill, "Many migrant workers in UK are modern day slaves" *The Guardian*, Aug. 30, 2010, available at: http://www.guardian.co.uk/uk/2010/aug/30/migrantworkers-modern-day-slavery (last visited on Jan. 20, 2019).
[21] *Ibid.*
[22]ILO Convention No. 189.

The Maternity Protection Convention (Revised), 1952[23] explicitly provides the domestic workers with maternity benefits.[24] The Maternity Protection Convention, 2000[25] also applies to all employed women, including those in typical forms of dependent work.[26] The Domestic Workers Convention, 2011, is not far behind to take cognizance of necessary maternity benefits for domestic workers.[27]

It has also been observed by the DW Report, 2013 that more than 83 percent of the total domestic work force is composed of female workers. Therefore, it is necessary to provide some fundamental maternity benefits such as paid maternity leave along with medical bonus, *etc*., for at least two children under all domestic laws. The availability of the benefits of maternity leave is a key worry in the domestic work sector. Less than two-thirds (27.6 million) of all female domestic workers as compared to other workers, are entitled to maternity leave under national legislations.[28]

Conclusion and Suggestions

It is suggested that India should establish and revise memorandum of understanding, multilateral or bilateral agreements, including prohibition of holding of documents of domestic workers by recruitment agency or employer, with the countries where large numbers of Indian migrant workers, especially manual or un-skilled workers, are employed. Such agreements should not be confined to statute books but must be implemented in letter and spirit. Sincere commitment to the compliances of social security agreements can certainly reduce the chances of exploitation of such work force.

Although protection related to domestic workers is confined to some major issues pertaining to working conditions, remuneration, social security protection, and welfare measures which must be provided by the employer to all domestic workers, whether inside or outside India, without any discrimination to migrant workers, workers cannot claim these protections unless they are informed about such rights. Sensitization of migrant workers of their rights and liability of employers and capability of enforcing their human rights in case of violation should be given top priority in the campaign for protecting domestic workers. Formulation of association of domestic workers will certainly enhance their bargaining capacity and protect them from exploitation.

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[23]ILO Convention No. 103.
[24]*Id.*, art. 3 (h).
[25]ILO Convention No. 183.
[26]*Id.*, art. 2(1) has two key aims: *first*, to ensure that work does not threaten the health of women and their new-born during pregnancy and nursing, and *second*, that maternity and women's reproductive roles do not jeopardize their economic security. The convention defines the five core elements of maternity protection at work, namely: maternity leave; cash and medical benefits; employment protection and n o n discrimination; health protection; and breastfeeding arrangements at the workplace.
[27] *Ibid.*
[28] Available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/travail/documents/publication/wcms_157509.pdf (last visited on 18th April, 2019).

India has enacted around a 100 labour laws including subordinate legislations, to provide protection to workers on social security, labour welfare, minimum wages, bonus, safety and other retirement benefits. Majority of these labour legislations have failed to secure and ensure effective and efficient enforcement of labour laws, especially laws related to unorganized sector which also includes domestic workers. Therefore, the need of hour is to fix the public accountability of public servants for the failure of enforcement mechanism for enforcing protection to domestic workers under the relevant labour laws in India.

There have been many attempts to regulate the living and working conditions of domestic workers in India. The legislative initiatives include the Domestic Workers (Conditions of Service) Bill 1959, All India Domestic Servants Bill 1959, Domestic Workers (Conditions of Service), Bill 1972 & 1977, and the House Workers (Conditions of Service) Bill, 1989. A private member's bill on the Housemaids and Domestic Servants (Conditions of Service and Welfare) Bill, 2004, was introduced by Shrimati Prema Cariappa on December 3, 2004.[29] The said bill aimed at providing for the conditions of service, such as minimum wages, holidays, hours of work, and other living and working conditions for the housemaids and domestic servants so as to eliminate their exploitation by their employers and for the welfare measures to be undertaken by their employers and the state and for matters connected therewith and incidental thereto.[30] Due to various social, economic and political reasons these bills could not get through the Parliament.

Since the subject matter of domestic workers falls within the jurisdiction of the states, the Central Government, in order to ensure uniformity and equal protection to domestic workers in various states, should frame a national model law. The model draft of 2010 framed by the NCW for the protection of domestic workers against any kind of exploitation including human trafficking for domestic work at the hands of employers and recruiting agencies, after the changes suggested, may be considered as a national model law for the state governments to frame uniform enactments for the protection of domestic workers. The proposed national model law is almost in compliance with the ILO Convention No. 189 on domestic workers and is capable of promoting the interests of domestic workers. The subsistence of human dignity is more precious than any kind of profit at the cost of human beings and it is the duty of the state to protect and promote human rights of each and every citizen. Therefore, the state governments should ensure the strict compliance of such model law for the protection of domestic migrant workers.

[29]*Available at:* http://previous.wiego.org/informal_economy_law/india/content/dm_housemaids_bill_2004.pdf (last visited on Mar. 14 (2019).
[30]*Available at:* http://previous.wiego.org/informal_economy_law/india/content/dm_housemaids_bill_2004.pdf (last visited on Mar. 14 (2019).

Industry: A study of Judicial Interpretations in Post-Independence Era

Dr. Pradeep Kumar[1]
Dr. Raju Majhi[2]

Introduction

During post-independence era we have witnessed the major development of a new jurisprudence, namely the 'Industrial Law'. The Industrial Law in pre-independence days was in a rudimentary form. But later on with the rapid development of industry, the Industrial Law developed side by side. Though, the growth of this law was slow in the beginning but gained its momentum in the recent years as is evident from the bulk of cases before the Supreme Court of India on Industrial Law matters. In the same one of the term 'industry' has been interpreted by Supreme Court from time to time either to expansion and narrower down the meaning of the industry as defined under the Industrial Disputes Act, 1947.

Trade or manufacturing the general, specific that concerned with a particular business as the automobile industry, the steel industry, diligence in employment, steady attention to work or business. In other word industry means any economic activity concerned with the processing of raw materials and manufacturing of goods in factories.

In ordinary sense 'industry' or business means an undertaking where capital and labour co-operate with each other for the purpose of producing wealth and for making profits. The word 'industry' in its widest scope and 'sovereign functions' within a limited orbit, industrial adjudication has greatly been influenced by the aforementioned precepts. An enterprise cannot, therefore, be excluded from the ambit of the Act merely because of the individual predilection of a judge.[3]

The definition of 'industry' has evolved and expanded significantly over a period of time by the legislative acts and judicial decisions. The journey of such evolution has been symbolic primarily because of lack of clarity in the legislative intent as embodied in the law and conflicting judicial approaches regarding the ambit of such definition. This paper aims to examine the definition of 'industry' and given in the Section 2(j) of the Industrial Disputes

[1] ***Assistant Professor, Faculty of Law, BHU, Varanasi.***
[2] ***Assistant Professor, Faculty of Law, BHU, Varanasi.***
[3] Bushan Tilak Kaul, 'Industry', 'Industrial Dispute', and 'Workman': Conceptual Framework and Judicial Activism, *Journal of the Indian Law Institute*, January-March 2008, Vol. 50, No. 1 (January-March 2008), p. 3.

Act, 1947 and the judicial interpretation from time to time, particularly post-independence era and finally it concluded with some remarkable observations.

Meaning and Definition

The term 'Industry' has been defined under the Industrial Disputes Act, 1947 (I.D. Act, 1947) as "Industry" means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen.[4]

It is very pertinent to mention here that according to the terminology of this definition one can easily identify any business activity or trade as an industry in order to attract the provisions of the Industrial Disputes Act, 1947. Normally speaking by industry it is meant production of goods, and wealth and with the cooperation of labour and capital, but it is not so under this Act.

This definition is in two parts. The *first part* says that industry means any business, trade, undertaking, manufacture or calling of employers and the second part provides that it includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen. If the activity can be described as an industry with reference to the occupation of the employers, the ambit of industry, under the force of the second part takes in the different kinds of activities of employees mentioned in the second part.

The *second part* of the definition i.e. any calling, service, employment, handicraft or industrial occupation or avocation of workmen gives the extended connotation to the definition and views the matter from the angle of workmen and is designed to include something more in what the term primarily denotes.

The *first part* of the definition determines an industry by reference of occupation of employers in respect of certain activities. The activities are specified by five words namely, ***'Business', 'Trade', 'Undertaking', 'Manufacture',*** or ***'Calling'***. These words determine what an industry is and what the cognate expression 'industrial is intended to convey.

Now, it is very relevant to discuss in brief what does mean by these words. Have a look on these words.

'**Business**' is a word of wide import. This expression is wider than the term 'trade' and is not synonymous with it and means practically 'anything which is not occupation as distinguished from pleasure.'

'**Trade**' is not only in the etymological or dictionary sense, but also in legal usage, a term of widest scope; it may mean the occupation of a smaller shopkeeper equally with that of commercial magnate and may also mean a skilled craft. The word 'trade' in its primary meaning is exchange of goods for goods for money' and in its secondary meaning it is 'any

[4] Section 2(j) of the Industrial Disputes Act, 1947

business carried on with a view to profiting whether manual or mercantile, as distinguished from the liberal arts or learned professions or from agriculture.

The occupation of men in buying and selling barter or commerce is generally considered, as trade. Occasionally the work especially skilled work is also considered as a 'trade', e.g., the trade of goldsmith. But in the other sense 'trade' would include only persons in a line of business in which persons are employed as workmen. An activity whether it is 'trade' or 'business' will be an industry because both have been included in the definition of industry.

The word '**undertaking**' is the most elastic of all used in the definition. Though the word 'undertaking' in the definition of "industry" is wedged between business and trade on the one hand and manufacture on the other, and though therefore it might mean only a business or trade undertaking, still it must be remembered that if that were so, there was no need to use the word separately from business or trade. It therefore follows that the word "undertaking," covers much more than trade or business. This has also been held by the Supreme Court in *D. N. Banerjee v. P. R. Mukherjee* case.[5]

According to 'Webster's Dictionary 'undertaking' means 'anything undertaken or any business, work or project which one engages in or attempts as an enterprise. The word 'undertaking' lid the context of the definition has been understood to mean 'any business or any work or project which one engages in or attempts as an enterprise analogous to business or trade"[6].

'**Manufacture**' is kind of productive activity in which the making of articles or materials (often on a large scale) is by physical labour or mechanical power.

The Second part of definition is any calling, service, employment, handicraft or industrial occupation or avocation of workmen.

"Calling"
The wider import is attracted even more clearly by the latter part of the definition which refer to "calling, service employment or industrial occupation or avocation of workmen.

"Service"
Mumbai Tiffin services can also under the term of industry under the Industrial Disputes Act, 1947

"Employment"

[5] A. P. A., Meaning of 'Industry' under the Industrial Disputes Act, 1947, *Journal of the Indian Law Institute*, Vol. 3, No. 2 (Apr.-June, 1961), pp. 251-264.
[6] *Supra Note 2* at p. 6. Bushan Tilak Kaul, 'Industry'' 'Industrial Dispute,' and 'Workman': Conceptual Framework and Judicial Activism, *Journal of the Indian Law Institute* , January-March 2008, Vol. 50, No. 1 (January-March 2008), p.6.

Employment' means the contract of service between the employer and the employee. Employment is defined as persons of working age who were engaged in any activity to produce goods or provide services for pay or profit, whether at work during the reference period or not at work due to temporary absence from a job, or to working-time arrangement.

"Handicraft"

In India handicraft is included in the term of industry after the revaluation of Russia *Marshal Tito* was gave a new concept of industry. 'Handicraft' means any manual labour exercised by way of trade or for purposes of gain in or incidental to the making of any article or part of an article.

"Industrial Occupation" or

Industrial Occupations of persons, who are employed intermittently, are temporarily out of the labour force, or are producing goods and services for their own consumption only usually will not be included.

"Avocation of Workmen"

On the basis of Yugoslavia the without any employer is also include in the term of industry under Section 2 (j) of Industrial Disputes Act, 1947. Avocation' means the way in which a man passes his life or spends his time. The word occupation has wider significance than avocation.

Essential ingredients:

1. There must be systematic activity.
2. Such activity must be carried on by Co-Operation between employer and his employees.
3. It is immaterial whether the workmen are employed by the employer directly or by or through any agency, including a contractor.
4. The object of the systematic activity must be the production, supply or distribution of goods or services.
5. The production, supply or distribution of goods or services must be with a view to satisfy human wants or wishes.
6. It is immaterial whether any capital has been invested for the purpose of carrying on such activity.
7. It is immaterial whether such activity is carried on with a motive to make any gain or profit.

Apart from this an attempt has been made to substitute the definition of term 'industry' by an amendment. Let us have a look on amended definition of the term 'industry'.

Amended Definition of 'Industry' Under the Industrial Disputes (Amendment) Act, 1982[7]

[7] The definition of term 'Industry' is substituted by Industrial Disputes (Amendment) Act, 1982. But the amended definition has not yet been enforced.

'Industry' means any systematic activity carried on by co-operation between an employer and his workmen (whether such workmen are employed by such employer directly or by or through any agency, including a contract) for the production, supply or distribution of goods or services with a view to satisfy human wants or whether or not;

i) Any capital has been invested for the purpose of carrying on such activity; or
ii) Such activity is carried on with a motive to make any profit or gain and includes;
   a) Any activity of the Dock Labour Board established under Section 5-A of the Dock Workers;
   b) Any activity relating to the promotion of sales or business or both carried on by an establishment,

but does not include:

(1) any agricultural operation except where such "agricultural operation" is carried on in an integrated manner with any other activity and such other activity is the predominant one.

Explanation: For the Purposes of this sub-clause "agricultural operation" does not include any activity carried on in a plantation as defined in clause (f) of section 2 of the Plantation Labour Act, 1951; or

(2) Hospitals or dispensaries; or
(3) Educational, scientific, research or training institutions; or
(4) Institutions owned or managed by organization wholly or substantially engaged in any charitable, social or philanthropic service; or
(5) Khadi or village industries; or
(6) Any activity of the Government relatable to the sovereign functions of the Government including all the activities carried on by the departments of the central government dealing with defence research, atomic energy and space; or
(7) Any domestic service;
(8) Any activity, being a profession practised by an individual or body of individuals, if the number of persons employed by individual or body of individuals in relation to such profession is less than ten; or
(9) Any activity, being an activity carried on by a co-operative society or a club or any other like body of individuals, if the number of persons employed by the co-operative society, club or other like body of individuals also in relation to such activity is less than ten;

It is very significant to note here that the Industrial Disputes (Amendment) Act, 1982 enacts altogether different definition of industry. This amended definition has not been enforced till now. It nullifies the effect of many judicial decisions and attempts to clarify conflicting views arising out of different interpretations of the word 'industry' adopted by the Supreme Court in various cases. On account of conflicting judicial decisions it had become difficult to understand the meaning of the word industry. The amended definition incorporates to a

greater extent the views of the Supreme Court expressed in the case of *Bangalore Water Supply v. A. Rajappa*[8].

After discussing the definitions and meaning of industry, it makes us clear that what we mean by industry. But this word 'industry' plays a very prominent role in the Industrial Disputes Act, 1947. Our judiciary has given a wide importance to interpret the word 'industry' to widen the scope of Industrial Disputes Act, 1947. Therefore, it is very relevant to have a look on judicial interpretation.

Judicial Interpretations

The *Bombay Province v. W. I. Automobile Association*[9] was the first case which required the understanding of the term 'industry' as used in the Industrial Disputes Act was faced with a problem to decide whether an association of automobile owners which simply rendered services to its members and had motive to make profit could be held an industry for the purposes the Industrial Disputes Act, 1947.

The Bombay High Court held that the Automobile Association was an industry though it no motive to make profit. Interpreting the statutory language section 2 (j) of the Act, the court pointed out that profit motive be essential for a business, trade or manufacture but, observed *Chagla, G. J.* "there is no indication in the section itself that the under taking referred to in this definition clause must be undertaking carried on for the purpose of making profit. The expression 'calling' is also sufficiently wide to include in its activities not necessarily concerned with profit motive."

In *V. S. Marwari Hospital v. Its Workmen*[10], the Labour Appellate Tribunal held that section 2(j) of the Industrial Disputes Act, 1947, is of wide amplitude and is not *ejusdem generis* with the word "business or trade" used in the section. It was held that if judged by the object and scope of the Act and the other provisions of the Act, the plain meaning of the word could not be cut down to limit it to profit making enterprises only. Hence charitable institutions like hospitals, universities, free schools or colleges or public bodies like municipalities would come within the concept of 'undertaking' as used in section 2(j) of the Industrial Disputes Act, 1947.

In *D. N. Banerjee v. P. R. Mukherjee*[11] case the Chairman of Budge Municipality dismissed two of its employees, namely, Mr. P.N. Ghose the sanitary inspector and Mr. Pc. Mitra the head clerk, on complain against them for negligence, insubordination and indiscipline. The Municipal Workers Union questioned the propriety of the dismissal and claimed that they

[8] AIR 1978 SC 548.
[9] A.I.R. 1949 Bom. 141.
[10] 4 F.J.R. 295 (L.A.T. Calcutta) (1952).
[11] A.I.R. 1953 S.C. 58.

should be reinstated. The matter was referred by the Government to the Industrial Tribunal for adjudication under the Industrial Disputes Act, 1947.

The Tribunal directed reinstate but the municipality challenged the award before the High Court and ultimately before the Supreme Court on the grounds that municipality in discharging its normal duties connected with local self government was not engaged in any industry. So the provisions of the I.D. Act were not applicable dispute was not an Industrial Dispute and therefore could be no reference to Industrial Tribunal.

The Supreme Court was faced with the problem whether a municipality is covered by the term "industry" as defined under section 2 (j) of the Industrial Disputes Act, 1947. The Court held that the conservancy service rendered by the municipality was an industry and the dispute between the municipality and the employees of the conservancy department was an industrial dispute within the meaning of the Industrial Disputes Act, 1947.

In this case *Justice Krishna Iyer* explained the concept and characteristics of industry as follows:

A. where
   (i) Systematic activity;
   (ii) Organised by Co-operation between employer and employee;
   (iii) For the production and distribution of goods and services calculated to satisfy human wants and wishes.
B. Absence of profit motive or gainful object is irrelevant;
C. True focus is functional and the decisive test is the nature of the activity with special emphasis on the employer employee relation;
D. If the organization is trade or business it does not cease to be one because of philanthropy animating the undertaking.

In *Baroda Borough Municipality v. Its Workmen*[12] case the workmen employed in the electricity department of the Baroda Municipality demanded bonus. The electricity undertaking of Baroda Municipality was held to be an industry. In *D. N. Banerjee* & *Baroda Borough Municipality* two cases it has been finally and authoritatively held that those branches of municipality are included in the definition of an Industry, which can be regarded as analogous to the carrying on of a trade or business.

In *State of Bombay v. Hospital Mazdoor Sabha*[13] the fact of the case were, Mrs. Vatsala Naryan and Mrs. Isaac were employed in J.J. Group of Hospital. The superintendent terminated the services of these employees after serving a notice. Later on two state servants discharged from civil supplies department were appointed in their place. The Hospital Mazdoor Sabha was a registered Trade Union of the employees of hospital in the State of

[12] A.I.R. 1957 S.C. 110.
[13] AIR 1960 SC 610.

Bombay. The Union filed a writ petition in the Bombay High Court claiming mandamus[14] directing the State of Bombay to reinstate these employees in their post. It was contended that the retrenchment of the employees was illegal as it did comply with the mandatory provision of Section 25 F and 25-H of the Industrial Disputes Act, 1947.

The writ petition was resisted by the state of Bombay on the grounds that the termination order was not invalid and the writ was unjustified. It was misconceived as much as JJ. Group of Hospital did not constitute an industry. Therefore, relevant provisions of the Industrial Disputes Act, 1947 are inapplicable. *Chief Justice Chagla* speaking for the division bench of the High Court observed that when we look at the definition of industry it is not confined to an activity of a commercial character. Industry is not only any business or trade or manufacture, but it is also an undertaking or calling of employers.

The Bombay High Court reject the objections raised by the state of Bombay and decided in favour of the employees, the writ of mandamus was issued in favour of the employees holding that JJ. Hospital Group is to be industry within the meaning of Sec. 2 (j) of Industrial Dispute Act, 1947. State of Bombay filed an appeal in the Supreme Court argued under Article 133 of the Constitution of India, 1950 on the ground that there involved a substantial question of law.

The Supreme Court realised the difficulty in stating the possible attributes of industry. The Supreme Court observed that:

1. An activity, systematically or habitually undertaken
   (A) For the production or Distribution of goods;
   (B) For rendering of martial service to community at large, or a part of such community with the help of employees as an undertaking.
2. Such activity generally involves the co-operation of employers and Employees.
3. The object is the satisfaction of martial human needs.

The Supreme Court thus dismissed the appeal of the State of Bombay and decided in favour of ward servants approving the decision of the Bombay High Court; Hospital is an undertaking under Sec. 2 (j) of I.D. Act, 1947.

In the case of the *Osmania University v. Industrial Tribunal*[15] the High Court of Andhra Pradesh held that the Osmania University was not an "industry" within the meaning of section 2(j). The court insisted on the co-operation of capital and labour (rather than employer and employees) and the activities connected directly with or attendant upon, the production or distribution of wealth, as the essential requisites for the test of an industry. The court held the co-operation between labour and capital being the significant and distinctive test it follows

[14] Mandamus means a command; it is used to enforce the performance of public duties by public authorities.
[15] 18 F.J.R. 440 (H.C. Andhra) (1960).

that any educational institution where the co-operation does not exist would not be covered by the definition of an industry.

But very short span of time, after three years in *Corporation of Nagpur v. It Employees*[16] the Apex Court has given a new interpretation and scope of "industry" to those branches of municipality not be analogous to the carrying on of a trade or business. The court rejected this argument that only those activities of municipalities analogous to trade or business would be industry within the meaning of the definition of "industry" in the Act, with a remark that it was "the result of an incorrect reading of the earlier two decisions *D. N. Banerjeev. P. R. Mukherjee* and *Baroda Borough Municipality* cases. Rao, Subba J., for the court, observed "we have already indicated our view on the section having regard to the clear phraseology the section cannot be confined to trade or business trade or business".

The court held that:

1. The definition of industry in the Act is very comprehensive. It is in two parts. One part defines it from the stand point of employer and the other from the stand point of the employee if an activity falls under either part of the definition, it will be an industry within the meaning of the Act;
2. The history of industrial dispute and the legislation recognises the basic concept that the activity shall be organised one and not that which pertains to private or personal employment;
3. If a service rendered by an individual or a private persons would be an industry, it would equally be an industry in the hands of a corporation;
4. If a service rendered by corporation is an industry the employees in the departments connected with that service whether financial, administrative or executive would be entitled to the benefits of the Act;
5. The regal functions prescribed as primary and inalienable functions of State though statutorily delegated to a corporation are necessarily excluded from the purview of the definition such regal function shall be confined to legislative power, administration of law and judicial power;
6. If a development of a municipality discharges many functions, some pertaining to industry as defined in the Act and the other non-industrial activities, the predominant functions of the department shall be the criterion for the purposes of the Act.

In *Lalit Hari Ayurvedic College v. Lalit Hart Ayurvedic College of Pharmacy*[17] case this appeal by special leave arises from an industrial dispute between Lalit Hari Ayurvedic College Pharmacy, Pilibhit (hereinafter called the appellant) and L. H. Ayurvedic College Pharmacy Workers' Union, Pilibhit (hereinafter called the respondent). It appears that the appellant had terminated the services of Mr. Mahesh Chandra Sharma, a clerk in its employment and the case of this clerk was taken up by the respondent on the ground that the termination of his services was unjustified and illegal.

[16] A.I.R. 1960 S.C. 675.
[17] AIR 1960 SC 1261.

The dispute thus raised by the respondent was referred for, adjudication by the State Government of Uttar Pradesh.

The tribunal held that the dispute between the parties was an industrial dispute and overruled the objection raised by the appellant that the activity carried on by it was not an industry under Section 2(j) of the Industrial Disputes Act. The tribunal also found that the dismissal of Mr. Sharma was illegal. In the result the case set up by the respondent was upheld and an order was passed for the reinstatement of Mr. Sharma.

Supreme Court held that we have already held in *State of Bombay v. The Hospital Mazdoor Sabha*, Civil Appeal No. 712 of 1957 decided today: On the broad facts held proved there can be no doubt that the activity of the appellant is an undertaking under Section 2(j). We ought to add that in this appeal we are not called upon to decide whether running an educational institution would be an industry under the Industrial Disputes Act, 1947.

In the case, *Ahmadabad Textile Industry's Research Association v. State of Bombay*[18], the issue was whether an association for research, setup and maintained by the textile industry and employing technical and other staff, was an 'industry'.

It appeared to the Appellate Tribunal that the students were not taught in the Pharmacy although it may be that in order to give the students an idea of large-scale production of Ayurvedic medicines students may be brought to the Pharmacy now and then; the primary object of the Pharmacy was to manufacture Ayurvedic medicines for sale in the market. It is on these findings that the appellate tribunal confirmed the conclusion of the original tribunal and held that the Pharmacy was an industry.

In *University of Delhi v. Ramnath*[19] case the Supreme Court says that any dispute between the employees and the University would be outside the Scope of the Act. It was held that educational institutions would not fall within the meaning of 'industry' because their aim was education and the teachers' profession was not to be equated with industrial workers. The work in the university was primarily carried on with the help of teachers who were not covered by the definition of "workman" and, therefore, educational institutions like the University of Delhi were not 'industry'. Reading Sections 2 (s), 2 (j) and 2 (g) together, it meant that the work of education carried on by educational institution cannot be said to be an Industry within the meaning of the Act. Therefore, the educational institution viz. University, colleges, schools etc. Are expressly excluded from the scope of industry, irrespective of who runs them and whether they run with or without the profit motive.

In *Madras Gymkhana Club Employees Union v. Madras Gym*[20] case the *Madras Gymkhana Club* a member club, were engaged multifunctional activities like accommodation, catering,

[18] AIR 1961 SC 484.
[19] 1963 II LLJ 335 SC
[20] AIR 1968 SC 554.

sale of alcohol and non alcoholic beverages games, etc. J. Hidayattulla was member of this club. In this case dispute arose between the management of the *Madras Gymkhana Club* and its workmen regarding the payment of bonus for the year 1962. The Government referred the dispute to the industrial tribunal for adjudication. The tribunal held that the *Madras Gymkhana Club* was not an industry and was, therefore, not liable to pay bonus to its workmen.

Against this order the aggrieved workmen filed an appeal before the Supreme Court on these facts a question arose for determination before the Supreme Court whether a club was an industry. In this case the Supreme Court limited the scope of Industry in for different ways:

1. The court held that the cardinal was to find out whether there was an industry according to the denotation of the words in the first part of the definition.
2. The second part of the definition of industry gave no extended connotation.
3. The emphasis on the production and distribution of a material goods, was giving an economic content to the first part of the definition.
4. The court define the word 'undertaking' as any business or any work or project which one engages in or attempts as an enterprise analogous to business or trade and which results, in material goods or material services.

The Supreme Court revisited the earlier decisions and in the process commented on each of them without bringing any material objectivity or uniformity in the principles laid down earlier. The court in this case was faced with the question whether the activities of the *Madras Gymkhana Club* which was a members club fell within the definition of 'industry'. The court, after laying down the principle as to what is 'industry', held that, though the activity of the club might be falling in the second part of the definition inasmuch as the work of the club was conducted with the aid of the employees who followed a 'calling' or an 'avocation', it could not be described as 'trade', 'business', 'manufacture' or 'calling' of the members of the managing committee of the club. It was also held that the activity of the club was not an 'undertaking' 'analogous to trade or business' as this element was completely missing in a members club. This non-proprietary club, therefore, was held to be not 'industry'.

In *Cricket Club of India v. Bombay Labour Union*[21]case club was incorporated with a view to encouraging and promoting various games and sports and to conduct sports and matches, particularly of cricket. The club involved in various activities like recreation and entertainment, provided residence and catering services etc. The club also made investment in immovable property. On these facts a question arose whether the activities carried on by the club were 'industry'.

The court observed that:

1. It was a member club without any share holders it was wrong to equate it with the activity of a hotel.

[21] (1969) I LLJ 775 (SC).

2. The opening of club stall to general public to buy snakes, etc. On few occasions in a year could not be held to be an 'undertaking' of the nature of business or trade.
3. Income from the rent of the building did not accrue with aid and cooperation of employees.
4. Club's income from the stadium was not of the nature of industry.

It accordingly, held that club was not an industry under Section 2 (j) of Industrial Dispute Act, 1947.

The court *Safdarjung Hospital v. Kuldeep Singh Sethi*[22] held that the definition had read as a whole and when so read it denoted a collective enterprise which employers and employees were associated. It did not exist by employers or by the employees alone. It was held that an industry is to be found when the employees are caring on any 'business, trade, undertaking, manufacture or calling of employers' it they are not, there is no industry as such. It was also held that employees in a Government Health Department are not workmen engaged in an Industry.

In the light of aforesaid test, the Court concludes that the *Hospital Mazdoor Sabha* wrongly held:

(1) that the second part of the definition contained an extension of the first part by including other items of industry;
(2) that economic activity was not an essential part of the concept of industry;
(3) that an economic activity could not exist without the presence of capital or profit-making or both;
(4) that the test namely, can such activity be carried on by private individuals or group of individuals applied to the facts of the case.

In *Management of Hospital, Orissa v. Their Workmen*[23] case, a dispute arose regarding the conditions of service of employees employed in hospital, sanatorium and infectious wards owned and run by the government. The government of Orissa made three references to the tribunal for adjudication. The tribunal in all three cases held that the activities of the hospital, sanatorium and infectious wards were 'industry'. Against this finding, the management of thr hospitals preferred an appeal before the SC. The question arose whether the aforesaid activity run by the government was 'industry'. The SC, following the decision in Safdarjung Hospital case held that the aforesaid activities were not 'industry' because it was being run as a part of the functions of the government and were being run as a department.

In *Dhanrajgiri Hospital v. Workmen*[24] case the hospital run by a charitable trust was engaged in imparting training in general nursing and midwifery. There were also good number of trainee beds in the hospital meant for their practical training. The hospital was not distinct or

[22] (1970) 1 SCC 735.
[23] (1971) Lab. IC 835 (SC).
[24] (1975) 2 LLJ 409 (SC).

separate from training nurses. The patients were charged according to their financial conditions and there was no regular charge fixed for a patient. On these facts, the SC held that the hospital was not engaged in any 'industry' under the I D Act.

Triple Test laid down in *Bangalore Water Supply v. A. Rajappa*

In *Bangalore Water Supply v. A. Rajappa*[25]; a seven judge's bench of the Supreme Court exhaustively considered the scope of industry and laid down the following test which has practically reiterated the test laid down in Hospital Mazdoor Sabha case. The Supreme Court in this case by a majority of five with two dissenting overruled Safdarjung Solicitors' Case, Gymkhana, Delhi University, Dhanrajgiri Hospital and cricket club of India. It rehabilitated Hospital Mazdoor Shabha and affirmed Indian standards institution. The court followed Banerji and Corporation of City of Nagpur cases. The SC has laid down the following test to determine whether an activity is covered by the definition of industry or not.

Triple Test:

A. where there is:-

(i) systematic activity;
(ii) organized by cooperation between employer and employee for the production and/or
(iii) Distribution of goods and services calculated to satisfy human wants and wishes, prima facie, there is an "industry" in that enterprise.

B. Absence of profit motive or gainful object is irrelevant;
C. The True focus is functional and the decisive test is the nature of the activity with special emphasis on the employer employee relation;
D. If the organization is trade or business it does not cease to be one because of philanthropy animating the undertaking.

The following points were also emphasized in the case:

1. Industry does not include spiritual or religious services or services geared to celestial bliss, example, making, on a large scale, Prasad or food. It includes material services and things.
2. Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.
3. The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.
4. If the organisation is a trade or business it does not cease to be one because of philanthropy, animating the undertaking.

Therefore the consequences of the decision in this case are that professions, clubs, educational institutions cooperatives, research institutes, charitable projects and other kindred adventures,

[25] AIR 1978 SC 548.

if they fulfil the triple test stated above cannot be exempted from the scope of section 2(j) of the act.

The dominant nature test:

a) where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not 'workmen' as in the university of Delhi or some departments are not productive of goods and services is isolated, even then the predominant nature of the services and the integrated nature of the departments as explained in the corporation of Nagpur will be the true test. The whole undertaking will be 'industry' although those who are not 'workmen' by definition may not benefit by the status.
b) Notwithstanding the previous clauses, sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies.
c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, they can be considered to come within s. 2(j). (d) Constitutional and competently enacted legislative provisions may remove from the scope of the act categories which otherwise may be covered thereby.

The Supreme Court overrule Safdarjung, Solicitors case, Gymkhana Club, Delhi University, Dhanrajgiri hospital and other rulings whose ratio runs counter to the principles enunciated above, and Hospital Mazdoor Sabha is hereby rehabilitated. Thus in Bangalore Water Supply and Sewer Age Boardy Rajappa, the Supreme Court laid down the following test which is practically reiteration of the test laid down in Hospital Mazdoor Sabha Case: Triple test. Where there is a (1) systematic activity; (2) organised by cooperation, between employer and employee and (3) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes, prima facie there is an industry in the enterprise. This is known as triple test,

The following points were also emphasised in this case:

1. Industry does not include spiritual or religious services geared to celestial bliss, e.g., making on large scale prasad or food,
2. Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.
3. The true test is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.
4. If the organisation is a trade or business, it does not cease to be one because of philanthropy animating the undertaking.
5. Although s. 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to over-reach each other.

The word 'undertaking' must suffer a contextual and associational shrinkage, so also 'service', 'calling' and the like. The inference is that all organised activity possessing the

triple elements although not trade or business may still be industry provided the employer-employee basis, bears resemblance to what we find in trade or business.

The consequences are: (1) professions, (2) clubs, (3) educational institutions, (4) co-operatives, (5) research institutions, (6) charitable projects, and (7) other kindred adventures, If they fulfil the triple test, cannot be exempted from scope of definition of industry under section 2(j) of the act.

In *Hari Nagar Cane Farm v. State of Bihar*[26] where a sugar factory purchased a cane farm and worked it as a department for agricultural operations of the firm, it was held to be 'industry' on the facts of the case, but it was made clear by the court that agriculture could not under all circumstances be called an 'industry'. In *Christian Medical College v. Gov. of India*[27] case the Hospital as an educational institution was held to be industry.

In *Desh Raj v. State of Punjab*[28] had by applying the dominant nature test, held that the irrigation department clearly came within the ambit of 'industry'. But in *Executive Engineer, State of Karnataka v. K. Somasetty*[29] case a subsequent case, two-judge bench held that the irrigation department was performing regal function' and, therefore, not an 'industry'. One hoped that the Court would adopt an approach consistent with *Bangalore Water Supply*, but judicial vacillation was clearly discernible in this case.

In *A Sundarambal v. Government of Goa, Daman and Diu*[30] case the SC held that educational institutions are covered by the definition of industry under the Industrial Dispute Act, 1947. In *Karnani Properties Ltd v. State of West Bengal*[31]; the Supreme Court held that the appellant company, a real estate company owning mansions and engaged in the activity of leasing those to tenants, which employed workers for their maintenance was an industry within the meaning of section 2(j).

In *Samistha Dube v. City Board, Etawah*[32] case the decision of *D. N. Banerjee* and *Bangalore Water Supply* case was re-affirmed. The court held that the general administration department was an industry. In *Suresh Chandra Mathe v. Jiwaji University*[33] it has been held that a clerk in the university is a workman and university is industry unless re drafted definition of Industry is enforced.

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[26] AIR 1964 SC 903.
[27] (1983) 2 LLJ 372
[28] (1988) 2 SCC 537.
[29] (1997) 5 SCC 434.
[30] (1988) 4 SCC 42.
[31] (1990) 4 SCC 472.
[32] 1991 (i) SCALE 655.
[33] (1994) II LLJ 462 (M.P.).

In *All India Radio v. Santosh Kumar*[34] case it was held that All India Radio and Doordarshan carry on commercial activity for profit by getting commercial advertisements telecast or broadcast. These functions carried on by them cannot be said to be of purely sovereign nature and hence these are industries within the definition of this Act.

In *General Manager, Telecom v. A. Srintvasa Rao*[35] case wherein the court had held that Telecommunication Department of Government of India was an 'industry,' as it answered the 'dominant nature test'. In *All India Radio v. Santosh Kumar*[36]; case it was held that All India Radio and Doordarshan carry on commercial activity for profit by getting commercial advertisements telecast or broadcast. These functions carried on by them cannot be said to be of purely sovereign nature and hence these are industries within the definition of this Act.

In *Coir Board, Ernakulam, Cochin v. Indira Devi P.S.*[37], however, a division bench of two judges of the court felt that the case-law on the question of 'industry' had left uncertainty and it was necessary that the decision in Bangalore Water Supply be re-examined by a larger bench, as it had the effect of bringing in various organisations in the fold of 'industry' which, in their opinion, were quite possibly not intended to be covered by the machinery set up under the Act. The division bench felt that Bangalore Water Supply might have done more damage than good not merely to the organisations but also to the employees by curtailing of employment opportunities. It is submitted that the sweeping observations of the division bench of the court that the decision in Bangalore Water Supply might have done more damage than good are not based on any study or research.

Subsequently, a three judge bench headed by the Chief Justice of India in *Coir Board, Ernakulam v. Indira Devi*[38] observed that the judgment delivered by the seven judge bench of the court in Bangalore Water Supply did not require any reconsideration on the reference being made by the two judge bench which was bound by the judgment of the larger bench. Court, therefore, directed that the appeal of the Coir Board, Ernakulam listed before the appropriate bench for further proceedings.[39]

The two judges bench of the Supreme Court in *State of Gujarat v. Pratamsingh Parmar*[40] took the view that ordinarily departments of a government cannot be held to be an 'industry' and rather it is a part of the sovereign function. The court observed that in the absence of any assertion by the petitioner in the writ petition indicating the nature of the duties discharged by

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[34] AIR 1998 SC 941.
[35] (1997) 8 SCC.
[36] AIR 1998 SC 941.
[37] (1998) 3 SCC 259.
[38] *Coir Board, Ernakulam, Kerala State v. Indira Devi P.S.,* (2000) 1 224 (hereinafter referred to as Coir Board) [Coram: A.S. Anand, C.J., S.P. Bharucha & M. K. Mukherjee,
[39] Bushan Tilak Kaul, 'Industry,' 'Industrial Dispute, 'and 'Workman': Conceptual Framework and Judicial Activism, *Journal of the Indian Law Institute*, Vol. 50, No. 1 (January-March 2008), pp. 13-15.
[40] (2001) 9 SCC 713.

him, as well as the job at the establishment where he has been recruited, it would not be correct to hold that the Forest Department of the State of Gujarat is an 'industry'.

The court distinguished this case from *Chief Conservator of Forests v. Jaganath Maruti Kondhra*[41] In this case court observed that the dichotomy of the levels such as sovereign and non- sovereign, or regal or non-regal, or state functions or non-government functions really did not exist. Therefore, to extend the concept of sovereign functions to include all welfare activities would erode the ratio of Bangalore Water Supply. Hence, except the strictly understood sovereign functions, other activities of the state such as welfare activities would fall within the purview of the definition 'industry'. Not only this, even within the wider circle of the sovereign functions there may be an inner circle encompassing some units which could be considered as 'industry', if substantially severable.

It was held that there was sufficient material on record and specific averments made in the petition and affidavits to show that social forestry department of a state could not be regarded as part and parcel of the sovereign function of the state. It is important to note that in both the judgments reference was made to Bangalore Water Supply to cull out differently the ratio of the said judgment.[42]

In case of *Parmanand v. Nagar Palika, Dehradun*[43] it is well established in a catena of cases decided by the Supreme Court that municipality is an industry under 2 (j) of the I. D. Act, 1947, yet an attempt was made in 2003 *Parmanad v. Nagar Palika Dehradun* case to reopen the position and re-examined the decisions of the Supreme Court in view of inclusion of municipalities in the constitution.

It was urged the municipality should not be held to be an industry under Section 2 (j) of the Industrial Disputes Act, 1947 after:

(1) It becomes creature of the Constitution.
(2) It has been elevated to the status of state and
(3) It is carrying on certain government functions.

The Supreme Court rejected the contention by holding the inclusion of municipalise in the constitution by itself would not dilute the effect of its decision in *Corps. of City of Nagpur v. Employees* and *Bangalore Water Supply case* wherein the Supreme Court held that municipality is an industry under the I.D. Act.

The Constitution Bench of five judges in *State of U.P. v. Jai Bir Singh*[44] after considering the rival contentions and closer examination of the decision in Bangalore Water Supply held that

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[41] (1996) 2 SCC.
[42] Bushan Tilak Kaul, 'Industry,' 'Industrial Dispute, 'and 'Workman': Conceptual Framework and Judicial Activism, *Journal of the Indian Law Institute*, Vol. 50, No. 1 (January-March 2008), p. 17.
[43] (2003)9 SCC 290.
[44] 2005 (5) SCC 1.

a reference to a larger bench for reconsideration of the decision was required for the following amongst other, reasons:

a) The judges delivered different opinions in the case of Bangalore Water Supply at different times and in some cases without going through, or having had an opportunity of going through, the opinion of some of the judges on the Bench. They have themselves recognized that the definition clause in the Act is so wide and vague that it is not susceptible to a very definite and precise meaning.
b) In the opinion of all of them it would be better that the legislature intervenes and clarifies the legal position by simply amending the definition of 'industry'. The legislature did respond by amending the definition of 'industry', but unfortunately 23 years were not enough for the legislature to provide Alternative Dispute Resolution Forums to the employees of specified categories of industries excluded from the amended definition.
c) The legal position thus continues to be unclear and to a large extent uncovered by the decision of the Bangalore Water Supply case. In its opinion the larger Bench will have to necessarily go into legal questions in all dimensions and depth, keeping in view all these aspects.[45]

Further, the Court in *Jaibir Singh case* expected the larger Bench which would review Bangalore Water Supply to look at the statute under consideration not only from the angle of protecting workers' interests but also of other stake holders in the industry- the employer and the society at large.

The Court also stressed the need to reconsider where the line should be drawn and what limitation can and should be reasonably implied in interpreting the wide words used in section 2 (j). It stated that no doubt it is rather a difficult problem to resolve more so when both the legislative and the executive branches are silent and have kept an important amended provision of law dormant on the statue book. It observed that pressing demands of the competing sectors of employers and employees and the helplessness of the legislative and the executive branches in bringing into force the Amendment Act compelled it to make the present reference for constituting of a suitable bench for reconsidering Bangalore Water Supply's case.

In *State of Rajasthan v. Ganeshi Lal*[46]; the labour court had held the law department of Government is an industry. This view has been upheld by the single judge and division bench of the High Court. It was challenged by the state before the Supreme Court. It was held that the Law Department of Government could not be considered as an industry. Labour Court and High Court have not indicated as to how the Law department is an industry. They merely stated in some cases certain departments have been held to be covered by the expression

[45] Bushan Tilak Kaul, 'Industry,' 'Industrial Dispute, 'and 'Workman': Conceptual Framework and Judicial Activism, *Journal of the Indian Law Institute*, Vol. 50, No. 1 (January-March 2008), p. 20.
[46] 2008 I.L.L.J. 670 (SC).

industry in some decisions. It was also pointed out that a decision is a precedent on its own facts.

Conclusion

After a thorough review of the foregoing discussion makes it ample clear that the Apex Court has been able to some extent to implement not directly but indirectly any business, trade, undertaking, manufacture, service, employment, handicraft or industrial occupation is a 'industry' under the meaning of Section 2 (j) of the Industrial Disputes Act, 1947.

It is evident from the decisions of Apex Court, in *Coir Board Case* of 1990, Apex Court was faced with whether Coir Board of Ernakulam, set up to support the Coir Industry, would be industry. The Court was of view that the Coir Board is delivering sovereign function and hence it is not industry. It differed with the judgment of *Bangalore Water Supply* Case and requested a larger Bench to review the judgment. Again in 2005, *Jai Bir Singh's case* rebelled with the Bangalore Water Supply Case. The Court held that the social forestry Department of a State is a sovereign function and not industry. Let a larger bench review Bangalore Water Supply Case. These post 1990 judgments reflect anguish of Court for the delay in implementing new definition and resultant litigation and chaos for business.

After a long journey of judicial interpretations made by our Courts from *D.N. Banerji v. P.R. Mukherjee* including the *Bangalore Water Supply* case to current position the Supreme Court cannot assign to itself a role that necessarily has to perform by the legislature, given the fact that there is basic need to reforms in Industrial Dispute Act, 1947.

No doubt, it is very clear that the definition of 'Industry' is still in crossroads. The *Bangalore Water Supply Case* and the Amendment have not able to resolve the crisis. We rest our hope in the proposed Industrial Relations Bill 2015. At stake is game changing agenda: Will Hospitals, Research institutes, Training Institutes be covered as industry? It is a big question before us. We will have to look forward that whether Doctors, Architects, Scientists, Trainers are the people who are taking India in the world map. They are the people who will make "Skill India" and "Entrepreneurial India" campaign in a reality. We will have to make a choice, whether to bound them in the shackles of the Industrial Disputes Act or allow them to explore their skills and knowledge so that they can create employment and growth.

Journal of Legal Studies, International Refereed Peer-Reviewed Journal
ISSN 2321-1059, Vol. 7, Issue II, July 2019
www.journaloflegalstudies.co.in

Empowering the Underprivileged: The Social Justice and Right to Education in India

Mr. Gaurav Patel[1]

Abstract

In Indian context, the constitution envisaged a concept of social justice which involves the establishment of an egalitarian, social order where there is no discrimination among individuals on the basis of caste, religion, race, sex or place of birth. Goal of political, social and economic democracy have been sought to be implemented through certain political and socio economic rights. If there is educational inequality in schools it demonstrates a case of social injustice. Educational institutions are considered a keystone for the establishment of a meritocratic society. They supposedly serve two functions: an educational function that promotes learning for all, and a selection function that sorts individuals into different programs, and ultimately social positions, based on individual merit. These conditions were to be established by adopting a socio economic model of development through a policy of socialism. In present study elements of social justice and its relevance in education system in India are discussed.

Introduction

The Idea of welfare state claims that social Justice must be treated as cardinal and paramount issue. Social Justice is not a blind concept. The Indian constitution is an illustration of the forces at work in socio-economic Jurisprudence. The preamble of Indian Constitution promises to secure for all citizens of India; Social Justice are the Human rights that are basic in nature and entitled to every human being. Such human rights would comprise right to life, right to education i.e. the development of one right makes the advancement of the others possible.

The right to education is marked priority on the agenda of the international community since right to education is not only a human right in itself but also is quintessential for the exercise of all other human rights. The right to education also includes a responsibility to provide basic education for individuals who have not completed primary education. In addition to this access to educational provisions, the right to education encompasses the obligation to rule out discrimination at all levels of the educational system, to set minimum standards and to improve quality of education. This paper argues that social justice aims of equal opportunity to every citizen in the matter of right of education in India.

Right to education and Indian Constitution

The Indian Constitution is known to be a document committed to social justice. The Indian Constitution has recognized education as the essence of social transformation, as is evident from its education specific Articles. The right to education up to the age of fourteen years has been raised by the decision of the Supreme Court in the Unni Krishnan case where it was held by the court that right to education for the children of the age of 6 to 14 is a fundamental

[1] ***Assistant Professor of Law, CMP Degree College, University of Allahabad, Allahabad.***

right. The Constitution (86th) Amendment Act, 2002, has added new Article 21 A after Article 21 and has made education for all children of the age of 6 to 14 a fundamental right".

The Constitutional 86th Amendment Act was passed in 2002 and inserted in the Constitution as Article 21A. This made three specific provisions in the Constitution to facilitate the realization to provide free and compulsory education to children between the age of six and 14 years as a fundamental right. While adding Article 21A in Part –III of the fundamental rights and slightly modifying Article 45, it also added a new clause (k) under Article 51A of the fundamental duties and it stated that the parent or guardian is responsible for providing opportunities for education to their children between six and 14 years.

Right to Education under Article 41 of the constitution lays down that the state shall, within the limits of its economic capacity and development", make effective provision for securing the right to education. Article 45 of the Constitution provides that the State shall provide early childhood care and provide compulsory education for all children until they complete the age of six years". The obligation of the state to provide education to all children till the age of fourteen years would still depend upon the economic capacity and development of the state.

Similarly, Article 46 of the Constitution requires the State to promote with special care the educational and economic interests of the weaker sections of the people, especially of the Scheduled Castes and Scheduled Tribes and to protect them from social injustice and all forms of exploitation". The Right to education is recognised as a human right by the United Nation and lays down International Legal Obligation for the right to Educationist entitle to provide free, compulsory primary Education for all children. Hence, Right to education encompasses to obligation and eliminate the discrimination at all levels of the Educational System and set minimum standards to improve quality.

Social Inequalities and education

Inequalities based on Caste System

Social stratification in India along the lines of caste, ethnicity and religion is also reflected in educational attainment. These inequalities have been a cause of concern to both the government and civil society. The government has put in place strong, affirmative action policies to redress many of the historical injustices. Some of these have received strong public support but others, particularly those regarding reservation of seats have led to resentment and protests from more privileged sections of the society. Despite the right to equality, the State can provide special measures for women and children, and for the advancement of any socially and educationally backward class of citizens, or for the Scheduled Castes and Scheduled Tribes.[2]

The education system, health facilities etc. were all dependent on the caste identity of the individuals, basic amenities necessary for human existence were denied in the name of caste.

[2] Article 15(4) of Constitution of India, 1950.

The first concrete step was initiated towards resolving the caste problem and oppression faced due to the existence of caste hierarchy when our constitution framers identified the issue and the vision of Dr. B.R. Ambedkar's affirmative action for the oppressed and the downtrodden was inserted in the constitution. The constitution understood that caste is one of the major factors in creating social inequality and it has also affected the economic and social spheres of life.

Education and Minority rights

Religion provides another major axis of stratification in India. The educational improvements for various religions would help us distinguish between secular improvements in education for all marginalized groups and improvements for groups that are subject to affirmative action.

Constitutionally, India is a secular country and has no State religion. The educational rights of minorities under Article 30 of the Constitution have from the earliest period of the post-Constitution era been the subject of a large number of judicial decisions of all kinds and implications. Our Constitution has guaranteed certain cherished rights of minorities concerning their language, culture and religion.

The right guaranteed under Article 30 (1) is a right that is absolute and any law or executive direction which infringes the substance of that right is void to the extent of infringement, this was held re Kerala Education Bill Case.[3] In a later ruling of 1974 the courts observed: These provisions enshrined a befitting pledge to the minorities in the Constitution of the country whose greatest son had laid down his life for the protection of the minorities. As long as the Constitution stands as it is today, no tampering with those rights can be countenanced. Any attempt to do so would be not only an act of breach of faith; it would be constitutionally impermissible.[4]

Some scholars have expressed an opinion that the scope of Article 30 of the Constitution is to be limited to the purposes mentioned in Article 29 and, therefore, minorities should be allowed to establish educational institutions only for the protection of their distinct languages, scripts and cultures. This opinion has never been accepted by the superior court. In St *Stephen's College v. University of Delhi*[5], the Supreme Court decided that minority intake in minority institutions should in the interest of national integration be limited to 50%. There is no law or judicial decision to ensure a reasonable presence of children from the minority communities in the educational institutions established and run by the majority community (e.g., the chain of DAY, Sana tan Dharma and Hindu Colleges). From 1997 onwards large Supreme Court Benches have looked into various aspects of the provision of Article 30,

[3]AIR 1958 SC 956.
[4]*St Xavier's College v State of Gujarat* AIR 1974 SC 1389.
[5](1992) 1 SCC 558.

generally restricting its scope in *TMA Pai foundation v. State of Karnataka*[6]*; Islamic Academy of Education v. State of Karnataka*[7]*and PA Inamdar v. State of Maharashtra*[8].

Child Labour

Although the right to education is universally recognized since the universal declaration of the human rights, 1948 and has since been enshrined in various international conventions, national constitution and development plans. The landmark passing of the right of children to free and compulsory education i.e. RTE Act, 2009 marks a historic moment for the children of India. But mere passing of the act will not ensure that the goals laid down will be achieved. The challenges before our educational are many and multifaceted. There is long interrelation between education and child labour.

Child labour is curse to society and it can be only eradicated by means of education. As an empowerment right, education is the primary vehicle for which economically, socially, and emotionally marginalized children can live themselves out of poverty and obtain the means to participate fully in the communities. It is observed the nation which has low literacy rate has high child labour so as literacy rate elevate high the child labour will lowered. As per the Constitution, no child below the age of 14 years is to be employed in any factory, mine or any hazardous employment.[9]

Further, it requires the States to direct its policy towards ensuring that the tender age of children is not abused and that they are not forced by economic necessity to enter avocations unsuited to their age or strength.[10]In M C Mehta v. State of Tamil Nadu[11], a historic judgement on child labour, which elaborated the situation of child labour in India. It outlines the vision of Constitution with respect to children. The judgement highlighted the relation between poverty and child labour and also shed light on how the state has failed to eradicate child labour and its lack of zeal to deal with it. The judgment also deliberated on possible solutions to eradicate the child labour.

Consistent with the Constitutional provisions, Child Labour (Prohibition and Regulation) Act was enacted in 1986, which seeks to prohibit employment of children below 14 years in hazardous occupations and processes and regulates the working conditions in other employments. In the last 5 years, the number of hazardous processes listed in the schedule of the Act has increased from 18 to 57 and occupations from 7 to 13.In Indian education system high illiteracy and dropout rates reflect the low quality of the educational system. Poverty plays a role in the ineffectiveness of the educational system. Dropout rates are high because children are forced to work in order to support their families. This can be seen from the comparative assessment of Literacy rates, in British India it raised from 3.2 per cent in 1881

[6](2002) 8 SCC 481.
[7](2003) 6 SCC 697.
[8](2003) 6 SCC 697.
[9] Article 24 of Constitution of India, 1950.
[10] Article 39 of Constitution of India, 1950.
[11] AIR 1997 SC 699.

to 7.2 per cent in 1931 and 12.2 per cent in 1947. The Indian literacy rate grew to 74.04% in 2011; still this level is well below the world average literacy rate of 84%.[12]

The rural-urban scenario in India and its impact on Literacy Rate

Quality public education for all can be a powerful engine for greater equality. Good education makes the likelihood of higher incomes and lower poverty much greater. It is estimated extreme poverty could be halved if universal primary and secondary education were achieved by boosting opportunities for all. Social mobility, i.e. the possibility for children from poor families to end up better off than their parents, is intimately tied to the availability of education. Policies that govern their lives and boosts democracy. The rural parts of India are struggling a lot when it comes to local transportation.

This problem poses a massive threat to education in rural Indian due to limited schools in the vicinity. The problem in transport coupled with schools located at a long distance in rural areas, urges parents not to send their kids to schools, thus keeping them devoid of education.

Residents of rural India usually come with low-income sources which are generally required for basic survival, making education out of their reach. The shortage of Government Schools in the local areas discourages parents more to spend on their kids resulting in no knowledge being imparted.

Year	Rural			Urban			Combined		
	Female	Male	Total	Female	Male	Total	Female	Male	Total
1951	4.87	19.02	12.1	22.33	45.6	34.59	8.86	27.15	18.32
1961	10.1	34.3	22.5	40.5	66	54.4	15.35	40.4	28.31
1971	15.5	48.6	27.9	48.8	69.8	60.2	21.97	45.96	34.45
1981	21.7	49.6	36	56.3	76.7	67.2	29.76	56.38	43.57
1991	30.17	56.96	36	64.05	81.09	67.2	39.29	64.13	52.21
2001	46.7	71.4	59.4	73.2	86.7	80.3	53.67	75.26	64.83
2011	58.75	78.57	67.8	79.92	89.67	84.1	65.46	82.14	74.04
% Increase in 2011 over 2001	**26%**	**10%**	**14%**	**9%**	**3%**	**5%**	**22%**	**9%**	**14%**

Source: Census of India, Office of Registrar General, India.

[12]Harewood, Jack. "Population Growth of Trinidad and Tobago in the Twentieth Century." *Social and Economic Studies*, vol. 12, no. 1, 1963, pp. 26.

The schools in rural India have an inferior infrastructure. There is a lack of well-trained teachers, which disturb the student-teacher ratio. This leads to very poor-quality education. Rural schools need to place significance on technology like basic computer knowledge, so that they are not left behind. Also, in the digitally growing world, every child needs to be aware of essential technologies and their usage. As per a Survey Report called the "Annual Status of Education Report", more than 50% of the students in fifth standard attending rural schools are incapable of reading a second standard textbook and cannot solve basic mathematical questions.

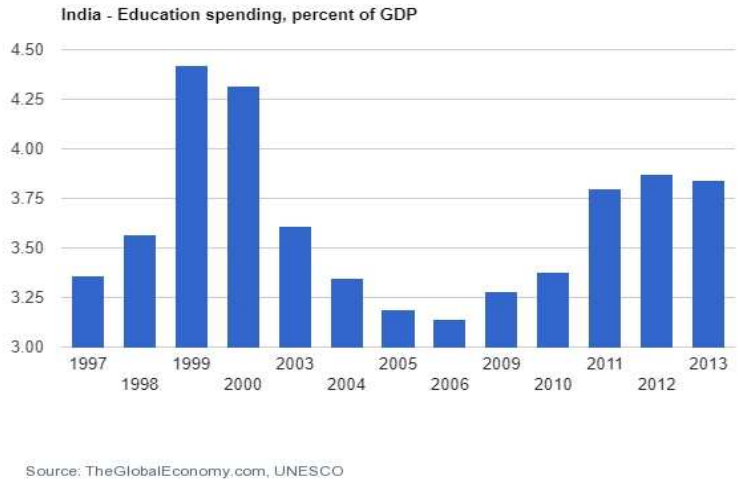
There is undoubtedly a massive gap between rural and urban education system, this gap need to be filled in, and we can create a common platform amalgamating students across the country.

Public spending on education in India

Public spending on education includes direct expenditure on educational institutions as well as educational-related public subsidies given to households and administered by educational institutions. This indicator is shown as a percentage of GDP, divided by primary, primary to post-secondary non-tertiary and tertiary levels. Public entities include ministries other than ministries of education, local and regional governments, and other public agencies. Public spending includes expenditure on schools, universities and other public and private institutions delivering or supporting educational services. This indicator shows the priority given by governments to education relative to other areas of investment, such as health care, social security, defence and security.

Education expenditure covers expenditure on schools, universities and other public and private institutions delivering or supporting educational services. In India from 1997 to 2013, the average value for India during that period was 3.63 per cent with a minimum of 3.14 per cent in 2006 and a maximum of 4.42 per cent in 1999. The latest value from 2013 is 3.84 per cent. For comparison, the world average in 2013 based on 118 countries is 4.52 per cent. See the global rankings for that indicator or use the country comparator to compare trends over time.[13]

[13]Available on https://www.theglobaleconomy.com/India/Education_spending/



The public funding of education enables every child to have access to education irrespective of the parent's economic and social status. Education is a central tool in the development of human resources needed for a functioning economy. The funding of education by government is always associated with policy decisions which ensure that education curriculum is relevant to the immediate and future human resource needs of the economy. By investing in education, government invariably invests in the development of human resources for the various sectors of the economy. The ultimate purpose of this investment is to reduce the cost of importing human capital from developed economies.

Government participation in the provision of education ensures that its citizens are educated. Since the norms and values of society are imbibed through education, government should ensure a higher level of social harmony by expanding opportunities for education.

Conclusion

Social justice is a key concept in the theory and practice of affirmative action. A range of educational concerns that have been highlighted in this paper require a number of possible interventions that can bring about equality and social justice to the citizens. Dr. Ambedkar said, "in our social and economic life, we shall by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment else those who suffer from inequality will blow up the structure of democracy which this Constituent Assembly has so laboriously built up."

Independent India did make significant progress of marginalized section during the second half of the 20th century. But poverty and deprivation persist. India has miles to go. The social justice and right to education based inequality in India are structural, i.e. they arise from

underlying social, political and economic structures (rather than factors such as lower access to education or jobs). Affirmative action resulted in some progress but has done little to change the social location of disadvantaged groups. But reservations have provided access by justice of SCs, STs and OBCs by seeking protection against discrimination. There is need to concentrate more and more on quality education because the society is becoming knowledge based, it is also evident that the social context of education in any country presents a number of challenges which must be addressed by policy makers both in its design and its implementation.

Journal of Legal Studies, International Refereed Peer-Reviewed Journal
ISSN 2321-1059, Vol. 7, Issue II, July 2019
www.journaloflegalstudies.co.in

Right to Food and Judicial Response in India

Mr. Om Prakash Kannaujia[1]

Introduction

The doctrine of *ubi jus ibi remedium* holds that where there is a right, there is a remedy. The great German philosopher *Immanuel Kant* defined justiciability as the power to award to each person that which is due to him under law.[2] Therefore, if the right to food is legally recognized in the country, according to Kant it is justiciable. Without the means of enforcement there can be no real right. The purpose of the right to food is that it imposes a certain responsibility on both the state and the custodian and enables the holder to find redress for the breach of that right. An inherent human right is the right to food. Not only is judiciary the only way to expand enforceability to the right. In making the right enforceable, the political and administrative authorities also play an important role.

According to *Amartya Sen* "in a democratic country the political freedom to create a Government responsible to the people helps to safeguard the economic freedom of the people.[3] Therefore freedom from starvation can be redressed through participating democratic process. Jean Dreze says that in India, most people are unable to participate effectively in the democratic process due to economic insecurity, lack of education, social discrimination and other forms of non-empowerment. They will not use the parliamentary system to address the infringement of their rights. This further entrenches their exploitation and the democratic structure ignores them.[4] Thus, in India the responsibility of ensuring the justiciability of the right to food is primarily on the judiciary.

Right to food as justiciable right

Jean Dreze defines justiciability of the right to food as the possibility that a recognised human right can be invoked before a judicial or quasi- judicial body which can determine as to whether the right has been violated and recommend appropriate measures in case of violation.[5] Thus justiciability is the ability of the judiciary or the quasi- judicial authority to uphold the law through effective judicial pronouncements.[6] In India through the process of judicial activism, the judiciary has made a tremendous contribution to evolution of the

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[1] ***Research Scholar, Faculty of Law, University of Allahabad, Allahabad.***
[2] Kant I., op. cit., p. 78.
[3] Sen A., Development as Freedom, New Delhi, 2000, Oxford University Press, p. 52.
[4] Dreze J., Democracy and the right to food, pp. 7-8,available at http://www.righttofoodindia.org (accessed on 12 July 2011)
[5] *Ibid.*
[6] Office of the High Commissioner for Human Rights, Human Rights and Poverty Reduction: A Conceptual Framework, New York, 2004, United Nation, as seen in A Primer on The Right to Food, loc. cit.

entitlements on the right to food. Whenever a right is held as a justiciable right, an adequate remedy may be provided in case of violation. The remedy can be in the form of restitution, financial compensation, non-repetition or just a declaration of violation.

The justiciability of the right to food has certain advantages. Firstly, the Constitution of India makes the judiciary the guardian of the rights of the people. The rights enumerated by the judiciary becomes binding before all authorities. Second advantage of enforcement of the right to food through the judiciary is that the judges apply the international standards of human rights to the national laws. Thus, through the decisions of the court a more appropriate relief can be given in case of violation of the right to food of the people. Thirdly, only the judgments of the court on the right to food can create a sense of obligation in the mind-set of the administration. Usually the Government looks upon the entitlements on the right to food as a kind gesture on their part, rather than redress of the rights of the people. Fourthly, when a law is ambiguous on a point, the judiciary is the appropriate forum to clarify it.

Fifthly, the political system is dysfunctional, so the political system can't implement the right to food. Sixthly, the doctrine of precedent is applicable to the judicial decisions. Therefore decision of the judiciary is established as the law of the land. This shall lead to a great expansion of the right to food. In India most of the entitlements for realization of the right to food have been implemented by the orders of the judiciary.[7] Enforcement of the right to food through the judiciary also suffers from certain limitations i.e. the judiciary is often inaccessible to the victims of the right to food violation. The victims of the right to food violation belong to poorest of the poor category of people and due to poverty and ignorance they are unable to take up their disputes before the judiciary. The victims and the lawyers have a very limited knowledge on the right to food.[8]

Entitlements for realization of the right to food are scattered in the various schemes, legislations and judicial pronouncements. India does not have legislation encompassing the different aspects of the right to food. Therefore, the lawyers as well as the victims are not totally aware of the protections on the right to food. This affects the enforceability of the right to food. In the legal system of India, right to food to a great extent remains as a derivative right established through the doctrine of precedent, its justiciability therefore suffers from the drawbacks of the doctrine of precedent. [9]Non-derivative provisions of the right to food find a place in the directive principles.

Problems of Resources and Justiciability of Right to Food

The strongest objection to the justiciability of the right to food is that the right to food is an economic and social right therefore it involves a resource implication and is a non-justiciable right. The poor countries cannot recognize the right to food as a justiciable right. The lack of

[7] Franco A.M.S., How to Promote the Justiciability of the Human Right to Food, Thomale C. (translator), Germany, 2008, Fian International, pp. 7-8.
[8] *Ibid.*
[9] *Ibid.*

resource is a valid defence however the courts can examine the measures taken for realization of the right in context to the available resource.[10] As starvation in India is not due to lack of resource of the country therefore the justiciability of the right to food cannot be denied in India on the ground of lack of resource.[11] In *Kapila Hingorani v. State of Bihar*[12] the Supreme Court held that economic rights of the people are often denied on the ground of financial stringency and the Nation State takes up this plea of helplessness to redress the grievance of the people. Thus, the court categorically stated that economic incapacity cannot be a ground for justifying the violation of the fundamental right to food.

Role of Judiciary to Create Right to Food as Fundamental Right

The right to food in India evolved through the process of judicial precedent. Therefore, the right to food in India established itself by Hon'ble Supreme Court as a justiciable right, the law laid down through the Doctrine of Stare Decisis which has binding nature followed by all subordinate courts including quasi-judicial authorities.[13]

Freedom from Starvation and minimum Wage

The first step taken by the judiciary to protect the people from hunger of India was to ensure that the poor can afford to feed themselves and their families with their minimum wages. Realizing that most of the poverty stricken people in India are landless labourers who undertake whatever work comestheir way due to their poor bargaining position, the judiciary ensured that they could not exploited. The justiciability of the right to food was established as back as 1954 when the Supreme Court of India through a number of case laws established that the minimum wage paid to a labourer should enable him to feed himself and his family. Terming the low wage paid to a labourer with which he is unable to feed himself and his family as starvation wage, the court prohibited the payment of starvation wage and held that a minimum wage enabling the labourer to maintain themselves and their families should be paid.

In the *Crown Aluminium Works v. Their Workmen*[14] the Supreme Court held that due to poverty, the unorganized labourer may at times be available at starvation wage. But a Welfare State cannot exploit the labourers. The Nation State is required to pay a fair and minimum living wage to its labourers so that they are able to afford a minimum comfort and decent life. This was the first step towards establishing the principle that wages should ensure minimum comfort in life of the poverty stricken starving labourers. As food is the basic requirement to lead a comfortable life the judiciary through this judgment ensured adequate food to the labourers. The progressive judicial minds living up to their constitutional duty ensured through this judgment that the starving and marginalized labourers in India are entitled to earn a wage which enables him to a healthy meal for himself and his family after a day of hard

[10] Under the ICESR the right to food is subject to progressive realization therefore the steps taken by different Nation State shall differ as per its economic capacity.
[11] *Ibid.*
[12] (2003) 6 SCC 1.
[13] Article 141 of the Constitution of India, 1950.
[14] AIR 1958 SC 30.

work. The Supreme Court recognized the lack of bargaining power of the poor and prohibited the Nation State to take advantage of their helpless situation. The poor do not enjoy a good bargaining position in employment and undertake any work that they find for whatever is paid in return, however in-adequate it may be.

In the *Express Newspaper Private Ltd. v. Union of India*[15] the court reminded the Government of the necessity to pay a minimum wage to its labourers which ensures their survival. Thus, the judiciary ensured that the wages of the labourers should be adequate to satisfy the basic requirements of the labourers and their families. Despite the judicial pronouncements the Nation State did not take any concrete step to end the employment of labourers at starvation wage. Many instances were brought before the judiciary where there was a payment of starvation wage in exchange of a hard days labour. Though during the early stage the judiciary observed a self- imposed judicial restraint, however it was very compassionate towards starvation suffered by the poor and time and again reminded the Government of its duty towards this deprived section of the population.

In *U. Unichoyi and others v. State of Kerala*[16] the court held that in underdeveloped countries like India, poverty may drive people to work on starvation wage. The Welfare State should ensure a minimum wage which covers the bare necessities of life like education, medical etc. Thus guidelines were laid down for fixation of a fair minimum wage. It ensured a wage from which a labourer can enjoy certain amount of comfort in their life. The Supreme Court again reiterated the need to pay the minimum wages in *Hydro (Engineers) Pvt. Ltd. v.Workman.*[17] Another important step towards realization of the right to food of the poverty stricken in India was taken in *Jaydip Paper Industries v. Workmen*[18]. In this case the Supreme Court held that the Nation State should provide protections against starvation and pay a minimum wage to its labourers. In a number of similar cases like *Gujarat Agricultural University v. Rathod Labhu Bechar*[19] the Supreme Court prohibited the employment of labourers on starvation wage and directed for the payment of minimum wages.

Minimum Wage and Forced Labour

Article 23 of Constitution of India provides that"Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law"[20].The judiciary went a step further in *Peoples Union for Democratic Rights v. Union of India*[21] *when* it held that the payment of starvation wage was a forced labour. Hunger, poverty, want and destitution are the factors

[15] AIR 1958 SC 578.
[16] AIR 1962 SC 12.
[17] AIR 1969 SC182.
[18] (1974) 4 SCC 316.
[19] AIR 2001 (SCW) 351.
[20] (1982) 3 SCC 235.
[21] Article 23(1) of the Constitution of India states that "Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law".

which have compelled the labourers to work on starvation wage. Thus the judiciary extended the protections against the starvation wage from the organized sectors to the unorganized sectors as well. Further in a similar case *Sanjit Roy v. State of Rajasthan*[22] the Apex Court observed that hunger and starvation are the main reasons behind the continuance of forced labour and called upon the Nation State to ensure that a minimum wage is paid even in drought relief schemes. Thus every opportunity was availed by the judiciary to ensure certain degree of relief in the lives of starving and marginal labourers.

Rehabilitation of Bonded Labourers

Another milestone was achieved in the war against hunger when the Apex Court in *Bandhua Mukti Morcha v. Union of India*[23] held that the duty of the Nation State does not end with just the release of the labourers from the bondage. The Nation State has a duty to rehabilitate the released labourers. This would ensure that the released labourers do not enter another cycle of starvation after they lost their job or enter into bondage again just to feed himself and his family. A similar view was held by the Supreme Court in *Neeraja Choudhury v. State of Madhya Pradesh.*[24] In this case the court called upon the Government to draw up a plan to rehabilitate the released bonded labourers so that they do not come out from the bondage of labour to the bondage of hunger and struggle. Thus the Apex Court brought to the attention of the Government the fact that the Government is duty bound to end hunger and starvation.

Hunger and Production of Food-grain Production

The justiciability of the right to food was not confined to the starving labourers alone but the judiciary also paid equal importance to the need to enhance the food production of the country to combat war against the starvation. Realizing the importance of cattle in agriculture the Supreme Court in *Ramanlal Gulabhand Shah v. State of Gujarat*[25] enlarged the definition of crop to include fodder. The court in its attempt to increase the food grain production, in *Dasaudha Singh and others v. State of Haryana*[26] upheld a Government policy compelling the Zaminders to cultivate all the agricultural lands. Thus the judiciary upheld legislation which contributed towards the increase in food grain production of the country and transformed India from a food importing Nation State to a food exporting Nation State. The increase in food production is a vital prerequisite to establish right to food in India.

Upholding Legislation to Prevent from Hunger

In order to combat hunger and starvation the Apex Court upheld legislation which helped the people to have at least two square meals a day. In *Smt. Savitri v. Gobind Singh Rawat*[27] *the* court held that Section 125 of The Code of Criminal Procedure, 1973 plays an important role in prevention of starvation amongst the women, children and aged parents.

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[22] (1983) 1 SCC 525.
[23] (1984) 3 SCC 115.
[24] (1984) 3 SCC 243.
[25] AIR 1969 SC 168.
[26] (1973) 2 SCC 393.
[27] (1985) 4 SCC 337.

Fundamental Right to Immunity from Starvation

In a landmark judgment the Supreme Court elevated the freedom from hunger to the status of fundamental right. In *Keshavananda Bharati v. State of Kerala*[28] interpreting the Constitution in the light of the municipal law and the Charter of the United Nations the court held that the object of the Constitution is to promote social and economic justice. The task of protecting the people from starvation is on all the wings of the Government, the executive, judiciary and the legislature. It further held that protection from starvation is a fundamental right of a citizen. The court also laid down the role required to be played by the different organs of the Government in eliminating hunger. It thereby created new jurisprudence in the right to food in Indian legal system. It is pertinent to mention here that the international law supporting the right to food of the people was not fully established at that point of time. India was yet to ratify the Conventions promoting the right to food.

Conventions were ratified after this dynamic approach of the Indian judiciary. During that period the international obligation for providing these basic rights were not very rigid. Under such circumstances it was the far sightedness and compassionate heart of the judiciary which felt for the hungry and starving population of India. However the judgment failed to specify the Article of the Constitution which could be invoked in case of violation of fundamental right to freedom from hunger or starvation. Thus this judgment falls short in bringing about enforceability to safeguard violation. The significance of the Keshavananda Bharati's case on the process of development of legal entitlements for the hungry population was tremendous. It created a platform for the launch of the new jurisprudence of direct intervention and access to livelihood to protect the hungry population who, despite their best efforts, are unable to feedthemselves.

Right to Food as Integral Component of Right to Life

Another landmark development took place when the Supreme Court in the *State of Maharashtra v. Chandrabhan*[29] held that the right to food is a component of the right to life guaranteed under Article 21 of the Constitution of India. In this case the Supreme Court struck down the second provision to Rule 151 (i) (ii) (6) of Bombay Civil Service Rule, 1959. The Rule provided for payment of Rupees one (Rs.1) as subsistence allowance during the period of suspension of a person. Though the petitioner was acquitted by the High Court and reinstated back to service, the Supreme Court, to protect the people from the monster legislation creating starvation and hunger decided the case on merit. The court declared the provision as unconstitutional. The judgment made a huge impact on the development of the right to food. This judgment brought about a positive change in the lives of the hunger people. The judiciary through a series of case laws established the right to food as a component of right to life guaranteed under the Constitution of India. The justiciability of the right to food was upheld by the Supreme Court in *State of Uttar Pradesh v. Uptron Employees Union CMD.*[30]

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[28] (1973) 4 SCC 225 (paragraph 1700).
[29] (1983) 3 SCC 387.
[30] (2006) 5 SCC 319.

The court observed that the Nation and State could not escape the liability when a human rights problem involving the starvation deaths and suicides by the employees has taken place as a result of non- payment of salaries of the employees of a public sector undertaking for a long period. The sensitivity of the judiciary towards the sufferings of the hungry and starving India is again reflected in the judgment of *Indian Council of Legal Aid and Advice & others v. State of Orissa.*[31]The court in this case requested the Human Rights Commission to look in to the implementation of various scheme undertaken by the Government for realization of the right to food of the people and prevent starvation death.

The justicaibility of the right can be again delineated from the judgment in *Kisshan Pattnayak and Another v. State of Orissa.*[32] In this case the court converted a letter addressed to the Chief Justice of India as a public interest litigation. Attention of the court was drawn towards the drought affected Kalahandi area. A number of people were starving to death. The court only on being assured by the Government, that the Government along with non-governmental organization have adopted various schemes for the benefit of the drought affected people, directed them to continue with their project.

With increase in production, the Government was in quite a comfortable position to ensure that its population does not sleep hungry. However amidst all growths, hunger and starvation played havoc in the lives of a little less than half of the population of the country. The emergency buffer stocks had crossed the buffer norms. The Government had no space to stock the new harvest. The Government was considering a proposal to dump the food-grains in the sea in order to create the required spaces. Some of the food-grains in the FCI go-downs were rotting and were a feast for the rats.[33] Thus around this period India suffered drought for a continuous period of three years. As a result there was a mass spectrum of hunger and starvation death.

As the Government continued denial of reports of starvation resulting from droughts as false and politically motivated hunger and starvation dominated the lives of the poor and marginalized population.[34] The Nation State lacked the political will to change the lives of the suffering and hungry population. The Government thought it wise to spend its funds on other options like defence or the luxurious foreign tours of its high officials at the cost of the lives of the hungry and starving.[35] The Government was a mere spectator to the starvation. Against this backdrop the door of the judiciary was knocked by the public inspirited persons to bring food in the empty plates of the drought affected people. The judiciary availed this opportunity to bring about a drastic change in the entitlement approach to the right to food of the hungry Indians. The Apex Court in *Peoples Union of Civil Liberties v. Union of India*[36], made the most significant contribution for the protection of the rights of the hungry and starving

[31] (2008) (1) SCC Supreme 421, Writ Petition (Civil) 43 of 1997.
[32] (1989) Supp (1) SCC 258.
[33] Gonsalvis C., Kumar P.R., Bhat A. (editors), op. cit., pp. 5-6.
[34] *Ibid.*
[35] *Ibid.*
[36] Writ Petition (Civil) 196 of 2001.

Indians. The court reiterated that the right to food is guaranteed under the right to life. In order to realize the right to life the court held that it is essential to protect the food vulnerable group from starvation. The court directed for implementation of various schemes namely –

a) Targeted Public Distribution Scheme.
b) Antyodaya Anna Yojana.
c) Mid-Day Meal Scheme.
d) National Old Age Pension scheme.
e) Annapurna Scheme.
f) Integrated Child Development Scheme.
g) National Maternity Benefit Scheme.
h) National Family Benefit Scheme.

The object of aforesaid all schemes intervene the hunger and malnutrition and to promote their nutritional health. The court through a process of continuous mandamus has been monitoring the effect of implementation of the above schemes. Numerous orders have been passed in this decade in a desperate attempt of the judiciary to bring about a change in the lives of the hungry population. This case takes judicial activism on the right to food to new heights. In this case various orders has been passed by the court over the years to address the problems of malnutrition amongst the different categories of malnourished people like the aged, sick, lactating mothers, street children etc.

In another important case *Shantistar Builders v. Narayan Khamalal Totame*[37] the Supreme Court held that the basic need of a man is food, clothing and shelter. The right to food falls within the ambit of the right to life. It includes all aspects of physical, mental and intellectual growth. The judiciary observed that most of the countries belonging to the civilized society recognize the right to food as a part of the right to life in their legal system as a justiciable right. Thus, through this case law the judiciary makes a clear indication to establish the right to food as a justiciable right in India.

Keeping up the same spirit, the Supreme Court in *C.E.S.C. Limited, and others v. Subhas Chandra Bose and other*[38] expanded the ambit of the right to life and held that the aim of the fundamental right is to ensure liberty to all. It further held that socio-economic rights are very relevant in bringing about a meaningful change in the lives of the poor. The Apex Court harmoniously construed the right to life with the Universal Declaration of Human Right, 1948, and the International Covenant on Economic Social and Cultural Rights, 1966 to expand the meaning of the right to life to include the right to food.

The court stated that social and economic justice is a fundamental right. The judiciary in another epoch making judgment addressed the sufferings of the hungry. In *Kapila Hingorani v. State of Bihar*[39] the Supreme Court allowed a public spirited person to take up the cause of

[37] (1990) 1 SCC 520.
[38] (1992) 1 SCC 441.
[39] (2003) 6 SCC 1.

about two hundred and fifty (250) employees suffering hunger and starvation due to non-payment of their salaries for a long period. Unable to suffer hunger many employees had committed suicide. The court held that the state is duty bound to uphold the constitutional mandate. It called upon the state to discharge its international obligation. The court held that the term life guaranteed as a fundamental right under the Constitution and has a far reaching connotation and includes food. In *P.G. Gupta v. State of Gujarat*[40] *the* Supreme Court again held that food, shelter and clothing make life meaningful. It makes life worth living and is guaranteed as a fundamental right.

In *Chameli Singh and another v. State of Uttar Pradesh and another*[41] the judiciary crossed another milestone for the hungry and starving population. The court held that the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Right, 1966 along with the Preamble of the Constitution of India assures social and economic justice. It provides food, shelter and clothing as the minimum human rights. The court further held that in an organised society, the right to life as a human right does not only mean animal existence but ensures various facilities to develop and grow. It includes food, water, decent environment, education, medical care and shelter.

The judgment had an important effect in the campaign against hunger and starvation. In its spirit to combat hunger the Apex Court in *J.P. Ravidas and others v. Navyuvak Harijan Utthapan Multi Unit Industrial Co-operative Society Ltd. and others*[42] held that under the international obligations in the form of Universal Declaration of Human Right, 1948, and International Covenant on Economic Social and Cultural Rights, 1966, the Nation State is required to provide adequate means of livelihood to all its citizens. It also called for the distribution of natural resources of the country amongst its people. The judiciary in *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*[43] *reminded* the Government of its duty towards the hungry and starving Indians. The Supreme Court held that the socio-economic justice is the goal of the Preamble. The court further held that Nation State should promote socio-economic justice and fulfil the basic human and Constitutional rights of the people so as to make their life more meaningful.

Right to Food Includes Right to Livelihood

The right to livelihood was established as a component of the right to food in *Air India Statutory Corporation v. United Labour Union and others*[44] the Supreme Court enlarged the scope of the right to food. The court held that the Preamble of the Constitution is designed to realize the socio economic justice amongst the poor and the common men. In order to achieve this goal it required to blend the fundamental rights with the directive principles. The Supreme Court further held that the poor and the common man can secure economic and

[40] (1995) Supplementary 2 SCC 182.
[41] (1996) 2 SCC 549.
[42] (1996) 9 SCC 300.
[43] (1997) 11 SCC 121.
[44] (1997) 9 SCC 377.

social freedom only when they enjoy a right to work, an adequate means of livelihood, just and human condition of work, a living wage, a decent standard of living, education and leisure. The court held that the right to food is a basic Human Right. This judgment has not only established the right to food as a justiciable right but also enlarged the scope of the right to food.

The right to food now includes the right to livelihood. Similarly, to reduce hunger amongst the people, the Apex Court in *Olga Tellis and others v. Bombay Municipal Corporation and others*[45] held that the right to life includes the right to livelihood. To deprive a person of his livelihood will lead to hunger and starvation. People shall be able to eat only when they have a means to earn livelihood. Again another epoch making judgment is the *Board of Trustee of the Port of Bombay v. Dilip Kumar Raghavendranath Nadkarni*[46] Supreme Court held that people cannot be allowed to lead a life of continued drudgery and they have a right to livelihood which makes life worth living. Thus, the court expands the horizon of the right to livelihood which is the basic component of the right to food. A person should have an access to earn an adequate livelihood to enable him and his family to basic comforts of life. The court in *Francis Coralie Mullin v. Administration of Union Territory of Delhi*[47] explaining the different component of the right to life laid down that right to life includes the bare necessities through which life is enjoyed like nutrition, clothing, shelter etc.

Justiciability of Right to Food in India and Quasi-Judicial Authorities

The Indian quasi-judicial authorities created by the legislature are competent to entertain the cases of violation of the right to food of the people.[48] Therefore the quasi-judicial authority plays a significant role in bringing about justiciability of the right to food. The quasi-judicial mechanism created to enforce the violation of the human rights is the National Human Rights Commission at Centre and the State level.[49] The Protection of Human Rights Act, 1993, enables the creation of a Human Rights Court at the district level for speedy trial of offences arising out of violation of human rights.[50] The Human Rights Commission has played a significant role in addressing the violation of the right to food of the people. In a number of decisions the Human Rights Commission has upheld the right to food of the people.

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[45] (1985) 3 SCC 545.
[46] (1983) 1 SCC 124.
[47] (1981) 1 SCC 608.
[48] Section 2(d) of the Protection of the Human Rights Act, 1993, defines the human right means that rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution. As the right to food flows from the right to life which is guaranteed by the Constitution it is covered under the protections guaranteed under the Act.
[49] Section 3 and Section 21 of the Protection of Human Rights Act, 1993.
[50] Section 30 of the Protection of Human Rights Act, 1993 envisages that for speedy trail of offences arising out of violation of human rights, the State Government may, with the concurrence of the Chief Justice of the High Court by notification specify for each district a court of sessions to be a Human Rights Court to try such offences.

In *Indian Council of Legal Aid and Advice and Others v. State of Orissa and Other*[51], the National Human Rights Commission held that out of the alleged twenty one (21) starvation deaths, seventeen (17) were attributed to factors connected to starvation. The commission recommended the State Government to set up institutional mechanism at the grass root level to monitor the relief programme and bring transparency. The commission also held that there was inadequacy of drinking water. The commission stressed the need of periodic review of the implementation of the schemes. The findings of the Human Rights Commissions are recommendatory in nature and therefore it cannot directly address the violation of the right to food. The commission can file a petition before the judiciary if the Government does not act according to the advice of the Human rights Commissions.

Conclusion

The judiciary through various case laws and tools of interpretation established the fundamental right to food as a justiciable right in India. Corresponding development in the field of legislation, creating statutory provisions, is however lacking. There is no doubt of the impact of the judicial contribution on the lives of the poor however the statistics on malnutrition showing hunger and starvation reminds that something more is needed . Though the right to food can be best protected by creating constitutional and statutory protection, keeping in mind the urgency of the matter and the magnitude of the violation the judiciary can frame guidelines for protection of the right to food.

The National Family Health Survey 2019-2020 indicates that all states of India average forty seven percent (47%) of the children are stunted, that is, they are shorter than their age. Around forty percent (40%) of the children are under-weight and a twenty percent (20%) of the children suffer from severe undernourishment. The survey indicates that twenty percent (20%) of the children of the age of five years have developed wasted bodies. Anaemia amongst children of 6 – 59 months is as high as sixty percent (60%). In India anaemia usually results from poor nutrition.

The statistics of the malnutrition of Indian women is as high as fifty percent (50%) while forty four percent (44%) of the Indian men suffer malnourishment. Thus it is required to introspect into the structural restraints for which the right to food of such a huge number of people remains un-enforced.

The Supreme Court and the High Court are the judicial organs to enforce the right to food. They are situated beyond the means and reach of the food vulnerable section of the society who are suffering from hunger and starvation. The justiciability of the right to food of the hungry and starving population depends to a large extent in the incidents of public interested litigation. The hungry population who are unable to manage two square meals a day cannot afford the time and money required to enforce their rights. The statistics of hunger clearly indicate towards this fact.

[51] Case No. 37/3/97-LD. Complainant Shri Chaturanan Mishra.

Therefore, there is a structural denial in the justiciability of right to food. The Constitution has ample provisions to take justice to the door step of the poor. Therefore, the parliament should adopt adequate legislation to enlarge the jurisdiction of the Civil Court and the Nyaya-Panchayat by empowering them to enforce the right to food in case of violation. Such a measure shall enable the poor to knock the doors of the judiciary in case of violation of their right to food. The establishment of the Human Rights Court in all districts of Assam as provided under the Protection of Human Rights Act, 1993 shall enable the food vulnerable section to enforce their rights easily. Therefore, the State government should take immediate steps to establish this court in districts as well as State level.

Journal of Legal Studies, International Refereed Peer-Reviewed Journal
ISSN 2321-1059, Vol. 7, Issue II, July 2019
www.journaloflegalstudies.co.in

Right to Equality under the Constitution of India

Dr. Aniruddha Ram[1]

Introduction

The first and the foremost fundamental right that the constitution of India guarantees to its people is the 'Right to Equality. Article 14 provides the general rule to equality whereas the other Article i.e., 15, 16, 17, & 18 lay the rule of equality in specific areas when taken together, these provisions provide a comprehensive law securing 'equality to all'. There is no doubt that all men are born equal but it is the status of their families in which they are born and the opportunities which are available to them, make them unequal, so here the 'right to equality comes into play to bridge down the gap and to bring 'equality of status and opportunity'[2].

The concept of equality has been held basic to the rule of law and is regarded as the most fundamental postulate of republicanism. In *Nehru Gandhi v. Raj Narain*[3], the majority of the Supreme Court has held that the right of equality contained in Article 14 is a Basic feature of the Constitution and an essential attribute of democracy of rule of law.

In *Secretary HSEB v. Suresh*[4], the Apex Court held that the equality clause, embodied in Article 14 does not speak of mere formal equality before the law but embodies the concept of real and substantive equality, which strikes at the inequalities arising on account of vast social and economic differentiation and is thus consequently an essential ingredient of social and economic justice.

Right to Equality (Article 14)

Art. 14 mandate that "the State shall not deny to any person equality before the law or equal protection of laws within the territory of India". The Constitution of India has imposed an obligation on the State under Art. 14 to ensure 'equality for all. The benefit of Art. 14 are, therefore, not limited to citizens. Every person within the Indian Territory whether natural or artificial, citizen or a foreigner, is entitled to the protection/guarantee of this Article. Art. 14 carry in it two expressions:

(i) Equality before law; and
(ii) Equal protection of laws.

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[1] ***Associate Professor, Jaipur School of Law, Maharaj Vinayak Global University, Jaipur, Rajasthan.***
[2] Article 14 to 18 provides a comprehensive Law on Equality.
[3] AIR 1975 SC 2299.
[4] AIR 1999 SC 1160.

Equality before law finds its source in the British Doctrine or 'rule of law'. The Doctrine of Rule of Law as is propounded by Dicey means that no man is above the law and that every person whatever be his rank or condition, is subjected to the ordinary law or the land and is amenable to the jurisdiction of the ordinary Courts. It is a negative concept as it implies the absence of any special privilege in the favor of any particular individual.

'Equal Protection of Law' has its source in the 14th Amendment of the Constitution of the United States of America. It means that all persons have the right to equal treatment in similar circumstances, both in the privileges conferred and, in the liabilities, imposed by the laws. The expression 'equal protection of laws' has a positive content as it ensures equality of treatment to all in equal circumstances.

Doctrine of equality

However, the concept of 'equality' is qualified and clipped by the introduction of various doctrines by the Supreme Court, from time to time. Initially, it was the 'theory of classification or nexus tests' and later on the courts went onto evolve another doctrine which slaps the State action as unequal, if exercised arbitrarily i.e. a guarantee against arbitrariness. Both the doctrine the old as well as the new has its own merits and demerits.

Theory of classification

The 'classification theory' is itself indicated or included in the right to equality which talks about equality amongst equals. The Supreme Court enunciated the 'nexus test' in the case of State of *West Bengal v. Anwal Ali Sankar*[5], as in order to pass the test of permissible classification two conditions must be fulfilled viz. (i) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others left out of the group, and (ii) that the differentia must have a rational relation to the objects sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct and what is necessary is that there must be nexus between them".

Equality secured by Art. 14 do not mean absolute equality, which is a human impossibility. In the case of *Kedar Nath v. State of West Bengal*[6], the Court held that the equal protection of laws does not mean that every law must have universal application, for all persons are not, by nature, attainment or circumstances in the same position. The varying needs of different classes of person often require separate treatment.

New Concept of Equality

Theory of non-arbitrariness to meet with the criticism, the Supreme Court evolved a new doctrine, which had a much wider scope and application in contrast to the old doctrine of classification'. The new doctrine Strikes at the 'arbitrary exercise of powers' and hence is termed as doctrine of 'non-arbitrariness'. It was developed to keep a check on the wide

[5] *State of West Bengal v. Anwal Ali Sarkar* 1952 AIR 75.
[6] AIR 1963 SC 404.

discretionary powers which are exercised arbitrarily i.e., orders passed independent of a rule or without adequate determining principle.

In *E.P Royappa v. State of Tamil Nadu*[7], the Supreme Court propounded the new concept of equality in the following words: *"Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed' and confined' within traditional and doctrinaire limits. From a positivistic point of view equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other to the whim and caprice of an absolute monarchy. Where an act is arbitrary, it is implicit in it that it that it is unequal both according to political logic and constitutional law and is therefore vocative of Art. 14"*.

In *Menka Gandhi v. Union of India*[8], the Supreme Court reiterated the new concept of equality propounded in the E.P Royappa Case and said…*"Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits Art. 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non- arbitrariness, pervades, Art, 14 like a brooding omnipresence."*

In *International Airport Authority Case*[9], the Court held that the doctrine of classification which is involved by the Court is not paraphrase of Art. 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action is question is arbitrary and therefore, constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to in the test, then the impugned legislation or executive action would plainly by arbitrary and the guarantee of equality under Art. 14 would be breached.

Hence, by enacting the doctrine of non- arbitrariness, the Supreme Court adopted a positivistic and activist approach. The new doctrine concludes that if the action of State is arbitrary it cannot be justified even on the basis of doctrine of classification. The doctrine of non-arbitrariness has another connotation i.e. "justice should not only be done but it must also be seen to be done".

However, the new doctrine is also not free from shortcomings. According to H.M. Seervai, the new doctrine hangs in the air because it propounds a theory of equality without reference to the terms in which Article 14 confers right to equality. Moreover, it is not necessary that every action which is arbitrary would amount to inequality. Hence, there is obviously the logical fallacy of equating arbitrariness with equality. A striking example of the fallacy is

[7] AIR 1994 SC 555.
[8] AIR 1978 SC 597.
[9] *R.D Shetty v. Airport Authority* AIR 1979 SC 1628.

equating arbitrariness with equality is given by T.N Andhyarujna[10]: *"The Queen in a lice in Wonderland acted quite capriciously when she ordered anyone's 'head to be taken off who irritated her but there was no question of her acting unequally. Similarly, one can act quit 'arbitrarily' to a person or body without violating any concept of equality as when permission is refused to a sole applicant on the ground that the applicant has red hair. No case of inequality also arises if all the applicants have red hair and are capriciously refused permission on the ground that they have red hair. It is only when permission is refused capriciously on the ground that some have red hair and is granted to others because they have black hair that a question unequal treatment arises, in which case it is the old theory of the absence of a rational reason for the distinction made that comes into operation."*

Conclusion

Finally, the Court made a conscious effort to put brakes on the 'activist approach' followed by it and to put a bridle on the vague and loose new doctrine of non-arbitrariness". In *G.B Mehajan v. Jalgaon Municipal Council*[11],. Where the state was challenged "arbitrary and unreasonable and therefore violative of Art. 14 the Supreme Court held that the court is to decide such cases by applying the test of Wednesbury unreasonableness.

In *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, Lord Creene, M.R in a classic and off-quoted passage held that when a statute gave discretion to an administrator to take decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other following conditions were satisfied viz. the order was contrary to law or irrelevant considered or the decision was one that no reasonable person could have taken.

Hence, in order to condemn an action as unreasonable, the Court has to inquire whether the decision is one which a reasonable body could have reached. Thus, the Court allows some latitude for the range of doddering opinions which may fall within the bounds of reasonableness.

The Supreme Court followed the Wednesbury Principle and in *State of A.P. v. Mc. Dowell*[12], Were the Constitutionality of the A.P. Prohibition Act, 1995 was challenged. It was alleged that the impugned act 'arbitrarily' prohibited the manufacture and production of liquor (amongst other grounds). Justice B.P. Jeevan Reddy succinctly stated: "*No enactment can be struck down by just saying that it is arbitrary or unreasonable…….it is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the Court can strike down an enactment if it thinks is unreasonable, unnecessary or unwarranted"*

[10] T.R Andhayarujna: Judicial Activism and Constitutional Democracy in India, Tripathi, 1992 at pp. 30-31.
[11] (1991) 3 SCC 91 at 110.
[12] *Ranjit Thakur v. Union of India* 1987 AIR 2386.

At the same time, the Apex Court has also adopted the 'proportionality' test in order to review administrative action. In *Om Kumar v. Union of India*[13], the Court held, that "when administrative action is attacked as discriminatory under Article 14" the Court is applying proportionality but when "administrative action is questioned as arbitrary, the Principle or Wednesbury applies".

[13] (2001) 2 SCC 386.