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ISSN : 2278-8093

Pragyaan

Volume 2 : Issue 2, December 2012

Pragyaan: Journal of Law
a bi-annual refereed Journal

Research Papers

Marital Violence against Women : Nature and Perspective
Komal Vig

Victims of Trafficking: Care and Support for Adolescent Girls/Women and Children
Nazia Khan

Road Accidents in India: Remedies and Concerns
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Right to Privacy in India: A Review
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Economic and Legal Outlook of Environmental Impact of Biotechnology: A Review
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Juvenile in Conflict with Law: Definitional Issue
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Role of Sub-ordinate judiciary in protecting Human Rights in India
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Sustainable Development: Need for Environment Conservation
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Short Submission

Right to Life and Personal Liberty: Call for Speedy Justice
Dr. Pradeep Kulshrestha

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Panel of Referees

From the Chief Editor

It is our pleasure to present December 2012 issue of **Pragyaan: Journal of Law.** The experience has been marvelous and full of challenges. Our team faced all challenges with never-ending energy and attitude. It depicts boundless enthusiasm, emotions, imagination and of course talent of the young minds. We applaud this creative endeavor with fine contribution from academicians and practitioners for the success of the journal.

Pragyaan: Journal of Law is a blind two fold peer reviewed bi-annual Journal. Accordingly, it brings to the readers only select articles of high standard and relevance. In a country governed by the rule of law, it is important that awareness about the laws is created among those who are supposed to be concerned with these laws. Academicians can play a very important role in the development of the law, and there is need to encourage young minds to participate in development of law based on the needs of the changing society and technical advances. This Journal provides an excellent platform to all the academicians and practitioners to contribute to the development of sound laws for the country. The current issue addresses vital issues such as Marital Violence against Women, Victims of Trafficking, Limited Liability Partnership, National Green Tribunal Act, 2010, Role of Sub-ordinate judiciary, Juvenile in Conflict with Law, Environmental Impact of Biotechnology, Right to Privacy, Legal Policy for Wetland Conservation in India and Sustainable Development.

We would like to express our gratitude to the Management of the institute, Editorial Advisory Board and the Panel of Referees for their constant guidance and support. Appreciation is due to our valued contributors for their scholarly contributions to the Journal. We would also like to thank our Editorial members and Faculty of Law whose valuable suggestions and continuous support especially Mr. Chandra Nath Singh for his hard work and dedication to make this edition a success.

Our team of professionals comprising of Dr. V K Jain (Dean Academics), Dr. A S Pandey (Dean Research Publications), Dr. T N Prasad (Editor) have made significant contribution towards making the research papers error free, presentable and reader friendly. The contribution of our team members is highly appreciated. Also, our thanks are due to the other faculty members of School of Law, IMS Dehradun who provided the necessary support.

We welcome contributions from academicians as well as practitioners to ensure a continued success of the journal.

We hope that this issue of **Pragyaan: Journal of Law** will prove to be of interest to all the readers. We have tried to put together all the articles coherently. Suggestions from our valued readers for adding further value to our Journal are however, solicited.

Dr Pawan K Aggarwal
Director
IMS, Dehradun

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Marital Violence against Women - Nature and Perspective

*Komal Vig**

ABSTRACT

Indian culture is undoubtedly the most ancient and identical culture of the world. This culture has honored and worshipped females as Goddesses. But with the advent of time, the social system got polluted and the fairer sex suffered at the hands of the arrogant men. The exploitation of women prevails across all communities, castes, religions and regions. It happens in various forms such as sex-selection, female feticide and infanticide, dowry tortures, and domestic violence. Domestic violence occurs within the four sacred walls of the home and is often accepted as her destiny. Many efforts have been pioneered at International level, and Indian legislature has always tried to amend the laws for specified purposes. The Constitution of India intended to remove all inequalities based on sex and gender. New amendments have been made in the penal provisions against violence and dowry laws to curb these evils. The new legislation, Domestic Violence Act (DVA) has been introduced to provide more effective protection of rights and security to the women victims. The Indian judiciary and NGOs play critical role in monitoring the implementation of protection laws. As violence against women is a complex problem, a multilayered strategy needs to be formulated to combat this evil.

Keywords: Amendments, Civil Legislation, Constitution of India, Covenant, Domestic violence, Elimination, Imperative needs, International Perspective, Judicial Concern, Penal provisions,

1. Introduction

The social fabric of family values constitutes the mainstay of Indian tradition and ethics. It is undoubtedly the strength and identity of our culture and society. It was believed, especially in a country like India, that a child is a gift of god and when the child happens to be a girl, the society worshipped her as the incarnation of Goddess of learning 'Saraswati', of wealth 'Laxmi', of power & energy 'Shakti' and 'Durga'.

The wife was considered as the 'Ardhangini' of a man that literally means the half-body of a man. Thus, she was honored with a very dignified position in the society. But this situation perhaps existed during the time of mythological culture and ideologies. With the passage of time, the social system got polluted and the dominance of males emerged as a feature analogous to our society. Since the time immemorial, the decision making power is single handedly bestowed on the physically stronger sex in almost all realms of life whether it is political, economic, family related, etc[1]. For long, the fairer sex has suffered at the hands of men. Their exploitation ranged from corporal to intangible abuse like mortal and psychological torture. This insidious nature of domestic violence is documented across cultures and nation worldwide. It is a universal phenomenon.

"Violence against women continues to persist as one of the most heinous, systematic and prevalent human rights abuses in the world. It is a threat to all women, and an obstacle to all our efforts for development, peace, and gender equality in all societies. Violence against women is always a violation of human rights; it is always a crime; and it is always unacceptable", says UN Secretary General, Ban Ki Moon. Domestic Abuse: Terror of a Different Kind[2].

Violence occurs in almost all the societies globally and is not a function of any particular religion or nationality, specific class or caste. In India, women can experience violence through their life cycle, across communities and classes, religions and regions. It varies from sex-selection,

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1 *Ratika Aiyar, "Relevance of Gender Based Laws- Domestic Violence Act 2005" Nov.27,2009, www.jurisonline.in*

2 *Ban Ki Moon, Domestic Abuse : Terror of a different kind*

female feticide and infanticide, forced pregnancy, domestic violence and dowry-related violence to violence in armed conflicts sexual harassment and assault, forced prostitution and honour killing. Every case visualizes that violence is perpetrated because of a women gender.

According to the myth, the family is a sanctuary of tranquility and harmony, whereas in contradictory terms, domestic violence is a veritable incongruity. Violence not only shatters the peaceful image of the home, but also the safety and security that kinship provides.

Domestic violence occurs within the private sphere and generally between individuals who are related to each other through blood, law or intimacy. In spite of the fact that the term domestic violence is apparently neutral, it is nearly always gender-specific crime often perpetrated by men against women[1]. Further, when the violence occurs within the four sacred walls of the home, abuse is effectively condoned by the tacit silence and very passively displayed by the law- enforcing machinery and the State. Therefore, the problem spells and urges for the establishment of a just and equitable social order, where nobody can be exploited by another and treated as an unequal or inferior.

2. International Perspectives and Efforts

Equal right for men and women has remained the focus at various international conventions/forums. Some efforts are listed below to through light on the international perspective on rights of men and women.

The United Nations Charter in 1945[2], made a provision for equal rights for men and women. The Universal Declaration of Human Rights in 1948[3] provides that all human beings are born free and equal in dignity and rights and everyone is entitled to all rights and freedom set forth in the Declarations without discrimination of any kind, such as sex.

The Convention on the Political Rights of Women in 1954[4] provides for right to vote without any discrimination, right to run for public office on equal terms with men, right to hold public office on equal terms with men. Commission on the status of women in 1947 recommended for promotion of women's rights. The Convention on Nationality of Married Women, 1957[5] has the provisions of celebration or dissolution of marriage between a national and an alien, or a change of nationality by the husband during marriage shall not automatically affect the nationality of the wife and voluntary acquisition of the nationality of another State or the renunciation of the nationality of a national shall not prevent the retention of the nationality of the wife.

The Convention on Consent to marriage, Minimum Age of Marriage and Registration of Marriage, 1962[6] provides for free and full consent of partner, legislative action to specify minimum age for marriage, and registration of marriage.

The International Covenant on Economic, social and Cultural Rights, 1966[7] specifically in Article 3 states the equal rights of women and men to enjoyment for economic, social and cultural rights.

The International Covenant on Civil and Political Rights, 1966[8] states the equal rights of women and men to enjoyment of civil and political rights.

The Declaration on the Elimination of Discrimination against Women, 1967[9] spells that the discrimination against women is fundamentally unjust and constitutes an offence against human dignity.

First World Conference on Women, Mexico, 1975[10]

The First world conference on the status of women was convened in Mexico City to coincide with the 1975 International Women's Year, observed to remind the international community that discrimination against women continued to be a persistent problem in much of the world. The Conference, along with the United Nations Decade for Women (1976-1985) proclaimed by the General Assembly, setup a process of learning that includes deliberation, negotiation, setting up objectives, identifying obstacles and reviewing the progress made.

The Convention on Elimination of All Forms of Discrimination against Women, 1979[11] is the main foundation of rights in respect of women to which 166 countries including India are members till date. The Convention inter alia recognized that the discrimination against women in some areas hampers economic growth and the society at large.

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1 *An Article by Indira Jaising, Director of the Women Rights Initiative of Lawyers collective, Nov.2002, New Delhi, www.indiatogether.org*

2 *Vide June 26, 1945, 59 Stat. 1031, T.S.993, 3 Beavans 1153, entered into force on 24-10-1945.*

3 *Vide United Nations General Assembly Resolution 217 A (III), dated 10th December 1948.*

4 *Vide 193, U.N.T.S. 135, entered into force July 7, 1954.*

5 *Vide UN General Assembly resolution 1040 (XI) of 29 Jan, 1957, Entry into force 11 Aug.1958, in accordance with article 6*

6 *Vide UN General Assembly resolution 1763A (XVII) of 7 Nov, 1962*

7 *Vide U.N. General Assembly Resolution 16 December, 1966, UN, Treaty Series, Vol. 993, p.3, entry into force : 3 January 1976.*

8 *Vide United Nations General Assembly Resolution, 2*

9 *UN General Assembly, 7 Nov. 1967, A/RES/2263*

10 *Vide United Nations General Assembly Resolution, Mexico, 19 June 2 July 1975*

11 *Dated 18-12-1979 and came into force in 1981.*

The United Nations fourth world conference on women - Beijing China September 1995 action for equality, development and peace[1] is a milestone for the countries for enacting their domestic laws on the subject. Following are the excerpts from the report published on "Violence against Women".

"Violence against women is an obstacle to the achievement of the objectives of equality, development and peace. Violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms. The long-standing failure to protect and promote those rights and freedoms in the case of violence against women is a matter of concern to all States and should be addressed.

Developing a holistic and multidisciplinary approach to the challenging task of promoting families, communities and States that are free of violence against women is necessary and achievable. Equality, partnership between women and men and respect for human dignity must permeate all stages of the socialization process. Educational systems should promote self-respect, mutual respect, and cooperation between women and men."

Governments across the world agreed to enact and implement national legislation to eradicate violence against women and to work effectively to ratify all international agreements that relates to ending violence against women. They agreed that there should be shelter homes, free-legal aid and other necessary services for girls and women prone to risk, as well as counseling and rehabilitation for perpetrators of such crimes. Governments also pledged to take suitable steps not only in the field of education to modify the social and cultural patterns of conduct of their citizens but also to strengthen the ethics and values of men and women.

The special Rapporteur on Violence against Women warns of threats to gains on women's human rights, 2004[2]. Mukta Tomar (India) said, "The progress of any society was dependent on its ability to protect and promote the rights of its women. The guaranteeing of equal rights and privileges for women by the Constitution had marked the first step towards the transformation of the status of women in India. As a result of concerted efforts and a comprehensive policy framework over the last five decades, there had been significant advances in the socio-economic indicators for women. Empowerment for women was critical for the socio-economic progress of any country. The Government of India was convinced that education was the key for unleashed forces for social reform and created awareness about the need for increased participation of women in the educational, social, economic and political life of India. In addition to the role of the State and the Constitutional provisions that existed, the judiciary had also played a key role in the advancement of gender justice in India. The Supreme Court of India had delivered landmark pronouncements on matters such as the need for equal property rights for women, and grass roots groups organizing women had become agents of social change, enabling access to financial and material resources".

3. Provisions Enshrined in the Constitution of India

The Indian legislature more or less has always tried to cope with the contemporary need-based development and amendment of laws for the specified purposes. It runs across every field may it be Politics, Constitutional Rights, Human Rights, Civil Rights or Social Transfer.

The Supreme Court in a case[3] observed that "it is well accepted by thinkers, philosophers and academicians that if JUSTICE, LIBERTY, EQUALITY and FRATERNITY (including social, economic and political justice), the golden goals set out by the Preamble of the Constitution, are to be achieved; the Indian polity has to be educated with excellence".

This is because the Constitution is not to be construed as a mere law, but also as the machinery by which laws are made. The Constitution is a living and organic thing which, of all instruments has the greatest claim to be construed broadly and liberally[4].

Article 14 and 16(4) of the Constitution intend to eradicate social and economic inequality to provide equal opportunities to man and woman. In reality, the right to social and economic justice envisaged in the Preamble and elongated in the Fundamental Rights and Directive Principles of the Constitution, in particular Articles 14, 15, 16, 21, 38, 39 and 46 are envisaged to make the life of the poor, disadvantaged and disabled citizens of the society, meaningful[5].

Further, the Supreme Court observed in various cases[6] that the Preamble embraces all the new laws aftermath Constitution and it can be invoked to determine the ambit of both Fundamental Rights and Directive Principles.

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1 *Beijing, China, September, 1995.*
2 *Vide Special Rapporteur on Violence against Women, General dated 5th April, 2004.*
3 *P.A. Inamdar v. State of Maharashtra, (2005) 6 SCC 537.*
4 *Goodyear India v71. State of Haryana, A.I.R. 1990 SC 781: (1990) 2 SCC*
5 *Valsamma Paul v. Cochin University, AIR 1996 SC 1011:(1996) 3 SCC 545*
6 *Keshvananda Bharti v. State of Kerala, AIR 1973 SC 1461 : (1973) 4 SCC 1461; 1973 Suppl SCR 1; Chandra Bhawan v. State of Mysore, AIR 1970 SC 2042 : (1969) 2 SCC 89; Dharwad District P.W.D. literate Daily Wage Employees Assn-V. State of Karnataka, (1990) 2 SCC 396 : AIR 1990 SC 883 : 1990 Lab I C 625*

This answers to the query, why the Government organs owe their origin to the Constitution and derive their authority from and discharge their responsibilities within the framework of the Constitution. The democratic socialism aims to end poverty, ignorance, disease, and inequality of opportunity. This socialistic concept ought to be implemented in the true spirit of the Constitution[1].

Further Article 51A (e) imposes the duty on every citizen in India to renounce practices derogatory to the dignity of women.

3.1 Amendments in the Penal Provisions against Violence

Earlier legislations in India tried to give the women the protection in respective fields but particularly, so far as the torture, cruelty and harassment are concerned, Sections 498A[2], 304B[3] of Indian Penal Code and the Dowry Prohibition Act of 1961[4] are basic provisions.

A new Chapter XXA was added in the Indian Penal Code in the year 1983[5] for punishing husband and his relatives for subjecting a woman to cruelty. This section provides for imprisonment up to 3 years[6] and a monetary fine. Concurrently, the Indian Evidence Act[7], 1872 was also amended by this Amending Act by inserting Sections 113A and 113B. According to these, in case of abetment of suicide by married woman within seven years of marriage, the burden of proof of innocence was shifted to accused. The Amending Act also inserted Section 198A in Criminal Procedure Code, 1973 whereas a court can take cognizance of the offence upon police report or upon complaint by party or women's parents, brother, sister, etc.

The provision of Section 498A I.P.C. was enacted to meet the social challenge to save married women from being ill-treated by husband or his relatives[8]. The objective of adding the Chapter XXA in Indian Penal Code was to protect the wife where she is subjected to cruelty but not to disrupt the family life. Where the husband and wife in spite of some previous misunderstanding intend to stay together, it should be the duty of Court to encourage such rapprochement and allow them to live as husband and wife rather than to disrupt the family prosperity by forcing the wife to pursue a criminal proceeding on the facile nay, fatuous plea that the offence alleged is not compoundable[9].

3.2 Evil Impact of Dowry

Dowry system is a curse and social evil in India and has been a source of great disturbance and embarrassment in our society. Dowry is a cultural system where the parents of bride (girl) pay huge amounts of money and give expensive gifts and jewellery to bride groom (boy) and his parents during marriage. Dowry was prohibited in 1961 under Indian civil law, and followed by Sections 304B and 498A of the Indian Penal Code.

The Court in a case[10] held that Section 498A does not create any situation for double jeopardy. That provision is distinguishable from section 4 of The Dowry Prohibition Act, 1961 because in the latter mere demand of dowry is punishable and existence of element of cruelty is unnecessary. Section 498A deals with aggravated form of the offence. It inter alia punishes such demand of property or valuable security from the wife or her relative as are coupled with cruelty, to her. Hence, a person can be prosecuted, in respect of both the offences punishable under Section 4 of the Dowry Prohibition Act and section 498A of Indian Penal Code.

"But every aspect of cruelty or harassment is not made a crime under Section 498A of IPC. The prosecution has to establish that the cruelty or harassment was unabated incessant and persistent, and being grave in nature unbearable and the same was with intention to force women to commit suicide or to fulfill illegal demand of dowry by husband or in-laws. A single or solitary incident will not invite a woman to commit suicide and cannot be considered cruelty or harassment envisaged under Section 498A[11]. A mere beating on one occasion is not sufficient to constitute cruelty." Scolding occasionally for a mistake of a woman, may not amount to cruelty, but the continued taunting, insulting and scolding a woman on false pretext clearly extracts the term cruelty as defined under Section 498 A of IPC[12]. Mere demand for property or mere harassment by itself is not cruelty[13].

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1 *G.B.Pant University of Agriculture and Technology v. State of Uttar Pradesh, AIR 2000 SC 2695 : (2000) 7 SCC 109 : (2000) All LT 2420*

2 *Ins. By The Criminal Laws (Second Amendment) Act, 1983 (46 of 1983), Sec. 2.*

3 *Ins. By Act 43 of 1986, Sec.10*

4 *Came into force on 01-07-1961, vide S.O.1410, dated 20th June, 1961.*

5 *Ins. By the Criminal Laws (second Amendment) Act, 1983 (46 of 1983), Sec.6.*

6 *L.V.Jadhav v. V.Shankara Rao Aba Saheb Pawar, (1983) CrLJ 1501 : AIR 1981 SC 1219*

7 *Ins. By the Criminal Laws (second Amendment) Act, 1983 (46 of 1983), Sec.2*

8 *1994 CrLJ 3472 : ILr (1994) 2 P & H 422.*

9 *(1998) 15 Orissa CR 449*

10 *1986 CrLJ 1510.*

11 *(1999) 2 Guj LH 596*

12 *(1996) CrLJ 2834 : (1996) 3 Andh LD 11*

13 *(1993) CrLJ 3019*

3.3 Imperative Need of New Civil Legislation

Though there are stringent provisions under Section 498A and 304B of IPC, yet the women are harassed by their husband and matrimonial family members. Further cases registered for cruelty, harassment and violence lead to number of acquittals.

The law itself becomes failure though not fully and it urges the necessity for enacting the Special Civil Legislations. Perhaps, these basic national and international bounties compelled the Indian Government and laid the foundation of enacting The Protection of Women from Domestic Violence Act, 2005[1] for making restrictive provisions for errant family members and prohibiting harassment or any kind of violence against women and girls in a family or in any relation.

The Act inter alia provides for more effective protection of the rights guaranteed under the Constitution to all those women who are victims of violence of any kind occurring within the family. According to the Act, any harm, injury to health, safety, life, limb or well-being or any other act or threatening or coercion, etc. by any adult member of the family, constitutes domestic violence. Any woman, who is or has been in a domestic or family relationship, is subjected to any act of domestic violence, can complain to the concerned Protection Officer, Police Officer, Service Provider or Magistrate.

This Act covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage, or through a relationship in the nature of marriage or adoption. The relationships with the family members, living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection.

This Act enables the wife or the female living in a relationship in the nature of marriage to file a complaint under the proposed enactment against any relative of the husband or the male partner but does not enable any female relative of the husband or the partner to file a complaint against wife or the female partner.

The Act also provides rights of women to secure housing and empowers the Magistrate to pass protection orders in favor of the aggrieved person.

4. Judicial Concern Regarding the Problem

Among Legislature, Executive and Judiciary, the supreme authority is vested in the Judiciary (i.e. brain of India) and Article 141 of our Constitution provides that the final authority vests in it. The judiciary always inspires directly or indirectly to meet the challenges as per need, either by precedents, directions, or suggestions etc[2].

The Supreme Court in some cases[3] held that the social justice enables the courts to uphold legislations, to remove economic inequalities, to provide decent standard of living to the working people and to protect the interests of the weaker sections of the society.

In Kundula Bala Subrahmanayam v. State of Andhra Pradesh,[4] the Supreme Court showed its very concern about the women harassment and torture. It held that, of late there had been an alarming increase in cases relating to harassment, torture, abetted suicides and dowry deaths of young innocent brides. This growing degree of violence and exploitation of the young brides, though keep on sending shock waves to the civilized societies where ever it happens, continues unabated. There is a continuous erosion of the basic human values of tolerance and the spirit of "live and let live". Lack of education and economic dependence of women have encouraged greedy perpetrators of the crime. It is more disturbing and sad that, in most of such reported cases it is the women who plays pivotal role in this crime against the younger women, In many cases, it has been observed that the husband, even after marriage, continues to be "Mamma's baby" and the umbilical cord appears not to have been cut even at that stage. This observation of Supreme Court in early 1990s shows that the judiciary is always at obverting state for women victim.

4.1 Participation of NGOs in Combating this Social Evil

NGOs played critical role in monitoring implementation of non-treaty instruments such as the UN Declaration on the Elimination of Violence against Women, the Vienna Declaration and Programme of Action and the Beijing Declaration and Platform for Action.

Women organizations provided leadership in boosting the visibility of violence against women, giving victim-survivors a voice through tribunals and personal testimonies; providing innovative forms of support to victims of

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1 *Effective from 26th October, 2006 Vide S.O.1776 (E), dated 17th October, 2006, published in Gazette of India, Extra. Pt. II, Sec-3 (ii), dated 17th October, 2006*

2 *P.K.Das, Universal's Handbook on Protection of Women from Domestic Violence, Act and Rules, Second Edition, 2007 (June).*

3 *Lingappa v. State of Maharashtra, AIR 1985 SC 389 : (1986) 1 SCC 479 ; Nakara v. Union of India, AIR 1983 SC 130 : (1983) 1 SCC 305 : (1983) 1 LLT 104; Sadhuram v.Pulin, AIR 1984 SC 1471 : (1984) 3 SCC 410*

4 *(1993) 2 SCC 684.*

violence; and forcing governments and the international community to recognize their own failure to protect women. It is crucial that women advocates continue to lead the process, particularly in playing a monitoring and accountability role, and that governments increase partnerships with them[1].

Women organizations lobbied to have the law tilted in favour of women's by bringing in amendments to shift the burden of proof on the accused and by instituting fairly stringent, pre-emptive measures and punishments against the accused[2].

5. Conclusion

Violence is a complex problem and there is no strategy which will work in all situations. Considering the interconnections between various factors responsible for domestic violence, strategies and interventions should always be designed within a comprehensive and integrated framework. A multi-layered strategy that addresses the structural causes of violence against women, provides immediate services to victim-survivors, ensures sustainability and has the potential to eliminate this scourge must be formulated.

Domestic violence is a health, economic, legal, developmental, educational and human rights problem. Strategies should be designed to operate across a broad range of areas depending upon the context in which they are required. An effective strategy is one that is designed to be culture- and region-oriented, providing victim-survivors easy access to wide-ranging services, and involving the community and individual stakeholders in the design of interventions.

Finally, it is only socialism that truly emancipates women by reversing the injustice of the past thousands of years. By socializing the masses and bringing the woman back into social production and design-making, she can be freed of her domestic enslavement.

[1] *"Domestic Violence against Women and Girls" Innocenti Digest No.6, June 2000, published by UNICEF Innocent Research Centre, www.uniceficde.org*

[2] *Madhu Kishwar 'Laws Against Domestic Violence, Underused or Abused?' MANUSHI, a Journal about women and society, Issue 120, September-October, 2000, 17-24 New Delhi, India at www.manushi-india.org.*

Victims of Trafficking: Care and Support for Adolescent Girls/Women and Children

*Nazia Khan**

ABSTRACT

Human trafficking is one of the fastest growing crimes with no authentic data available for it. This is one of the organized crimes conducted in most methodical, harmonious and efficient way. As the perpetrators of these crimes first take into good confidence the victims and their relatives by promising them a better life in the cities, hence this makes the crime more organized and methodical. This crime also requires good social networking as it cannot be possible in isolation. It happens in most organized and efficient way. Keeping in mind the vulnerability of the victim (social, economic psychological) the perpetrator of crime exploits these vulnerable situation which ends up in ruining the whole life of the victim, ensued her to become a mere commodity in the whole process of the crime with no say of her own. Such crime is so heinous that it leaves no space for the victim to get back to the society from where she has come; it ends up in effacing the very existence of the victim from society as a respectable person. In other words, it totally annihilates the dignity and self-respect of the victim in the society. The nature of this crime is such that society back blames and criticizes the victim only; look down upon her as a promiscuous without considering the compelling situation and the whole organized process that has made the victim a commodity in the crime process.

Keywords: Crime, Women, Vulnerability, Trafficking, Poverty, Economic Deprivation, Organization, Insecurity, Commodity, Phenomena, Borders, Society, Police, Livelihood, Family.

1. Introduction

Whenever a crime is systematically performed and efficiently managed by the network of perpetrators in methodical manner it becomes organized crime. The organization is a functional group, intertwined and interdependent in its activities. Today, we have such organized crimes like human trafficking which do not consider the borders and are transcending in nature. Such crimes are conjured in a very sophisticated manner assisted by modern technology. Since these crimes are transcendental in nature as origin and organization of such crimes cross the borders hence, these crimes are extremely complicated and are even difficult to investigate.

Every year thousands of men and women are illegally trafficked all over the world. Despite the political will to combat illegal trafficking the available information on the magnitude of the problem remains limited. Especially in the area of data collection there is hardly any data available on this crime. General assumption about the people who are trafficked is that they are willing participant in the criminal transaction. We believe that they are simply looking for an escape from poverty. However, the reality is that people are often economically, sexually and physically exploited. This phenomenon is actually closely related to the issues of human insecurity in terms of food insecurity, gender inequity, poverty and economic deprivation, lack of employment, limited access to basic resources and so on so forth. Coupled with it is the perception of women as expendable commodities, making them even more vulnerable[1]. This crime of illegal trafficking is closely linked with poverty as one can see that the victims are mostly from the underdeveloped regions like tribes, dalits or minority communities. The close associates of a victim often receive large sum of money for transporting the victim to another country under harsh conditions and often unknowingly under the false pretext. They are forced in to prostitution or are engaged in other criminal activities in the country of

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[1] *Kapadia, Kamini. 2002. Traffic Cops. Humanscape. 9(5) : 5.*

destination. As with many criminal activities, our understanding of human trafficking is piecemeal and lacks much of the corroborated evidence and information. Our understanding is also complicated by the global reach of trafficking and by social and cultural variation in the ways that the crime of trafficking unfolds. It is especially difficult to get a clear picture of human trafficking, partly because the victims of trafficking are more likely to be hidden or unreachable and also there is no authentic data available on the illegal human trafficking.

2. Causes of Trafficking

Trafficking is one of the organized crimes; it is done not only for sexual exploitation but also for other purposes like organ trade, child labour, camel jockey and so on. There are so many causes of trafficking but the main causal factors are poverty and illiteracy. It is not an isolated practice but is done in the context of market that promotes exploitation of women and children, which further promotes the culture of injustice in the vulnerable section of society. However, in trafficking the consent of the victim is irrelevant. Many times victims are trafficked by making false promises for providing better job opportunities in the cities, and sometimes by force.

There are various factors that contribute to the trafficking and are responsible to a great extent for trafficking:

i. Economic Vulnerability

Trafficking always happens from very low economic regions. Women and children in these regions fall prey at the hands of traffickers. Women in these low economic societies are considered as economic burden and many times are subject to violence. Due to change in the traditional roles of women, as they are expected to work outside their homes as well to earn money, now they are less constrained socially to seek work outside their homes. As we have seen globally, the regions which are less developed and have low economic profile are the places of origin of trafficking like Nepal, Bangladesh, India, and some underdeveloped regions of Africa. Usually, these traffickers help the victim's family with money, negotiate with the family and give the surety to provide some better opportunity to the victim in cities. Unemployment, serious economic hardships and hope for better life for them and their families are all push factors. Ready global market for the trafficked as commodities fuel demand[1]. These abuses are serious violation of human rights in which the victims lose their social capital and face the ordeal with serious ramifications. There are cases of suicide, mental illness, fear, exhaustion, and murder.

ii. Pull Factor towards Urban Cities

Due to economic opportunities to work in urban areas, people move from rural to urban areas in search of better employment opportunities. As in rural areas there are less job opportunities, still agriculture is the primary source in the rural areas, that is also diminishing due to the increasing population. Women and children are the most vulnerable as they have least alternative means of security. This led them to get influenced by the job opportunities in the urban areas. Moreover, male migration has resulted into the increasing number of households headed by women, with children and sometimes related members helping out. Failing to manage the household on their own, women and children often migrate to urban areas to seek a livelihood[2]. In the hope to get some job in urban areas, women from rural areas often get trapped into trafficking.

iii. Lack of Political will to Combat Trafficking

Illegal trafficking is one of the most heinous and underground crime. It is committed in a very organized way. The traffickers often take the family of the victim into confidence. Many NGOs allege that lack of political will to tackle it and corruption are the two basic causes that give more and more encouragement to the crime. It has been observed that police do not play a positive role in protecting the victims from the violence inflicted by pimps or traffickers. A commonly held view among the sex workers is that local police and politicians responsible for the red-light areas receive bribes from the organized crime network to protect the lucrative sex trade[3]. Victims of trafficking often face intimidation, violence, emotional blackmail and threats of detention, prosecution and deportation. However, once the victim is removed from the community and taken into the fold of trafficking, it is very difficult for her to get back to the same community from where she has come. This is because of the fact that these victims are ostracized from the community, nobody looks at them with respect. Even the family members of the victim feel reluctant in taking them back. The social stigma attached with the victim forces her to remain in the dirty world of trafficking with no alternative. The crime of trafficking is a vicious circle where there is no way out once the victim gets trapped into it. Hence unless some concrete measures are adopted by the State to tackle the crime and save the victims of trafficking, it is almost impossible for the victims to free themselves from the clutches of the traffickers.

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1 *Buckley, Mary. Traffic in People: Evil Trade.*

2 *Khair, S. Enslavement Across Borders: The Case of Trafficking of Women and Children in Bangladesh. Biss Journal. Vol. 25. 3 July 2004. P: 255-278*

3 *Mallick. A. trafficking in Persons: Facts and Facets. Social Change. Vol. 34 No. 3. September 2004. p: 125-134*

iv. Low Economic Status of Women

Women in most of the societies in rural areas are not well educated. They do not get the exposure of the outside world and remains ignorant about the crimes against them. Changing traditional role of women has led to the increasing pressure on women to financially support their families. This has led the women to leave their traditional places at home and work somewhere else. The low economic status often forces the women to migrate and this phenomenon is described by UNICEF in one of its report on trafficking as "Feminization of Migration". Often many women are not aware of the dangers associated with their migration from their traditional places. Many women leave their home in a hope of better job opportunities and some of them end up in trafficking involving sex trade or labour.Often trafficked workers are to work in - Dirty, Difficult and Dangerous (3D) jobs. Many times they even get exploited by the police authorities. Asking bribes from migrants and free sex from migrated women and sex workers by the authority to avoid statutory penalties is not uncommon[1].

v. Violence against Women

Women are subjected to violence at home. They are often considered as the economic burden at home by parents. Rarely do they get the opportunity to receive education. They are mostly confined to home to do the domestic work. In order to retain their chastity they are often given in child marriage. At their in-laws home child brides are often subjected to violence coupled with the demand of dowry. Child brides are frequently tortured for money and if their families fail to respond to the demands then they are subjected to the maltreatment and abuse including desertion, divorce and also sale and trafficking into prostitution[2]. Moreover, young widowed women often face social stigma. They are often not welcomed in their parents' home. They are considered as unlucky and are not allowed to attend the auspicious functions. Under these adverse circumstances, these women find it difficult to deny the offer of marriage and employment and thus get themselves entrapped into exploitative conditions.

3. Historical Background of Trafficking

Slavery is recorded in history of almost every ancient civilization and was mostly viewed as normal state for certain people who are somehow dispossessed whether by debt, by war, by economic circumstances, or by race. Slaves were essential to the economy and society of all ancient societies in which some were known as Kaneez and Gulam. Their sale was organised because they were sold at specified places in organised manner.

During the middle ages, we have witnessed development of the concept of slave to one of a serf, who is largely treated better than earlier slaves, the power of the master to those in the serfdom being less absolute. These middle age societies of Europe and Middle East instead of giving up slavery as an ignorable practice continued the practice, recognizing it for its importance to development and power. The ruling elites in society determine who can be enslaved and who cannot by representing to the holders of the societies' value set. This has certainly not changed so much. This is an enduring pattern of trafficking throughout the ages. Those less valued people in a society are more at risk of being trafficked, being defined as somehow imbued with less human value than others.

India has a long history of prostitution and the sale of women in the past, all this bear great influence on the position of women in the present day in the society. It reinforces the toleration of assault on the status of women in the present context. If one looks back at Brahamana period, prostitutes were called as Veshya and were basically meant for entertaining the traders and merchants who led their lives away from homes and wives. The prostitutes were also known as ganika, bandhaki, rupajiva, veshya, varangana, kultani, sambhali, pumscali. The prostitutes were also taken over during the war along with the soldiers in the battle fields to provide them sexual pleasures. They were treated as commodities with no respect and were looked upon to fulfil the sexual desires of soldiers. They were also used for intelligence services of the king during Chandragupta Mauryan's time (324-300 BC).

During the Mughal period (1526-1787 AD), prostitution was recognized as an institution, although it was anti to the family life. There was the practice of singing and dancing girls. These women became rich but were not considered as part of the society. Prostitutes were confined outside the cities and that place was called as Shaitanpura or Devil's quarters[3].

Today, after so many years when we talk of not only equality but also equity among men and women, women empowerment, and treating women with full respect and dignity, the practice of prostitution is still prevalent. If one looks back on the entire chain of the prostitution, most of the women end up in prostitution through illegal trafficking

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[1] *Asian Migrant Centre. Mekong Migration Network. Migration Needs, Issues and Responses in the Greater Mekong Subregion. AMC. Hongkong. 2002*

[2] *Khair, S. Enslavement Across Borders: The Case of Trafficking of Women and Children in Bangladesh. Biss Journal. Vol. 25. 3 July 2004. P: 255-278*

[3] *Rozario, M. R. 1988. Trafficking in Women and Children in India: Sexual Exploitation and Sale. Uppal Publishing House.*

and by force, deception, cheating. Still in the current scenario the practice of trafficking lowers the status of women and forces then to have low self-esteem. Since prostitution has its roots in illegal trafficking, till the time this practice is prevalent it is very difficult to abolish illegal trafficking from the face of this world. Till the time women are exploited at the hands of men and are considered as a commodity in the market to satisfy men's sexual desires, it is almost impossible to give them the status of equality to men.

Prostitution violates the very basic human rights of women who are considered not as human beings but as mere commodities. There respect and self dignity are compromised in such a profession. In other words, they are considered as means to an end and not an end in itself. In the opinion of some people, human rights also include right to earn according to ones wishes and on that basis they support the legalization of prostitution. Now here comes the argument of 'ones own wish' but does the woman adopt prostitution as per their wish? And the answer is 'No'. No woman joins this dirty world of prostitution according to her own wish, there is always some compulsion, force or fraud behind her reason to be in prostitution. They are looked down in the society, with no respect and dignity, and are secluded from the society. By virtue of being a human being every person has right to live with dignity and also entitled to live in freedom, justice and peace.

4. Conceptual Clarity in regard to UN Convention

Trafficking can be defined as "trade in something that should not be traded in for various social, economic and political reasons." The concept of trafficking refers to "the criminal practice of exploiting human beings by treating them like commodities for profit." According to the UN Protocol to Prevent, Suppress and Punish trafficking in Persons, Especially Women and Children, "trafficking in persons" shall mean, "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include, at the minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs."

Trafficking is closely associated with the migration, from less developed parts to the developing ones in search of better job opportunities. It has been noticed by International Labour Organisation (2003) that there has been increasing pressure on women to financially support their families and changing traditional roles of women in society have resulted in more women leaving their traditional places of work to work somewhere else, this phenomena is referred as Feminization of Migration. The term 'Feminization of Migration' is closely associated with socio-economic vulnerability of women in the society. Since women get less preference in terms of education and this ensued to less job opportunity for them in public/private institutions. With the increasing inflation, women with economic vulnerability have started becoming a burden in the family. They are now accepted to do some work outside (apart from the domestic work which is not counted as work as it is non-paid) so to shed off some economic burden from the family. Given the low socio-economic profile they become easy targets in human trafficking. Hence, it is obvious that the 'Feminization of Migration' is closely associated with poverty and economic vulnerability of women. Often most of them being unaware about the dangerous ramifications of such migration end up in being trafficked and sexually exploited. Trafficking in persons is a particularly abusive form of migration. It is defined by the coercive, non-consensual and exploitative or servile nature of the purpose of movement, and involves a number of serious human rights violations, including forced labour, sexual and labour exploitation, violence and abuse of the victims[1].

However there is a very thin line drawn between prostitution and trafficking, during the framework of the UN Protocol many NGOs and countries emphasize on limiting the concept of trafficking to force or coercion. The Coalition Against Trafficking in Women International (CATW), along with the Movement to abolish Pornography and Prostitution (MAPP), France, the European Women's Lobby (EWL), International federation for Human Rights played significant role in the evolution of UN trafficking Protocol. These organizations and almost 140 NGOs from all over the world protected victims of trafficking and not just the ones who could prove that they have been forced. The Network opined that only this kind of principled and inclusive definition of trafficking would take burden of proof of the exploited and place it on the exploiters and make no distinction between deserving and undeserving victims of trafficking- those who can prove that they have been forced and those who cannot[2].

[1] *Gender Promotion Programme (GENPROM): Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers: An Information Guide, Booklet 6, Trafficking of Women and Girls, ILO, Geneva, 2003.*

[2] *Raymond, G. Janice. 2002. The New UN Trafficking Protocol. Women Studies Forum. Vol 25. No.5. Pp:491-502*

Report of the UN Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, entitled Integration of the Human Rights of Women and the Gender Perspectives: Violence Against Women (2001), acknowledges that all commentators agree that there are fewer victims of trafficking who are' being kidnapped or abducted… an overwhelming majority are being trafficked through deception and false promises…'[1] Hence the consent and no consent is irrelevant in the definition of Trafficking according to the new UN Protocol.

The definitions on trafficking available so far reflect the lack of consensus on what constitutes 'trafficking'. Over the decades, the concept itself has evolved to include many more attributes and features, so much so that increasingly, it has been recognized that historical characteristics of trafficking are outdated, ill-defined, non-responsive to the current realities of the movement and trade in people and to the nature and extent of abuses inherent in and accidental to trafficking. The UN Protocol definition of trafficking deals with the exploitative conditions that may result from trafficking, including ideas that were earlier only confined to understanding prostitution. The positive aspect of this definition includes the explanation of the means used for trafficking, its clarity of the issue of consent and the different acts in the trafficking process that it elucidates. Concern has been expressed that this modern definition of trafficking is being elaborated on the concept of crime control, rather than with a focus on human rights.

Women trafficking may consist of the transport, sale and purchase of women for the purpose of prostitution within the country as well as abroad in order to pit them under actual unlawful power of others by means of violence, threat or abuse of the person deriving from a relationship or by misleading the other person. Women's trafficking is gender specific exploitation, which specifically relates to the exploitation of female sexuality.

However, large numbers of children as well as young girls are also trafficked. Among children, female children are more vulnerable of being trafficked. Due to the patriarchal mind set of the society, the girl child is always discriminated and is confined to the domestic work. Moreover, the practice of polygamy and domestic violence is still rampant. Divorced or widowed women are often considered as economic burden and also at the same time have to bear the social stigma. Due to their lack of education as well as the social and economic vulnerability, they are often subjected them to exploitative conditions. Often in the societal burden and low economic profile, they are easily entrapped by the traffickers who sometimes lure them of providing some job in the cities.

A trafficker is a person who helps in the process of trafficking. The traffickers are divided into three types as per their role in the process. These types are briefly described as follows:

- A primary trafficker is a person who is somewhat related and well known to the victim as well as her family. For example, husband, parents and relatives.
- The secondary traffickers are people who are not directly related to the person but known to the victim. For example, domestic helpers, truck drivers, and panchayat community.
- The tertiary traffickers are the people who help them in the transportation process and take undue advantage. For example, an unemployed youth of the village who in order to earn some money becomes a "dalal" and helps the trafficking process.

5. Magnitude of the Problem

There is no authentic data available for such a crime; however some estimates prepared by many NGOs and Women Rights Organizations from time to time, are available. The Situation Report India, Dept. of Women and Child Development, 1998, estimates that 61% of commercial sex workers in India belong to lower caste or are refugees or illegal migrants. Many tribal women are forced into Sexual exploitation (ICIPT 1998). Women's rights organizations and NGO's estimates that more than 12000, and perhaps as many as 50,000 women and children are trafficked into the country annually from neighbouring states for the sex trade. There is a growing pattern of trafficking child prostitutes from Nepal. According to one estimate, 5,000 to 10,000 children, mostly between the ages of 10 and 18 years, are drawn or forced into this traffic annually. Girls as young as 7 years of age are trafficked from the economically weak neighbourhoods in Nepal, Bangladesh and rural areas of India to major prostitution centres of Mumbai, Kolkata and New Delhi. In Mumbai, approximately 90% of sex workers began when they were under 18 years of age; and half of them are from Nepal. NGO's in the region estimate that about 6,000 to 10,000 girls are trafficked annually from Nepal to Indian brothels, and that a similar number is trafficked from Bangladesh[2].

Mostly, the traffickers target the economically underdeveloped region of a state, as they know that it is

[1] *UN Special Rapporteur, 2001. para 19. p: 9*

[2] *Dutta, R. Chaudhari, Prajanapramita.2003. the Human Mercandise. Deccan Herald. Oct 12. 2003*

not so difficult to exploit the economically vulnerable people. Like in West Bengal, especially Murshidabad, Nadia, North 24 Paragans, South 24 Paragans, Birbhum, Burdwan, are the resource base for the traffickers. These are the places in West Bengal with rampant poverty, lack of education and highly under developed. Traffickers take undue advantage of these factors and use the hapless people for trafficking to the metropolitan cities like Kolkata, Mumbai and Delhi.

The Global report of UNICEF in 2001 estimated trafficking around Asian region as:

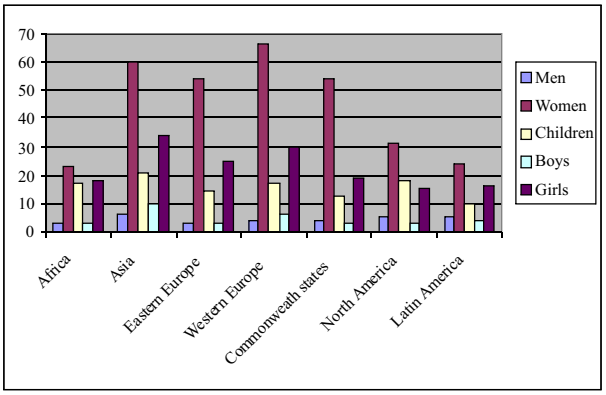
- A UNICEF survey indicates that 30 to 40 % of all sex workers in the Mekong sub-region are between the ages of 12-17 years;
- In Thailand it was reported that 200,000 foreign children were in the country in 1996 for the purpose of exploitative child labour including commercial sexual exploitation;
- An estimation of 13,000 children have been trafficked out of Bangladesh in last five years, and 300,000 Bangladeshi minors are working in the red light areas in India;
- Between 5000 to 7000 girls are trafficked annually from Nepal to India;
- And in 1997, the UN Rapporteur on Violence Against Women stated that in some rural villages in China between 30 to 90% of marriages resulted from trafficking, a demand created by shortage of women available for marriage in some communities.

Due to the strategic geographical location of India, the traffickers have used India as a way for trafficking to Pakistan and West Asia. Thousands of women and young children are trafficked end up in sex trade, domestic help, construction, beggary, hawkers and also as camel jockeys in Gulf countries. A large number of trafficking also happens within the country as large number of young girls and boys are moved from poor regions to the big cities like Mumbai, Delhi, Kolkata and so on.

6. Trafficking at the global level

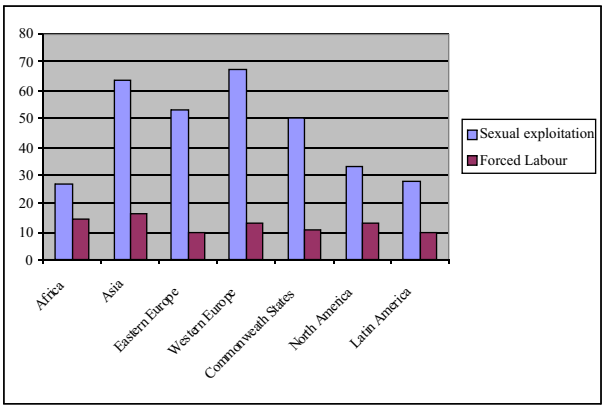
Profile of Victims at Global Level (Africa, Asia, Central and South Eastern Europe, Western Europe, Commonwealth states, North America and Latin America) is shown in Graphs 1 and 2. It may be noted that majority of victims are women (Graph1) and most of victims are sexually exploited (Graph 2). The pattern/purpose of trafficking at the global level indicates that the demand for trafficking is mostly for commoditisation of women in market as a sexual object for satisfying the sexual desires of men.

Graph1. Profile of victims of trafficking at Global Level



Source: United Nations Office on Drug and Crime; Trafficking in Persons: Global Patterns; April 2006

Graph 2. Reported Global Pattern in the Forms of exploitation



Source: United Nations Office on Drug and Crime; Trafficking in Persons: Global Patterns; April 2006

7. Trafficking in India

The National Crime Record in India Bureau collects the data on human trafficking under the following heads of the crime.

a Procuration of minor girls (section 366A of IPC)

b. Importation of girls (Section 366-B of IPC)

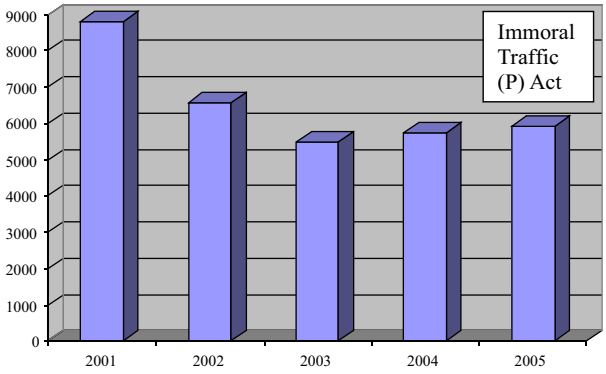
c. Selling of girls for prostitution (Section 372 IPC)

d. Buying of girls for prostitution (Section 373of IPC)

Apart from the above mentioned heads of the crime under Indian Penal Code (IPC), it also collects data under Immoral Trafficking Prevention Act, 1956 and also Child Marriage Restraint Act, 1929. Reported crime in India under Immoral Trafficking (P) Act seems to have declined

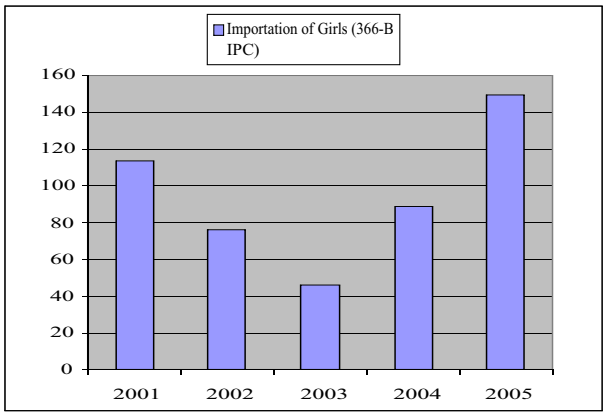
over time (Graph 3) while the profession of women in trafficking has increased since 2004 (Graph 4).

Graph 3. Crime in India under Immoral Traffic (P) Act



Source: National Crime Record Bureau, Crime in India, 2005

Graph 4 Crimes in India under Importation of Girls (366of IPC)



Source: National Crime Record Bureau, Crime in India, 2005

The trend shows that the crime under human trafficking during year 2007 has decreased by 19.8% over 2006 and 30.1% over 2003[1]. Bihar and West Bengal have accounted for highest number of cases pertaining to human trafficking, for instance 69 cases of Selling of Minor Girls for Prostitution were reported in the country during 2007, and out of 69 cases 55 such cases alone have been reported from West Bengal. Whereas one can see that the demand of minor girls are more in the metropolitan states like Maharashtra where the crime under section 373 of IPC (Buying of Girls for Prostitution) has been reported to be largest in the state, 77.5% of such cases have been reported from Maharashtra in 2007. Overall 40 cases have been reported under section 373 of IPC and 31 out of 40 cases have been reported in Maharashtra.

This is because of the fact that West Bengal borders Bangladesh and Bihar borders Nepal and in both the countries Nepal and Bangladesh poverty is a major problem. In Nepal, problems like Maoist insurgency, political upheavals have made the life unstable accompanied by poverty. There are as many as 20 transit points from districts of Bangladesh bordering India through which women are imported in to India. The easiest and best known land route to India is through Benapole border; it is connected with bus and train service and is only at 10 km from Kolkata, India. In this scenario, many women in a hope to get some job in another country find themselves entrapped in trafficking and are sexually exploited.

Since Nepal and Bangladesh share large boundaries with India which are poorly guarded, not surprisingly these countries are the largest contributors of women in trafficking into India.

The Indo-Nepal treaty of Peace and Friendship was signed in 1950 so as to promote easy movement of people and also to improve the bilateral relations between both the countries. These included a liberalized travel regime with no need of visas with use of minimal travel documents. While these treaties are made up of noble intentions to promote friendship on both the sides but these provisions have not only allowed traffickers to get young girls and women trafficked but also to make the ascertaining whereabouts of the persons difficult once they cross the borders.

8. Suggestions to Combat Trafficking

Illegal trafficking is one of the most heinous crimes at the national and international levels. This crime in fact is more transnational in nature, as more porous borders, poverty, economic vulnerability of the victims, low socio-economic status of women in society, sex-stereotyped image of women, ignorance about the dangers of trafficking are some of the reasons for rampant at national and international level. However, certain measures can be adopted to combat trafficking which violates the basic human rights of the victims and ruins their lives. These are given below.

(i) The security agencies should become more vigilant to control any illegal migration. Moreover, there are even chances of corruption as because India has large borders manned by the security personnel who are poorly paid, this can also be a reason for trafficking via legitimate routes. Government agencies should make suitable legislations which make it compulsory for the people below the age of

[1] *Crime in India; National Crime Record Bureau; Ministry of Home Affairs; 2007*

18 years to have proper identification proof to travel across the border. This would help to lessen the young children and girls crossing the borders.

(ii) The requirement for travel documents should be tightened and provision to issue visas to curb the abuse of trafficking from Bangladesh and Nepal should be introduced.

(iii) There is urgent need to evolve comprehensive framework between India and its neighbours like Bangladesh, Nepal and Pakistan to exchange information on traffickers and their operations, make borders more vigilant, establish criminal procedures and fast repatriation.

(iv) Since the root cause of trafficking from either Nepal or Bangladesh has been poverty, which makes people willing even to sell their daughters or sisters. The Government of the respective countries should look at means to uplift downtrodden sections in these countries. There is need to open up new job opportunities for women. Some handicrafts and dairy industries should be opened up at the rural level to generate employment for women; this would help them to do respectable jobs at their places without moving to urban areas other countries.

(v) Vulnerable groups which are more prone to trafficking i.e. women and young girls should be given education about their rights and basic laws. This would help in preventing them to get trapped into the hands of traffickers and the middle men.

(vi) More shelter homes should be built up with adequate infrastructure to house the rescued victims of trafficking, as they are insufficient to accommodate all the victims of trafficking.

9. Conclusion

As long as there are people living in miserable conditions, the breeding ground of illegal human trafficking would keep flourishing. To tackle this heinous crime there is a need to join hands against such evil. Government or police alone should not be held responsible for trafficking of people. It is the responsibility of all citizens to provide the necessary support to these agencies in curbing trafficking. The root cause of trafficking is not only poverty but also the low status of women in the society. A woman is considered not only a human being but also as an object for satisfying the male desires. She in fact, is considered as a commodity in the market with no human rights. Trafficking including (prostitution) is a gross violation of human rights as it reduces a human being to a mere object. Hence, there is a need for the individuals, societies and nations to come together join hands to fight against such heinous crime of trafficking human beings.

Road Accidents in India: Remedies and Concerns

*Dr. Gurmeet Kaur**

ABSTRACT

The rapid growth in road accidents has become a matter of great concern both at national and international level. Currently, road accidents rank 9th as a cause of death worldwide but by the year 2020 road death and injury are predicted to be the third leading cause of death and disability facing the world community.

The objective of the present paper is to study the trends in Road accidents deaths and injury in India for which the data from the year 2001 to 2010 has been analyzed. Further, the paper also deals with the remedies available to the victims of road accident under Motor Vehicles Act. The main crux of the provisions of Motor Vehicles Act, 1988 has been discussed in the light of recent amendments and judicial interpretations. The Motor Vehicle Act is considered as piece of social legislation enacted to protect the interest of users of the road who are unfortunately involved in the accidents but there is need to amend the act to enhance the amount of compensation payable under different heads.

Key words: Road accidents, legal remedies, Motor Vehicles Act, Traffic Deaths and Injuries and Compensation.

1. Introduction

Road transport system is one of the key element of the Indian economy and an important component of urban infrastructure which includes both commercial as well as personal transport. Rapid motorization and urbanization has become one of the major concerns for public health, as road accident has become leading causes of death, disability and hospitalization. The rapid growth in road accidents has become a matter of great concern both at national and international level though the patterns of road use in developing countries are very different from developed countries. According to the projection of world report on Road Traffic Injury Prevention jointly issued on world Health Day 2004 by WHO and World Bank[1], Worldwide, an estimated 1.2 million people were killed in road crashes each year and as many as 50 million were injured, the global road fatalities will increase by more than 65% between the year 2000-2020 unless intensified safety intervention are implemented with this trend varying across regions of the world. Fatalities are predicted to increase by more than 80% in low and middle income countries but decrease by nearly 30% in high income countries. Currently road accidents rank 9th as a cause of death worldwide but by the year 2020 road death and injury are predicted to be third leading causes of death and disability facing the world community[2]. However, the majority of deaths about 70% occur in developing countries, 65% of death involves pedestrians and 35% of pedestrian's death are children[3]. As per the Commission for Global Road Safety, road traffic accidents kill an estimated 1.3 million people and injure 50 million people per year globally, and global road fatalities are forecast to reach 1.9 million by 2020[4].

2. Road Transport in India

Road transport has emerged as dominant segment in India's transportation sector with the share of 4.8% in India's GDP in 2008-09[5].Transport demand in most Indian cities is increasing substantially due to an increase in

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1 *Peden M.etal. Eds.2004. The work report on road traffic injury prevention. WHO Geneva.*

2 *Murray C.J.L., Lopez A.D. eds. 1996. "The global burden of disease; a comprehensive assessment of mortality and disability from disease, injury and risk factor in 1990 and projected to 2020" Harvard University press. Boston.*

3 *Road and High way; Road safety. 2002. The World Bank Group. March 19.2008 <http: www.worldbank.org >.*

4 *Commission for Global Road Safety .<www.makeroadssafe.org>*

5 *Road Transport Year Book (2007 -2009).Volume- I. Transport Research Wing, Ministry Of Road Transport & Highways Government of India, New Delhi. March 2011.*

population, increase in commercial and industrial activities. Although in large cities, there has been unprecedented growth in the use of motor vehicles, not only due to increase in travel demand but also because of inadequate transportation system, the transport situation in most of the Indian metropolitan cities is rapidly deteriorating. According to official statistics in India the total number of registered motor vehicles in 2001 (in millions) were 54.99 which increased to 105.33 in 2008 and provisionally to 115.0 in 2009. The Personalized mode (constituting mainly two wheelers and passenger cars) accounted for more than four-fifth of the motor vehicle population in the country. The analysis of growth in vehicular population of the country shows that in contrast to personalized mode, the share of public transport, buses has declined from 11.1% in 1951 to 1.3% in 2009, the share of goods vehicle has also shrunk to 5.3 %[1].This shows that personalized mode of transport will further grow in coming years in comparison to public transport services which are usually over crowded and have long waiting intervals. This growth in number of vehicles has lead to its own problems like increase in traffic congestion, air pollution which in turn is responsible for various types of health problems. The pollutants emitted from vehicles are leading to various direct and indirect adverse effects on our health and environment, it has led to increase in traffic accidents.

3. Road Traffic Deaths and Injuries: Indian scenario

Over the past three decades, commensurate with the development of the Nation, the burden of injuries and deaths due to road traffic crashes has been steadily increasing in India. The road traffic crash injuries and deaths in India are unacceptably high and that the total number of annual deaths in India ranked second after China as compared to all countries in the world[2]. Even twenty years ago in rural India, traffic injuries were the cause of about 20% of medico legal deaths[3]. Further, the unplanned urban growth and land use has further deteriorated the driving conditions resulting in to the number of road traffic fatalities. The situation of road accidents in India is worsening as the deaths and injuries have been increasing. During the year 2009, there were around 4.9 lakh road accidents which killed 1, 25,660 people and injured more than 5 lakh people in India[4]. During 2010, around 499,628 road accidents were reported by all States/Union Territories (UTs). The number of persons killed in road accidents were 1,34,513[5]. These numbers translate into 1 road accident every minute and 1 road accident death every four minutes[6]. Kopits and Cropper has projected that death rate in India will not decline until 2042[7]. The percentage share of vehicle in road accidents is contributed largely by private vehicles, the road accidental deaths by types of vehicle during 2010 reveals that 97.3% victims of Jeeps, 96.8% victims of Truck/Lorry, 97.6% victims of Cars, 97.7% victims of Tempo/Vans and 67.6% victims of Buses involved in accidents, were traveling in private vehicles[8]. However, there has been discrepancy in both death and injury rates between States and Union Territories in India that can be attributed to higher vehicular penetration and lower population density in the Union Territories. The Nagaland has 73.3 percent of all India road accident deaths followed by Jammu and Kashmir 66.5, Manipur 59.3 and Uttar Pradesh with 53.5 are considered as the high road accidental death prone areas[9].

4. Accident Rate, Accident Severity Index[10]

Accident rate is worked out on the basis of three criteria's (a) per lakh Persons, (b) per ten thousand motor vehicles and (c) per ten thousand kilometers of road length. Between 1970 and 2010, there was an increase of more than 100% in accidents per lakh persons, though significant decline can be seen in accidents per ten thousand vehicles, in India, it is 814 in 1970, 339 in 1980, 148 in 1990, 80 in 2000, and 42 in 2009 though the number of vehicle in the country and the quantum of road accidents have been increasing continuously. The trend in the number of accidents per ten thousand kilometers of the road length shows that the number of accidents have increased over the last few decades, from 960 in1970 to 1,027 in 1980; peaked to 1,424 in 1990; but declined thereafter, fluctuating within a band of 1,100 to 1,200 per ten thousand kilometers and is at 1,179 in the year 2008. The severity of road accidents, measured in terms of persons killed per 100 accidents, has also increased from 19.9 in 2001 to 26.9 in 2010.

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1 *Ibid*

2 *Dinesh Mohan. "The road ahead: traffic injuries and fatalities in India". April 2004. Indian Institute on Technology. Delhi.*

3 *Ramchandran v. "A study of medico-legal deaths in a rural area of Pondicherry (south India)". Indian J Public Health 1982:229-33.*

4 *Road Accident in India 2009. Government of India. Ministry of Road Transport and Highways Transport, Research Wing, New Delhi .March 2011.*

5 *Road Accident in India 2010. Government of India. Ministry Of Road Transport And Highways Transport, Research Wing, New Delhi.26 December 2011*

6 *ibid.*

8 *KopitsE.,cropper M. "Traffic Fatalities and Economic Growth". Accid Anal Prev 2005:37:169-78.*

8 *Accidental Deaths and Suicides in India. National Crime Record Bureau. Ministry of Home Affairs. Government of India. New Delhi. 2010. 30th Sept., 2011*

9 *Ibid*

10 *Supra note 10 at 5-8*

5. Fatality Risk

It is defined as the number of road accident death per million populations. In India, from 2001 to 2010, it is seen that in 2001 fatality risk was 7.9 which is continuously increasing and it is as high as 10.7 in 2009 and 11.3 in 2010 see Table1 below. This table further reveals that during the period 2001 to 2010 road accidental deaths have increased from 80.9 to 134.5 at an annual percentage growth rate of 6.6% while annual percentage growth rate of population of the country was 1.5%.

6. Causes of Road Accidents in India

Accident is the outcome of many factors. About 80% of road accidents are caused due to driver's negligence/fault. The lack of organized wayside amenities, maintenance and repair facilities and parking spaces along highway is also one of the reasons, among others include type of road users, colliding vehicles, environment/road related factors (road geometry, design, visibility etc)[1]. The other causes of accidents in India are: drunk driving and intake of drugs by drivers; bad and insufficient roads; enormous growth and overcrowding of vehicular population; poor licensing norms; poor maintenance /defects in the motor vehicles; weather conditions; insufficient emergency care for accident trauma victims; and lack of will on the part of government and police officials to implement motor vehicle rules.

7. Remedies available in India to the Victims of Road Accident

The motorization of the economy is inevitable as any country enters the rapid development mode. During the last few decades, question of payment of compensation for accidents has assumed great importance, which is co-related with the accidents. The Motor Vehicle Act provides framework for compensation to the victims. The term compensation is a comprehensive term and has acquired a multi dimensional meaning. Compensation for victims is a remedy to lessen the direct and secondary effects of the disaster. The object of an award of damages is to give the plaintiff compensation for damage, loss or injury, he has suffered. The elements of damage recognised by law are divisible into two main groups: pecuniary and non-pecuniary. While the pecuniary loss is capable of being arithmetically worked out, the non-pecuniary loss is not so computable[2]. The Motor Vehicles Act has provisions for compensation on the basis of no fault liability, compulsory third party risk compensation and compensation in case of hit and run motor accident. Act also lays down payment of

Table 1: Rate of Road accident Deaths per Million Population during 2001 to 2010

Year (1)	No. of Road Accident Death (in thousands) (2)	Estimated midyear population (in millions)(3)	Fatality Risk (Col. 2 X 100 / Col. 3) (4)
2001	80.9	1027.0	7.9
2002	84.7	1050.6	8.1
2003	86	1068.2	8.1
2004	92.6	1085.6	8.5
2005	95.0	1102.8	8.6
2006	105.7	1119.78	9.4
2007	114.4	1136.55	10.1
2008	119.9	1153.1	10.4
2009	125.7	1169.4	10.7
2010(P)	134.5	1185.8	11.3

Source: Col. 2: MORTH
Col.3: The Registrar General of India. Accidental Deaths and Suicides in India. NCRB. MHA. Government of India. New Delhi. 2010. 30th Sept., 2011

[1] *See supra note 1 at p 1.*

[2] *Common Cause, A Registered Society v. Union of India, AIR 1999 SC 2979128*

compensation on structured formula.

The diagrammatic representation of scheme of compensation as provided under Motor Vehicles Act is shown in Chart 1.

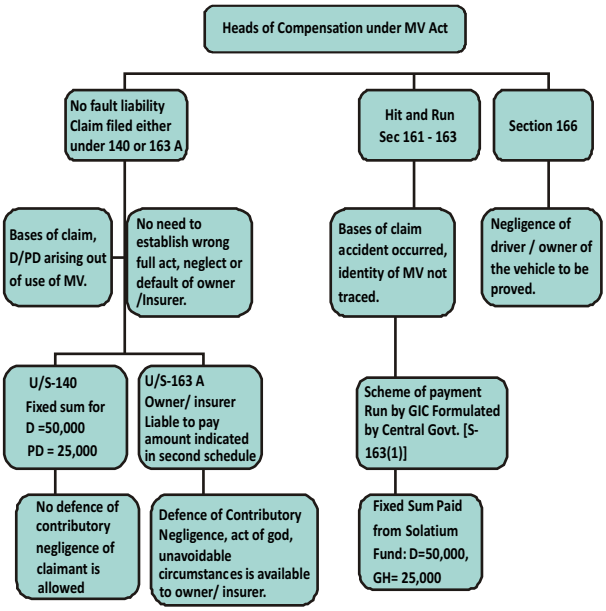

Chart 1. Scheme of compensation under Motor Vehicle Act

Notes: MV Act = Motor Vehicle Act, D= Death, PD=Permanent Disablement, GH= Grievous Hurt

In the Motor Vehicles Act 1988, under Section 146, every vehicle that is plied on the road must be insured. Similarly, Section 146(2) envisages that the government will maintain a separate fund for accident cases, if the vehicle is not insured. Thus, from the reasonable construction of Section 146, the legislature does not want to give any immunity even to the government vehicles and the purpose behind is, that the victims should get the compensation in every eventuality whether it is the vehicle of state or private vehicle.

7.1. No Fault Liability

In a "Nofault system", compensation is granted for certain injuries without proof of fault. Compensation in this context means compensation for actual losses, but not for intangible damage. Under Motor Vehicle Act, 1988, no-fault refers to fixed sum as compensation payable under Sec 140(1) in respect of death of any person (Rs 50,000) in case of permanent disablement Rs.(25,000) on the principle of no fault liability, on the basis that use of vehicle has caused accident resulting there by to loss of life or bodily injury. The interest is admissible on interim award passed under Sec140 of the Act. Failure of insurer to establish breach of condition of policy willfully makes them liable to pay compensation[1]. In accordance with Section 141 of the Motor Vehicles Act, the right to compensation based on the principle of 'no fault liability' under Section 140 is in addition to any other right to compensation i.e. either under the Motor Vehicles Act or in any other law for the time being in force, except the right to claim compensation under the 'structured formula' envisaged in Section 163-A. However, it is seen that Sec -140 does not provide any relief for disabilities other than permanent disability, which are less severe in nature but resulted in loss of earning of the claimant. The Act was amended in 1994 whereby the present amount in case of death and permanent disablement was fixed, though the law commission in its 149th report, 1994 has recommended the higher amount, since then, 18 years have passed and no changes have been made into amount which is not justifiable taking into account inflation and the very purpose of social justice and immediate relief to the victim or his dependents.

7.2. Payment of compensation on structured formula basis under Section 163 A of the Act

The sole object of the legislature to enact Section 163 A is to provide the expeditious remedy to the bereaved family and to shorten the formalities. Therefore, the roadside victim under Section 163A is entitled for damages, though there is no negligence on the part of the driver, owner, or victim himself. However, section 140(4) of Motor Vehicle Act, 1988 spells out that the no fault liability would not be affected even if there is negligence on the part of the victim. The said provision is missing in Section 163 A. No other exceptions which were laid down by Supreme Court in Khushnuma Begam[2] such as act of God, act of third party, things being used of common benefits or act done under statutory authority should be made applicable under Section 163A as per the intention of the legislature.

7.3.Hit and Run Cases (Section 163 of the Act)

In Hit and Run Cases the remedy provided under Section 140 and 147 is of no avail and the victims are paid fixed sum of Rs 25, 000 for death and Rs 12,500 for grievous hurt to be paid from solatium fund created by central government. It is seen that such victims are getting even less amount then the amount fixed for no fault liability,

[1] *Divisional Manager, New India Assurance C. Ltd. v. Tumu Gurava Reddy, 2000 (1) Civil LJ 24 (AP)*

[2] *2001 ACJ 428 SC*

therefore there is need for increasing the amount in parity with no fault provisions.

7.4. Fault liability under section 166 of Motor Vehicle Act.

The Act provides for payment of "just compensation" vide Section 166 and 168. The compensation is granted on the basis of fault liability under section 166 of Motor Vehicle Act. However, it is left to the courts to decide what would be "just compensation" in facts of a case. 'It should neither be punitive against whom claim is decreed nor it should be a source of profit of the person in whose favor it is awarded.

7.5. Motor Accidents Claims Tribunal

Under Section 165 of the Motor Vehicles Act, 1988, the Motor Accidents Claims Tribunal has exclusive jurisdiction to decide the claims with regard to death, bodily as well as damage to property of third parties, irrespective of the amount involved in the property damage. In the year of 1994, the limitation for filing a claim in accident cases has been deleted however, those cases which were dismissed already on account of limitation could not be filed after this amendment. The Claims Tribunal have no power to review its own judgment and award. Under Section 168 of the Act, the Claims Tribunal shall give the parties an opportunity of being heard, hold an inquiry into the claim and make an award determining just compensation etc. In holding any such inquiry, Section 169 of the Act mandates the Tribunal to follow such summary procedure as it thinks fit subject to rules. The Tribunal was conferred with the powers of a Civil Court for the specified purposes and under Rule 476 of the Rules; the Claims Tribunal was directed to follow the procedure of summary trial as contained in the Code of Criminal Procedure, 1973.

No rate of interest is fixed under Section 171 of the Motor Vehicles Act, 1988 and the award of interest is solely on the discretion of the Tribunal or the High Court. Neither Section 34 of CPC nor Section 4-A(3) of the Workmen's Compensation Act are applicable in the matter of fixing rate of interest in a claim under the Motor Vehicles Act. The courts have awarded the interest at different rates depending on the facts and circumstances of each case taking all relevant factors including inflation, change of economy, policy being adopted by the Reserve Bank of India from time to time, how long the case is pending, permanent injuries suffered by the victim, enormity of suffering, loss of future income, loss of enjoyment of life, etc., into consideration. It is seen that there is no uniformity in the rate of interest though there is a statutory provision as regard to the date from which the interest is to be awarded, in some cases interest awarded is 6%, in some 8 % and maximum up to 12% interested can be granted. Interest can be granted even if claimant does not specifically plead for the same, as it is consequential in the eye of law.

7.6. Accident information report

Section 158 (6) of Motor Vehicles Act, makes it compulsory for the officer in-charge of the Police Station to send a copy of the police report to the Claims Tribunals having the jurisdiction and also a copy to insurer after registration of the FIR within 30 days, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report forward the same to such Claims Tribunal and Insurer. The importance of this Accident information Report by the police is that Section 166(4) mandates the Claims Tribunals to treat the Accident Information Report as an application for Compensation. However it is seen that so far Delhi Police was not implementing section 158(6) of the Motor Vehicle act despite direction passed Hon'ble Supreme Court in All India Lawyers Union[1]. In all India Lawyers Union[2] court observed from the reports received from the Tribunal that in a large number of cases the information furnished is not in the prescribed format. Usually, a copy of the FIR is furnished. It does not meet the requirement of law. FIR does not contain the required details in most of the cases. The concerned offices are to strictly comply with the requirements as stipulated in the statutory provisions.

8. Liability of Insurance Company to Pay Compensation

8.1. Third party Claim

The term third party is neither defined nor explained either under the Motor Vehicles Act, 1939 or under Motor Vehicles Act, 1988. As per dictionary meaning, the contract of insurance contains two parties, one is the insured and second is the insurer and all other parties are third parties. A third party claim arises when a victim of an accident suffers bodily or death as a result thereof or his property is damaged. However, under the Motor Vehicles Act, 1988 passengers in public transport vehicle are placed in separate category whose risk is now unlimited and every Act Policy would cover the risk of passengers and the third party compulsory, so the distinction between the passenger and their party has become meaningless.

It is clear from the provisions contained under the Motor Vehicles Act, 1988 that a claimant is entitled to recover from the insurer the amount of compensation which he in law is entitled to obtain from the insurer, subject to the

[1] *2002 ACJ 2019*
[2] *2002 ACJ 2019*

statutory limits of liability of the insurers. The insurer cannot escape liability under the policy on the ground that of breach of any terms of the contract on the part of the insured, the claim of the third party was not covered, or, otherwise, the insurer is entitled to avoid the policy. In National Insurance Co. Ltd. v. Swaran Singh[1], Supreme Court has held that any condition in the Insurance policy whereby the right of third party is taken away would be avoided. Thus, we see that the Hon'ble Supreme Court has acted with much dynamism and pragmatism and proved that judiciary, is not superfluous but it is really a meaningful institution in formulating viable scheme/ upholding the rights of victims of road accidents through its various landmark judgments.

It is observed that under the New Act the risk of third party is covered and no policy can be issued unless it includes the risk of third party.

8.2. Minor breaches of licence conditions

After construing and determining the scope of Sub-clause (ii) of sub-section (2) (a) of Section 149 of the Act, it is found that minor breaches of licence conditions, such as want of medical fitness certificate, requirement about age of the driver and the like which are not found to have been the direct cause of the accident, would be treated as minor breaches or inconsequential deviation in the matter of use of vehicles. Such minor and inconsequential deviations with regards to licensing conditions would not constitute sufficient ground to deny the benefit of the coverage of the insurance to the third parties. On all pleas of breach of licensing conditions taken by the insurer, it would be open to the Tribunal to adjudicate the claim and decide inter se liability of the insurer and insured; although, where such adjudication is likely to entail under delay in decision of the claim of the victim, the Tribunal in its discretion may relegate the insurer to seek its remedy of reimbursement from the insured in the civil court.

8.3. Gratuitous passenger in the Private Vehicle and owner /agents of goods

Now under the New Motor Vehicles Act, 1988, the risk of gratuitous passenger in the Private Vehicle and on two wheeler scooter/motorcycle as well as owner of goods and the agent of the owner of the goods accompanying such goods is covered under Section 147 since 1994. The position was made clear in United India Insurance co v Appukuttun (1995ACJ888, [1995] 84 Comp Cas686 (Ker)), where it was held, when a policy of insurance "is an Act policy", it does not necessarily mean that the insurance company will stand absolved from the liability in respect of the pillion rider of a motorcycle and the same view is reiterated by High court of karnataka in Ramachandra and Anr. Vs. Shantaram and Ors (2005ACJ462, ILR2004KAR398) and by Gujrat High court in National Insurance Company vs. Shabbir Mohmad Kunjada and 2 Ors. (First Appeal No. 2030 of 2008, Decided On: 25.08.2008).

8.4. Learner's license

Motor Vehicle Act, 1988 provides for grant of learner's licence [See Section 4(3), Section 7(2), Section 10(2) and Section 14]. A learner's licence is, thus, also a licence within the meaning of the provisions of the said Act. It cannot therefore, be said that a vehicle when being driven by a learner subject to the conditions mentioned in the licence, he would not be a person who is not duly licensed resulting in conferring a right on the insurer to avoid the claim of the third party. It cannot be said that a person holding a learner's licence is not entitled to drive a vehicle. Even if there exists a condition in the contract of insurance that the vehicle cannot be driven by a person holding a learner's licence, the same would run counter to the provisions of Section 149(2) of the Act.

8.5. Insurance Company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver

It has been also observed that the liability of the Insurance Company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereof has been holding the field for a long time and the doctrine of stare decisis persuades not to deviate from the said principle. However in a case where a person is not a third party within the meaning of the Act, the insurance company cannot be made automatically liable as expounded recently by SC in National Insurance Co. Ltd. v. Laxmi Narain Dhut[2].

8.6. Guidelines for awarding compensation to the claimants

There are certain guidelines as set out in Union Carbide Corporation and Ors. v. Union of India and Ors[3], which the tribunals should follow in awarding compensation to the claimants, The Claims Tribunal should invariably order the amount of compensation awarded to the claimant to be invested in long term fixed deposits on condition that the Bank will not permit any loan or advance on the fixed deposit and interest on the amount invested is paid

[1] *ACJ 2004 VOL 1*
[2] *AIR 2007 SC 1414*
[3] *AIR1992 SC248*

monthly directly to the claimant or his guardian, as the case may be. However, Tribunal should grant to the claimants liberty to apply for withdrawal in case of an emergency or under the following circumstances where the whole or part of the amount is required for expanding and existing business; or for purchasing any movable or immovable property such as agricultural implements, rickshaw, etc., to earn a living; or if having regard to the age, fiscal background and strata of society to which the claimant belongs and such other considerations, the Tribunal in the larger interest of the claimant and with the view to ensuring the safety of the compensation awarded to him thinks it necessary to do order.

8.7. Principles governing the assessment of compensation

From the various legal authorities it is out that the basic principles governing the assessment of compensation is that the multiplier method is logically sound and legally well established and accepted method of assessing for ensuring a 'just' compensation which will make for uniformity and certainty of the awards. In Sarla verma vs. Delhi Transport Corporation and Anr.[1] Court held that basically only three facts need to be established by the claimants for assessing compensation in the case of death: (a) age of the deceased; (b) income of the deceased; and (c) the number of dependents. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure there from should be made only in rare and exceptional cases involving special circumstances.

The Supreme Court taking into consideration several subsequent decisions of this Court, is of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed six. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on him. However, where family of the bachelor is large and dependant on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third. In cases falling under Section 166 of the MV Act, Davies method is applicable and that the multiplier to be used should starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years.

9. Alternative Dispute Resolution Mechanisms

The Alternative dispute resolution is a mechanism by which justice could be given to persons engaged in conflicts and disputes at an early stage other than conventional method of justice through courts, avoiding long litigation procedure with the aim of providing justice. It is a process where disputes are settled with an assistance of neutral third person generally of parties' own choice. Need for alternative dispute resolution arises due Pendency of cases in courts which may be due to many reasons, one being adjournments, less number of judges.

Over the years the compensation claims have increased many folds causing delay in their settlements. The law and its interpretation have over a period of time is strongly evolving in favour of claimants, yet the poor, illiterate and desperate victims of the motor vehicles accident are not getting compensatory relief because of the procedural difficulties causing delay in settlement of their claims. Legal aid is an essential part of the administration of justice with the objective to ensure quality legal services to the beneficiates, so that justice is not denied to citizens by any reason thereof. The legal aid is an enforceable right, which is now firmly entrenched, in the legal services Authorities Act, 1987. The Act also provides for organization of Lok Adalats to secure that the operation of the legal system promotes justice on the basis of equal opportunity. The Act created National, State and District Legal Service Authorities with the power to organize Lok Adalats. The Lok Adalats was introduced in 1982 and is gaining popularity since its inception. Lok Adalat is a Para judicial institution. The aim of Lok Adalat is to provide cheap, informal, speedy justice to the parties to dispute in a harmonious and conductive atmosphere. The modern version of Lok Adalat has arisen out of the concern expressed by the Gujarat Legal Aid Committee (1971), The Report on Processual Justice To the people (1973), Juridicare: Equal justice-Social Justice Report (1977) and Committee for implementing Legal Aid Schemes (CILAS), 1980, set up to report on organizing legal aid to the needy and poor people. The basic philosophy behind the Lok Adalat is to resolve the people's disputes by discussions, counseling, persuasion and conciliation so that it gives speedy and

[1] *2009ACJ 1298,*

cheap justice with the mutual and free consent of the parties. The Delhi Legal Services Authority has set up 9 permanent Lok Adalats in Government bodies/ departments and 7 MACT permanent Lok Adalats have been functioning regularly in Delhi.

10. Conclusions

Today, the time demands that the residents of the Country should have safe and easily accessible mode of transportation, there is the need for policy document for road traffic accident control. According to the National Road Transport Council and Trauma Cases Association, at least 25000 lives are lost every year due to road accidents in India. India has only 1% of vehicle in the world but accounts for nearly 6% of the total cases of unintentional injuries. The cost of injuries in India is high as compared to per capita income of the country i.e., the ratio of cost per fatality: per capita income are17: 1[1]. It is thus clear that morbidity and mortality from road accidents is increasing rapidly in India, where road accident victims are predominantly male within the age group of 5-44 years 70%, the most productive section of our society[2]. The Vehicular traffic is increasing at the fastest pace leading to traffic congestion and contributing to deaths and injuries due to road accidents. This is increasing in India at the much high rate in comparison to rate of increase of population. Further, studies indicate that the actual number of injuries could be 15 to 20 times the number of deaths, the discrepancies in number of deaths and injuries are a result of the different methodologies for the derivation of estimates[3].

Just compensation to victims of road accidents is very important and vital for people in a democratic and socialistic country like India. The Motor Vehicles Act, 1988 has provisions for the payment of compensation to victims of road accident or their legal heirs, by the owner of vehicle, which caused the accident or his Insurer. This Act is still in an era of serious changes, Supreme Court has held in number of cases that this is welfare legislation and the interpretation of provision of law is required to be made so as to help the victim. In this process, Supreme Court has passed various judgments in recent past, thereby restricting the statutory defenses available to the Insurance Companies to the great extent, as law relating to burden of proof has been totally changed. The defenses of not holding valid driving license; use of vehicle for hire and reward; use of transport vehicle for the purpose not allowed by permit, are required to be proved in so stringent manner that the insurer do not get advantage of these defenses[4]. Therefore Motor Vehicle Act is considered as piece of social legislation enacted to protect the interest of users of the road who are unfortunately involved in the accidents but there is need of amending the act to enhance the amount of compensation payable under different heads. Further the people in India are not well aware of their entitlement to get compensation; this is true in case not only of those people who belong to poor strata or are illiterate but also to the people who are quite well educated. Therefore, it is necessary that awareness should be created within masses by all possible means by use of press Television, e-communication etc.

[1] *"Road user cost study in India". The central Road Research Institute Report. New Delhi. 1982.*
[2] *Report of the Committee on Road Safety and Traffic Management. February.2007.*
[3] *ibid*
[4] *National Insurance Co. Ltd. v. Swaran Singh ACJ 2004, Vol I.*

Right to Privacy in India: A Review

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ABSTRACT

The objective of this article is to draw the context of right to privacy enshrined under Constitution of India with an interpretation of various judicial pronouncements. Right to privacy is an ability of an individual or group of individuals to keep away others from the information of themselves. It is considered as one of the most essential aspects of life and personal liberty of an individual under modern civilized society. In this paper, idea behind right to privacy is to protect confidentiality of information; sometimes the wish of individual is to remain unnoticed in the public realm has been discussed. Privacy, thus guarantees protection of individual and his personal information. In this paper, various aspects of privacy such as family matters, lawful communication between individuals, financial, medical and legal information, and police surveillance so on as considered.

Keywords: Confidentiality, Dignity, Intrusion, Liberty, Private affairs, Privacy, Public disclosure, Sanctity.

1. Introduction

The term 'Privacy' is derived from Latin word 'privatus' which means separated from the rest. The dictionary[1] precisely defines it as "The state of being free from unsanctioned intrusion". The Black's Law Dictionary[2] refers to privacy as "The right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned".

Privacy may be informational, organizational or intellectual in nature. William Prosser has described privacy rights as follows:

1. Intrusion upon a person's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about an individual.
3. Publicity placing one in a false light in the public eye.
4. Appropriation of one's likeness for the advantage of another

The principle that law shall protect person and property is embodied in common law since its genesis. As the development of law is inevitable, the nature and extent of such protection is required to be defined from time to time to meet the demands of changing scenario of society. In very early times, law rendered remedy only for physical interference, thus right to life earlier was construed as protection from battery in its various forms. Similarly, in that era, liberty means freedom from actual restraint. With change in time and due to other socio-cultural developments, law recognized man's spiritual nature which is composed of his feelings and intellect. It widened the scope of Right to life which now means and includes right to enjoy life, right to be let alone etc. "Right to Privacy" is an outcome of such legal evolution and development. It is considered to be one of the important aspects of life and personal liberty in the modern civilized societies.

A law school treatise of Israel[3] attempts to define right to privacy as "The right to privacy is our right to keep a domain around us, which includes all those things that are part of us, such as our body, home, thoughts, feelings, secrets and identity. The right to privacy gives us the ability to choose which parts in this domain can be accessed by others, and to control the extent, manner and timing of the use of those parts we choose to disclose."

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1 *American Heritage Dictionary 4 Edn*

2 *Black's Law Dictionary, (6th Ed., 1990)*

3 *Yael Onn, et. al., Privacy in the Digital Environment , Haifa Center of Law & Technology, (2005) pp. 1-12*

The domain of private and domestic life shall not be intruded. It is an obligation on law to provide remedy for such intrusion. Various legal systems have remedied such intrusions by giving right to privacy a legal recognition in their respective municipal laws. Internationally, the Universal Declaration of Human Rights[1] and The International Covenant on Civil and Political Rights (India being signatory to both) recognizes Right to Privacy. The European Convention on Human Rights also recognizes and guarantees right to respect for private and family life[2]. In India, this right is recognized as an implicit part of Fundamental Rights as enshrined in the Indian constitution.

2. Right to Privacy in India

The Indian constitution doesn't exclusively grant in express term any right to privacy. Right to privacy is not enumerated as a fundamental right in the constitution of India. The apex court has called this right by wider interpretation of Articles 19(1)(d), 19(1)(e) and 21. Thus, it is a result of judicial activism in the absence of legislation to the same effect.

3. Judicial Pronouncements

In Francis Coralie Mullin v Union territory of Delhi[3] The Supreme Court of India in some decision developed that right of free enjoyment, right to sleep, right to human dignity, right to have access to justice, etc. are all cases of privacy under Article 21 of the Constitution of India.

In Phoolan Devi v Shekar Kapur[4], Edward Shils maintains that privacy is a zero- relationship between two persons or two groups or a person. It is zero-relationship in the sense that it is constituted by the absence of interaction or communication or perception within contacts in which such a scenario is practicable, such as a family, a working group or ultimately a society. Privacy may be of an individual or numerous persons it depicts sentiments, emotions and thoughts of a person. In India, various crimes like rape hurt the soul, feelings and sentiments of the victim as it challenges dignity, freedom and right to privacy of an individual.

In Kushwant Singh v Maneka Gandhi[5], the Hon'ble court held that Citizen has right to safeguard the privacy of his own life, marriage, procreation of children, motherhood and other matters.

4. Women's Right to Privacy

Neera Mathur v. Life Insurance Corporation of India[6], Hon'ble Supreme Court held that certain interest needed protection, right of privacy would exclude embarrassing question put to female candidates as modesty and self-respect may preclude the disclosure of personal problems.

5. Matrimonial dispute

A direct case before Andhra Pradesh High Court came in T. Sareetha v T. Venkata Subbaiah, Hon'ble Court held that right to privacy is a fundamental right. Sexual autonomy was necessary for enjoyment of life. The court elaborates the concept of sexual autonomy of Hindu wife and brought Section 9 of Hindu marriage Act 1955, which provids for Restitution of Conjugal Rights. It was observed that by this matrimonial remedy during a moment's duration, the entire life cycle was destroyed without her consent; the situation was violation of one's dignity and right to privacy.

Every individual has a right to privacy as a part of overall life with dignity. He has the right to enjoy it without interference. Any unjust interference may lead to legal action against it.

6. Police Surveillance

In Kharag Singh v. State of Punjab[7], It was concerned with validity of U.P Police Regulations, held by the Apex Court that police surveillance of a person by domiciliary visit would be violative of Article 21 of the Constitution of India. It was observed that under Article 21 right to personal liberty was a right of an individual to be free from restriction of encroachments are directly imposed or indirectly brought about by calculated measures. It is understood that all the provision under Regulation 236 of U.P Police Regulations infringes fundamental right of petitioner[8].

A more evaluative judgment of Hobn'ble Supreme Court came in Govind v State of M.P.[9] In this matter the Hon'ble court brought into light, various US Supreme Court judgments dealt with right to privacy. It was held that depending on the character and antecedents of surveillance it also has objects and limitations under which

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1 *By the virtue of its Art.12 which states ""No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

2 *in its Article 8*

3 *AIR 1981 SC 746*

4 *(1995) 57 DLT 154.*

5 *AIR 2002 Del 58(67)*

6 *AIR 1992 SC 392 (395)*

7 *AIR 1963 SC 1295*

8 *Dr. L.M Singhivi, Jagdish Swarup Constitution of India, Modern Law Publication, 2nd Edition, Volume-1*

9 *AIR 1975 SC 1378.*

it is done, but surveillance, as domiciliary visit always does not render as unreasonable restriction upon right to privacy. Right to privacy is also a fundamental right that has explicitly guaranteed certain penumbral zones. Further, the fundamental right must be subject to certain restriction upon it convincing public interest.

In Malak Singh vs. State of Punjab[1], The Apex court held that permissive surveillance is granted to the extent of keeping close watch over movement of person and not more. The object behind surveillance is to prevent the crime. It should be of genuine nature and extent. It does not mean that Police personal can any time cause him obstruction without valid reason. Such Surveillance should not obstruct person fundamental freedom guaranteed to all or obstruct free enjoyment and movement of such person, nor it should offend dignity of such an individual.

In Moti Sunar v State of U.P[2], While explaining the power of police search and seizure and right to privacy, court report the English maxim which says that " every man's house is his castle, or the house of everyone is to him as his castle and fortress as well for his defence aginst injury and violence as for his repose[3]" has been accepted by Indian courts and imbedded in Article 21 of the Constitution of India.

7. Freedom of Press

In R.R Gopal vs. State of Tamil Nadu[4], right to privacy vis-as-vis freedom of press received great acknowledgment, here the petitioner published a life story of a prisoner. This exposes close connection of prisoner and several I.A.S and I.P.S officers. There was apprehension that Police will seize such publication of magazine to which petitioner moved to Supreme Court under Article 19 (1) (a) and 21 of the Constitution of India with respect to right to privacy. The Court held that right to privacy is implicit in itself right under Article 21 of Constitution of India. Everyone has right to protect privacy of his own. No one can publish anything concerning privacy of a person without prior consent, whether it is true or critical. If he does so he would be violating the right to privacy of such a person and would be liable for damages. However, position may be different, if a person voluntarily thrust himself into controversy or voluntarily raise controversy.

8. Doctor Patient Relationships

Right to privacy also exists in doctor and patient relationship X v. Z[5] it was held by Hon'ble Supreme Court that doctor also has equally important duty to maintain privacy of a person to some extent. However, in some cases disclosure of two private facts does not infringe fundamental rights and right to privacy of a person. In the instant case the lady with whom appellant was going to married came to know the fact that appellant was suffering from HIV+ this fact not only saved her life but her fundamental right too i.e. right to life, because it might affect her with the disease of appellant after marriage. The court held that while dealing with such context the lady's right to life must be protected and judges have to keep their hand more firmly while holding it.

9. Tapping of Telephone

In its landmark judgment, People's Union for Civil liberties v. Union of India[6] the apex court ruled that the right to privacy is a part of the right to life and 'personal liberty' enshrined under Article 21 of the constitution. Once the facts of the case constitute a right to privacy, Article 21 is attracted and the said right could not be curtailed "except according to procedure established by law". The court further ruled that "telephone conversation is an important facet of a man's private life." The right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversation on telephone is often of an intimate or confidential nature. Tapping phone is a serious invasion of privacy. Thus, telephone tapping is violative of Article 21 unless it is permitted under procedure established by law and such procedure be "just, fair and reasonable". In India telephone tapping is permissible under Telegraph Act, 1885[7] to subserve any public safety interest or in public emergency only.

10. Revelation of Bank Account Details

In Ram Jethmalani & ors v Union of India & ors[8] the hon'ble Apex Court observed[9] that "Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner."

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1 *AIR 1981 SC 760(763)*
2 *1997 CriLJ 2260 (2261)*
3 *Dr. L.M Singhvi, Jagdish Swarup Constitution of India, Modern Law Publication, 2nd Edition, Volume-1*
4 *AIR 1995 SC 264*
5 *AIR 1999 SC 495 (501)*
6 *AIR 1997 SC 568*
7 *In sec 5(2)*
8 *(2011) 8 SCC , 1*
9 *In para 73*

… as constitutional adjudicators we always have to be mindful of preserving the sanctity of constitutional values, and hasty steps that derogate from fundamental rights. Howsoever well meaning they may be, have to be necessarily very carefully scrutinized …. to effectively seek the protection of fundamental rights, under Clause (1) of Article 32 have to be balanced against the rights of citizens and persons under Article 21.The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as unaccounted monies. Thus, in the instant case it was held[1] that "The revelation of details of bank accounts of individuals, without establishment of prima facie grounds to accuse them of wrong doing, would be a violation of their rights to privacy."

11. Conclusion

The right to privacy is doctrinal concept which prevails in India since the time immemorial. It is an age old concept which now in independent India is given a legal recognition by the judicial creativity. Therefore, in view of various judicial rulings, it can oviously be inferred that right to privacy has evolved judicially and is a recognized constitutional right. Though the Apex Court rulings in the case of Kharag Singh, which was decided by a larger bench denied the right to privacy but later in the case of Govind, Rajagopal aad PUCL decided the matter as the existence of such right. Adhering to the principle of Stare Decisis, technically the smaller bench cannot over rule the decisions delivered by the larger bench on the same point of law. Thus, to validate right to privacy, the Apex Court is required to effectively overrule Kharag Singh with a larger bench that would ultimately settle the judicial controversy at rest.

[1] Para 77

Economic and Legal Outlook of Environmental Impact of Biotechnology: A Review

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ABSTRACT

Development of sustainable pest management strategies in Agriculture has become necessary in view of increasing non-viability of chemical based approach. Among various approaches for the purpose, policy makers have paid far more attention to biotechnological alternatives. Biotechnology, in its broadest sense, can be defined as the use of biological systems to provide goods and services. In this sense, biotechnology has been used for centuries through the use of microorganisms, to produce wine and cheese and through cross-breeding to grow hardier plants and animals. However, this definition ignores the fact that modern biotechnology, along with both the promise and concern it has engendered, is generally associated in the minds of both the scientific community and the general public with certain new technologies. The most prominent among the so-called enabling technologies are recombinant DNA and cell fusion. It is this technology that allows scientists to develop new life forms, i.e., microorganisms, plants, and higher animals with a modified gene complement, or unique hybrids, and which form the scientific basis for modern biotechnology.

This paper analysis potential of environmental biotechnology impacts especially in the agricultural sector. Further an attempt has been made to look into the socio-economic conditions of the families which are adversely affected due to use of genetically modified (GM) crops. Analysis of pesticide market in India shows that resources worth 2500 crores has been affected by an introduction of GM foods, crops etc. Legal aspects and consequences arising from biotechnology, and the flaws in laws are also highlighted.

Keywords: biotechnology, microorganisms, GE Technology, GM labeling

1. Introduction

In the broadest sense, biotechnology includes, "any technique that uses living organisms, or parts of such organisms, to make or modify products, to improve plants or animals for human needs, or to develop microorganisms for specific use."[1] Biotechnology consists of techniques ranging from traditional methods that have been performed throughout human history in industry, agriculture, and food processing, to modern biotechnology characterized by genetic engineering[2].

Genetically modified (GM) is a special set of technology that alters the genetic makeup of organisms such as animals, plants, or bacteria[3]. Combining genes from different organisms is known as recombinant DNA technology and the resulting organism is said to be genetically modified, engineered or transgenic.

Approximately, 60% of the industry is devoted to human health applications, 10% to agricultural biotechnology and 30% to industrial applications, bioinformatics and genomics. The Recombinant DNA (rDNA) technology is being successfully used in various sectors like Agriculture, Health Care, Process Industry and Environmental Management. The current focus is on Genomics, Proteomics, Transgenic, Stem cell research and Product development.

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1 *Organic Trade Association, 1988.*
2 *Doyle and Persley.*
3 *Sehata, 2005- Genetically modified organisms (GMOs), food and feed: Current status and detection. cientficjournal/2005/issue2/pdf/food/f7.pdf*

According to the Navadanya, Genetical engineering (GE) is a highly artificial manipulation of genes. Plant takes birth in the laboratory and the plant cells are implanted with artificial genetic material. Host DNA's genes are disrupt from the natural order.

2. History

The history of biotechnology can be discussed in three phases. The first generation of biotechnology is based on empirical practice and minimal scientific or technical inputs. These techniques date back to the Stone Age, and use biological organisms such as bacteria, yeasts, enzymes, and traditional methods of fermentation to produce food and drink such as bread and wine.

The second generation of biotechnology began during the interval period when developments in fermentation technology using pure cell culture and sterile manufacturing facilities began to yield new products. For Example, acetone, butanol, glycerol, Vitamin B2, citric acid, and lactic acid, but perhaps the most important discovery was that of penicillin in 1928. These discoveries led to the interest in, and subsequent development of, large-scale production of fermentation products for the pharmaceutical industry. The ability is to innovate biomechanically, and produce new products for mass market, spurred a rapid increase in life sciences research. This research spawned the production of new antibiotics such as cephalosporines, as well as an increasing range of enzymes, vitamins and steroid like hydrocortisones.

In the 1930's the US agriculture industry began to use hybrid crop varieties which increased crop yields dramatically. By the late 1950's increases in biotech research led to the use of amino acid preparation for agricultural products such as glutamate in food flavoring and polysaccharides used as stabilizing/filling agents in food manufacturing. Due to the tremendous economic significance of the products developed this stage became known as the "Green Revolution." The Green Revolution can be viewed as a predecessor to the biotechnical revolution except that biotechnology encompasses a greater number of affected areas with a heightened impact.

The turning point leading to a third generation, or modern biotechnology, is the discovery at Cambridge University of the structure of Deoxyribonucleic acid (DNA). The subsequent research linking four related chemicals called bases to their related DNA sequence led to product developments signifying the beginning of modern biotechnology.

3. Effects of Biotechnology

According to the Finucane and Holup 2005, in early 1990's Europe had a liberal policies regarding the development and production of the GM food and crops. While US consumers and farmers had already welcomed the new technology since then. It was only until the journal Nature recommended that GE may have adverse effects on the human health[1] that the European Union (EU) since then has been relatively cautious about the new GE technology[2]. According to Hurburg, 2000, US continued to promote GE. The arrival of shipments of Monsanto GM soybeans in 1996-1997 resulted in massive protests in most of western and northern Europe[3].

US Food and Drug Administration in the year 1992 allowed bringing engineered food to market in US, without getting it labeled. According to the survey by Finucane and Holup, 2005, one-third to one-half of the respondents in European countries rated GE technology as risky and hazardous .On the other hand, mere one-fifth of the US respondents have the opinion of GM being hazardous technology[4]. Today US explain GM to carry the potential to benefit consumers[5].

An approach on the approval of new genetically modified organisms explains EU concern about human and health protection[6]. On the other side, US, views EU policies as non-tariff trade barriers[7]. According to Carter and Gruere,

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[1] *Losey, J. E., Rayor, L. S., & Carter, M. E. (1999). Transgenic pollen harms monarch larvae. Nature: Volume399(6733), /ovidsp.tx.ovid.com/spa/ovidweb.cgi?&S=HMLBFPJIDPDDHHAHNCFLEGPLIICMAA00&Full+Text+Link=S.sh.15.17%7c12%7csl_20%7c80%7c2&WebLinkReturn=Full+Text%3dL%7cS.sh.15.16%7c0%7c00006056-199905200-13http://corey.uwe.ac.uk:3210/sfxlcl3?sid=google&auinit=JE&aulast=Losey&atitle=Transgenic+pollen+harms+monarch+larvae.&id=pmid:10353241*

[2] *Carlsson, F. Frykblom, P. LagerkvistC, J, C.2004. Consumer benefits of labels and bans on genetically modified food - An empirical analysis using Choice Experiments. Working papers in economics no 129. [Online].available from: http://www.p2pays.org/ref/37/36394.pdf*

[3] *Finucane, M, L. Holup J, L. (2005) Psychosocial and cultural factors affecting the perceived risk of genetically modified food: an overview of the literature. Soc. Science. Med. 60: p: 16031612. [online].Available from : http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6VBF-4DTKX29-2&_user=122883&_rdoc=1&_fmt=&_orig=search&_sort=d&_docanchor=&view=c&_searchStrId=981866916&_rerunOrigin=scholar.google&_acct=C000010139&_version=1&_urlVersion=0&_userid=122883&md5=0bbc247624b47ee7237929a4f5d89dc5*

[4] *Hoban, T. (1997) Consumer acceptance of biotechnology: an international perspective. Nature Biotechnology, 15,232234*

[5] *Lusk, J.L., Fox, J.A. (2001). Cited by Onyango, Benjamin, Nayga, Rodolfo M Jr, Govindasamy, Ramu(2006). U.S. Consumers' Willingness to Pay for Food Labeled 'Genetically Modified'. In Agricultural and Resource Economics Review. [Online].Available from: http://findarticles.com/p/articles/mi_qa4046/is_200610/ai_n17196332/*

[6] *Carlsson, Frykblom and Lagerkvist 2004 - Consumer benefits of labels and bans on genetically modified food Working Paper Series vol 2004:1*

[7] *Sheldon2002- Welfare and slow economic growth, Indicators, 1(3)*

2003, "the United States has criticized the EU's mandatory GM labeling as being nothing more than trade protection". They argued that even mandatory labeling, standards are inconsistent and consumers are not necessarily provided with greater choice. In European Union and Japan (where GM labeling is mandatory) it is virtually impossible to find any products on the food shelf that are labeled as containing GM ingredients. So the approach taken by Japan and the EU is not really giving consumers a choice. Further, according to Klintman (2002) "In the arguments against mandatory GM labeling, US and other proponents hold that labeling reflects imperfect separation of products. The very fact that there exist, substances and ingredients that could be mixed between GM food, non-approved chemicals and organic food would accordingly make food labels meaningless". Advocates of GM have also debated on the issue of rising marketing cost on the issue of labeling of GE products and crops.

According to the survey cited by Carlsson, Frykblom, Lagerkvist (2004), consumers are willing to pay more for a product, for a total ban on GM within the EU. Similarly a recent national survey in France, Germany, and the United Kingdom suggests that about 90 percent of consumers would opt for mandatory labeling on genetically modified crops rather than opting for unlabelled products[1]. This signifies if, GM in EU is carried out, it might go against the will of people. With both the EU regulations and the biotech industry suffering from the recent disappointing track record, European consumers are understandably suspicious of biotech crops from the United States[2]. There has been rigorous International public debate on GMO. Debate has been mostly concentrated and publicized in the European Union[3] leading EU to impose a moratorium on consumer concerns over the safety and environmental impacts of GMOs.

EU argues, long term environmental risk assessment of GMOs should be improved. EU's revised legislation for the marketing and release of GM products were released under directive 2001/18/ EC (CEC, 2001). As cited by Jensen, Gamborg, Madsen, Jorgensen, Krauss, Folker and Sandoen (2003), revised directive stresses that "an environmental risk assessment must comprise both direct and indirect effects, as well as immediate and delayed effects and that any new approval of a GMO should take due account of the potential, cumulative and long-term effects associated with its interaction with other (already released) GMOs and with the environment".

4. Environmental Impact of Biotechnology Economic and Legal Outlook

The Agri-biotech industry, since its emergence in 1970s, posed large difficulties. As American agriculture adopted Genetically Engineered transgenic plants created by biotechnology, questions regarding, Property damaged - through pollen flow from the transgenic crop to non-transgenic crops and mixing of seeds or plant parts during harvest, storage, and transportation, and Damage to economic interest - as law suits by farmers who didn't grow transgenic crops claiming that the introduction of transgenic crops increased their production and equipment costs and depressed the price for their agricultural products etc have kept on arising so far[4].

Uzogara 2000 explains that GE technology may cause alteration in nutritional quality of foods, potential toxicity, potential allergenicity, unintentional transfer to wild plants[5] and in most parts of the world environmentalists are concerned about these environmental and biodiversity risk posed by the genetically engineered crops. Transgenic crops could also become weeds requiring expensive and environmentally dangerous chemical control programs[6]. Philips (1994) cited by Uzogara 2000 explains that "Plants engineered to contain virus particles as part of a strategy to enhance resistance could facilitate the creation of new

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1 *Hallman, W.K., W.C. Hebden, H.L. Aquino, C.L. Cuite, and J. Lang. 2003. "Public Perceptions of Genetically Modified Foods: A National Study of Americans' Knowledge and Opinion." Publication No. RR-1003-004, Food Policy Institute, Rutgers University, New Brunswick, NJ.*

Hallman, W.K., W.C. Hebden, H.L. Aquino, C.L. Cuite, and J. Lang 2004. "Americans and GM Food: Knowledge, Opinion and Interest in 2004." Publication No. RR-1104-007, Food Policy Institute, Rutgers University, New Brunswick, NJ , J.L. Lusk, and J.A. Fox. 2001. "Consumer Demand for and Attitudes Toward Beef Labeling Strategies in France, Germany and U.K." Selected paper, American Agricultural Economics Association's annual meetings, Chicago, IL (August 58).

2 *Redick, P, T. & Adrian, J, A. (2005). Do European Union Non-Tariff Barriers Create Economic Nuisances in the United States? Journal of Food Law & Policy Vol-1. [online].*

Available from: http://www.nationalaglawcenter.org/assets/articles/redick_nontariff.pdf

3 *Ghosh, k, s. (2001). GM crops: Rationally irresistible. Current Science, VOL. 81, NO. 6. [Online].Available from: http://www.ias.ac.in/currsci/sep252001/655.pdf*

4 *Kershen, L, D. (2004). Legal Liability Issues in Agricultural Biotechnology. Crop Science. vol. 44. [Online]. Available from: http://crop.scijournals.org/cgi/reprint/44/2/456.pdf*

5 *Kaiser J (1996). Pests overwhelm Bt cotton crop. Science journal.273 (5274):423. [Online]. Available from: http://4ccr.pgr.mpf.gov.br/institucional/grupos-de-trabalho/gt-transgenicos/bibliografia/pgm-resultados-contestados/Kaiser,%201996,%20Science.pdf*

6 *Rissler J, Mellon M. The ecological risks of engineered crops. Union of Concerned Scientists. Cambridge, MA: The MIT Press, 1996.[online]. Availablehttp://books.google.co.uk/books?hl=en&lr=&id=omRUQ6p2szAC&oi=fnd&pg=PR7&dq=Rissler+J,+Mellon+M.+The+ecological+risks+of+engineered+crops.+Union+of+Concerned+Scientists.+Cambridge,+MA:+The+MIT+Press,+1996.&ots=SF9duCFejL&sig=WsJ2mdytMaEmWE9SksAlWoKWt-s#v=onepage&q=&f=false*

viruses in the environment". Religious, cultural, and ethical concerns are some of the other matters that need consideration before the commercialization of GE crops, as explained by Crist (1996) that Jews and Muslims may avoid derivatives, engineered with pig genes while vegetarians may object animal genes. Breeding antibiotic resistance into widely consumed crops may have unintended consequences for the environment as well as for humans and animals consuming the crops[1].

Traxler 2004 states that in a total of six countries, five are producing higher yield with high profits and reduced expenses on pesticides. GE Bt cotton for the first time was developed in US and Mexico, later on nations like Argentina, Australia, south Africa, china, India, Indonesia introduced the technology. Traxler (2004) states Bt advantage over chemical control pest and decreased dependence on weather conditions. Consequently, these GE varieties have superior yield performance over a wide range of growing conditions[2] and conventional crops. From environmental point of view, in a procedure of using chemical, according to Traxler, 2004, on average, "the technology reduced the number of tillage operations by one passage per field". Therefore, on an average number machinery hours are reduced by 20 percent, and fuel savings are almost 10 litres per hectare. According to Traxler, (2004), there are several studies which try to estimate the impact and distribution of benefit by the engineered variety on industry, consumer and producer and they conclude that producer take only a part of the economic benefits which is fair enough as it develops the technology. Further benefits are always shared by members of the society, demonstrating that GE technology provides economic and environmental advantages.

The introduction of GE technology in Indian agriculture has fostered the debate between NGOs representing farmers and Regulatory bodies in context to the hazards and potential for solving problems arising from adopting this technology. It is believed and proved by the studies covering the crises in Indian agriculture that there is a close relationship between GE seeds and suicides. In fact, there is a book written on the subject by Shiva (2004) 'Seeds of Suicides'.

According to Pimbert, Wakeford and Satheesh (2001) a citizen's jury consisting of 10 members regarding GMOs was organized in Karnataka India. The discussed topic was regarding a possible future role of GMOs in dropping rural poverty and advancing agriculture. After a series of discussions and practical tests in fields, jury announced their result in the form of a secret ballot. The answer came out 4 yes and 9 No to the GM technology. It was not only major jury against gene technology but they also suggested some steps to be followed by the government, if they wanted their seeds to be accepted:

(i) Microbes and beneficial insects should not be damaged. Also, new seeds should not cause damage to animal populations and other environmental elements.

(ii) They should be lawfully released only after extensive field trials for 5-10 years in which farmers shall be involved, not only in yield assessments, but also in safety, environmental and other aspects.

(iii) They should not damage the next crop that is grown on the same field or adjoining fields.

(iv) The success of the new seeds should be judged not just under lab conditions, but also, on fields involving farmers.

(v) The technology must be easy to adapt.

Farmer's unwillingness to follow the GE technology is being backed up by the studies stating the technological use not economically viable. According to Sahai (2002), Bt cotton introduction in Indian perspective is not economically viable and practical. She describes that there is a bio safety directive known as 'refugfia' which require farmers should surround the GM crops field with non GM crops, with a difference of leaving at least 20% area, so that in future GM resistant pest don't outdone non-resistant pests. According to Sahai (2002), it is not worthy for the small farmers because they would not be left with much field to sow and a high percentage of farmers in India are farmers with very small holdings, which will surely have an economic impact on them, with the reduction in production and ultimately earnings. On the other hand, from a totally different perspective but similar economic result, a report by Department of Biotechnology, (1992), states, while paying Monsanto an amount of 4 million dollars for the technology, India will save cotton of an approximate amount 100m to 200m US dollar and it will also help India in reducing the insecticide usage by half of its quantity, therefore benefiting economically[3]. Some of the anti-GMO activists argue that GE Bt cotton put

[1] *Phillips, S, C (1994) (cited by Uzogara 2000). Genetically engineered foods: do they pose health and environmental hazards? CQ Researcher VOL-4(29):67396*

[2] *Cornejo, F, J & McBride, D, W (2002). Adoption of Bioengineered Crops. Economic Research Service/USDA.[ONLINE].Available from: https://scholarworks.iupui.edu/bitstream/handle/1805/767/Adoption%20of%20Bioengineered%20Crops%20-%202002.pdf?sequence=1*

[3] *BBC Summary of World Broadcasts, 1992. Cited by YAMAGUCHI, T. HARRIS, K, C.BUSCH, L. (2003). Science Technology Society 8(47). [Online]. Available from: http://sts.sagepub.com/cgi/reprint/8/1/47.pdf*

forward very undesirable risk for environmental and human health in India[1]. According to Barwale (2002), genetic engineering is necessary for production growth and improvement, and reduction in pesticide usage.

According to a research paper by Ifft (2001), the uninformed and confusing procedures of the approval of genetically modified organism by the Indian government and inefficient bureaucratic control are often condemned. According to the Public Interest Litigation group, there are concerns in India that agricultural policy by Genetic Engineering Approval Committee (GEAC) and International Service for the Acquisition of Agri-biotech Applications, (ISAAA) is manipulated by the corporate entities with a full force of US government behind them[2].

According to Gala (2005), the ISAAA report claims reductions in cotton growing cost for Indian farmers, which is falsehood that should be challenged. In fact, more than 100 000 farmers in India who were involved in growing GM crops have committed suicide in the ten years since 1993[3]. An average of 16000 farmers a year have killed themselves since 2003 because of crop failures and debts incurred by buying the expensive GM cottonseed and herbicides touted around Indian farms by Monsanto[4].

Maharashtra Hybrid Seed Company, a collaborator with Monsanto imported 100 grams of the developed cottonseed[5] obtaining permission from RCGM. As per GMO rules 1989, permission could have only be given by GEAC, RCGM is not authorized for the permission. However, no such permission was given by GEAC. Hence it was illegal[6].

GEAC is the sole agency to grant approval for large scale field trial as per the GMO rules 1989. Trial by Monsanto and Mahyco in 1998 in 9 states in 40 acres of area at 40 locations[7] was given by RCGM and not GEAC. Thus, the violation of rule is clearly visible here.

According to Bio Safety Regulations, there is a need of ecological assessment of GMOs under varied conditions before introduction[8]. As reported by Shiva (2004), letter of intent issued by DBT in the year 1998 did not have any such requirement to be completed by the concerned organization.

One of the very serious violation of the rules and regulations regarding the introduction, production and promotion of the GMO was done by the Departments, when governments of nine concerned states were not consulted before the plantation of seeds, though both Bio Safety Regulations & Guidelines and GMO rule 1989, mention that, concerned place must know about the trials as it had got direct connection with the fields, food and human beings[9]. Further, State Biotechnology coordination committee and District Level Committee concerned with bio safety were also not informed and no post harvest management and safety was ensured[10].

According to the Shiva (2004), Monsanto and Mahyco did not follow required isolation distance and buffer zone also known as 'refugia' during trials. Rule provided by US

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1 *Shiva,V. 2004. Monsanto the gene giant: Peddling life sciences or death sciences. Research foundation for science technology and. New Delhi. Navdanya, Polaris institute*

2 *Scoones,I. 2003 . Regulatory manoeuvres: the Bt cotton controversy in India. Institute of development studies working paper 197.[online]. Available from: http://www.eldis.org/vfile/upload/1/document/0708/DOC13512.pdf*

3 *Burcher, S. (2006) .Stem Farmers' Suicides with Organic Farming. ISIS Report 12/10/06.[online].Available from: http://www.i-sis.org.uk/farmersuicides.php*

4 *Burcher, S. (2007). Global GM Crops Area Exaggerated. Institute of Science and Society. [Online].Available from: http://www.i-sis.org.uk/GlobalGMCropsAreaExaggerated.php*

5 *Shiva,V. Jafri,H,A. Emani,A. Pande,M.(2000) . Seeds of Suicide The Ecological and Human Costs of Globalisation of Agriculture. Research Foundation for Science, Technology and Ecology (RFSTE).[Online].Available from: http://sanhati.com/wp-content/uploads/2007/08/seeds-of-suicide.pdf*

6 *Shiva,V. 2004. Monsanto the gene giant: Peddling life sciences or death sciences. Research foundation for science technology and. New Delhi. Navdanya, Polaris institute*

7 *APCoAB 2006- Bt cotton in India: A status report. New Delhi, India: Asia-Pacific Consortium on Agricultural Biotechnology. Cited by Vijaykumar, Bashasab,F, Krishnareddy,B,K., Kuruvinashetti,S,M. and Patil,V,B.(2007). Mating Compatibility AmongHelicoverpa armigera (Lepidoptera: Noctuidae) Occurring on Selected Host Plants and Bt Cotton Survivors. Journal of Economic Entomology 100(3):903-908. [Online] Available from: http://www.bioone.org/doi/abs/10.1603/00220493%282007%29100%5B903%3AMCAHAL%5D2.0.CO%3B2 APCoAB 2006. Bt cotton in India a status report. [ONLINE].Available from: http://www.parc.gov.pk/bt_cotton.pdf*

8 *Munson 1995. Should a Biosafety protocol be negotiated as part of the Biodiversity Convention? . Global Environmental Change Volume 5, Issue 1, March 1995, Pages 7-26. [online]. Available from: http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6VFV-3YVCYSD-M&_user=122883&_rdoc=1&_fmt=&_orig=search&_sort=d&_docanchor=&view=c&_rerunOrigin=scholar.google&_acct=C000010139&_version=1&_urlVersion=0&_userid=122883&md5=c215a02eeea3d1a8eafc9c02ec70814e*

9 *Raghavan.C.(1998). INDIA: MONSANTO'S FIELD TRIALS SET OFF A STORM. [Online].Available from: http://www.sunsonline.org/trade/process/followup/1998/12010398.htm*

10 *Raghavan.C.(1998). INDIA: MONSANTO'S FIELD TRIALS SET OFF A STORM. [Online].Available from: http://www.sunsonline.org/trade/process/followup/1998/12010398.htm*

pertaining to cotton to maintain genetic purity, a distance of above 3000ft should be maintained[1], but in actual at the trials limit prescribed by the Indian regulatory body RCGM was 5 metres, though even seed certification norms says it should be at least 30 metres[2].

5. Conclusions and Suggestions

Economics advantages of adoption of biotechnology are not clear and further research in this area is required. In fact, indications are that, in India, farmers have been victims of this technology and resulted in suicides by the farmers. Legal procedures for ensuring that it is safe to use the bio-products developed are not strictly adheased to.

Policies regarding bio-safety regulation should be strictly followed. A system of educating farmers about the new technology should be started, so that technology can be handled in a better and efficient way by farmers.

Before the introduction of any seeds in the market a thorough test and analysis of its advantages in comparison to its disadvantages should be executed and made public. Ecologists should also be included in the decision-making panels of the country. Communication should be impressed not only between the regulatory bodies, decision making panels and concerned scientists, but also between the people who will get affected by the technology, people who will utilize the technology and those who work for the betterment of the society like NGOs and CSOs.

[1] *Malik.A (2005). The globalisation and war against it .The EDICIT vol - 2 (2). [Online].Available from: http://www.edict.co.in/images/globalisation.pdf, Shiva,V. 2004. Monsanto the gene giant: Peddling life sciences or death sciences. Research foundation for science technology and. New Delhi. Navdanya, Polaris institute.*

[2] *Environmental, Health, and Safety Guidelines for Forest Harvesting Operations 2007*

Juvenile in Conflict with Law: Definitional Issue

*Dr. A S Dalal**

ABSTRACT

Juvenile Justice has its origin in the twin concepts of mens rea and parens patriae. Children found in difficult circumstances, including those committing offences, are treated differentially because they are less culpable and less capable of looking after themselves[1]. Such a lack of mental capability and consequent lack of culpability relates to the time when the act is being committed and continues while the person continues to be so. This lack of mental capability and consequent lack of culpability, at the time of committing the offence cannot be retrospectively affected by such a child reaching an age at which he would not be so incapable.

The Juvenile Justice (Care and Protection of Children) Act, 2000 certainly deals with juveniles and has been enacted to provide care, protection, treatment, development and rehabilitation of juveniles. An interpretation that extends the benefits of this legislation to children is to be preferred over another that excludes it. The Supreme Court itself has mentioned that this exercise would have been unnecessary if the legislature had not left an ambiguity in the definition. Once it is agreed that there is an ambiguity, it is in consonance with the previous practice of the Supreme Court to resolve it to extend the benefits to children. There is nothing in the sections or scheme that categorically prevents the court to apply the JJ Act to all those who were children on the date of commission of offence. On the contrary the precedents, provisions and scheme point to the opposite direction.

Key Words: Care & Protection, Delinquencies, Juvenile, Punishment.

1. Introduction

This research work shall, within its limited scope deal solely with the definition of "Juveniles in conflict with the law", as laid down in S.2 (i) of the Juvenile Justice (Care & Protection of Children) Act, 2000 (hereinafter "the Act"), as being "a juvenile who is alleged to have committed an offence", while a "juvenile" or "child" means "a person who has not completed eighteenth year of age". The Act is stated to be: -

An Act to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this enactment.

Further, Chapter II of this Act, encompassing Ss.4-28, is specifically entitled "Juveniles in Conflict of the law", and lays down the procedure to be followed in case a juvenile is alleged to have committed an offence.

Prior to the Juvenile Justice (Care & Protection of Children) Act, 2000, the applicable law was the Juvenile Justice Act, 1986, (hereinafter "the 1986 Act" or "the JJA"), and prior to that, the field was covered by the various Children's Acts of the States. In all of these statutes, the basic intent of the legislature seems to remain the same, as does the legal phraseology and most of the terminology used. Further, the actual contents of several of the more important provisions remain substantially similar.

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[1] *Dr.Ved Kumari, Relevant Date for Applying the Juvenile Justice Act, 2000 6 SCC (Jour) 9; Dr.Ved Kumari, In Defence of Anit Das v. State of Bihar: A Rejoinder, 2002 2 SCC (Jour) 15.*

The basic definitional issue to be dealt within this particular research work deals with the controversial question regarding the correct date for assessing juvenility of the accused. Previous legislations dealing with the same subject matter shall be referred to in enunciating the meaning of this particular definition and several case-laws on the point shall also be referred to in this context. The present position of law will be stated, as will any deviations from the same. There will also be a critical analysis of the same.

2. Definitional Issues

The law in this regard is now laid down by the Juvenile Justice (Care and Protection of Children) Act, 2000, which repealed the previous legislation of the Juvenile Justice Act, 1986. That too had originally been enacted to replace the several Children's Acts enacted by the various State legislatures in this regard.

The actual position of the law at present will, however, be discussed only after the critical appreciation of a controversy which had broken out on this particular issue with regard to the interpretation of the Juvenile Justice Act, 1986.

3. The Controversy: Arnit Das v. State of Bihar

Although the law formulated in this regard has been (implicitly or explicitly) applied consistently, a controversy recently arose due to the decision of Arnit Das v. State of Bihar (hereinafter Arnit Das)[1], where, in a murder case, the petitioner claimed to be entitled to the protection of the Juvenile Justice Act, 1986, the same being disputed on behalf of the prosecution. Two questions thus arose for consideration of the Hon'ble Supreme Court. Firstly, whether the finding as to age, as arrived at by the Courts below and maintained by the High Court, can be sustained? Secondly, by reference to which date the age of the petitioner is required to be determined for finding out whether he is a juvenile or not? Although, by answering the first question in the positive, due to the concurrent findings of fact by three separate Courts[2], the Court did not require to answer the second question, the Court did so. And in doing so, the Court, in the most humble submitted opinion of the researcher, dwelt upon an excessively technical interpretation of the wordings of several sections in the 1986 Act[3], decided that "an enquiry as to the age of the juvenile has to be made only when he is brought or appears before the competent authority" and that "It is irrelevant what was the age of the person on the date of commission of the offence. Any other interpretation would not fit in the scheme and phraseology employed by the Parliament in drafting the Act.[4]"

In holding this, the Hon'ble Court reasoned:

1. Section 32 of the JJ Act uses the expression "Where it appears that a person is brought before it ... is a juvenile...." This expression indicates that the jurisdiction to record the finding of age commences when the person is brought before it and that he should be a juvenile on that date[5].
2. Section 8 of the JJ Act directs the Magistrate not empowered to deal with juveniles under the JJA to transfer them if such Magistrate is of opinion that the person brought before it is a juvenile[6].
3. Sections 18 and 20 of the JJ Act also indicate that inquiry into age has to be made only by the competent authority. Other Magistrates or the police have to reach a tentative finding of age for sending those cases to the competent authority[7].
4. There was no need to have Section 3 of the JJ Act if age at the date of commission of the offence was conclusive of its applicability[8].
5. The decisions of the Supreme Court in Santenu Mitra v. State of West Bengal (hereinafter Santenu Mitra)[9], Bhola Bhagat v. State of Bihar (hereinafter Bhola Bhagat)[10], and Gopinath Ghosh v. State of West Bengal (hereinafter Gopinath Ghosh)[11], were authorities on issues other than the one under consideration.
6. The decision of the Calcutta High Court in Dilip Saha v. State of West Bengal (hereinafter Dilip Saha)[12], proceeded on an erroneous understanding of Article 20 (1) of the Constitution of India. The

1 *rnit Das* v. *State of Bihar*, AIR 2000 SC 2264: (2000) 5 SCC 488.

2 *Ibid* at para 23.

3 See also para 13 "The use of the word 'is' at two places in Sub-section (1) of Section 32 of the Act read in conjunction with 'a person brought before it' also suggests that the competent authority is required to record the finding by reference to an event in presenti before it, i.e. by reference to the date when the person is brought before it and not by reference to a remote event i.e. the date on which the offence was committed."

4 *Ibid* at para 12.

5 *Ibid* at para 13.

6 *Ibid* at para 11.

7 *Ibid* at para 12.

8 *Ibid* at para 17.

9 *Santenu Mitra* v. *State of West Bengal*, (1998) 5 SCC 697.

10 *Bhola Bhagat* v. *State of Bihar*, (1997) 8 SCC 720.

11 *Gopinath Ghosh* v. *State of West Bengal*, 1984 Supp SCC 228.

12 *Dilip Saha* v. *State of West Bengal*, AIR 1978 Cal 529.

Patna High Court in Krishna Bhagwan v. State of Bihar[1], was faced with questions that were different from those before it.

3.1. Arnit Das v. State of Bihar: Critical Analysis

It is submitted that each one of these reasons is subject to question by reference to the provisions, their intent and the scheme of the JJ Act, apart from the philosophy behind juvenile justice.

Juvenile Justice has its origin in the twin concepts of mens rea and parens patriae. Children found in difficult circumstances, including those committing offences, are treated differentially because they are less culpable and less capable of looking after themselves[2]. Such a lack of mental capability and consequent lack of culpability relates to the time when the act is being committed and continues while the person continues to be so. This lack of mental capability and consequent lack of culpability, at the time of committing the offence cannot be retrospectively affected by such a child reaching an age at which he would not be so incapable.

The scheme of the Act clearly shows that it is geared to deal with persons who were below the specified age at the time of occurrence but ceased to be so during the inquiry. In the humble opinion of the researcher, the approach of the 1986 Act is broad and inclusive rather than narrow and pedantic, as the Hon'ble Supreme Court seems to have interpreted it.

There are no logical explanations for differential application of the JJ Act to persons who were juveniles on the date of commission of the offence. It makes no difference whether such a juvenile ceases to be juvenile during an inquiry or before being brought before the competent authority. In both cases the twin concepts of mens rea and parens patriae apply similarly.

In this regard, a few apposite analogies may be drawn. The Indian Penal Code itself completely excuses and exonerates minors of liability from offences when they are below 7 years of age at the time of the commission of the offence, by virtue of S.82[3], and from certain offences where the minor, being between 7 and 12 years of age had has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion, by virtue of S.83[4], due to the concept of their being doli incapax incapable, at the time of commission of the offence, of being sufficiently mature to have the capacity to understand the nature and consequences of their conduct. It would, however, be illogical to conclude that, if during the pendency of the trial, such person attained majority, she/he would be barred from claiming the protection of Ss.82/83.

The Supreme Court found fault with the reasoning of the Calcutta High Court in Dilip Saha. It brushed aside the importance of Article 20(1) of the Constitution of India in determining the issue of applicability of the JJ Act to children who cease to be so by the time they are brought before the competent authority. Article 20(1) prescribes that no person shall be subjected to penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The article refers to the penalty that might be inflicted at the time of commission of the offence and not the penalties that might be inflicted on the date of appearance of the accused before the court of law. What is the penalty that might be inflicted on a person who was a child on the date of the offence? If the date of appearance is the date to determine what law will apply to such a child, then it introduces uncertainty as to what punishment may be imposed on such a person. It introduces two sets of regimes that will determine penalties that might be inflicted on such a child. The child who continued to be a child when produced before the competent authority will be subjected to the protective regime of the JJ Act. The other child, who is not so produced for whatever reason including slack investigation by police, will be subjected to the penal regime of the criminal proceedings. This interpretation not only violates Article 20(1) but also the right to equality before law. How can two children of same age committing an offence be subjected to differential regimes without violating the constitutional guarantees under Articles 14, 20 and 21?

The JJ Act certainly deals with juveniles and has been enacted to provide care, protection, treatment, development and rehabilitation of juveniles. An interpretation that extends the benefits of this legislation to children is to be preferred over another that excludes it. The Supreme Court itself has mentioned that this exercise would have been unnecessary if the legislature had not left an ambiguity in the definition. Once it is agreed that there

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[1] *State of Bihar, AIR 1989 Pat 217.*

[2] *Dr.Ved Kumari, Relevant Date for Applying the Juvenile Justice Act, 2000 6 SCC (Jour) 9; Dr.Ved Kumari, In Defence of Anit Das v. State of Bihar: A Rejoinder, 2002 2 SCC (Jour) 15.*

[3] *Indian Penal Code, 1872. Section 82. Act of a child under seven years of age: Nothing is an offence which is done by a child under seven years of age.*

[4] *Indian Penal Code, 1860. Section 83. Act of a child above seven and under twelve of immature understanding: Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.*

is an ambiguity, it is in consonance with the previous practice of the Supreme Court to resolve it to extend the benefits to children. There is nothing in the sections or scheme that categorically prevents the court to apply the JJ Act to all those who were children on the date of commission of offence. On the contrary the precedents, provisions and scheme point to the opposite direction.

In Umesh Chandra v. State of Rajasthan[1], the Supreme Court while dealing with a pari materia statute, the Rajasthan Children Act, observed: "the relevant date for applicability of the Act so far as the age of the accused, who claims to be a child, is concerned, is the date of the occurrence and not the date of the trial."[2] The above categorical ruling of the Supreme Court appears to have missed the attention of the learned counsel as well as the Supreme Court. Thus, being a two-Judge Bench decision, the ruling in Arnit Das is per incuriam.

Furthermore, though the learned Court has considered Santenu Mitra ruling not relevant for the issue involved in the present case, with due deference, the following observation of the Court deserves consideration: "We are of the view that the High Court fell in error in not holding the appellant to be below sixteen years of age on the date of the commission of the offence."[3] Similarly Bhola Bhagat had raised the age issue in a different manner, when the statement of the accused four years after the incident was recognised as a basis for the Court to issue direction to hold an age inquiry even after four years. Obviously such age inquiry is not possible if S.32(1) is understood strictly in the present tense. Dr. Hon'rable Justice A.S. Anand (for himself and Hon'ble Justice K. Venkatswami) made the following observation which is very pertinent for the present debate: "We would like to re-emphasise that when a plea is raised on behalf of an accused that he was a "child" within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age.... We expect the High Courts and subordinate courts to deal with such cases with more sensitivity, as otherwise the object of the Acts would be frustrated...."[4].

In the above case, where at the time of the hearing, the accused was admittedly above the minimum age as required by the 1986 Act, what purpose would be served by an inquiry if the relevant date is when he is produced before a competent authority for that same inquiry? The age determination inquiry has meaning only if it relates back to the incident in question.

There is another line of judicial decisions that incidentally relate to age issue. Particularly notable in this context is the case of Gopinath Ghosh in which the Supreme Court remitted a case relating to an incident of August 1974 in November 1983 (after 9 years and 3 months)[5]. Obviously a case that is remitted for being tried in terms of the Juvenile Justice jurisdiction after nine years, has to relate to the age when he committed the offence, otherwise it is impossible to expect that even after nine years, at the time of presentation of the person before the competent authority, he will still be below sixteen years. Almost similar logic applies to cases where the juveniles-turned-adults are convicted but their sentence is quashed in terms of the Juvenile Justice Act[6].

4. Stating the correct law: Pratap Singh v. State of Jharkhand

However, the controversy was put to rest by the Hon'ble Supreme Court in Pratap Singh v. State of Jharkand (hereinafter referred to as Pratap Singh)[7], where, in another murder case, the petitioner claimed the protection of the Juvenile Justice (Care and Protection of Children) Act, 2000, and the Hon'ble Supreme Court, noting that certain disparities were alleged against the Arnit Das decision, the issue was referred to a Constitutional Bench for a final decision.

The Constitution Bench of the Supreme Court has elaborately addressed the aforesaid question in its two separate but concurring judgments of Justice H.K. Sema and Justice S.B. Sinha. Though both the judgments more

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1 *Umesh Chandra v. State of Rajasthan, (1982) 2 SCC 202.*

2 *Ibid at para 29.*

3 *Santenu Mitra v. State of West Bengal, (1998) 5 SCC 697 at 698.*

4 *Bhola Bhagat v. State, (1997) 8 SCC 720 at 729.*

5 *Other cases in which the matter is remitted to the lower court after a lapse of time are Sarita Narayan Sawant v. State, 1990 Cri LJ 351 (Bom).*

6 *Umesh Chandra v. State of Rajasthan, (1982) 2 SCC 202 : 1982 SCC (Cri) 396; Gopinath Ghosh v. State of W.B., 1984 Supp SCC 228 : 1984 SCC (Cri) 478; Bhoop Ram v. State of U.P., (1989) 3 SCC 1 : 1989 SCC (Cri) 486; Pradeep Kumar v. State of U.P., 1995 Supp (4) SCC 419 : 1995 SCC (Cri) 395; Bhola Bhagat v. State of Bihar, (1997) 8 SCC 720 : 1998 SCC (Cri) 125; Santenu Mitra v. State of W.B., (1998) 5 SCC 697 : 1998 SCC (Cri) 1381; Also the High Court rulings in Krishna Bhagwan v. State of Bihar, AIR 1989 Pat 217; Bandela Ailaiah v. State of A.P., 1995 Cri LJ 1083 (AP); Mayank Rajput v. State of U.P., 1998 Cri LJ 2797 (All). See also a recent unreported decision of the Supreme Court in Raj Singh v. State of Haryana [now reported at (2000) 6 SCC 759] which relied on Raghbir v. State of Haryana, (1981) 4 SCC 210.*

7 *Pratap Singh v. State of Jharkand, AIR 2005 SC 2731: (2005) 3 SCC 551.*

or less concurred in their conclusions, but their range of arguments and basic thrust varied considerably.

The first question formulated by the Constitution Bench in effect relates to choosing between the traditional line of juvenile justice underscored in Umesh Chandra v. State of Rajasthan (hereinafter referred to as Umesh Chandra)[1], and the new and restricted line of juvenile justice propagated by Arnit Das. The traditional line is premised on a neo-classical assumption about the differential mental and maturity levels of juveniles that requires that criminal behaviour of juveniles ought to be assessed in terms of their diminished capacities and that the diminished capacities must be shown to be at the time of the commission of deviant behaviour, neither before nor after it. As against this, the new line does accept the fact of diminished capacities of juveniles, but on policy grounds takes that into account only at the stage of their production before the adjudicatory authorities, which is recognised as the key institution for giving effect to the aims of securing juvenile justice. This difference in approach between the traditional line and the proposed new line influences the outcomes vitally, namely: the first, relates juvenile justice to its inception, right from the time of its first manifestation but, the second, relates it to the later point of time when the juvenile is brought before the competent authority.

4.1. Pratap Singh v. State of Jharkhand: Critical Analysis

Before adverting to the Supreme Court's reasoning in Pratap Singh it may be worthwhile to examine in some detail why the Arnit Das ruling evoked a welcome response, though of a limited section of the judiciary[2], and academics[3] in the short span of five years of its existence[4]. There are two prominent reasons for the appeal of Arnit Das. First, a growing apprehension that unscrupulous and manipulating party are taking undue advantage of the juvenile justice jurisdiction benefits[5]. Second, the increasing involvement of youth in violent delinquencies, creating a pressure for treating juvenile delinquents on at par with ordinary criminals[6]. The Court identified the over-wide conceptualisation of juvenile justice as the main cause for both the ills and saw a narrow and strict conceptualisation a way out of the impasse in these words. The term 'juvenile justice' before the onset of delinquency may refer to social justice; after the onset of delinquency, it refers to justice in its normal juridical sense. ... The Juvenile Justice Act provides for justice after the onset of delinquency. The societal factors leading to the birth of delinquency and the preventive measures which would check juvenile delinquency legitimately fall within the scope of social justice. ... the field sought to be covered by the Act is not the one which had led to juvenile delinquency but the field when a juvenile having committed a delinquency is placed for being taken care of post-delinquency."[7]

With respect, it may be submitted that juvenile justice philosophy has a long history and sound basis than the limited language of the provisions of an Act. For instance does the mere change in the language of Section 2(e) in the 1986 Act: "juvenile who has been found to have committed an offence" to Section 2(1) in the 2000 Act: "juvenile who is alleged to have committed an offence" alter the conceptualization of juvenile justice? Should our understanding of juvenile justice solely depend upon linguistic niceties alone?

This question, is, in fact, comprehensively answered by Hon'ble Justice H.K.Sema, in the majority judgement. It was noted that it is the date of offence that the juvenile comes into conflict with law, and, therefore, what was implicit in 1986 Act has been made explicit in 2000 Act[8].

The majority judgment of Hon'ble Justice H.K. Sema has mainly relied upon the three-Judges Bench decision in Umesh Chandra which has resolved the relevant date issue in these words: "Therefore, Sections 3 and 26 became necessary. Both the sections clearly point in the

1 *Umesh Chandra v. State of Rajasthan, (1982) 2 SCC 202 : 1982 SCC (Cri) 396.*

2 *Khunnu Yadav v. Rajesh Maurya, (2003) 10 SCC 291.*

3 *R.D. Jain, In Defence of Arnit Das, 2001 2 SCC (Jour) 9 at pp. 11 to 17. See also Dr. Chandrashekharan Pillai in his editorial comment in (2001) 2 SCC (Jour) 9 at pp. ix-x*

4 *However, the opposition to Arnit Das was equally strong, if not more. See Professor B.B. Pande's, Rethinking Juvenile Justice: Arnit Das style, 2000 6 SCC (Jour) 1; Dr. Ved Kumari, Relevant Date for Applying the Juvenile Justice Act, 2000 6 SCC (Jour) 6 and In Defence of Arnit Das v. State of Bihar : A Rejoinder, 2002 2 SCC (Jour) 15. These comments critiqued Arnit Das on several counts and were responsible for impassioned academic debates in Delhi Law Faculty and elsewhere. It is significant that some of the lines of arguments taken in the aforesaid critiques have influenced the Constitution Bench, with due respect. One realises that there is not a word of acknowledgement in the two judgments either about the comments or the associated academic debates.*

5 *The apprehension was actually raised by R.C. Lahoti, J. (as he then was) in these words: "What happens if a boy or a girl of just less than 16 or 18 years of age commits an offence and then leaves the country or for any reasons neither appears nor is brought before the competent authority until he or she attains the age of say 50 years?" Arnit Das at p. 497, para 17.*

6 *In an earlier comment on Arnit Das in this context it was observed: "In India too there is a growing thinking amongst law enforcers and policy planners that there is a need to take a tough approach to serious kinds of delinquencies", B.B. Pande op.cit. at p. 7.*

7 *Arnit Das at pp. 496-97, para 16.*

8 *Pratap Singh* at para 11.

direction of the relevant date for the applicability of the Act as the date of occurrence. We are clearly of the view that the relevant date for applicability of the Act so far as age of the accused, who claims to be a child, is concerned, is the date of the occurrence and not the date of the trial." The Court further added "As already noticed the decision rendered by a three-Judges Bench of this Court in Umesh Chandra was not noticed by a Division Bench of this Court in Arnit Das. We are clearly of the view that the law laid down in Umesh Chandra is the correct law and that the decision rendered by a Division Bench of this Court in Arnit Das cannot be said to have laid down a good law."[1]

Further, Hon'ble Justice H.K. Sema reasoned that the Act being a beneficial legislation, which, aimed to make available the benefit of the Act to neglected or delinquent juveniles, interpretation of such a statute of beneficial legislation must be to advance the cause of legislation to the benefit for whom it is made and not to frustrate the intendment of the legislation.[2]

Hon'ble Justice S.B. Sinha's separate but concurring judgment in Pratap Singh does provide a much wider range of arguments for overruling Arnit Das and upholding Umesh Chandra. His well-articulated judgment provides answers to the two questions confronting the Court in the light of crucial themes such as objects of juvenile justice legislations, relevance of the UN Standard Minimum Rules and the relationship between the international juvenile justice laws and the municipal laws. The judgment begins with an overview of the UN Standard Minimum Rules for the Administration of Juvenile Justice, 1985 and the evolution of the standards set by the UN along with their impact on the Acts of 1986 and 2000, followed by a brief account of the salient features of these Acts. Adverting specifically to question (a), relating to the reckoning date in determining the age of the offender, Hon'ble Justice Sinha has observed: "It must also be borne in mind that the moral and psychological components of criminal responsibility were also one of the factors in defining a juvenile. The first objective, therefore, is the promotion of well-being of the juvenile and the second objective is to bring about the principle of proportionality whereby and where under the proportionality of the reaction to the circumstances of both the offender and the offence including the victim should be safeguarded."[3] Finally, the issue is clinched by the following observation, "The field covered by the Act includes a situation leading to juvenile delinquency vis-a-vis commission of an offence. In such an event he is to be provided the post-delinquency care and for the said purpose the date when delinquency took place would be the relevant date. It must, therefore, be held that the relevant date for determining the age of the juvenile would be one on which the offence has been committed and not when he is produced in court."[4]

The humble researcher agrees with all of the above arguments and consequent conclusions of law as propounded by the Hon'ble Supreme Court and would also venture to suggest that his own personal criticism of Arnit Das has been put comprehensively to rights by the Pratap Singh judgement.

5. Pratap Singh v. State of Jharkhand: The Lacuna in the Law

However, there is just one remaining lacunae that need to be pointed out by the researcher, as a part of his critical analysis, and resolved, so as to ensure that the juvenile justice machinery functions perfectly for the purpose of justice delivery.

Ironically, such a lacuna had been pointed out by the Hon'ble Supreme Court in Arnit Das, and the same has formed part of the reasoning of the Court as well. In Arnit Das, the Court posed a question: "What happens if a boy or a girl of just less than 16 or 18 years of age commits an offence and then leaves the country or for any reasons neither appears nor is brought before the competent authority until he or she attains the age of say 50 years? If the interpretation suggested by the learned senior counsel for the appellant were to be accepted, he shall have to be sent to a juvenile home, special home or an observation home or entrusted to an after care organisation where there would all be boys and girls of less than 16 or 18 years of age. Would he be required to be dealt by a Juvenile Welfare Board or a Juvenile Court?"[5]

Such a question does raise interesting doubts. The same question was addressed parenthetically in Pratap Singh by Justice Sinha, who answered that hypothetical questions, such as this, would only lead to hypothetical answers, and that the Court would not concern itself with such matters.[6]

This, however, with all due and humble deference, can hardly be commended. While it is definitely correct within the factual parameters of Pratap Singh's case, where such a factual scenario did not arise, and hence, did not require to be considered, that hardly means that the same question may not assume importance at later stages. A solution is definitely required for this question, and calling

1 *As quoted in Pratap Singh at p. 567, para 19.*

2 *Pratap Singh at para 9.*

3 *Pratap Singh,* at p. 567, para 20.

4 *Pratap Singh,* at p. 582, para 77.

5 *Arnit Das, para16.*

6 *Pratap Singh, para 85.*

it a hypothetical question, undeserving of an answer shall not suffice.

5.1. Attempting to resolve the Lacuna

Several scholars have also attempted to answer the question. Some say that the question reflects the focus of the Court being on the offence rather than on the person. The JJ Act is there to ensure care, protection, etc., to children. It does not concern itself with punishing persons for committing offences. If for some reasons the opportunity to provide that care and protection is lost, there is not much that can be done to salvage the situation and the matter ought to be dropped[1].

The same question arises in those cases also where the "juvenile" becomes too old to be dealt with under the provisions of the Act after the competent authority has ceased of the matter. There is already a precedent of the Supreme Court on the matter. In Jayendra v. State of Uttar Pradesh,[2] by the time the Court finally determined that he was a child on the date of the offence, the accused had become 25 years of age. The Supreme Court ordered the proceedings to be closed as no useful purpose would be served to send the matter back to the Juvenile Court for disposal under the Act. Similarly, in Bhoop Ram v. State of Uttar Pradesh[3], where the appellant had reached the age of 28, the Hon'ble Court decided to sustain the conviction but however quash the sentence imposed on the accused and direct his release forthwith. Same was held in Gurpreet Singh v. Sate of Punjab[4], a recent case of 2005 in the Hon'ble Supreme Court.

It may be mentioned, however, that the Supreme Court has not dealt with the subject consistently. Umesh Chandra was decided by the Supreme Court a month-and-a-half later than Jayendra, and the "child" had become 26-and-a-half years old by the time the Supreme Court decided that he was a child on the date of the offence. The matter was referred to the Juvenile Court for final disposal in accordance with the Children Act. While the Allahabad High Court considered such a case fit to be sent to the State Government for appropriate orders[5], the High Court of Punjab ordered that such child be released on probation of good conduct.[6]

7.2. The Lacuna resolved in part: Altering the vision of Juvenile Justice

Traditionally understood juvenile justice relates to an all-embracing concept that aims at providing, first, an alternative system of justicing, and, second, justice and fairness for the child not only at the trial stage, but also at the investigation, pre-trial custody, bail and remand proceeding stages. However, it appears that the Court in Arnit Das was propagating a new vision of Juvenile Justice in these words: "The term 'juvenile justice' before the onset of delinquency may refer to social justice; after the onset of delinquency, it refers to justice in its normal juridical sense. ... The Juvenile Justice Act provides for justice after the onset of delinquency. The societal factors leading to the birth of delinquency and the preventive measures which would check juvenile delinquency legitimately fall within the scope of social justice. Once a boy or a girl has assumed delinquency, his or her treatment and trial at the hands of the justice delivery system is taken care of by the provisions of the Juvenile Justice Act."[7]

This way, the Court has expounded certain new ideas concerning juvenile justice as follows:

(a) There is a distinction between juvenile justice and social justice.

(b) The Juvenile Justice Act is confined to justice after the onset of delinquency.

(c) The pre-delinquency preventive measures and other societal efforts fall within the ambit of social justice.

It is true that conceiving juvenile justice too widely is the main reason for many implementation level flaws and crisis within the juvenile justice system today. This is because, first, it leads to the merger of the two, almost opposed, welfare and justice jurisdictions, second, it generates problems of coordination between the functions of diverse agencies like the police, the adjudicators and the welfare administration and, third, it inhibits specialized approach to the issue. But, with deference, it may be suggested that by arbitrarily demarcating on the basis of pre-onset and post-onset of delinquency or confining strictly to juridical justice or the functions related to justice

1 *Dr.Ved Kumari, Relevant Date for Applying the Juvenile Justice Act, 2000 6 SCC (Jour) 9.*

2 *(1981) 4 SCC 149 : 1981 SCC (Cri) 809.*

3 *Bhoop Ram v. State of Uttar Pradesh, AIR 1989 SC 1329: (1989) 3 SCC 1.*

4 *Gurpreet Singh v. Sate of Punjab*, MANU/SC/2525/2005.

5 *Ghanshyam v. State*, 1982 Cri LJ 138 (All).

6 *Bhudha Singh v. State of Punjab*, 1979 Chand LR (Cri) 114.

7 *Arnit Das*, at pp. 496-97.

delivery alone would neither suffice for reinventing new justice system nor afford sufficient motivation to the agencies involved in the task to strive for a coherent child justice policy[1]. However, the lead given by the Court deserves a better appreciation and analysis, with a view to its incorporation in the proposed new juvenile justice law.

In this view the observation of Hon'ble Justice N.P. Singh in Krishna Bhagwan v. State of Bihar[2], is very pertinent: "It is a matter of common knowledge especially in the State of Bihar that trial commences in many cases three to five years after the date of the commission of the offence. In the meantime, many accused persons who committed the offences as children cease to be children."[3]

How fair would it be, to exclude from juvenile justice jurisdiction, those cases where the delay in presentation was on account of investigatory and prosecuting agencies, either on account of their inefficiency[4] or by sheer design? The Court has very emphatically referred to the clever (or foolish?) juvenile who evades arrest and action till he turns 50 years of age, but how do you rule out the possibility of an ignorant and ill-informed juvenile who evades arrest and presentation because he does not understand the implications of it? The possibility of variation in the period of presentation depending upon the State, the region, urban and rural location etc. is likely to introduce arbitrariness in the whole process, which would lead to discrimination between one juvenile and another. Such consequences are likely to be violative of the constitutional guarantee of equality.

In the end, with due deference, it is difficult to agree with the Arnit Das brand of juvenile justice, which is neither unquestionably sound in law nor unreservedly appealing philosophically.

However, at the same time, it must be confessed that a complete solution is not provided to the lacuna as stated above, by the various authorities cited above.

8. Conclusion

The Lacuna resolved: New Dimensions

It may be mentioned that while a far better solution is provided by Pratap Singh than by Arnit Das, there still remain certain lacuna as pointed out above. The situation becomes even more complex if the factual situation were to include, for example, the factum of "common intention" under S.34 of the Indian Panel Code. Imagining a situation where more than one (say, two) minors (of the exact same age) engage in committing a particular offence with the common intention to do so, and while one of the minors gets arrested, tried and convicted by the Juvenile Courts, the other, perhaps due to his/her own escape, stalling methods, or due to the failure of the State machinery (police, prosecution or judiciary) is not so arrested, tried and convicted till such time that she/he ceases to be a minor. In such a case, although S.34 of the IPC read with Art.14 of the Constitution of India, read with the Jurisprudential concept of "Justice" (a discussion on which is beyond the scope of this particular research work), would demand equal punishment for both, the first minor will serve his sentence whereas the second will be convicted and released.

A Complete Solution

However, the humble researcher suggests that, in such a case, the text of the Act itself, in S.16[5], provides an analogy for a solution of this problem. Under such a provision, where the juvenile in conflict with the law has already attained the age of 16 years, it is possible for the Court to order him to "be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government." Thus, the Act itself contemplates extraordinary situations, and provides for the same. In the humble opinion of the researcher, an amendment may be made for disposing of extraordinary cases and similar factual scenarios as previously outlined by the humble researcher in just such "places of safety". In all other respects, it is submitted that Pratap Singh lays down good law.

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1 *Incidentally it may be mentioned that the Central Ministry of Social Justice and Empowerment has introduced in the current session of Parliament a new Juvenile Justice Bill that provides for the welfare and the justice jurisdictions in two separate parts. The Bill has proposed to broaden the ambit of welfare jurisdiction and make the justice jurisdiction more punitive and exclusive.*

2 *Krishna Bhagwan v. State of Bihar, AIR 1989 Pat 217.*

3 *Id., at p. 224.*

4 *Sheela Barse v. Union of India, (1986) 3 SCC 596 : 1986 SCC (Cri) 337 is perhaps the only juvenile delinquency case in which the Supreme Court has stressed the need for having a timebound investigation and trial.*

5 *Juvenile Justice (Care and Protection of Children) Act, 2000. Section 16. Order that may not be passed against juvenile Provided that where a juvenile who has attained the age of sixteen years has committed an offence and the Board is satisfied that the offence committed is of so serious in nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other juvenile in a special home to send him to such special home and that none of the other measures provided under this Act is suitable or sufficient, the Board may order the juvenile in conflict with law to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government. (2) On receipt of a report from a Board under sub-section (1), the State Government may make such arrangement in respect of the juvenile as it deems proper and may order such juvenile to be kept under protective custody at such place and on such conditions as it thinks fit: Provided that the period of detention so ordered shall not exceed the maximum period of imprisonment to which the juvenile could have been sentenced for the offence committed.*

Role of Sub-ordinate judiciary in protecting Human Rights in India

*Dr. Gokulesh Sharma**

ABSTRACT

Preamble of the Constitution lays down provisions of fundamental rights and duties. It has constituted India into a sovereign, socialist, secular, democratic republic and has secured to all its citizens' social, economic, political justice; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and to promote among them all fraternity, assuring the dignity of the individual and the unity and integrity of the nation. But, if we enjoy certain rights, we are also bound by certain duties to our country. In case of enforcement or infringement of our rights, we can seek the protection by approaching the respective courts.

The study emphasises that apart from the State Human Rights Commission and National Human Rights Commission, the Special Courts constituted under the Protection of Human Rights Act, 1993 need to be given further impetus to deal with the cases of violation of human rights.

Keywords: Constitution, Duties, Enforcement, India, Judiciary, Legislature, Preamble, Protection, Rights.

1. Introduction

Sources of all rights, duties and related ancillary benefits are derived from the preamble of the constitution of the India. In other words, preamble is the repository of every kind of available benefits and liabilities to the individuals in the Indian society. For the protection of human rights too, preamble cannot be ignored at all.

Preamble of the Constitution lays down provisions of fundamental rights and duties. We, the people of India, have solemnly resolved to constitute India into a sovereign socialist secular democratic republic and to secure to all its citizens: justice - social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all, fraternity assuring the dignity of the individual and the unity and integrity of the nation. As we know that rights and duties are co-relative. Salmond in his book Jurisprudence has described the co-relation of rights and duties. In nutshell, it can be inferred that, if we enjoy over someone, we are also duty bound to someone. In this context, the part IV-A of the Constitution of India is very indispensable material which is epitomized below.

2. Fundamental duties (Article 51A)

The fundamental duties have been incorporated in the Constitution of India by the 42nd Amendment Act 1976, which came in force on December 18, 1976 as Article 51 A. the duties are conjoined with rights too. The duties of every citizen of India are:

(a) To abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;

(b) To cherish and follow the noble ideals which inspired our national struggle for freedom;

(c) To uphold and protect the Sovereignty Unity and Integrity of India;

(d) To defend the country and render national service when called upon to do so;

(e) To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

(f) To value and preserve the rich heritage of our composite culture;

(g) To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

(h) To develop the scientific temper, humanism and the spirit of inquiry and reform;

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(i) To safeguard public property and to abjure violence;

(j) To strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

(k) Who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

3. Human Rights

Human Rights are not conferred by any Rules, Constitution or Statute, rather these are inherent in the very nature of the human being. In other words, every human being is born with certain rights and privileges. The Universal Declaration of Human Rights, 1948 has aptly called as 'International Magnacarta' was adopted by the United Nations Organisation(UNO) on December 10, 1948 is a milestone in the history of human rights. India being a signatory to the Declaration, committed to respect and protect the human rights declared and accepted by the United Nations Organizations (U.N.O.). The U.N.O. had requested the signatory countries to incorporate the universally acknowledged human rights in their Constitutional and domestic laws. India being signatory to the U.N.O. declaration on human rights, incorporated the human rights as fundamental rights in the Indian Constitution enforceable since January 26, 1950. Our Constitution specifically empowers the judiciary to protect and restore the rights enshrined in the Constitution, in case of their violations or infringement. The sub-ordinate judiciary being easily accessible to the common citizens is supposed to come first to the rescue and protection of human rights of the citizens. Since the inception of Constitution, the Country is governed by rule of law and not by the whims and fancies of any individual authority. The object behind various legislations and creation of different organs of the State is nothing but to ensure the overall welfare of the citizens and to protect their life, liberty, dignity and fundamental or human rights. Apart from the higher judiciary, the sub-ordinate courts do also play very important role in protecting the human rights of the citizens. The Supreme Court has over the years, taken much pains in issuing directions and guidelines to the sub-ordinate judiciary for protection of human rights of the citizens. Most of the complaints regarding violation of human rights are made against the police and the jail authorities. The National Police Commission (3rd Report), while referring to the quality of arrest by police in India, mentioned power of arrest as one of the chief source of corruption in the police department. According to the Commission's report, nearly 60% of the arrests were either unnecessary or unjustified followed by 43.2% unnecessary expenditure on jails thereby casting heavy burden on the exchequer. Considering the gravity of situation, the Hon'ble Supreme Court in Joginder Kumar v. State of U.P[1] directed that no arrest can be made in a routine matter on a mere allegation of commission of an offence. Various legislations and the judicial pronouncements by the Apex Court for the protection of human rights of the citizens/ persons are discussed here. For the sake of brevity and clarity, various initiatives, guidelines and directions issued by Courts/Parliament can be summed up under the following heads:

i. Protection of Human Rights vis-à-vis pre-arrest and post-arrest

ii. Protection of Human Rights vis-à-vis custodial torture

iii. Protection of Human Rights vis-à-vis amendment/ enactment of laws

iv. Protection of Human Rights vis-à-vis legal aid to indigent accused

v. Protection of Human Rights vis-à-vis medical aid to prisoners

3.1 Protection of Human Rights vis-à-vis pre-arrest and post-arrest

Arrest of a citizen by police and the treatment with him thereafter by the police has always been the area of concern for the courts. In the case of Joginder Kumar v. State of U.P.[2] the Hon'ble Supreme Court has clarified that an accused named in an FIR should not be arrested soon after the registration of the FIR. He should be arrested by the investigating officer only after collecting *prima facie* some evidence showing his involvement in the commission of the offence.

In the famous cases of D.K. Basu v. State of West Bengal[3], and A.K. Jauhari v. State of U.P.[4] the Hon'ble Supreme Court has issued following guidelines for the arresting officers to be observed at the time of arrest of a person and treatment thereafter with him:

(a) The police personnel carrying out the arrest and

1 *(1994) 4 SCC 260*

2 *1994) 4 SCC 260*

3 *(1997) 1 SCC 416*

4 *(1997) 1SCC 416*

handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(b) The police officers carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee and shall contain the time and date of arrest.

(c) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at a particular place unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(d) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district and the police station of the area concerned telegraphically within a period of 8 to 10 hours after the arrest.

(e) The person arrested must be made aware of his right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(f) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(g) The arrestee should, where he so requires, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body must be recorded at that time. the "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and it's copy provided to the arrestee.

(h) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director Health Services of the state or union territory concerned. Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(i) Copies of all the documents including the Memo of Arrest referred to above should be sent to the Illaka Magistrate for his record.

(j) The arrestee may be permitted to meet his Lawyer during interrogation, though not throughout the interrogation.

(k) A Police Control Room should be provided at all District and State Headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest within 12 hours of effecting the arrest and the police control room it should be displayed on a conspicuous notice board.

A full bench of the Allahabad High Court has in the matter Ajeet Singh v. State of U.P.[1] held that any violation of the guidelines issued by Hon'ble Supreme Court in the cases of D.K. Basu and A.K. Jauhari[2] would not only provide a ground to the accused to question the correctness of his arrest but the arresting officer would also stand exposed to the contempt proceedings for non observance of the aforesaid guidelines of the Hon'ble Supreme Court. The guidelines issued by Hon'ble Supreme Court in the cases of D.K. Basu and A.K. Jauhari in the year 1997 have now been incorporated in Sec. 50-A of the Cr.P.C. through the amendments since June, 2006. Under the newly added Sec. 50-A (4), a duty has been cast upon the Magistrates to ensure at the time of production of the arrested accused before them that the guidelines contained in Sec. 50-A of the Cr.P.C. have been complied with by the arresting officer. The introduction of these provisions in the Cr.P.C. through amendment is aimed at protecting the human rights of the arrestee from the tortures and atrocities committed by the police.

Respecting the human rights of the female accused a new sub-section (4) to Sec. 46 Cr.P.C. has been added since June, 2006 which provides that barring exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of first class within whose jurisdiction the offence is committed or the arrest is to be made, However, in the case of State of Maharashtra v. Christian Community Welfare council of India[3], the Supreme Court

[1] 2006 (6) ALJ 110 (Full Bench)

[2] ibid

[3] (2003) 8 SCC 546

while interpreting the provisions contained U/S 41 and 46 Cr.P.C. for the arrest of a female accused, has clarified that it is not necessary that a lady constable must be present at the time of her arrest and in case a lady constable is not present to effect the arrest of the female accused then the arrest can be made by the male police officer also provided there would be undue delay in the arrest of the female accused and that would impede the investigation.

3.2. Protection of Human Rights vis-à-vis custodial torture

Torture of an accused in police custody, custodial deaths and atrocities on prisoners in jails have also been one of the major area of concern as regards to the human rights, the Hon'ble Supreme Court has in a plethora of cases (given below) clarified that if a person in the custody of police is subjected to any torture, inhuman treatment or violence or custodial death takes place then courts can, not only take appropriate action against the responsible police officer but can also provide compensation to the dependents of the deceased or the victim of the illegal torture or violence:

a. Shakila Abdul Gafar Khan (Smt.) v.Vasant Raghunath Dhoble, (2003) 7 SCC 749

b. Raghbir singh v. State of Haryana, (1980) 3 SCC 70

c. Gauri Shankar Sharma v. State of U.P., AIR 1990 SC 709

d. Bhagwan Singh v. State of Punjab, (1992) 3 SCC 249

e. Nilabati Behera v. State of Orissa, AIR 1993 SC 1960

f. Pratul Krishna v. State of Bihar, 1994 Supp. (3) SCC 100

g. Kewalpati v. State of U.P., (1995) 3SCC 600

h. Inder Singh v. State of Punjab,(1995) 3 SCC 702

i. State of M.P. v. Shyam Sunder Trivedi, (1995) 4 SCC 262

j. D.K. Basu v. State of W.B., (1997) 1 SCC 416

k. Sheela Barse v. State of Maharashtra, (1983) 2 SCC 96

l. State of Maharashtra v. Christian community welfare Council, (2003) 8 SCC 546

m. Sube Singh v. State of Haryana, 2006(54) ACC 873 (SC)

3.3. Protection of Human Rights vis-à-vis amendment/enactment of laws

With the introduction of a new Sec. 176 (1-A) in the Cr. P.C. by the Parliament with effect from June, 2006, a duty has been cast upon the Judicial Magistrates exercising local territorial jurisdiction to conduct judicial inquiry in the matters of fake encounters, custodial deaths or extra judicial killings caused by the police and subject to the result of the inquiry to take appropriate further legal action in such matters against the responsible police officer or the arresting officer.

A new Section 436-A has also been added in the Cr.P.C. since June, 2006 which provides that where a person has, during the period of investigation, inquiry or trial under Cr.P.C of a offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under the law undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties.

The purpose behind incorporation of aforesaid new provisions in the Cr.P.C. through amendments w.e.f. June, 2006 is to protect the human rights of the arrestees and the accused persons as directed by the Hon'ble Supreme Court in the above noted cases. The sub-ordinate courts particularly the magisterial courts have been assigned the task of ensuring the observance of the aforesaid new provisions in the Cr.P.C. and the guidelines issued by Hon'ble Supreme Court from time to time in the above noted cases.

With the passage of Protection of Human Rights Act, 1993, Special Sessions courts have been constituted and empowered to deal with the cases of violation of human rights. The 1993 Act, no doubt, doesn't contain any penal provision in itself for punishing the violator of the human rights but Sec. 30 of the Act makes it sufficiently clear that the cases regarding violation of human rights are to be exclusively dealt with by such special courts only. The Allahabad High Court, vide its C.L. NO. 18/2006/Admin. (A-3)/ Dated: Allahabad: 10.5.06 in consonance with the U.P. Government's Notification No. A-20/VII-Nyaya-805-36G-2000, dated May 2, 2005, has notified and authorized different Additional District & Sessions Judges in different districts in the State of U.P. to try the cases involving violation of human rights. The procedure laid down in the above noted C.L. issued by the high Court provides that the complaints regarding the violation of human rights would be instituted in the Courts of the judicial magistrates exercising local territorial jurisdiction over the area and if after inquiry in the complaint the judicial magistrate finds that some prima facie case of violation of human rights is made out, he shall commit the case for trial to the court of Special Additional Sessions Judge constituted for the purpose. As per the procedure laid down by Allahabad High Court in the aforesaid C.L. dated 10.5.2006, the special courts constituted U/S. 30 of the 1993 Act can take cognizance of the offences only after the case has been committed to the court of sessions. It is thus abundantly clear that a complaint alleging violation of human rights requires to be filed in the court of the judicial magistrate having jurisdiction over the area

within which the offence regarding violation of human rights is alleged to have taken place. In case the Special Court of the Additional Sessions Judge finds the accused guilty for the violation of the human rights, it would recommend for initiation of proper prosecution of the violator of the human rights for the offences under the appropriate penal sections attracted to the case and such an accused would then be prosecuted for the sort of offences which are declared penal in the IPC or in any other penal laws for the time being in force. Since the 1993 Act itself does not provide any penalty and as such the general penal law contained in the IPC or any other penal laws for the time being in force may be applied by the courts to award appropriate penalty or sentence upon the violator of the human rights as per the provisions in the relevant penal laws. Putting hand-cuff to the accused or the prisoners or subjecting them to any other manner of inhuman treatment has also been depreciated by the Hon'ble Supreme Court and various guidelines have been issued in this regard to the effect that without the prior permission of the courts no authority including jail authorities would hand-cuff or fetter the prisoners. Any violation of the guidelines issued by Hon'ble Supreme Court to that effect has been declared a punishable offence and contempt of court as per the following cases:

a. Atemesh Rein Advocate, Supreme Court of India v. Union of India, AIR 1988 SC 1768

b. Prem Shanker Shukla v. Delhi Administration, AIR 1980 SC 1535

c. State of Maharashtra v. Ravikant S. Patil, (1991) 2 SCC 373

d. Sunil Batra v. Delhi Administration, (1978) 4 SCC 494

e. Sunil Gupta v. State of MP, (1990) 3 SCC 119

f. Rudal Shah v. State of Bihar, (1983) 4 SCC 141

g. Citizen for Democracy through it's President v. State of Assam, AIR 1996 SC 2193

h. D.K. Basu v. State of W.B.,(1997) SCC 416

i. A.K. Jauhari v. State of U.P., (1997) SCC 416

j. In re; M.P. Dwivedi and others, AIR 1996 SC2299

k. R.P. Veghela v. State of Gujarat, 2002(2) JIC 951 (Gujarat) (FB)

A duty has been imposed upon the courts that no under trial prisoner is produced before the courts in hand-cuffed or fettered. In the case of M.P. Dwivedi & others[1], a judicial magistrate who had failed to take suitable action against the police constables producing the accused hand-cuffed in his court, was summoned by the Supreme Court and was severely reprimanded for not having observed the guidelines issued by the Hon'ble Supreme Court in relation to the hand-cuffing of the accused persons. The judicial magistrate, in this case, was being sent to jail by the Supreme Court but on request having been made by the senior advocates of the Supreme Court then present in the court room and looking into the fact that the concerned judicial magistrate was a new entrant in the judicial service and was not aware of the pronouncements of the Hon'ble Supreme Court on the subject, was spared with the warning not to commit such omissions in future and the court strongly disapproving his conduct directed the observations of the Supreme Court to be kept on his personal service record.

3.4. Protection of Human Rights vis-à-vis legal aid to indigent accused

The Parliament has passed the Legal Services Authority Act, 1987 to give effect to the provisions of Article 39-A of the Constitution to provide free legal aid to the poor and the needy. The District Legal Services Authorities constituted under the aforesaid Act have been specially required to provide assistance to the poor litigants, convicts, under trials and the litigants belonging to the poor sections of the society in the form of court fees, expenses of the litigations and the Advocates fee etc. A litigant belonging to the aforesaid categories may apply to the Secretary of the DLSA to avail the free of cost assistance as noted above. These provisions are also aimed at protecting and promoting the basic human rights of the citizens.

In the case of M.H. Hoskot v. State of Maharashtra[2], the Supreme Court has directed the jail authorities to prefer jail appeals of such convict prisoners who are unable to prefer appeals to the higher courts due to poverty or other reasons and the expenses therefore are to be borne by the state. These directions of the Supreme Court are to protect the human rights of the poor convict prisoners. The convicting trial court and the D.L.S.A. have also been directed in the case noted above to ensure that the jail appeal, if desired by the convict, is preferred to the higher courts at the cost of the state.

3.5. Protection of Human Rights vis-à-vis medical aid to prisoners

Regular monthly inspections and even surprise inspections of the jails are made by the District Magistrates, Superintendents of Police of the Districts, District Judges and the Chief Judicial Magistrates to ensure that the human rights of the prisoners are not violated in the jails.

[1] *AIR 1996 SC 2299*

[2] *AIR 1978 SC 1548*

Ailing prisoners are to be provided with necessary medical care as per the provisions contained under para 1058 of the U.P. Jail manual. Courts of Judicial Magistrates and other district courts are specially empowered under various provisions of law to direct the jail authorities for providing adequate care and necessary medical facilities to the prisoners in the jail. These provisions are also aimed at protecting the basic human rights of the prisoners. It has to be kept in mind that the human rights or the fundamental rights of a citizen do not extinguish with the imprisonment of the citizen in a jail. Only the personal liberty to go beyond the jail premises is curtailed and regulated under the authority of the law but in no case the basic human rights of a citizen or human can be curtailed or finished in jail. Even a foreigner is entitled to claim protection of his human rights in another country.

The Hon'ble Supreme Court, while interpreting the provisions of Mental Health Act, 1987, has in the case of Sharda v. Dharam Pal[1], declared that the sub-ordinate judiciary requires to play major role for the protection of human rights of the citizens. It is the sub-ordinate judiciary that can respond first and rapidly to the rescue of a citizen whose human rights are in jeopardy at the hands of the police, jail or other law enforcement agencies.

4. Conclusions

The sub-ordinate judiciary has to play a major role in protecting the human rights of the citizens. Apart from the State Human Rights Commissions and the National Human Rights Commission, the special courts constituted for the protection of the cases of violation of human rights, also need to play a serious role in curbing violation of human rights by police personnel. Enabling provisions under Section 46 of the Cr. P. C. and Cr. P. C. (Amendment) Act, 2005 (Notes on Clauses) are appropriate for achieving this objective.

[1] *AIR 2003 SC 3450*

Limited Liability Partnership in India: Issues and Concerns

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ABSTRACT

Limited Liability Partnership (LLP) entities, the world wide recognized form of business organization has been introduced in India by way of Limited Liability Partnership Act, 2008. A Limited Liability Partnership combines the advantages of both the Company and Partnership into a single form of organization. In a Limited Liability Partnership, one partner is not responsible or liable for another partner's misconduct or negligence; this is an important difference from that of an unlimited partnership or general partnership. In a Limited Liability Partnership, all partners have a form of limited liability for each individual's protection within the partnership, similar to that of the shareholders of a corporation. However, unlike corporate shareholders, the partners have the right to manage the business directly. A Limited Liability Partnership also limits the personal liability of a partner for the errors, omissions, incompetence, or negligence of its employees or other agents. In this article, the provisions of LLP in India have been discussed in detail.

Keywords: Business, Company, Corporate, Limited liability, Partnership, Professionals.

1. Introduction

Limited Liability Partnership (LLP)[1] is viewed as an alternative corporate business vehicle that provides the benefits of limited liability but allows its members the flexibility of organizing their internal structure as a partnership based on mutually arrived agreement. The LLP form would enable entrepreneurs, professionals and enterprises providing services of any kind or engaged in scientific and technical disciplines, to form commercially efficient vehicles suited to their requirements. Because of flexibility in its structure and operation, the LLP would also be a suitable vehicle for small enterprises and for investment by venture capital. Keeping in mind the need of the day, the Parliament enacted the Limited Liability Partnership Act, 2008 which received the assent of the President on 7th January, 2009. The salient features of the LLP Act 2008 inter-alia are as follows:

i. The LLP shall be a body corporate and a legal entity separate from its partners[2]. Any two or more persons, associated for carrying on a lawful business with a view to profit, may by subscribing their names to an incorporation document and filing the same with the Registrar, form a Limited Liability Partnership. The LLP will have perpetual succession[3];

ii. The mutual rights and duties of partners of an LLP inter se and those of the LLP and its partners shall be governed by an agreement[4] between partners or between the LLP and the partners subject to the provisions of the LLP Act 2008. The act provides flexibility to devise the agreement as per their choice. In absence of any such agreement, the mutual rights and duties shall be governed by the provisions of the LLP Act[5];

iii. The LLP shall be a separate legal entity, liable to the full extent of its assets, with the liability of the partners being limited to their agreed contribution in the LLP which may be of tangible or intangible nature or both tangible and intangible partly in nature. No partner would be liable on account of the independent or un-authorized actions of other partners or their misconduct. The liabilities of the

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1 *As introduced by the Parliament of India through Limited Liability Partnership Act, 2008*
2 *Section 3(1) of the Limited Liability Partnership Act, 2008*
3 *Section 3(1) of the Limited Liability Partnership Act, 2008*
4 *Section 23(1) of the Limited Liability Partnership Act, 2008*
5 *Section 23(4) and the First Schedule to the Limited Liability Partnership Act, 2008*

LLP and partners who are found to have acted with intent to defraud creditors or for any fraudulent purpose shall be unlimited[1] for all or any of the debts or other liabilities of the LLP.

iv. Every LLP shall have at least two partners and shall also have at least two individuals as Designated Partners, of whom at least one shall be resident in India[2]. The duties and obligations of Designated Partners shall be as provided in the law;

v. The LLP shall be under an obligation to maintain annual accounts reflecting true and fair view of its state of affairs. A statement of accounts and solvency shall be filed by every LLP with the Registrar every year. The accounts of LLPs shall also be audited, subject to any class of LLPs being exempted from this requirement by the Central Government[3];

vi. The Central Government have powers to investigate the affairs of an LLP, if required, by appointment of competent Inspector for the purpose. The compromise or arrangement including merger and amalgamation of LLPs shall be in accordance with the provisions of the LLP Act 2008;

vii. A firm, private company or an unlisted public company is allowed to be converted into LLP in accordance with the provisions of the Act[4]. Upon such conversion, on and from the date of certificate of registration issued by the Registrar in this regard, the effects of the conversion shall be such as are specified in the LLP Act. On and from the date of registration specified in the certificate of registration, all tangible (movable or immovable) and intangible property vested in the firm or the company, all assets, interests, rights, privileges, liabilities, obligations relating to the firm or the company, and the whole of the undertaking of the firm or the company, shall be transferred to and shall vest in the LLP without further assurance, act or deed and the firm or the company, shall be deemed to be dissolved and removed from the records of the Registrar of Firms or Registrar of Companies, as the case may be;

viii. The winding up of the LLP may be either voluntary or by the Tribunal to be established under the Companies Act, 1956. Till the Tribunal is established, the power in this regard has been given to the High Court;

ix. The LLP Act 2008 confers powers on the Central Government to apply provisions of the Companies Act, 1956 as appropriate, by notification with such changes or modifications as deemed necessary. However, such notifications shall be laid in draft before each House of Parliament for a total period of 30 days and shall be subject to any modification as may be approved by both Houses;

x. The Indian Partnership Act, 1932 shall not be applicable to LLPs;

xi. A Limited Liability Partnership has the best of both partnership and company. It has the features of a partnership, vis-à-vis, agreement, to carry lawful business, and motive to make profit, as well as features of a company, vis-à-vis, perpetual succession (coming and going out of members do not affect the continued existence of the company), and legal personality separate from its partners. Thus, LLP is a hybrid of a company and a partnership.

xii. The main attraction of LLP which makes it a popular mode for conducting business is the limited liability of its partners. The liability of the partners is limited to their agreed contribution in the LLP i.e. the partners will be liable only to the extent of their contribution. No partner would be liable on account of the independent or unauthorized acts of other partners. On the other hand, in a partnership originating from the Partnership Act 1932, every partner is liable individually as well as jointly for all acts of the firm, thereby responsible with unlimited liability. As the firm cannot, literally, act on its own, act of the firm means those acts done through its human agents. Section 2(a) of the Partnership Act 1932 defines “act of the firm” as such Section 2(a) an "act of a firm" means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm.

Indian partnership firms are mostly family-owned and there is a lack of trust in having outsiders, but with the introduction of LLP, things will change dramatically because of the limited liability. Earlier, where two or more persons were desirous of carrying on joint business enterprises, their choices were to either form a company or a partnership. The advantage of trading with limited liability was elaborated by Buckley J in London and Globe Finance Corporation[5] as follows:

[1] *Section 30(1) of the Limited Liability Partnership Act, 2008*

[2] *Section 7(1) of the Limited Liability Partnership Act, 2008*

[3] *Section 34(4) of the Limited Liability Partnership Act, 2008*

[4] *Chapter X of the Limited Liability Partnership Act, 2008*

[5] *Re [1903] 1 Ch 728, 731*

"The statutes relating to limited liability have probably done more than any legislation of the last fifty years to further the commercial prosperity of the country. They have, to the advantage of the investor as well as of the public, allowed and encouraged aggregation of small sums into large capitals which have been employed in undertakings of great public utility largely increasing the wealth of the country."

Though, he said this in relation to incorporating a company, it is equally applicable to Limited Liability Partnerships as well.

In order to make Indian businesses more conducive to growth and development and to tide over the shortcomings of unlimited liability, the Parliament of India enacted the Limited Liability Partnership Act 2008 whereby individual partners are detached from the joint liability created by another partner's wrongful acts or misconduct. In India, we recognize several forms of business entities like Sole Proprietorship, Hindu Undivided Firms, Partnership Firms and Companies and the latest to join the bandwagon is Limited Liability Partnership. Handoo and Handoo, a legal consulting firm in New Delhi, is the first firm to register under the Limited Liability Partnership Act, 2008. The new business form will be beneficial to professionals like Chartered Accountants, Advocates and Company Secretaries and will allow them to come together and form an LLP and provide a single platform to all people wanting to avail the professional services. It was the Committee headed by Shri Naresh Chandra that came up with the framework for introducing LLP in India. The Committee stated that:

"With Indian professionals increasingly transacting with or representing multi-nationals in international transactions, the extent of the liability they could potentially be exposed to is extremely high. Hence, in order to encourage Indian professionals to participate in the international business community without apprehension of being subject to excessive liability, the need for having a legal structure like the LLP is self-evident. Provisions which restrict the number of partners to twenty, prevent the growth of professional firms to the large entities operating on an international scale. Such inhibiting conditions have to be removed. Otherwise, Indian professionals may well get excluded from taking their rightful place in the international community, that their skills otherwise entitle them to. The Committee believes that, to encourage greater professionalism and create commercially efficient, vehicles for providing service of the highest quality, it is essential to create a regulatory regime that would govern the formation of such a hybrid entity between the partnership simpliciter, or general partnership, and a private limited company, that is, an LLP. Such an entity would provide the flexibility of a partnership (allowing the owners to adopt whatever form of internal organization they prefer), and limiting at the same time, the owner's liability with respect to the LLP."

LLP is an excellent hybrid of Partnership Act and Companies Act, and is a very good substitute to formation of a private limited company. LLP may not be a good substitute for small family owned partnerships, but will be excellent tool for professional partnerships.

Even in the case of small partnerships, in certain situations, LLP may be a good option. If the proposed activity is of manufacturer, service provider, import/export etc.; there can be a sudden huge tax liability. In such cases, LLP gives protection. LLP is also a good alternative for partnerships where in some of the partners are willing to provide finance but do not want to be saddled with unlimited liability which can accrue in case of traditional partnership firm. Before the enactment of LLP Act, under partnership law, the partners are liable jointly and severally and most importantly their liability is unlimited which means that the personal property of the partners can also be attached for the satisfaction of the debt or in addition to the capital contributed by the partners in the firm.

This is the principal reason why partnership firms of professionals have not grown in size to meet the challenges posed today. Not only are the firm's assets completely liquidated under the standard principles of the partnership law, but also the partners are jointly and severally liable for the entire liabilities of the partnership. Thus, the traditional partnership system acts as a deterrent for the growth and expansion of service based organizations.

2. Meaning and Concept of Limited Liability Partnership

Limited Liability Partnership is the new form of business entity. It is a hybrid entity incorporating features of a body corporate and that of the partnership. Limited Liability Partnership is prevalent across the globe. This form of business entity is being used by private equity/venture capital funds and professionals. In United States, Canada, China, Poland and Germany, Limited Liability Partnerships can be formed only by professional service providers. In United States of America, this concept was introduced in 1991. In United Kingdom, Limited Liability Partnerships are treated as incorporated entities for legal purposes. In Singapore Limited Liability Partnerships are governed by Limited Liability Partnership Act, 2005 which is similar to the structure as in United Kingdom. In India, Limited Liability Partnership, 2008 was enacted which is similar to United Kingdom and Singapore Law of Limited Liability Partnerships. However, Indian Limited Liability Partnership Act is unique in tax treatment.

A partnership firm is not a separate legal entity characterized by the fact that its members are personally liable to third parties, in addition to the liability imposed on the partnership. However, there may be certain situations in which a partner may be interested in limiting his personal liability. Such a partnership, if allowed, is a "Limited Liability Partnership," since the liability of each of its partners is limited to the amount he contributed, invested, or undertook to invest, in that partnership.

The Limited Liability Partnership Act, 2008 defines "Limited Liability Partnership" to mean a partnership formed and registered under this Act[1]. In the light of the provisions of the Act, Limited Liability Partnership can be said to be a partnership having the following attributes:

i. Hybrid business entity combining features of partnership firm and company both.

ii. Limited Liability Partnership is a form of business model which is organized and operates on the basis of an agreement.

iii. Any two or more persons associating for carrying on a lawful business with a view to profit sharing may be by subscribing to and filing the same with registrar set up a Limited Liability Partnership.

iv. It is a body corporate and a legal entity separate from its partners having a perpetual succession.v. I t can continue its existence irrespective of changes in partners.

vi. Once registered, a Limited Liability Partnership shall by its own name be capable of

   a. Suing and being sued;

   b. Acquiring, owning, holding and developing or disposing of property, whether movable or immovable, tangible or intangible;

   c. Having a common seal, and

   d. Doing and suffering such other acts and things as bodies Corporate may lawfully do and suffer[2].

3. Need of Limited Liability Partnership

For a long time, a need has been felt to provide for a business format that would combine the flexibility of a partnership and the advantages of limited liability of a company at a low compliance cost. The Limited Liability Partnership format is an alternative corporate business vehicle that provides the benefits of limited liability of a company but allows its members the flexibility of organizing their internal management on the basis of a mutually arrived agreement, as is the case in a partnership firm. This format would be quite useful for small and medium enterprises in general and for the enterprises in services sector in particular. Internationally, LLPs are the preferred vehicle of business particularly for service industry or for activities involving professionals. An LLP is similar in some ways to a Standard Partnership, except that the individual members have lower liabilities to any debts which may arise from running the business. There are more administrative duties involved compared to the Partnership business structure.

Limited liability partnership concept was introduced in order to adopt a corporate form, which combines the organizational flexibility and tax status of partnership with advantage of limited liability for its partners. LLP is a body corporate formed and incorporated under the LLP Act, which is a distinct legal entity separate from that of its partners. Introducing LLPs, as a new business structure would fill the gap between business firms such as sole proprietorship and partnership, which are generally unregulated and Limited Liability Companies, which are governed by the Companies Act, 1956. In addition to an alternative business structure, LLPs would foster the growth of the services sector. The regime of limited liability partnership will provide a platform to small and medium enterprises and professional firms of Company Secretaries, Chartered Accountants, Advocates etc. to conduct their business/ profession efficiently which would in turn increase their global competitiveness.

The rise in the number of companies has put India on the international front competing with the international counterparts; this has made India providers of a wide range of goods and services while increasing employment opportunities at home. One very important feature of a new age company is Limited Liability Partnership. In an LLP, one partner is not responsible or liable for another partner's misconduct or negligence. Unlike corporate shareholders; the partners have the right to manage the business directly. As opposed to that, corporate shareholders have to elect a board of directors under the companies Act. An LLP is more suited for businesses where all investors wish to take an active role in management.

It was felt that the Companies Act, 1956 is not suited to the liability and governance structure intended for LLPs. The overall intent of the legislation to regulate widely-held companies is different. Therefore, in accordance with the recommendations of the Irani Committee, it was felt

[1] *Clause (n) of Section 2 of the Limited Liability Partnership Act, 2008*

[2] *C.L.Gupta, Law of Partnership Including Limited Liability Partnership, Modern Law Publication, 4th Edition, 2010, p.II.2*

appropriate to bring a new legislation for LLPs. The administration and enforcement of partnership firms under the Indian Partnership Act, 1932 ('Partnership Act') is at the State level. Besides, a partnership firm involves full, joint and several liabilities of the partners. Because of this, many enterprises engaged in biotech, information technology, etc., find traditional partnerships unsuitable. Also, the traditional partnership firms are very unsuitable for multi-disciplinary combinations like the combination of Lawyers and Accountants, which is the hot combination today. Thus, the LLP Act is intended to remove the gulf which exists between a company governed by the Companies Act and a general partnership firm governed by the Partnership Act.

Before the concept being introduced in India it has been accepted in countries like U.S.A, U.K, Australia, and Germany. It is a form of business entity, which allows individual partners to be restricted from joint liability of partners in a partnership firm. The Liability of the partners incurred in the normal course of business is that of LLP and it does not extend to the personal assets of the partners. This is a great relief to the partners, particularly professionals like Company Secretaries, Chartered Accountants, Cost Accountants, Advocates and other professionals. These professionals may also form multi-disciplinary LLPs to meet the changing economic environment. The introduction of LLPs in India is a good beginning towards a long journey. The hybrid structure of LLP will facilitate entrepreneurs, service providers and professionals to organize and operate in an innovative and efficient manner for effectively competing in the global market.

Keeping in mind the need of the day, the Parliament enacted the Limited Liability Partnership Act, 2008 which received the assent of the President on 7th January, 2009.

4. Nature of Limited Liability Partnership

Limited Liability Partnership has a Flexible nature and it suits small business owners. Since this is an alternative entity which has been introduced in India based on the recommendations of the Committee of Partnerships and Private Companies headed by Mr Naresh Chandra, Committee on New Company Law headed by Dr J.J. Irani. The concept comes from the US in 1991 and the Indian Limited Liability Partnership Act is broadly based on UK Limited Liability Partnership Act 2000 and the Singapore Limited Liability Partnership Act 2005. Other countries which offered Limited Liability Partnership were Japan, Australia and some Gulf Countries. The Limited Liability Partnership entity is a hybrid of part partnership which provided a shelter/protection to the partners unlike the ordinary partnership entities where the partners also are penalized for civil and criminal liabilities which are ultra virus to the interest of the stakeholders and the enforcement agencies. Limited Liability Partnership is a separate legal entity and can sue or be sued without involving the partners. Also, unlike a partnership company where the entity is closed due to the death of a partner, a perpetual succession plan can be put into place with no effect on entry or exit of partners. An agreement to govern the mutual rights and duties of partners inter se and those of Limited Liability Partnership and its partners. Further, liability of partners is limited only to their agreed contribution in the Limited Liability Partnership and there is no liability to the partners for independent or un-authorized action or misconduct of other partners. The biggest advantage in Limited Liability Partnership is that, unlike a partnership company, the Limited Liability Partnership avails of external finance or a foreign currency loan at comparatively low interest rates than those borrowed from the domestic banks.

4.1 Who may form a Limited Liability Partnership?

Any two or more persons associated for carrying on lawful business with a view to earn profit may form a Limited Liability Partnership in India.

4.2 Who can be a Partner of a Limited Liability Partnership?

Any one or more may be a partner of the Limited Liability Partnership in India.

(i) An Individual

(ii) Indian Private and/or Public Company

(iii) Foreign Company

(iv) Any other Limited Liability Partnership

(v) Limited Liability Partnership Registered Outside India

4.3 Who cannot be a Partner of a Limited Liability Partnership?

(i) A Corporation Sole

(ii) A Co-operative Society

Limited Liability Partnership framework is best suited for enterprises/organizations like:

1. Traditional Partnership Firms
2. Private Limited and unlisted Companies
3. Multidisciplinary Partnerships
4. Venture Capital Funds
5. Professionals such as Chartered Accountants, Company Secretaries, Cost and Works Accountants and Advocates

6. Small Scale Enterprises including Micro, Small and Medium Enterprises
7. Professionals and Enterprises engaged in Scientific, Technical or Artistic discipline
8. Producer companies in handloom, handicrafts[1].

5. The Advantages of Limited Liability Partnership

Following are the advantages of the Limited Liability Partnership:

i. Renowned form of business: Though the concept of Limited Liability Partnership has been recently introduced in India but it is very known concept in other countries of the world especially in service sector.

ii. Easy to Form: It is very easy to form Limited Liability Partnership, as the process is very simple as compared to Companies and does not involve much formality. Moreover, in terms of cost the minimum fees of incorporation is as low as Rs 800 and maximum is Rs 5600.

iii. Body Corporate: Just like a Company, Limited Liability Partnership is also body corporate, which means it has its own existence as compared to partnership. Limited Liability Partnership and its Partners are distinct entity in the eyes of law. Limited Liability Partnership will be known by its own name and not the name of its partners.

iv. Liability: A Limited Liability Partnership exists as a separate legal entity from your personal life. Both Limited Liability Partnership and person, who own it, are separate entities and both function separately. Liability for repayment of debts and lawsuits incurred by the Limited Liability Partnership lies on it and not the owner. Any business with potential for lawsuits should consider incorporation; it will offer an added layer of protection.

v. Perpetual Succession: An incorporated Limited Liability Partnership has perpetual succession. Notwithstanding any changes in the partners of the Limited Liability Partnership, the Limited Liability Partnership will be a same entity with the same privileges, immunities, estates and possessions. The Limited Liability Partnership shall continue to exist till its wound up in accordance with the provisions of the relevant law.

vi. Flexible to Manage: Limited Liability Partnership Act 2008 gives Limited Liability Partnership the freedom to manage its own affairs. Partner can decide the way they want to run and manage the Limited Liability Partnership, in form of Limited Liability Partnership Agreement. The Limited Liability Partnership Act does not regulate the Limited Liability Partnership to large extent rather than allows partners the liberty to manage it as per their will and fancies.

vii. Easy Transferable Ownership: It is easy to become or leave the Limited Liability Partnership or otherwise it is easier to transfer the ownership in accordance with the terms of the Limited Liability Partnership Agreement.

viii. Separate Property: A Limited Liability Partnership as legal entity is capable of owning its funds and other properties. The Limited Liability Partnership is the real person in which all the property is vested and by which it is controlled, managed and disposed off. The property of Limited Liability Partnership is not the property of its partners. Therefore partners cannot make any claim on the property in case of any dispute among themselves.

ix. Taxation: Another main benefit of incorporation is the taxation of a Limited Liability Partnership. Limited Liability Partnership is taxed at a lower rate as compared to Company. Moreover, Limited Liability Partnership is also not subject to Dividend Distribution Tax as compared to company, so there will not be any tax while you distribute profit to your partners.

x. Raising Money: Financing a small business like sole proprietorship or partnership can be difficult at times. A Limited Liability Partnership being a regulated entity like company can attract finance from PE Investors, financial institutions etc.

xi. Capacity to sue: As a juristic legal person, a Limited Liability Partnership can sue in its name and be sued by others. The partners are not liable to be sued for dues against the Limited Liability Partnership.

xii. No Mandatory Audit Requirement: Under Limited Liability Partnership, only in case of business, where the annual turnover/contribution exceeds Rs 40 Lakhs /Rs 25 Lakhs are required to get their account audited annually by a chartered accountant. This provides great relief to small businessmen.

xiii. Partners are not agent of other Partners: In Limited Liability Partnership, Partners unlike partnership are not agents of the partners and therefore they are not liable for the individual act of other partners in

[1] *http://www.fieomail.org/FIEO NEWS I June 2011*

Limited Liability Partnership, which protects the interest of individual partners.

xiv. Compliance: As compared to a private company, compliance is relatively low in case of Limited Liability Partnership.

6. The Disadvantages of Limited Liability Partnership

Following are the disadvantages of Limited Liability Partnership:

i. Regulated form of Business: Limited Liability Partnership is regulated form of business, as the Limited Liability Partnership Act 2008 provides various provisions relating to management of affairs of the Limited Liability Partnership which includes taking the permission of regulatory authority for undertaking certain actions.

ii. Audit and Financial Disclosure: It is necessary for Limited Liability Partnership to get its accounts audited annually and to prepare its balance sheet and profit and loss account in accordance with the prescribed guidelines. Lot of information as to the financial condition of the business is required to be disclosed and moreover, all such documents are available for public inspection, therefore it is not possible to maintain financial secrecy of the business.

iii. Long Closing Proceedings: It is generally not easy to close the company as compared to other forms of business, the procedure to close is long and involves compliance of various formalities, at times it takes 1-2 years to completely wind-up the company. Moreover, in certain cases, it is necessary to take the permission of the High Court to close the Company.

iv. Transfer of Interest: It is not easy to transfer the interest in Limited Liability Partnership as compared to company; various formalities are required to comply with in accordance with the terms and conditions of the Limited Liability Partnership Agreement.

v. Amendment in Limited Liability Partnership Agreement: Limited Liability Partnership is governed by the terms and conditions as prescribed in the Limited Liability Partnership Agreement and which if not properly drafted will result in dispute among the partners, delay in executing decision, requirement of amending the Agreement or executing a new one, in case the new partners are admitted.

vi. Lack of Recognition: Limited Liability Partnership is recently introduced in India and is therefore, not recognized under various laws for the purpose of carrying various businesses and moreover, due to being relatively new concept, there is still no clarity on various issues related to it, which might create problems in its smooth functioning.

vii. Any act of a partner without the other may bind the Limited Liability Partnership. Under some cases, liability may extend to personal assets of partners.

viii. No separation of Management from owners[1].

7. Structure of Limited Liability Partnership

i. The Limited Liability Partnership will be an alternative corporate business vehicle that would give the benefits of limited liability but would allow its members the flexibility of organizing their internal structure as a partnership based on an agreement.

ii. The Limited Liability Partnership Law does not restrict the benefit of Limited Liability Partnership structure to certain classes of professionals only and would be available for use by any enterprise which fulfils the requirements of the Act.

iii. While the Limited Liability Partnership will be a separate legal entity, liable to the full extent of its assets, the liability of the partners would be limited to their agreed contribution in the Limited Liability Partnership. Further, no partner would be liable on account of the independent or un-authorized actions of other partners, thus allowing individual partners to be shielded from joint liability created by another partner's wrongful business decisions or misconduct.

iv. Limited Liability Partnership shall be a body corporate and a legal entity separate from its partners. It will have perpetual succession. Indian Partnership Act, 1932 shall not be applicable to Limited Liability Partnerships and there shall not be any upper limit on number of partners in a Limited Liability Partnership unlike an ordinary partnership firm where the maximum number of partners cannot exceed 20.

v. A Limited Liability Partnership shall be under obligation to maintain annual accounts reflecting true and fair view of its state of affairs. Since tax matters of all entities in India are addressed in the Income Tax Act, 1961, the taxation of Limited Liability Partnerships shall be addressed in that Act.

[1] *http:// www.llponline.co.in, visited on 20/4/2011.*

vi. Provisions have been made in the Limited Liability Partnership Act for corporate actions like mergers, amalgamations etc.

vii. Enabling provisions in respect of winding up and dissolutions of Limited Liability Partnerships have been made in the Act, detailed provisions in this regard are provided by way of rules framed under the Act.

8. Significance of Limited Liability Partnership

Partnerships are commercial vehicles that combine the features of partnership and company form of business. The main concept of Limited Liability Partnership has been introduced in India by way of Limited Liability Partnership Act, 2008. A Limited Liability Partnership combines the advantages of both the Company and Partnership into a single form of organization, which is a separate legal entity, liable to the full extent of its assets, the liability of the partners would be limited to their agreed contribution in the Limited Liability Partnership. Limited Liability Partnership registration is a kind of partnership in which the partners have limited liability. The main feature of Limited Liability Partnership registration is that one partner is not responsible or liable for another partner's negligence.

One of the main advantages of Limited Liability Partnership is that it is a separate legal entity and there is flexibility without imposing legal and procedural requirements. In the formation of Limited Liability Partnership, there is no minimum requirement of capital formation. The Limited Liability Partnership is viewed as an alternative corporate business vehicle, which not only provides the advantages of limited liability but also allows its members the flexibility of organizing their internal structure as a partnership based on a mutually arrived agreement. The Limited Liability Partnership registration form would enable entrepreneurs, professionals and enterprises providing services of any kind or engaged in scientific and technical disciplines, to form commercially efficient vehicles suited to their requirements. Owing to flexibility in its operation and structure, the Limited Liability Partnership would also be a suitable vehicle for small enterprises and for investment by venture capital.

A Limited Liability Partnership registration protects each partner from personal liability for certain compulsions of the partnership. The Limited Liability Partnership differs in one important way from general partnerships. Each partner is not liable to the other partner's debts or obligations as they would be in a general partnership. Equity joint ventures are the favoured investment vehicle for most manufacturing Joint Ventures. The profits in equity joint venture must be allocated according to the ratio of the capital contributions made by the partners. The purpose of contract monitoring procedure is to ensure SP Grant is purchasing efficient and effective services that meet the needs of users, and to identify any problems as early as possible. People prefer Limited Liability Partnership which is most suited in several countries where Limited Liability Partnership and Limited Partnerships are different. As it may allow all LLP partners to have limited liabilities while on the other hand limited partnership could require at least one partner with unlimited liabilities[1].

9. Foreign Direct Investment in Limited Liability Partnership in India

It is the intent and objective of the Government of India to attract and promote foreign direct investment in order to supplement domestic capital, technology and skills, for accelerated economic growth. Foreign Direct Investment, as distinguished from portfolio investment, has the connotation of establishing a lasting interest in an enterprise that is resident in an economy other than that of the investor.

Investing in India or setting up business in India is governed by rules and regulations under the Foreign Direct Investment ('FDI') Policy issued and updated by Department of Industrial Policy and Promotion. FDI regulations allow investment in all industries expect those in the negative list. Additionally, there are sectoral caps for investing in certain industries. FDI is not permitted beyond these caps. FDI can be brought into India through the automatic approval route and, for certain activities, on obtaining prior government approval. A foreign company planning to set up business operations in India may:

- Incorporate a company under the Companies Act, 1956, as a Joint Venture or a Wholly Owned Subsidiary either which could be either in the form of Private Company, public company or a Section 25 Company and may come and do business in India as a Foreign LLP as per Limited Liability Partnership Act, 2008.
- Set up a Liaison Office / Representative Office or a Project Office or a Branch Office of the foreign company which can undertake activities permitted under the Foreign Exchange Management (Establishment in India of Branch Office or Other Place of Business) Regulations, 2000.

The Foreign Direct Investment ('FDI') Policy announced by the Government of India and the provisions of the Foreign Exchange Management Act ('FEMA') 1999 governs the exchange control matters in India.

India has among the most liberal and transparent policies on FDI among the emerging economies. Foreign direct

[1] *http://www.articlesnatch.com*

investment is freely allowed in all sectors including the services sector, except a few sectors where the existing and notified sectoral policy does not permit FDI beyond a ceiling. FDI for virtually all items/activities can be brought in through the Automatic Route under powers delegated to the Reserve Bank of India ('RBI'), and for the remaining items/activities through Government approval. Government approvals are accorded on the recommendation of the Foreign Investment Promotion Board ('FIPB').

Governed by the Limited Liability Partnership Act, 2008, LLP is a corporate medium that conglomerates professional and entrepreneurial competence by providing to its members limited liability and also the flexibility to organize the structure as a partnership. To attract foreign investment, the Cabinet Committee on Economic Affairs (CCEA), agreed to foreign direct investments (FDI) in LLPs in sectors like mining, power and airports. This will be implemented in a regulated and calibrated manner, beginning with the "open sectors" where monitoring is not required. Under the current FDI policy, foreign investment in Indian Companies is permitted under:

1. The automatic route; and
2. The approval route (with prior approval of the Foreign Investment Promotion Board ('FIPB'), depending on the sector in which FDI is being inducted.

The Government of India through the 'Press Note[1] has permitted FDI in LLP firms, subject to specified conditions.

- FDI in LLPs will be allowed up to 100% in sectors/activities that are currently eligible for 100% FDI under automatic route and which do not have any FDI-linked performance conditions and there should not be any FDI-linked performance related conditions (such as 'Non Banking Finance Companies' or 'Development of Townships, Housing, Built-up infrastructure and Construction-development projects' etc.);
- An Indian company, having FDI, will be permitted to make downstream investment in an LLP only if both- the company, as well as the LLP are operating in sectors where 100% FDI is allowed, through the automatic route and there are no FDI-linked performance related conditions;
- LLP with FDI has a body corporate that is a designated partner or nominates an individual to act as a designated partner in accordance with the provisions of Section 7 of the LLP Act, 2008 such a body corporate should only be a company registered in India under the Companies Act, 1956 and not any other body, such as an LLP or trust;
- Foreign capital participation in the capital structure of LLPs will be allowed only by way of cash consideration, received by inward remittance, through normal banking channels or by debit to NRE/FCNR account of the person concerned, maintained with an authorized dealer/authorized bank. For such LLPs, the designated partner "resident in India", as defined under the 'Explanation' to Section 7(1) of the LLP Act, 2008, would also have to satisfy the definition of "person resident in India", as prescribed under Section 2 (v) (i) of the Foreign Exchange Management Act, 1999. The designated partners will be responsible for compliance with all the above conditions and also liable for all penalties imposed on the LLP for their contravention, if any;
- Any conversion of a company with FDI into an LLP will be allowed only if the company is engaged in sectors/activities where 100% FDI is allowed, through the automatic route and there are no FDI-linked performance related conditions and prior approval of FIPB/Government is obtained;
- Prior approval from the Foreign Investment Promotion Board (FIPB) will be required for FDI in a LLP.

Restrictions:

- LLPs with FDI will not be allowed to operate in agricultural/plantation activity, print media or real estate business; eligible to make any downstream investments'; and permitted to avail External Commercial Borrowings (ECBs);
- Only cash contribution will be permissible for FDI in LLPs; and
- Foreign Institutional Investors (FIIs) and Foreign Venture Capital Investors (FVCIs) will not be permitted to invest in LLPs.

10. Conclusions

Limited Liability Partnership (LLP) combines the advantages of both the Company and Partnership into a single form of business organization. Globally, the LLPs are the preferred form of doing business by professionals. In India, LLP is a new kind of entity with a new law, the Government of India is being cautious in allowing FDI into LLP, and hence, at the initial stage, certain restrictions have been imposed on FDI into LLP. Wherever, FDI in LLP is allowed, RBI is keeping a tab to ensure that no violation of Foreign Exchange Management Act (FEMA) occurs. Introduction of LLP is expected to give a boost to the number of joint ventures in the country.

[1] *Press Note No. 1 (2011 Series), Dated 20-5-2011*

National Green Tribunal Act, 2010: An Analysis

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ABSTRACT

An Act to provide for the establishment of a National Green Tribunal for an effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right related to environment and providing relief and compensation for damages to persons property and for matters connected therewith or incidental thereto. This article considers the passage of the National Green Tribunal Act, 2010 in India and the proposal to constitute a National Green Tribunal as a specialist body to hear environmental cases. The article also throws light on the debate surrounding with the introduction of a specialist environmental tribunal and explores questions of its composition, jurisdiction and procedures.

Key Words: National Green Tribunal, Compensation, NGO, Offences, National Environment Appellate Authority.

1. Introduction

In an attempt to bring forth change over from the environmental courts to tribunal and vice versa, the present legislation makes an important attempt in this direction and tries to meet out the persistent demand for expert justice. The environmental justice which will be delivered by this alternative dispute resolution mechanism will now be judicial expertise justice. Further the expert member will measure justice with techno-science scale, leaving little scope of judges forging their philosophy of either justice to environment or development. Twenty-six years after the world's worst industrial disaster in Bhopal, India has a new National Green Tribunal Act, for effective and expeditious disposal of cases relating to environment protection and giving relief and compensation for damages. The country already has a National Environment Appellate Authority (NEAA) which is a paper tiger. Justice (retired.) N. Venkatachala of the Supreme Court, who headed the NEAA for three years, demands at the new Green Tribunal should be scrapped. He holds out that sections 14 to 17 which relate to the powers and jurisdiction of the new Act undermine its purpose. At a state- level consultation held on June 19 in Mumbai, Mr. Venkatachala was scathing about the ambiguities in the Act which does not fix responsibility on who should pay damages in case of an accident and limits complaints to five years since the inception of the problem. The new Act also allows industries to appeal before the Tribunal if they fail to get environmental clearance. How green then is this tribunal?[1]

2. Analysis of the National Green Tribunal Act, 2010

Anyone who has read the 18 page Act would wonder as to whether the tribunal is meant to be a club of retired IAS officers and technocrats. Although the NGT Act keeps referring to public health concerns, it neither defines public health nor includes social scientists with familiarity with health aspects. It has been a constant concern of the Supreme Court that has been expressed in several orders that an expert body (Tribunal in the present case) should consist of experts in relevant fields and not the bureaucrats. All earlier attempts in handling the environmental problems through Pollution Control Boards/National Environment Appellate Authority etc have failed because their control was given in the hands of bureaucrats or to political appointees.

The Tribunal is envisaged as a multi member expert adjudicatory body on environmental issues. Chapter II of the Act deals with qualification, terms of service and process of removal of members of the Tribunal. This

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[1] http://www.hindu.com/2010/07/07/stories/2010070752811100.htm accessed 2 March 2011.

section is important given the fact that the Government of India has not been able to put in place a functioning Environmental Tribunal in the last 15 years. Thus, the National Environment Tribunal Act was passed by Parliament in 1995 and was never set up while the National Environment Appellate Authority (NEAA) has been a limping authority ever since the last Ten years. The establishment of the Authority is thus of crucial significance. However, what is important is the willingness of the Government to make it functional. As the experiences with both the National Environment Appellate Authority and the National Environment Tribunal show, even when the statutory provisions existed, the Government of the day was completely unconscious to the need to make it effective.

The Law Commission in its 186th report[1] proposed that the Tribunal would be assisted by a statutory panel of technical/scientific personnel called Commissioners. This was in tune with the Judgment of the Supreme Court in Sriram Gas Leak Case M.C Mehta v Union of India,[1] wherein the Court emphasized on the need for an Ecological Sciences Research Group to assist the Court with respect to environmental matters. This would be an advisory panel and will not be present during court hearings but would independently advise and assist the Tribunal in analyzing and assessing scientific and technological issues. It would clearly make sense that a nationwide panel of experts be formed. Individual regional Tribunals can, therefore, call upon the expertise of a Commissioner wherever necessary.

3. Title of the Act

First of all, there is a suggestion in regard to Sub Section (1) of Section 1 of the Act.[2] The title of the Act should be 'The National Environment Tribunal Act, 2010' and not a subjective, vague and loaded term like a 'Green' Tribunal. This is to reflect clearly the objective and purpose of the Tribunal. This also shall be necessary in the light of a need for universal understanding of the title, when it requires translation and appreciation at the local and village levels.

4. Substantial Question Relating to Environment

The Act limits its jurisdiction to "substantial questions relating to environment"[3] i.e., situations where the damage to public health is 'broadly measurable', or 'gravity of damage' to environment is 'substantial' or relates to 'point source of pollution'. The environmental questions cannot be left to the subjective assessment of an individual to judge as to what is 'substantial' or not? Similarly, the "environmental consequences" cannot be restricted to either specific activity or to a "point source of pollution" because non-point sources of pollution and a bundle of industrial activities leading to cumulative impacts on the environment require as much adjudication as specific activities with obvious impacts.

The Act as it exists is of regressive nature since it involves instances where the "community at large" is affected or is likely to be affectedbut excludes 'individuals' or 'groups of individuals.'[4] This is contradictory to the settled principle of locus standi where the courts have emphasized on liberal approach to be followed when environmental matters are concerned. Environmental impact and conflict need not be only limited to the "community at large" but may also affect groups of individuals and individuals who deserve as much protection in equal measure as the "community at large" a term, which itself has been left undefined in the act.

The Act also fails to note that if there is a direct violation of a statutory environmental obligation, it becomes a legal wrong and hence, any individual or group of individual can take action. Otherwise, it would mean that though the statutory environmental obligation is violated but still no action can be taken because it has not affected the community at large. There is no tangible method by which the gravity of the damage to environment and public health can be measured in general. The environmental questions cannot be left to the subjective assessment of an individual to judge what is substantial or not. The "environmental consequences" cannot be restricted to either "specific activity or to a point source of pollution" as is being proposed in the bill because non-point source of pollution and a bundle of industrial activities are also a major contributor of pollution load. Therefore, the definition of environmental questions and the aggrieved person must be suitably amended[5].

5. Institutional Structure of Green Tribunal

5.1 Composition of Tribunal

The Act needs to exclusively state that the Rules and Procedure will be simple. It is necessary to stipulate in the Act itself that the Rules and Practice should be made in such a manner so as to be simple and understandable and not be bound by procedural technicalities. Further, filing of appeals etc should be in a manner similar to that of the Right to Information Act, 2005 especially when the poor affected persons are approaching the Tribunal[6].

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1 *186th Report of Law Commission of India on Proposal to Constitute Environment Courts published in September 2003.*
2 *National Green Tribunal Act 2010, s.1 (1).*
3 *ibid, s.2 (1) (m).*
4 *ibid,* s.2 *(1) (m)(i)(A).*
5 *ibid*,s.2(1) (m) (ii).
6 *ibid*,s.4.

The Act should clearly stipulate that the Tribunal, which cannot be considered as functional unless it has a mix of technical and judicial members including the chairperson. This need not be limited to individuals only but also to expert national as well as international institutions[1].

5.2 Qualification of Chairperson and Members

There are two aspects of constitution that are relevant - nature of constitution and membership. Sitting and retired High Court and Supreme Court judges are eligible to be its members. The nature of disputes that the National Green Tribunal Act may be called upon to decide may not be necessarily from similar areas in which the members have an expertise in[2]. The nature of disputes may comprise of a variety of areas. The option here is to either create ad-hoc tribunals for disputes (which may be location-specific) or vest in the NGT powers to seek assistance of experts or committees if it requires[3]. This may appear to be similar to the practice we have today of green benches seeking help from expert committees. However, such green benches have today become methods for administration of environmental resources. It is un desirable to vest in our courts the duty to manage our neither resources, as they may not have the time or resources to effectively conduct it. Membership is another important aspect. The expert member can be a person with administrative experience in environmental matters in governmental or state level institutions[4]. This would mean that the person responsible for clearances can at some other point of time be responsible for deciding on its validity.[5]

The provisions relating to appointment of judicial members brings forth institutional memories of the "collegiums" debate and the post-retirement rehabilitation debate. If we want to show that we have learnt from the mistakes of the past, we should try and rework our processes. In the case of appointments, an independent appointing body may be a solution[6]. Subjecting the selection process to public scrutiny can also be an option[7].

5.3 Judicial Member can be an Advocate/ Jurist/ Professor

With respect to Judicial Member there is no need to limit the same to only a Judge of the High Court. Even the Constitution of India allows for an appointment of lawyers directly as Judges of Supreme Court. In such case, the Act should make it clear that lawyers with about 15 years of practice in the field of environment and public interest law will be eligible for appointment as judicial member.

Expert Member Qualifications need not be confined to Science, Engineering and Technology:

With respect to Expert Member, there is no logic in limiting the appointment to only those with Masters in Technology, Sciences and Engineering. Interestingly, there appears to be no room for social scientists with appropriate specialization or familiarity with environment or occupational risk. Members will need practical experience of not less than five years or will be an administrative expert with more than 15 years experience of dealing with environmental matters. Environmental issues are broad and the issue with respect to 'substantial questions with respect to the environment' cannot be regarded as the sole domain of the technologists and engineers. In this respect, it is suggested that the criteria for selection be broadened to include social scientists and specifically sociologists, qualified social workers, ecologists and environmentalist. The criteria used for selection of non official members to the Forest Advisory Committee (FAC) may be adopted. It should specifically mention disciplines such as Hydrologist, Ecologist, Wildlife Scientist etc.

5.4 Inclusion of NGO's

The word 'reputed National Level Institution' under Section 5 (2) (a) & (b) of NGT Act is highly subjective. It effectively keeps out various NGOs and other institutions which need not necessarily be regarded as reputed National Level Institution. In such circumstances, either this word be amended or defined broadly to include NGOs and other CSOs (Civil Society Organizations).

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1 *The Access Initiative India' Coalition [TAI-India], How Green Will be the Green Tribunal? Concerns and Suggestions on the National Green Tribunal Bill, 2009, [2009] http://www.elaw.org/system/files/How+Green+Will+be+the+Green+Tribunal.pdf accessed 20 January 2011.*

2 *As pointed out in the legislative brief brought out by PRS Legislative Research, our experience with the National Environment Appellate Authority shows that it is difficult to find people with the prescribed qualification. The Delhi High Court had to issue directions on the basis of a petition for appointment of a member using its powers under Article 226 of the Constitution in Vimal Bhai v. Union of India, 158 (2009) DLT 477. The brief can be accessed at http://www.prsindia.org/uploads/media/Green%20Tribunal/Final%20Version%20- %20National%20Green%20Tribunal%20Bill.pdf. accessed 4 March 2011.*

3 *National Green Tribunal Act 2010, s.4 (2).*

4 *ibid, S.5 (2).*

5 *Indiana experience has some lessons for us. Hearing officers recommended language at one stage and reviewed its meaning in another stage. Later they were prohibited by statute from participation in investigation or enforcement activities.*

6 *The Judicial Appointments Commission in United Kingdom may be a model.*

7 *Armen Rosencranz & Geetanjoy Sahu, "National Green Tribunal Bill 2009: Proposals for Improvement", 54 Economic & Political Weekly 10 (2009).*

Ensuring that as far as possible no Bureaucrats are appointed as Expert Members:

Section 5 (b) provides a window for bureaucrats to be appointed as Expert Members. Similar to the other Committees of the Ministry of Environment and Forests, it will open the way for appointing retired IAS and IFS officers as Expert Members thus defeating the purpose of the specialized body. This has happened with the NEAA as well as the Information Commissions and is likely to happen with this Tribunal. Clearly, administrative experience is not needed in the Green tribunal. If issues related to Centre State relationship or administrative challenges need to be adjudicated, the Green Tribunal can invite specific officers for expert advice[1]. Thus, this sub clause needs to be amended. However, the only exception can be a bureaucrat who due to special training and interest (and not by virtue of a post held) has an in-depth understanding of issues related to environment. As a last option, a post of Member (Administrative) could be added with a rider that the Member (Administrative) cannot decide on scientific and technical aspects with respect to the issues under dispute[2].

The 'administrative experience of 15 years' clause also raises significant issues based on the historic field performance of such officers. The mismanagement and frequent failure to enforce the relevant legislative norms concerning the protection of the environment has contributed significantly to the backlog of complaints and current state of the environmental indifference[3]. Had the enforcement officials proved diligent and effective in their duties, it might be argued that the need for a new procedure and tribunal might not have been so apparent. It remains to be seen whether this 'administrative experience' can be utilized more effectively within the new parameters and procedures laid down in the NGT. There is a concern that these qualifications will allow the Tribunal to become potential retirement home for senior civil servants who are not necessarily best placed to curb environmental maladministration. Much will depend upon the selection process, which must ensure that there is both transparency and accountability in the selection of tribunal membership. Public scrutiny minimizes the possibility of cronyism and will encourage independent and impartial decisions leading to effective environmental governance[4].

The rule should also stipulate that any person who has been working at the Ministry of Environment and Forests or any authority whose decisions are subject matter before the Tribunal cannot be made an Expert Member.

5.5 The Appointment of Chairperson and Members

It is essential that since the Ministry of Environment and Forests is an interested party, the process of selection of Chairperson should involve the Ministry of Law and Justice, Ministry of Environment and Forests and at least two Judges of the Supreme Court including the Chief Justice as also the leader of the Opposition in the Lok Sabha.

Section 11 allows the executive to appoint temporary Chairperson, if the current one dies, resigns etc. Since, the Chairperson is appointed in consultation with the Chief Justice [Section 6(2)], temporary appointments must also be done in consultation with the Chief Justice of India otherwise, there will be a period in which an appointee of the executive (without judicial concurrence) runs the tribunal. A clear process of appointment should be in place so as to minimize the scope of arbitrariness. Specifically, the Selection Committee should be constituted for the Chairperson as well as Judicial Members and Expert Members alike and should be transparent[5]. The Selection Committee should be a multi-disciplinary body with ecologist and environmentalist as members so far as selection of expert members are concerned.

6. Jurisdiction of the Tribunal

Environmental Tribunals should have a broad range of jurisdiction which can be used in relation to environmental violations. These would include injunctions (which are generally temporary, but could also be permanent), declaratory relief clarifying the legal rights, duties and relationship of the parties and administrative review of government decisions. The Law Commission stated that the new Environmental Tribunal should not only have all the powers currently included in the Bill[6], but also the ability to pass injunctions temporary, permanent and mandatory[7]. In the act, the powers of the Tribunal are dealt in Section 14 to 16 in Chapter III.

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1 *Supra note, 10.p. 8.*

2 *ibid, p. 9.*

3 *Gitanjali Nain Gill, 'A Green Tribunal for India', [2010] Journal of Environmental Law, Oxford University Press. http://jel.oxfordjournals.org/content/22/3/461.full.pdf+html accessed 15 January 2011.p.469.*

4 *ibid, p.469.*

5 *Supra Note,10, p. 10.*

6 *National Green Tribunal Bill, 2009.*

7 *186th Report of Law Commission of India on Proposal to Constitute Environment Courts published in September 2003.*

Section 14. (1) The Tribunal shall have the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment), is involved and such question arises out of the implementation of the enactments specified in Schedule I.

(2) The Tribunal shall hear the disputes arising from the questions referred to in Subsection (1) and settle such disputes and pass order thereon.

(3) No application for adjudication of dispute under this section shall be entertained by the Tribunal unless it is made within a period of six months from the date on which the cause of action for such dispute first arose:

Provided that the Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from filing the application within the said period, allow it to be filed within a further period not exceeding sixty days[1].

7. 'Substantial question relating to environment' is defined in Section 2 (m) (i)

"Substantial question relating to environment" shall include an instance where,

(i) there is a direct violation of a specific statutory environmental obligation by a person by which,

(A) the community at large other than an individual or group of individuals is affected or likely to be affected by the environmental consequences; or

(B) the gravity of damage to the environment or property is substantial; or (C) the damage to public health is broadly measurable;

(ii) the environmental consequences relate to a specific activity or a point source of Pollution[2].

Section 16 provides for an aggrieved person to inter alia challenge water and air pollution and prospectively the granting or refusal to grant environmental clearance.[3] Curiously, the Tribunal have no clear jurisdiction, nor the power under Section 15 to order that environmental clearance should or should not be granted. Section 15 provides as follows:

Section 15. (1) The Tribunal may, by an order, provide,

(a) Relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in the Schedule I (including accident occurring while handling any hazardous substance);

(b) For restitution of property damaged;

(c) For restitution of the environment for such area or areas,

(2) The relief and compensation and restitution of property and environment referred to in clauses (a), (b) and (c) of Sub-Section (1) shall be in addition to the relief paid or payable under the Public Liability Insurance Act, 1991.

(3) No application for grant of any compensation or relief or restitution of property or environment under this section shall be entertained by the Tribunal unless it is made within a period of five years from the date on which the cause for such compensation or relief first arose:

Provided that the Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from filing the application within the said period, allow it to be filed within a further period not exceeding sixty days.[4]

The most serious jurisdictional problem arises from the provision of Section 14 that grants jurisdiction only for claims that present a "substantial question relating to environment." It limits the jurisdiction to "substantial questions relating to environment" which only includes instances where the community at large is affected or likely to be affected but excludes individuals or groups of individuals. It is, therefore, unclear whether this law only seeks to promote class actions. If this is the case, such a structure would be undesirable. Environmental impact and conflict need not be only limited to the "community at large" but may also affect groups of individuals and individuals who deserve as much protection in equal measure as the "community at large" or "group of Individuals", which itself is not defined. This portion of the Act should simply be amended, before it heads inevitably towards a constitutional challenge in the Supreme Court.[5] The Act confers significant jurisdictional powers to the Tribunal but these require clarification. For example, substantial damage to the environment needs to be quantified and public health should be defined in a tangible form whereby a consistent and uniform approach can be followed by the Tribunal. If precedent or guidelines are applied, this will reduce the likelihood of subjective and possibly contradictory conclusions in the

[1] *National Green Tribunal Act, 2010, s.14.*
[2] *ibid, s. 2 (m) (i).*
[3] *ibid, s. 16.*
[4] *ibid,* s. 15.
[5] The Access Initiative India' Coalition [TAI-India], *How Green Will be the Green Tribunal? Concerns and Suggestions on the National Green Tribunal Bill, 2009,* [2009] http://www.elaw.org/system/files/How+Green+Will+be+the+Green+Tribunal.pdf accessed 20 January 2011.

determination of what constitutes the term 'substantial'. As unreported administrative decisions are prone to inconsistency, this is a matter of some importance. For example, there have been numerous grand judicial pronouncements concerning the environment but also some subjective statements by members of the judiciary which do not sit well with the overarching commitment to protect the environment[1].

It appears that when socio-economic rights of the poor come into conflict with environmental protection, the court has often subordinated those rights to the environmental protection. Further when environmental protection comes into conflict with what is perceived by the court to be 'development issues' or powerful commercial, vested interests, environmental protection is often sacrificed at the altar of 'development' or similar powerful interests[2].

Further, since the courts have recognized that the environment falls within the purview of Article 21, it is obvious that all persons have a duty to protect the environment and a corresponding right to question the adverse impact on environment and human health. But the Act ignores this principle. Particularly, troubling is the prospect that the Tribunal can decide that a significant collection of individuals such as the Dongria Kond tribal people at Lanjigarh, Orissa or the Idu Mishmi in Arunachal Pradesh is not large or broad based enough to invoke the Tribunal's jurisdiction, despite their established cultural identity and severe potential damage from environmental violations. It would mean that though the statutory environmental obligation is violated but still no action can be taken because it has not affected the community at large.[3]

The Tribunal cannot entertain an application for adjudication unless it is made within a period of six months from the date on which the cause of action in such a dispute first arose[4]. However, where there is sufficient cause, the Tribunal may allow a further period not exceeding 60 days. This time-limitation clause appears to be unduly restrictive in certain situations relating to health and pollution. The effects of pollution are sometimes subtle and may take years to develop. For instance, industrial processes like smelting of non-ferrous metals, mining and burning of fossil fuels emit arsenic that contaminates air, water and soil[5]. According to the World Health Organization (WHO) inorganic arsenic is acutely toxic. Events of exposure may cause long term effects. To take one example pertinent to India, the effects of arsenic poisoning known as arsenicosis can take number of years to develop (typically 5-20). Arsenic exposure via drinking water causes cancer in the skin, bladder and kidney as well as skin changes such as hyperkeratosis and pigmentation changes. Occupational exposure by arsenic is mainly by inhalation and increased risks of lung cancer have been reported at cumulative exposure levels of (¼) 0.75mg/cubic metre. These amounts to around 15 year's exposure at a work room concentration of 50 m/cubic metre[6].

Similarly, the effects of asbestos fibers take around 20 years to manifest illness and evoke reactions. Consequently, the NGT should be aware of long timescales before damage becomes apparent and must consider carefully issues of manifestation and discovery.

8. Focus just on individual compensation and restitution of property

Even if the Tribunal is effective in obtaining individual compensation and refund of damaged environment, the costs of damaging the environment are in some cases, likely to be less than the profits made by Corporations by damaging the environment. Mining is a good example of this. There are huge profits to be made by mining that breaches the environmental laws. Even if, it should be shown that the environmental damage was caused by mining in breach of the environmental laws, the Tribunal would have no power to stop it. Further, it is unlikely that the threat of having to compensate individuals or to restitute the environment would be sufficient deterrent against environmental damage under a cost-benefit analysis[7].

9. Failure to Specifically Include Prospective Activity which may Cause Environmental Damage in the Future

It is not clear from the statutory wording of the Act as to how the proposed Green Tribunal could have jurisdiction over prospective, as opposed to retrospective, activity which

[1] *MC Mehta v Union of India (2004) 12 SCC 118; Almitra H Patel v Union of India (2000) 2 SCC 166; ND Jayal v Union of India (2003) 7 SCALE 54; Narmada Bachao Andolan v Union of India (2000) 10 SCC 664; India TN Godavarman Thirumulkpad v Union of India (2006) 10 SCC 490.*

[2] *P. Bhushan 'Misplaced Priorities and Class Bias of the Judiciary' (April 2009) XLIV Econ Pol Wkly 32; also see A Rosencranz and S Lele 'Supreme Court and India's Forests' (2 February 2008) XLIII Economic & political weekly 11.*

[3] *Supra note 27 p. 13.*

[4] *Supra note 23 s. 14 (3).*

[5] *WHO (2001) Environmental Health Criteria 224: Arsenic & Arsenic Compounds 5http:// whqlibdoc.who.int4 accessed 30 January 2011.*

[6] *http://www.who.int/water_sanitation_health/naturalhazards/en4 accessed 20 June 2010; also see Dr A Basu, 'The Health Effects of Industrial Pollution: A Primer' 5http://www .infochangeindia.org4 accessed 30 January 2011.*

[7] *Supra Note, 27 p. 14.*

may cause environmental damage. The whole tenet of the Act, in particular, the clauses on jurisdiction and powers, tends to indicate that the jurisdiction and powers of the Tribunal will be limited to an activity that is presently occurring which is causing environmental damage, or is likely to cause environmental damage. There appears to be no jurisdiction or powers to stop environmentally-damaging activities before they begin. This, therefore, is not only a major lacunae in the jurisdiction and powers of the proposed Tribunal, but also goes against much of the current international and domestic case law, in particular "the precautionary principle" which was extensively quoted in the Law Commission's Report. Indeed, the Law Commission recognized that prevention was better than compensation, it stated: "The Prevention Principle takes care of reckless polluters who would continue polluting the environment in as much as paying for pollution is a small fraction of the benefits they earn from their harmful acts or omissions. Prevention of pollution must therefore take priority over compelling the polluter to cough up"[1]

10. Direct Violation of a Specific Statutory Obligation by a Person

The Act provides that there may be a "direct violation of a specific statutory obligation by a person"[2]. However, it may be difficult to identify what the specific statutory obligations are in any given statute(s), notification(s) and/ or rule(s) of which Indian environmental law is comprised. Whilst there are specific procedural or other requirements in Indian environmental law that might be violated, the majority of environmental violations are construe when fact-sensitive cases, including particular scientific data, are measured against some statutory standard. The nodal statutory authority is required to apply its mind and provides judgment as to whether there is a violation. This will involve obtaining, developing and considering important facts. It may be difficult therefore to show that not withstanding an environmental violation, that this involved a direct violation of a specific statutory obligation.

11. Power to pass orders but not to quash any clearance granted

Among the most problematic part of the Green Tribunal is that it will not have the power to quash an approval granted. Thus it will be completely devoid of power so for quashing any order. One may repeat by stating that Section 16 provides for an aggrieved person to inter alia challenge water and air pollution and prospectively the granting or refusal to grant environmental clearance. Presently, the environmental clearance under the environmental laws rests with the appropriate government and if the appropriate government gives its approval for any project which is pro development and not friendly with the environment then the Green Tribunal have no authority under this legislation to supervise the decision of the appropriate government and to put it down on the ground of pro development.

Curiously, the Tribunal has neither clear jurisdiction, nor the power under Section 15 to order that environmental clearance should or should not be granted. Section 15 provides as follows:

15. (1) The Tribunal may, by an order, provide,

(a) relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in the Schedule I (including accident occurring while handling any hazardous substance);

(b) for restitution of property damaged;

(c) for restitution of the environment for such area or areas,

Therefore even, if an aggrieved person has an ability to lodge an appeal to the Tribunal, against a polluting industry, destruction of bio-diversity, or an environmental clearance of any industrial project that would be likely to cause damage to the environment. The Tribunal may not have jurisdiction or power under the Act to do anything about it.[3]

12. Restricted Locus Standi

The Act provides access for all aggrieved parties to approach the Tribunal to seek relief or compensation or the settlement of environmental disputes[4]. This obviously, includes a person who has sustained injury or an owner of property to which damage has been caused or the legal representatives of the deceased where death has resulted from environmental damage.

However, any person aggrieved has standing including, with the permission of the Tribunal, a representative body or organization functioning in the field of the environment, making the provisions sufficiently wide to allow enforcement by non-governmental organizations (NGOs)

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1 *186th Report of Law Commission of India on Proposal to Constitute Environment Courts, published in September 2003.p. 129.*

2 *Supra Note, 23 S. 2 (m) (i).*

3 *The Access Initiative India' Coalition [TAI-India], How Green Will be the Green Tribunal? Concerns and Suggestions on the National Green Tribunal Bill, 2009, [2009] page.17. http://www.elaw.org/system/files/How+Green+Will+be+the+Green+Tribunal.pdf accessed 20 January 2011.*

4 *Supra Note, 23, s. 18 (2).*

of all legal rights relating to the environment. In the original Bill, the provision in regard to access was limited in that it was silent on the right of individuals to approach the Tribunal as an aggrieved party. This evoked criticism from activists, particularly, NGOs. It was also believed that the original Bill diluted the objectives of both the Stockholm Declaration and the Rio Conference. The later changes to the Bill have ensured compliance and therefore, with international commitments.

In the present Act, Section 18, indirectly ruled out the jurisdiction of the self motivated individuals or Non Governmental Organizations (NGOs), independently to present an application before the tribunal for the settlement of environmental dispute and for claiming relief and compensation and restitution of property and environment areas, without representing the aggrieved person. For filing application under Section 18, the individual or organization must be representative of an aggrieved person, which discourages the rule of liberal locus as created by the P. N. Bhagwati, former CJI, in the form of Public Interest Litigation.

13. Recent Court Decision on Sanding Before Environment Tribunal

In Vedanta Alumina Ltd v Prafulla Samantara,[1] the Delhi High Court explained the concept of aggrieved person so far as environmental issues are concerned. Justice A.P Shah held:

"Association of persons, particularly an incorporated association cannot be said to be affected in the manner traditionally understood. Moreover, in environmental cases the damage is not necessarily confined to the local area where the industry is set up. The effect of environmental pollution or environmental degradation might have far-reaching effects going beyond the local area and might have national or global effects. For example, the destruction of forests is said to be one of the causes leading to global warming. Therefore, the aggrieved person need not be resident of the local area. Such an interpretation would also result in defeating the very objective of this enactment in terms of access to justice. As per the learned single Judge: "….India, even today, lives largely in its villages. A project or scheme, which is likely to affect or impact a remote community, that may comprise even a cluster of villages, may or may not have an "association of persons" who work in the field of environment. The villagers, like most others, are unlikely to know about the project clearance, or possess the wherewithal to question it, through an appeal. If the third respondents' contention, and the authority's impugned order were to be accepted, and upheld, such community's right to appeal, meaningfully, would be rendered a chimera, an illusion. In their case, the Act would be a cruel joke, paying lip service, while promising access to justice, but in reality depriving such a right….." The expression "aggrieved person" denotes an elastic, and, to an extent, an elusive concept. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged[2]. In Bar Council of Maharashtra v M.V. Dabholkar & Ors[3], the Court held that the words "person aggrieved" are found in several statutes and the meaning will have to be ascertained with reference to the purpose and the provisions of the statute. It has been noticed in Ghulam Qadir v Special Tribunal & Others, that the orthodox rule of interpretation regarding the locus standi of a person to reach the court has undergone a sea change and the constitutional courts have been adopting a liberal approach in dealing with the cases or the claims of litigants cannot be dislodged merely on hyper technical grounds.

Also in Prafulla Samatara v Union of India and ors[4], the Ravindra Bhat J., of the Delhi High Court held:

"The world as we know is gravely imperiled by mankind's collective folly. Unconcern to the environment has reached such damaging levels which threatens the very existence of life on this planet. If standing before a special tribunal, created to assess impact of projects and activities that impact, or pose potential threats to the environment, or local communities, is construed narrowly, organizations working for the betterment of the environment whether in form of NGOs or otherwise, would be effectively kept out of the discourse, that is so crucial an input in such proceedings. Such association of persons, as long as they work in the field of environment, possesses a right to oppose and challenge all actions, whether of the State or private parties, that impair or potentially impair the environment. In cases where complaints, appeals etc. are filed bona fide by public spirited interested persons, environmental activists or other such voluntary organizations working for the betterment of the community as a whole, they are to be construed as "aggrieved persons" within the meaning of that expression under Section 11 (2) (c) of the Act. As a native American proverb goes, "We do not inherit the earth from our ancestors, we borrow it from our children"; denial of access to meaningful channels to communities who can be affected

[1] *Vedanta Alumina Ltd v Prafulla Samantara, L P A 277/ 2009, Delhi High Court.*

[2] *J.M. Desai v Roshan Kumar, AIR 1976 SC 578.*

[3] *Bar Council of Maharashtra v M.V. Dabholkar & Ors., [1975] 2 SCC 702.*

[4] *Prafulla Samatara v Union of India and ors,* (W.P 3126 of 2008) Delhi High Court.

by proposed projects would only leave them without remedy, on the one hand, and allow challenged indiscriminate drawings from the future generations' rights with impunity.

14. The Burden of Cost on Litigants

The issue of costs to be awarded against a losing party is also a deterrent against taking litigation to protect the environment. The act seems to indicate that costs will only be awarded against litigants who bring claims that are not maintainable, false or vexatious. This is a serious aspect and will greatly discourage affected persons from approaching the Green Tribunal. Section 23 deals with this aspect:

Section 23(1) While disposing of an application or an appeal under this Act the Tribunal shall have power to make such order as to costs as it may consider necessary.

Section 23(2) Where the Tribunal holds that a claim is not maintainable, or is false or vexatious, and such claim is disallowed, in whole or part, the Tribunal may, if it so thinks fit, after recording its reasons for holding such claim to be false or vexatious, make an order to award costs, including lost benefits due to any interim injunction[1].

This provision is quite discouraging. The courts (tribunal in this case) always have a general right to impose costs. There is no need to include Section 23 (2). This will deter the concerned citizens to bring in environmental issues before the tribunal fearing the imposition of heavy cost in case their claim is disallowed. While granting interim injunction the court/tribunal properly weighs the facts and law and it is only when the prima facie case is established and balance of convenience and the interest of justice is in favour of the applicant that injunction is granted. It is pure and simple judicial discretion, if subsequently, the interim injunction is vacated for whatever reasons, and the applicant cannot be saddled with costs. Of course, the petitions based on concealment of important facts and fraud always stand on a different footing. The court/tribunal has ample power to deal with them even in the absence of Section 23 (2)[2].

The Law Commission however only recommended that exemplary costs be awarded where the application or appeal was frivolous or vexatious[3]. A frivolous or vexatious claim is a very threshold and simply a claim which is subsequently found to be false or which subsequently loses, and which the Sections 23 of the act empower the tribunal to impose an order to pay the costs of litigation can be extremely debilitating. Such authority may not necessarily be inappropriate in those few cases where suits are brought in bad faith, or without credible legal basis. But costs might easily imposed only because the Tribunal reaches a different interpretation of law or fact that presented by the advocate no matter how much good faith may have been involved in bringing the claim. The majority of the environmental litigation in India is neither frivolous nor vexatious, but brought in a genuine and sincere understanding that the environmental damage is caused by the complained activity. Therefore, any provision to prevent vexatious claims through costs should be used sparingly and only if there in incontrovertible evidence that indicates that there was no genuine belief that the facts on which the claim is founded were true.

Further, ordering costs against impoverished litigants who bring genuine claims but which are disallowed by the Tribunal as non maintainable, will simply dissuade them from bringing claims in the future. Costs orders against such individuals, or against groups working in the field of the environment protection should be used sparingly. The provision with respect to imposition of costs on litigants should be limited only in instances where it is proved that the litigation was done at the instance of an interested party.

15. Limited Time for Approaching the Tribunal

The Act stipulates the following time frame:

For Filing Appeal against any order passed by the Authorities as stipulated in Section 16 within a period of 30 days and by explaining sufficient clause within the next 60 days thereafter[4]. [Proviso to Section 16]

On matters concerning civil disputes on 'Substantial questions on environment' within a period of six months from the date on which the cause of action first arose[5]. [Proviso to Section 14]

With respect to grant of any compensation and relief or restitution or property within a period of five years from the date on which the cause of relief or compensation first arose.[6] [Section 15(3)]

15.1 Thirty days for challenging an order passed

The time frame of 30 days for challenging an order as stipulated in Section 16 is impractical in view of the fact that environmental and forest clearance is generally

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1 *Supra note 23, s. 23.*
2 *http://www.rediff.com/news/2009/aug/11guest-not-enough-teeth-in-green-tribunal-bill.htm accessed 22 January 2011.*
3 *Supra Note, 39, p. 145.*
4 *Supra* Note, 23, s. 16.
5 *ibid*, s. 14.
6 *ibid,* s. 15.

granted in areas which are remote and approaching the tribunal requires time and resources. The further period of 60 days also does not help much since it is not easy for the affected communities to understand the Clearance orders, its implication and also the grounds for challenge. Consultation with relevant people and their consensus within the group among villagers need to be formed which does take some time. In view of it a minimum time of six months with a further period of three months, is essential[1].

15.2 Six months on matters concerning substantial questions on environment

It is extremely difficult to locate as to when the cause of action with respect to civil disputes on substantial questions on environment first arose. Again an arbitrary time frame of 6 months has been prescribed. This will leave a lot of discretion on the Tribunal. It will be extremely difficult to prove as to exactly when the cause of dispute arose with mathematical precision. Although, it can be argued that the Green Tribunal could take a liberal approach, yet such issues cannot be left to the discretion of the members of the Tribunal[2].

Environmental damage is a continuous process, no time period can be fixed when the question is raised with regard to the same because its impact also affects the quality of life under Article 21 or human environment as such as mentioned in the Stockholm Declaration. For example, a lake is destroyed, a pond is filled up or construction is made in the forest area or unacceptable level of blood contamination is noticed, under the stipulated position in the current form of the bill, no challenge can be made after six months[3]. That means the mankind would lose the natural resource forever. Will this position not benefit the violators of environment?

15.3 Five years for claiming compensation

In relation to compensation for victims of pollution, the tribunal bill stipulates a five-year limitation period from when the cause of such claim for compensation first arose, with a further extension where the applicant was prevented by sufficient cause from filing the application. This is a remarkable provision. The statute of limitations begins tolling in personal injury cases from the date of knowledge of an injury caused by the alleged wrong. In asbestosis cases, the incubation period is around 15 years before the damage caused by the long-term effects of inhaling asbestos become manifest. In a recent case of cancer caused by the over-use of pesticides, the incubation period was 10 years.

There is a recent case on this matter. I am giving only brief note of this case. For nearly 30 years Pramila washed her husband's clothes, little knowing she would one day contract a fatal disease. Her husband was a sweeper in an asbestos factory in a Mumbai suburb. Pramila was diagnosed with asbestosis, a fatal disease, which has a latency period of ten to 15 years. The asbestos fibres from her husband's clothes were the culprit. Goa-based lawyer Krishnendu Mukherjee who is dealing with a case on behalf of such victims argues that Pramila and others like her will find it difficult to approach the National Green Tribunal, created by the new Act passed by Parliament which received Presidential assent on June 2, 2010[4]. Under Section 15 (3) of the Act, applications for compensation, relief or restitution of property or environment have to be made within a period of five years from the date on which the cause for such compensation or relief first arose. Or to put it simply, Pramila whose disease took over ten years to manifest probably, has no chance before this specially created Tribunal[5].

Before Pramila the thousands of people maimed by the Bhopal gas leak or other environmental disasters did not have any chance of justice from the Indian government. As a country we shy away from fixing liability and bringing criminals to book. And when we do bring laws, mostly without discussion or debate, to redress the situation, they remain on paper.

The effect of silicosis, asbestosis, radiation etc may take more than five years to manifest them. Given the fact that environmental damage is a continuous process, no time period can be fixed when the question is raised with regard to the same because its impact also affects the quality of life under Article 21 of the Constitution. The Section 15(3) should be changed to "or date of first knowledge", with a proviso to extend time in the interests of justice.

16. Conclusion

The Gandhian approach to environment is that the earth has enough resources for our need, but not for our greed. That is a universal truth. The environmental justice is a part of socio-economic development of the society. The superior judiciary has made tremendous progress in

[1] *Supra Note, 41, p. 25.*

[2] *ibid, p.26.*

[3] *http://www.rediff.com/news/2009/aug/11guest-not-enough-teeth-in-green-tribunal-bill.htm accessed 22 January 2011.*

[4] *The Bill was introduced to Parliament on 31 July 2009; passed in Lok Sabha (the lower house) on 30 April 2010 and passed in Rajya Sabha (upper house) on 5 May 2010.*

[5] *http://www.hindu.com/2010/07/07/stories/2010070752811100.htm accessed 25 January 2011.*

distributing environmental justice. The orders passed by the Supreme Court have provided healing touch to many and even those, who are residing in remote places in hills, coastal areas and forests. The Courts, however, are not the forum to solve all environmental related challenges in the country. Judiciary has to be equipped with creation of additional capacities to deal with the whole gamut of environment related issues. Only the trained and motivated judges can take correctional measures and help in distributing environmental justice with human element, fairness and compassion. If the public governance has to meet the challenges of globalization which makes states more permeable, then we should have stable institutions based on principles. Adjudication in this scenario would not be mere presupposition of dispute and rational decisions, but a participatory dialogue between the judges, lawyers and parties. This calls for a new theory of judgment- from 'rule of law' to 'rule of integrity'. So there is need of re thinking on this Act by which a good and effective Act can be enacted about what this Green Tribunal Act had been drafted.

Sustainable Development: Need for Environment Conservation

*Dr. Ajai Singh**

ABSTRACT

There is a need to strike a balance between development and environmental conservation. The concept of sustainable development is the only way by which Mother Nature can be sustained and kept. The goal of economic and social development must be defined in terms of sustainability in all countries. Interpretation may vary, but must share certain general features and must flow from a consensus on the basic concept of sustainable and on a broad strategic framework for achieving it. The Earth Summit succeeded in presenting new perspectives on economic progress. There should be balance between ecology and development. Protection of environment and development are two sides of the same coin. Any one of these cannot be sacrificed for the other, and both are equally important for our better future.

Key Words: Sustainable Development, Ecology, Legislative and Constitutional efforts, Judicial Approach.

1. Introduction:

The question is how long this kind of development is sustainable? On the other hand, developing countries, are still struggling to attain a minimum standard of living though, they are also contributing to environmental deteration.

It is a fact that both the consumption and life style of the people have relevance to the environmental problems; therefore living habits and ethical question have now entered into an environmental balance area. The major question is what is the pattern of growth and development which must be followed. What kind of model development and business that of development. Their primary concern is the improvement of quality of life of people and enhanced access to resources.[1] In this connection, there must be some changes at local, national, regional together with an economic and social transformation at level of personal as well as communities levels.

All the demands of developing and developed nations are required for the manipulation of natural resources. No economy survives without coal, petroleum, electricity, wood and steel. Industries can not run until they are fed with depleting resources. It is a demanding time like the present that the world has become aware of how these resources are fast depleting, if facilities are utilized in efficiently, soon a day will come when our future generations will not even have drinking water. Fossil fuel which satiate hunger for resources in most developed countries, are not renewable and unsustainable. Their production is declined and they are about to finish. Now the world is confronted with the challenge of optimizing of the currently available resources in a way to meet the needs of the present generation without compromising on requirements of future generation[2] .

2. Goals of Sustainable Development

The concept of sustainable development is the only way by which Mother Nature can be sustained and kept. Brundtland Commission defined sustainable development as "development that meets the need of present without compromising the ability of future generations to meet their own needs."

The goal of economic and social development must be defined in terms of sustainability in all countries, developed or developing, market oriented or centrally planned. Interpretation may vary, but must share certain general features and must flow from a consensus on the basic concept of sustainable development and on a broad strategic framework for achieving it[3].

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1 *http://www.ielrc.org/content/w9601.pdfaccess on 4/06/2011*

2 *http://www.scdl.net/sic/SIC%202011/pdf/sustainable-development.pdf access on 9/6/2011*

3 *World Commission on Environment and Development, 1987, P. 43*

3. Safeguards for Sustainable Development

At International Level, According to the Brundtland Report, the U.N. General Assembly decided to convene a Conference on Environment and Development (UNCED) in 1989 which could take place in "Rio-de Janerio", the capital of Brazil in 1992 and passed a "Rio Declaration on Environment and Development"; a programme for action known as "Agenda21", and two environmental protection conventions;

(i) The convention on Biological Diversity; and

(ii) The convention on climate change.

Today, Agenda 21[1] addresses problems and aims to prepare the world to meet the challenges of the next century. It contains detailed proposals for action in solid and economic area such as combating poverty changing patterns of production and consumption, addressing demographic dynamics, and conserving natural resources that are the basis for life such as protecting the atmosphere, oceans and biodiversity; preventing deforestation; and promoting sustainable agriculture.

In achieving sustainable development, the programme of action also recommends ways to strengthen the part played by major groups like women, trade unions, farmers, children and young people, indigenous people, scientific community, local authorities, business, industry and non-governmental organizations.

4. Principles of Agenda 21 of the Earth Summit

The Rio Declaration on Environmental Development provides series of principles which define the rights and liability of states regarding the following issues

i. Human beings are at the centre of concerns for sustainable development. They are entitled to healthy and productive life in harmony with nature.

ii. Scientific uncertainty should not delay measures to prevent environmental degradation where there are threats of serious or irreversible damages.

iii. States have a sovereign right to exploit their own resources but not to cause damage to the environment of other states.

iv. Minimizing poverty and deducting the disparities in the world wide standards of living are indispensable for sustainable developments

v. The major participation of women is essential for achieving sustainable development and

vi. The developed countries acknowledge the responsibilities that they bear in the international pursuit of sustainable development in view of the pressures of their societies place on the global environment and of the technologies and financial resources they demand.

The Statement of Forest Principles is the non-legally binding statement of principles for the sustainable management of forests .The first global consensus that provides the principles of sustainable management of forests, observed the following :

- All countries, notably developed countries, should make an effort to "green the world" through reforestation and forest conservation;
- States have a right to develop forests according to their socio-economic needs, in keeping with national sustainable development policies; and
- Specific financial resources should be provided to develop programmes that encourage economic and social substitution policies.

At the Earth Summit, the UN was also called on to negotiate an international legal agreement on desertification, to hold talks on preventing the depletion of certain fish stocks, to devise programme of action for the sustainable development of small island developing States and to establish mechanisms for ensuring the implementation of the Rio accords.

5. UN Initiatives on Earh Summit's Agenda 21

The Earth Summit succeeded in presenting new perspectives on economic progress. It was lauded as the beginning of new era and its success would be measured by the implementation of its agreements locally, nationally and internationally. Attending participant of the Summit understood that making essential changes would not be easy: it would be a multi-phased process; it would occurs at different rates in different parts of the world; and requires funds in order to prevent much larger financial and environmental costs in the future. In Rio, the UN was given a key role in the implementation of Agenda 21. Since then, the Organization has taken steps to integrate concept of sustainable development into all relevant policies and programmes. Specifically income-generating projects increasingly take into account environmental consequences[2].

In adopting Agenda 21, the Earth Summit requested the United Nations to initiate talks aimed at halting the rapid depletion of certain fish stocks and preventing conflict over

[1] *http://www.wissenwiki.de/United_Nations_Conference_on_Environment_and_Development access on 9/06/2011*

[2] *Ibid*

fishing on the high seas. After negotiations spanning more than two years, the UN Agreement on High Seas Fishing was opened for signature on 4 December 1995.

Governments requested the UN in Earth Summit to hold negotiations for an international legal agreement to prevent the degradation of drylands. The impact of this International Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, was signing of an agreement in October 1994 that was implemented in December 1996. It calls for urgent action to be taken in Africa, where some 66 percent of the continent is desert or drylands and 73 percent of agricultural drylands are already degraded.

In order to promote well-being of people living in island countries, the Summit called for the UN to convene a Global Conference on the Sustainable Development of Small Island developing States.The Conference was held in Barbados in May 1994 and produced a programme of action designed to assist these environmentally and economically vulnerable countries.In addition, three bodies were created within the United Nations to ensure full support for implementation of Agenda 21 worldwide:

- The UN Commission on Sustainable Development, which first met in June 1993;
- The Inter-agency Committee on Sustainable Development, set up by the Secretary-General in 1992 to ensure effective system-wide co-operation and co-ordination in the follow-up to the Summit; and
- The High-level Advisory Board on Sustainable Development, established in 1993 to advise the Secretary-General and the Commission on issues relating to the implementation of Agenda 21.

6. UN Commission on Sustainable Development (CSD)

The Earth Summit called on the General Assembly to establish the Commission under the Economic and Social Council as a means of supporting and encouraging action by Governments, business, industry and other non-governmental groups to bring forth the social and economic changes needed for sustainable development. Every year, the Commission reviews implementation of the Earth Summit agreements, provides policy guidance to Governments and major groups involved in sustainable development and strengthens Agenda 21 by devising additional strategies where ever necessary. It also promotes dialogue and builds partnerships between Governments and the major groups, which are seen as the key to achieving sustainable development worldwide. The work of the Commission was supported by numerous inter-sessional meetings and activities initiated by Governments, international organizations and major groups. In June 1997, the General Assembly organized a special session to review overall progress following the Earth Summit[1].

Under a multi-year thematic work programme, the Commission has monitored the early implementation of Agenda 21 in stages. Each sectoral issues such as health, human settlements, freshwater, toxic chemicals and hazardous waste, land, agriculture, desertification, mountains, forests, biodiversity, atmosphere, oceans and seas were reviewed between 1994 and 1996. Developments on most "cross-sectoral" issues were considered each year. These issues, which must be addressed, if action in sectoral areas is to be effective, are clustered as follows:

i) Critical elements of sustainability (trade and environment,)

ii) Patterns of production and consumption,

iii) Combating poverty, demographic dynamics;

iv) Financial resources and mechanisms;

v) Education, science, transfer of environmentally sound technologies, technical co-operation and capacity-building;

vi) Decision-making; and

vii) Activities of the major groups, such as business and labour.

In 1995, the Commission established under its auspices the Intergovernmental Panel on Forests with a broad mandate covering the entire spectrum of forest-related issues and dealing with conservation, sustainable development and management of all types of forests. The Panel will submit its final report containing concrete conclusions and proposals for action to the 1997 session of the CSD.

Reports submitted annually by Governments formed basis for monitoring progress and identifying problems faced by the diffrent countries. In1996, 100 Governments had established national sustainable development councils or other coordinating bodies. More than 2,000 municipal and town governments had each formulated a local Agenda 21 of its own. Many countries were seeking legislative approval for sustainable development plans, and the level of NGO involvement remained high.

[1] *Ibid*

Central to the ability of Governments to formulate policies for sustainability and to regulate their impact is the development of a set of internationally accepted criteria and indicators for sustainable development. The Commission on Sustainable Development is spearheading this work, which will enable countries to gather and report the data needed to measure progress on Agenda 21. It is hoped that a "menu" of indicators from which Governments will choose those appropriate to local conditions will be used by countries in their national plans and strategies and, subsequently, when they report to the Commission.

Achieving sustainable development worldwide depends largely on changing patterns of production and consumption, what we produce, how it is produced and how much consume, particularly in the developed countries. CSD's work programme in this area focuses on projected trends in consumption and production; impacts on developing countries, including trade opportunities; and assessment of the effectiveness of policy instruments, including new and innovative instruments; progress by countries through their timebound voluntary commitments; and extension and revision of UN guidelines for consumer protection.

In 1995, the Commission adopted a work programme on the transfer of environmentally sound technology, cooperation and capacity building. The programme emphasis on three interrelated priority areas: access to and dissemination of information, capacity building for managing technological change, and financial and partnership arrangements. The Commission is working with the World Trade Organization, the UN Conference on Trade and Development and the United Nations Environment Programme (UNEP) to ensure that trade, environment and sustainable development issues are mutually reinforcing.

7. Finance for Sustainable Development

At Rio, it was agreed that finance for the implemention of Agenda 21 would come from within a country's own public and private sectors. However, new and additional external funds were considered necessary if developing countries were to adopt sustainable development practices. Out of estimated $600 billion required annually by developing countries to implement Agenda 21 approximately $475 billion could be transferred from economic activities in those countries.

A further $125 billion would be needed in new and additional funds from external sources, some $70 billion more than current levels of official development assistance (ODA). According to the Organisation for Economic Co-operation and Development (OECD), between 1992 and 1995, levels of ODA fell from about $60.8 billion to $59.2 billion, despite a call at Rio for donor countries to more than double their official assistance. Agenda 21 are also implemented by other nations . The Global Environment Facility (GEF) was set up in 1991. It is implemented by the World Bank, the United Nations Development Programme and the United Nations Environment Programme. The GEF provides funding for activities aimed at achieving global environmental benefits in four areas: climate change, loss of biodiversity, pollution of international waters and the depletion of the ozone layer. At Rio, the Facility became the funding mechanism for activities under the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity. In 1994, the scope of the GEF's funding was broadened to include land degradation, primarily desertification and deforestation, where this is linked to the four focal areas above. Since 1992, some $2 billion has been pledged for activities supported by the GEF. In the years since the Earth Summit, the level of funding channelled to many of the developing countries as direct private investment has increased significantly and now far outstrips official flows. In 1995, this reportedly amounted to some $95 billion. Efforts are being made to ensure that activities supported by these funds are also environmentally sustainable[1].

In June 1997, the world's attention will again focus on the Earth Summit. When Governments meet in New York for the UN General Assembly's special session to review progress since Rio, the question were What changes have the major players including Governments, international policy makers, businesses, trade unions,farmers and women's groups?.Whether they have been able to bring about in the five years since Rio. A great deal has happened, but, in the view of some, not nearly enough to achieve the Summit's goals. There is growing awareness of the many "negative incentives"which continue to encourage people to become wasteful consumers. The Commission intends to elaborate for the 1997 special session of the GA concrete proposals for mechanisms and policy instruments to facilitate the Commitments to the Rio principles, were strongly reaffirmed at the World Summit on Sustainable Development (WSSD) held at Johannesburg, South Africa from 26 August to 4 September 2002.

Next Earth Summit2012 UNCSD will take place in Rio de Janeiro. It is also referred as the Rio+20 or the Earth Summit 2012. The objectives of the Summit are to secure renewed political commitment to sustainable

[1] *Ibid*

development, to assess progress towards internationally agreed goals on sustainable development and to address new and emerging challenges. The Summit will also focus on two specific themes: a green economy in the context of poor eradication and an institutional framework for sustainable development.

8. Safeguards for Environmental Protection

Environmental crisis cannot be managed without transforming the attitude, consumption pattern, manufacturing and marketing practices. There are other several protective measures that could be adopted to eradicate the environmental pollution. Environmental pollution caused by discharge of toxic substances from industries is significant. The efforts made to address these concerns are discussed below.

Legislative Efforts: The first formal official pronouncement of the government for the industrialization was the first Industrial Policy Resolution of 1948 and second Industrial Policy Resolution of 1956.Both the policies have emphasized on accelerated pace of industrialization particularly and it has resulted into a massive environmental degradation.

As economic prosperity is not allowed to flourish at the cost of environmental pollution, human health and life, the responsibility and burden of providing an effective mechanism to avoid environmental pollution is on those who will manage the hazardous and polluting industries .As an immediate action, the problem, therefore, calls for the waste reduction by way of adopting latest and most sophisticated pollution control technologies.

Industries .As an immediate action, the problem, therefore, calls for the waste reduction by way of adopting latest and most sophisticated pollution control technologies[1].

Since 1952,National Programme in sanitation, public health, water supply, nutrition, etc; were given top priority, but the issue of ecological balance could not got recognition in planning process until 1968. Initially in fourth five year plan, harmonious development must be introduced with respect to environmental aspects. In fifth plan, the entire emphasis of the development should not be taken on cost of reduction of the quality of life through degradation of natural environment. In the sixth plan, systematic efforts were made to integrate environmental imperatives in the planning process in the entire key in socio-economic sector. Consequently, all major sectors like industry, agriculture, and energy incorporates environmental consideration .In this plan, sustainable effort was made. However, the seventh plan saw a more significant progress in environment and ecology; and set up a Ganga action plan to prevent the pollution of the river water of Ganga and to restore its purity.

During the plan period, the report of the eighth plan considered the possibility of converting Ganga Action Plan into the proposed National River Action Plan. The Government also proposed to begin the Yamuna and Gomati Action Plan at the second stage. It is necessary to assist in the establishment of common effluent treatment plants so that small and medium size industries may have their wastes treated and effect waste recovery in economically viable manners[2].

The Planning Commission of India recommended that all future development programmes must take environmental considerations into account and the activities which may cause loss of environmental quality or undesirable damage to ecosystem may have to be carefully regulated.[3] Thus, both sustainable development and quality of life is supposed to be obtaining from environmental planning. India's national policy for abatement of pollution has also taken place.[4] Several legislative efforts through enactment of Act for the protection of environment have been framed.

Constitutional Efforts: Indian Constitution did not deal with the environmental protection as such. First time provision relating to the environmental protection has been incorporated under Indian Constitution by 42nd amendment. It laid down the basic foundation for the environmental legislations in Directive Principle of State Policy. Article 48A of the Indian Constitution enables the State not only to adopt a protective measure but also to call for taking all suitable steps for improving an already polluted environment .It is, thus, within the duty and powers of the state to impose restrictions on use of those resources and factor which adversely affect life and its development[5].

According to Article 51A (g) of the Indian Constitution which provides that every citizen should care for the protection and improvement of natural environment. Since the fundamental duties are not addressed to the state, a citizen cannot claim that he must be properly equipped by the state for the performance of such duties. Fundamental duties is similar to those of directive principle

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1 *See National Industrial Policy 2(1989)*

2 *See Eight Five Year Plan (1992-97),Vol. II, Government of India*

3 *See also the approach to the Seventh Five Year Plan,1985-90,Government of India ,Planning Commission, New Delhi, at Pp. 7-8*

4 *See policy statement for Abatement of Pollution, Ministry of Environment and Forest, Government of India, 1992.*

5 *See Article48A of the Indian Constitution and see also,O.P. Dwivedi and B Kishore , "India'sEnvironmental policies: A Review" in Shekhar Singh(Ed), Environmental policy in Indi, Indian Institute of Public Administration, New Delhi, 49(1984) P. 279*

of state policy they have no legal sanction for their violation .Although, they are not legally enforceable in the court ,but if the state makes a law to prohibit the breach of such duties, the courts would uphold it as reasonable restriction on the relevant Fundamental Right.[1] Thus the Article 48A and51A (g) of the Indian constitution which emphasize the expression protect and improve with reference to the environment. Both the words are significant which obligate the state and citizens to endeavour towards preserving the environment at its best by ensuring that the degraded form is also improved in its quality.

9. Role of Judiciary in Sustainable Development

In our country, a significant step was taken when the environmental litigation was permitted by the courts. Independent judiciary always pays a vital role in cases of environmental protection which is required for welfare of human being. If the environmental pollution and ecological imbalance have the potential to affect the fundamental right, it is the duty of a citizen to invoke the superior court to implement the fundamental rights. Under Writ jurisdiction, the courts have given wide-ranging reliefs to citizens who are not even contemplated under the existing environmental laws in India. There are several cases on the point of environment and sustainable development.

The first landmark judgment of Supreme Court was delivered on the point of sustainable development and pollution of environment in case of Rural Litigation Entitlement Kendra,Dehradun v State of UP, the fact of this case is that the Himalayan mountains,[2] especially in the region of Dehradun and Mussoorie are rich with limestone which was used for the manufacture of Steel and Defense equipments. The mining operations were going on in the region since long in an unplanned way resulting into damage to hills due to the use of dynamic cave ins and slumps, and mining debris, clogged river channel during monsoon and severe flooding. Mining operation helped in the increase of incidents of landslide causing loss of life and property to villagers. Springs and water resources were drying up and forests were affected adversely. In1962, the Government of UP granted mining lease for a period of 20 years to industrialists. They were supposed to carry mining operations as per mining rules taking precaution for safety life and property as well as to landscape of the area. But they too, continued illegal and destructive practices and flouted the safety with impunity. After expiration of period of lease in1982, they submitted application for renewal. The Government declined to renew the lease recognizing the dimension of ecological destruction in the valley. Industrialist knocked the door of Allahabad High Court for remedies. The Court issued injunction allowing the applicants to continue mining operations probably recognizing the rights of a miners in the absence of any specific charge against them; may be also giving economic priority over ecological factors. During pendencies of the writ petition before the High Court, the Rural Litigation Entitlement Kendra,Dehradun submitted a letter to the Supreme Court under Article 32 complaining against environmental degradation and the Supreme Court treating the same as a writ petition directed that:

(i) Blasting operations pending review of the case to be stopped forthwith (i.e., in1983) and at the same time appointed an expert committee (known as Bhargava Committee) to assess the mining operations.

(ii) Court ordered that most dangerous mines which are within the Mussoorie City Board limits should not be granted lease to continue their operations and operation being carried on under the order of High Court be stopped immediately.

(iii) After getting report of the committee, the Court made the following observations:

"While we reiterate our conclusion that the mining in this area has to be stopped as far as practicable ,we also make it clear that mining activity has to be permitted to the extent necessary in the interests of the defence of the country as also for the safeguarding of the exchange position .We call upon the Union of India in the relevant ministry or ministries to take place before the court on affidavit the minimum total requirement of this grade to limestone for manufacture of quality steel and defence ornaments. The Affidavit should also specify as to much of high grade of ore is being imported into the country and as whether other indigenous sources are available to meet such requirement"

The concluded view of the court is that all mines in Dehradun valley remain closed, except three. It further directed that lease of the three remaining mines should not be renewed upon expiration of their remaining duration of lease and their operation to be closed. The Court has tried to strike a balance between development and preservation and conservation of ecology of the region.

Again, in case of M .C. Mehta v Union of India[3]. Supreme Court directed the company manufacturing hazardous

[1] *D.D Basu, Shorter constitution of India, Prentice-Hall of India, New Delhi, 279(1989)*

[2] *AIR 1985 SC 652*

[3] *(1986)2 SCC 176, This case is also said to be Sriram Food and Fertilizer case*

and lethal chemicals and gases posing danger to health and life of the workmen and people living in its neighbourhood to take all safety measures before re-opening the plant.

In case of M.C. Mehta v Union of India[1] a petition was filed by social worker through PIL before the Supreme Court on point of polluting the Ganga at Jajmau near Kanpur. The SC ordered the closure of tanneries at Jajmau near Kanpur which were polluting the Ganga.The Court observed that notwithstanding the comprehensive provisions in the Water (Prevention and Control of Pollution)Act and The Environmental Protection Act, no effective steps have been taken by the government to stop the grave public nuisance caused by the tanneries at Jajmau, Kanpur. Supreme Court further observed that the court was entitled to order the closure of tanneries unless they took steps to set up treatment plans.

In case of M.C. Mehta v Union of India[2] wherein the petitioner brought a Public Interest Litigation against Ganga water pollution requiring the court to issue appropriate directions for the prevention of Ganga water pollution. He claimed that although the parliament and the state legislatures have passed several laws imposing duties on the central and state boards constituted under Water (Prevention and Control of Pollution) Act and the municipalities under the UP Nagar Maha Palika Adhiniyam. They have just remained on paper and no proper action has been taken pursuing thereto. Supreme Court held that the petitioner although not a riparian owner is entitled to move the court for the enforcement of various statutory provisions which impose duties on the municipal and other authorities. He is a person interested in protecting the lives of the people who make use of Ganga water. The nuisance caused by the river Ganga is a public nuisance which is widespread and affecting the lives of the large number of persons. And therefore any particular person can take proceedings to stop it as distinct from the community at large.

In case of Subhash Kumar v State of Bihar[3] it has been held that public interest litigation is maintainable for ensuring enjoyment of pollution free water and air which is included in right of life under Article 21 of the Indian Constitution. If anything endangers or impairs that quality of life in violation of law, a citizen has right to recourse to Art.32 for removing the pollution of water or air which may be detrimental to the quality of life.

Again in case of M.C.Mehta v Union of India, and others[4] wherein a PIL was filed by environmentalist lawyer Shri M.C. Mehta under Art.32 of the constitution for seeking a direction to Haryana Pollution Control Board caused by the stone crushers, pulverisers and mine operators in Ballabhgarh area of Faridabad. The major question was whether to preserve environment and control pollution the mining operation should be stopped within the radius of 5 km from the tourists resorts of Badkhal Lake and Surajkund in the State of Haryana. After getting reports, from the environmental scientist and engineers as to the environmental conditions prevailing at the two tourist resorts and steps taken by the mine operators to prevent pollution of the environment, Court came to the conclusion that the mining operations in the vicinity of the tourist resorts are bound to cause serious impact on the local ecology. The Court noted with the concern that the mining operations bring about extensive alterations in the natural land profile of the area. Mined pits and unattended dumps of soil are the irreversible consequences of mining operations. Rock blasting movement of heavy vehicles, movement and operations of mining equipments and machinery causes considerable pollution in the shape of noise pollution and vibration.

In the light of these facts the division Bench of Supreme Court comprising of Mr. Justice Kuldeep Singh and K. Ramaswamy directed that mining operations in these areas be stopped within the 2 km radius of the tourist resorts and without obtaining the permission certificate of lease from Haryana Pollution and Control Board ,it can not be renewed.

In case of Vellore Citizens Welfare Forum v Union of and Others[5] wherein Vellore Citizens Welfare Forum has filed writ petition against the large scale pollution which was being caused due to enormous discharge of untreated effluent by the tanneries and other industries in the State of Tamil Nadu. Supreme Court appointed an expert committee to report and the matter. After examination, Committee has presented his report to the Supreme Court and observed that it is an effort to strike a balance between economic developments on the one hand and welfare of people on other. The Court held that it is true to state that leather industry in India has become a major foreign exchange earner, as it provides employment to a good number of people; it has no right to destroy the ecology, degrade the environment and pose a health hazard. It can not be permitted or even to continue with the present production unless it tackles by itself the problem of pollution created by the tannery. Remediation of the

[1] *(1987)4 SCC 463 (it is said to be Ganga pollution tanneries case)*
[2] *(1988)2 SCC 471*
[3] *AIR 1991 SC 420*
[4] *AIR 1996 SC 1997*
[5] *AIR 1996 SC 2115*

damaged environment is a part of the process of "sustainable development", and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. Supreme Court has defined "the precautionary principle" and "the polluter pays principle" as under "…we are, however, of view that "the precautionary principle" and "the polluter pays principle" are essential feature of the sustainable development." In the context of municipal law "precautionary principle" means:

i) Environmental measures by the state government and statutory authorities must anticipate, prevent and attack the cause of environmental degradation.

ii) 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.

iii) The "onus of proof" is on the actor or developer / industrialist to that this action is environmentally benign.

This polluter pays principle was already held in case of Indian Council for Enviro Legal Action v Union of India[1]. Supreme Court observed: "we are of the opinion that any principle evolved in this behalf should be simple, practical suited to the conditions prevailing in this country". SC ruled that "once the activity carried on is hazardous or inherently dangerous, the person carried on such activity is liable to make good the loss caused to any other person by his activity ,irrespective of the fact whether he took reasonable care while carrying on his activity the rule is premised upon very nature of the activity carried on". The result was that the polluting industries are absolutely liable to compensate for the harm caused by them to the villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutant in affected area. According to the interpretation of court of polluter pays principle, means that the absolute liability for harm to environment extends not only to compensate the victims of the pollution but also the cost restoring environmental degradation .Thus always conflict arose between industrial development conservation of environment. Now, there is a need of balance between industry and environment.

In case of M.C. Mehta v Union of India,[2] where in the Supreme Court held that the Master Plan for Delhi provides that the existing hazardous industries should be shifted, the same was done within a reasonable time period. The Court directed the Member Secretary for Central Pollution Control Board, New Delhi to issue notices for relocation of polluting industries with reasonable time to the industries for filing objections. To implement this decision Supreme Court gave direction to relocate and shift the hazardous industries to any other industrial estate in the national capital region.

In case M.C. Mehta v Union of India,[3] a PIL was filed to protect the Taj Mahal. It is one of the wonders of the world and a monument of unparalleled beauty, which is undergoing degradation due to atmospheric pollution. Court observed that precautionary principle requires that environmental measure must anticipate, prevent attack the causes of environmental degradation and the onus of proof is on an industry to that its operation with aid of coke/coal by industries in TTZ (Taj Trapezium) are the main polluters of the ambient air, the Supreme Court upheld that the polluting industries should change over a natural gas as industrial fuel.

In case of T.N. Godarvarman Thirumulkpad v Union of India,[4] writ was filed regarding the application of the Forest Conservation Act,1980. The Supreme Court held that as the Act was enacted with a view to check further deforestation, which ultimately resulted in ecological imbalance; it must apply to all forests irrespective of the nature of ownership or classification thereof. In the matter of Maharastra, the Government of Maharashtra had submitted a request to the Supreme Court that some more time be given to the Government for conversion of city bus fleet to CNG mode, which the Supreme Court rightly refused.[5] Again in case of T.N. Godarvarman Thirumulkpad v Union of India[6] wherein Supreme Court said that forests is a vital component to sustain the life support system on the earth. Forests in India have been dwindling over the years for a number of reasons, one of it being the need to use forest area for development activities including economic development. Undoubtedly, in any nation development is also necessary but it has to be consistent with protection of environments and not at the cost of degradation of environments. Any programme, policy or vision for overall development has to evolve a systemic approach so as to balance economic development and environmental protection. Both have to go hand in hand. In ultimate analysis, economic development at the cost of degradation of environments

1 *AIR 1996 SCW 1096*
2 *AIR 1996 SC 2231*
3 *AIR 1997 SC 934 (It is said to be Taj case)*
4 *AIR 1997 SC 1223 at 1230*
5 *Hindustan-April 16, 2004.*
6 *AIR 2005 SC 4256, (2005)6CompLJ158(SC), JT2005(8)SC588, (2006)1SCC1.*

and depletion of forest cover would not be long lasting. Such development would be counterproductive. Therefore, there is an absolute need to take all precautionary measures when forest lands are sought to be directed for non forest use.

10. Conclusion

There are several provisions available for maintaining the relationships between environment and sustainable development, which have been discussed at International and Domestic levels. In the Earth Summit 1992, Agenda 21 was prepared that addresses challenges of the next century. Based on this Agenda, a, few articles like 48A and 51A (g) have been incorporated under Indian Constitution. Some policy measures and legislative acts have also been framed. On the other hand, the courts give equal importance to both ecology and development while dealing with the cases of environmental degradation. First case on which the apex court had applied the doctrine of ' Sustainable Development' was Vellore Citizen Welfare Forum vs. Union of India. In the instant case, dispute arose over some tanneries in the state of Tamil Nadu. These tanneries were discharging effluents in the river Palar, which was the main source of drinking water in the state.The Hon'ble Supreme Court held that:"We have no hesitation in holding that the precautionary principle and polluter pays principle are part of the environmental law of India" The court also held that:" Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology." But before Vellore Citizen's case, the Supreme Court has in many cases tried to keep the balance between ecology and development Environment and development are two sides of the same coin. Any one of these cannot be sacrificed for the other. On contrary, both are equally important for our better future. Thus the responsibility lies on the Supreme Court and the various High Courts to deal with these cases with caution of high degree. Then only, we will achieve our goal i.e. to secure a pollution free developed country for our next generation. On the behalf of aforesaid observations we can say that sustainable development is a back bone of environment. At last my entire emphasis on the point of sustainable development and environment is based on the statement of Sundar Lal Bahuguna ie. "You have to decide whether development means affluence or whether development means, peace, prosperity and happiness".

Legal Policy for Wetland Conservation in India: A Review

*Zafar Mahfooz Nomani**

ABSTRACT

The legal policy for wetland conservation in India requires managerial, legal and scientific strategies for conservation, wise use and sustainable environmental framework. The wetlands have the dual capacity of being 'water providers' and 'water users' and are critical components of the water cycle that delivers fresh water. The wetland plays an important role in the livelihood security, although it is destroyed by draining and land filling, over-exploitation of fish resources, pollution, agricultural production and residues, industrial wastes. The loss of wetlands results in increased flooding, decline in water quality, degraded freshwater supply, threatening the ecosystem, the flora and fauna, clogging of the natural conduits in the marsh land and runoff in the low-lying marshland gets blocked. The Ramsar Convention, (1971) aims conservation and wise use of wetlands as a means to achieving sustainable development by imposing an obligation on the contracting parties to promote conservation of wetlands and waterfowl by establishing natural reserves on wetland. India lacks an effective legal mechanism adequate legislative safeguard of fisheries, land acquisitions, wild life, water, environment and coastal resource zone laws. The NEP, (2006) and National Forest Commission, (2006) also recommended for legal and institutional review of wetland by enactment of National Wetland Conservation Act which encompasses all types of wetlands in the land use classification. The National Wetland Conservation Programme and Management Action Plans the draft law on Wetlands (Conservation and Management Draft Rules, 2008 and Wetlands Conservation and Management Rules, 2010 has reformed the wetland conservation in India. The paper Reviews the legal policy in classical and modern for the conservation of wetland laws for wise and sustainable use in a strategic environmental framework.

Keywords: Water Providers, Water Users, Wetland Ecosystem, Ramsar Obligation, Wise And Sustainable Use, Legal Policy, Review Of Laws, Strategic Environmental Framework.

1. Ecological Significance of Wetland

The wetland requires managerial, legal and scientific strategies for conservation, wise use and sustainable development. The wetlands have traditionally been viewed as wastelands and for the better part of our civilization experience, they have been shunned as breeding grounds of disease, death and despair. The wetlands are the link between water and land as ecologically sensitive areas deplete fast, causing a threat to the environment. The Wetlands can be defined as areas of marsh, fen, peat land or water (permanent or temporary), with water that is static or flowing. They can be natural or manmade. The wetland characteristic carries the soil which must remain water logged or submerged for whole or part of the year. The wetland biota depends upon and is adapted to this water logging or submergence during at least a part of their life cycle.[1] India has a varied terrain and climate that supports a rich diversity of inland and coastal wetland habitats which are unique ecosystems. The health of inland freshwater wetlands affects the health of coastal wetlands also. They hold rainwater, snowmelt and sediments; act as filters, thereby protecting and purifying sources of drinking water.

Wetlands have the dual capacity of being 'water providers' and 'water users'. Being critical components of the water cycle that delivers the fresh water, the wetlands need some

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[1] *Chatrath, K.J.S. (1992), Wetlands of India, New Delhi: Ashish Pub. House*

quantities of water to keep their functions in perfect order. Wetland and water play an important role in the livelihood security of the rural poor. Globalization has prevented rural communities from developing trading initiatives to market wetland products. Promoting sustainable trade in wetland products is a way to alleviate poverty and conserve wetland.[1] The Wetlands help in Controlling floods, Water storage or supply, Water purification, retention of pollutants/nutrients/sediments, Ground water recharge or discharge, maintenance of underground water tables, Freshwater cycle, Staging ground for waterfowl, nurseries for fisheries and wildlife, Stabilization of local climate, Protecting bio-diversity, Recreation, tourism and cultural heritage besides Providing livelihoods to local people[2].

2. Loss of Wetland Habitat

The Wetland habitats have been destroyed constantly by draining and land filling, Over-exploitation of fish resources, pollution, agricultural production and residues, and industrial wastes suffocate wetlands. The loss of wetlands results in increased flooding, decline in water quality, degraded freshwater supply, threatening the ecosystem, the flora and fauna, clogging of the natural conduits in the marsh land and blockage of runoff in the low-lying marshland[3]. The facts relating to wetlands are startling globally and nationally:[4]

- More than ½ of the worlds remaining wetlands have been destroyed in the 20th century, especially in developing countries by the demands of industrialization.
- 1/3rd of Indian wetlands has already been wiped out or has been severely degraded.
- Coastal wetlands provide nearly 12% of the total fish catch.
- Nearly 1.1 billion people do not have access to safe freshwater, and nearly 1.7 billion people live in water scarce areas. (Source: The World Summit on Sustainable Development, 2002)
- One of the most important wetlands in India is the Keoladeo National Park, Bharatpur, Rajasthan, which is a manmade wetland. Various migratory birds visit this park almost every winter.
- Chilka in Orissa is another important wetland and is the largest (1100 sq km) Brackish-water Lake in India.
- The Government identifies 6, 48,507 hectares as wetland in India.

The degraded Wetlands in India notably located in Ladakh, Jammu & Kashmir, Punjab and Rajasthan[5].

3. Extent of Indian Wetland

Ladakh is a home to a large variety of flora and fauna and land of the Indus River, cold desert. The environment is ideal for the endangered black necked crane, Brahmini ducks, Kiangs and various medicinal flowers. These wetlands face dangers from the nomadic tribes, growing demand for Pashmina wool, over-grazing in the pasturelands, non-biodegradable garbage thrown into the lakes, pollution, cars washed in water bodies, off track driving by tourists, all is harmful for the balance of the eco-system.

The Wular Lake in Jammu and Kashmir is grossly encroached by farmers who convert vast catchment area into agricultural land. Besides, pollution from fertilizers and animal waste, hunting pressure on waterfowl and migratory birds and weed infestation has led to problems[6]. The Tsomoriri Lake in Jammu and Kashmir was connected by road that promoted tourism and economic activities, however, affecting the breeding of waterfowl population.The Harike wetland in Punjab based on surface and ground water are utilized on a large scale for irrigation. Untreated waste from catchment town is discharged into the lake. Deforestation is on the rise in lower Shivaliks, causing soil erosion and siltation.[7] The Ropar Lake in Punjab suffers siltation from the adjoining barren and soft hills causing threat to the lake. Water quality degradation is caused by fertilizer and thermal power plants in the vicinity. Besides, interference with the

[1] *Choudhury, B.C. (2000). Conserving wetlands: emerging scenario. pp. 131-138. In: A. Bhardwaj, R. Badola & B. M. Rathore (eds.) Proceedings of the workshop on the 'Conserving Biodiversity in the 21st Century, through Integrated Conservation and Development Planning on a Regional Scale'. LBSNA Mussorie and WII Dehradun.*

[2] *Davis, T. J. (1993). Towards the Wise Use of Wetlands, Report of the Ramsar Convention Wise Use Project, Gland, Switzerland.*

[3] *Deepa, R.S., & T.V. Ramachandra. 1999. Impact of Urbanization in the Interconnectivity of Wetlands. Paper presented at the National Symposium on Remote Sensing Applications for Natural Resources: Retrospective and Perspective (XIX-XXI 1999), Indian Society of Remote Sensing, Banglore*

[4] *Devaki Panini, The Ramsar Convention And National Laws And Policies For Wetlands In India,1988[Study prepared for the Technical Consultation on Designing Methodologies to Review Laws and Institutions Relevant to Wetlands Gland, Switzerland 3-4 July 1998]*

[5] *WWF India (1994). Ramsar Sites; Chilika, Sambhar Lake, Keoladeo National Park, Loktak Lake, Wular Lake, Harike Lake. (Six Booklets). WWF*

[6] *Dewar, D. (1923). Himalayan and Kashimiri Birds. London: J. Lane*

[7] *Jerath, N. (1993). Harike Wetland-An Avian Paradise. Punjab State Council for Science & Technology,Chandigarh*

resident and migratory birds, illegal fishing and poaching of wildlife endanger these species. The Point Calimere in Tamil Nadu is an illegal extraction of timber and non-timber produce that has led to an ecological imbalance in this wildlife and bird sanctuary which already faces danger from industrial pollution and poaching. The Sambhar Lake in Rajasthan grazing pressure from the 20-odd villages around the lake causes desertification[1].

The East Calcutta Wetlands in West Bengal witnessed Land use changes over a period of time have led to conversion of some of the largest fish farms pisciculture to paddy cultivation in these wetlands. Waste water effluents of the industries are emptied into the city outfall channels, illegally, resulting in metal deposition in the canal sludge. Thus this waste water is incapable of ensuring the edible quality of fish and vegetables grown in the wetland.[2] The Asan Barrage in Dehradun is 3.2 sq.km wetland has been host to a number of migratory water fowls. Though covered under the national biodiversity strategy action plan and declared as 'important bird areas (IBA)', poachers kill the birds indiscriminately, also turning the wetlands into unfit marshy lands. This is because of the delay in declaring them as sanctuaries.[3]

4. Multiple use of Wetland

Indian rural communities as regards sustainable use and conservation of wetlands need to be examined. The substantial legal rights given to rural communities to use and reserve wetlands as per their traditional customary norm and practices are not considered adequate. The wetland conservation community must promote a five point argument[4]. Many wetlands in the developing world are used daily by rural communities who depend upon them for their livelihood the extent of this use should, therefore, be central to the argument for Wetland conservation in the tropics.

(a) In some areas, e.g. the inner Niger delta, this dependence is so close that the annual calendar of the rural population is tied to the movement of the river flood. These communities have great difficulty in adjusting to major changes in the wetland ecosystem and the idea that they can adapt readily to other forms of land use, especially intensive irrigated rice culture, has proved erroneous.

(b) As efforts intensify to exploit the vast natural resources of Africa, Asia and Latin America, and apply these to the development of these continents, great care must be taken in order to ensure that these wetland resources make 'their maximum sustainable contribution to the development process.

(c) Assessing the value to human society of water diversion or of Wetland reclamation for agriculture or industrial uses, the value of current human use must be carefully assessed and compared with the net sustainable benefit to the same population of the modified wetland to retain natural wetland ecosystem.

(d) The heavy dependence of tropical rural societies upon wetlands must be developed and implemented in close collaboration with the rural communities. By addressing, the conservation and development communities will have greater consideration to the fundamental point that in many parts of the world, human beings arc the most important inhabitants of wetlands ecosystems. The human cost of wetland loss, and the man direct benefits of wetland maintenance indicate the need for greater attention to the role of wetland ecosystems, and the need to integrate the human use of these with those of more traditional conservation goals.

The sustainable use of wetlands needs substantial empowerment of rural communities as per customary norms. Article 243 of the Constitution of India makes it mandatory upon the State governments to constitute in every state, institutions of local self-government called panchayats at the village, intermediate and district levels in accordance with provisions of Part-IX of the Constitution. The panchayats are best suited to maintain and conserve wetland eco-system for the small wetland sites.

5. Ramsar Convention on Wetland

Ramsar is the only global environment treaty dealing with a particular ecosystem. The aim of Ramsar convention is the conservation and wise use of wetlands as a means to achieving sustainable development throughout the world. At the outset, it would be pertinent to dispel the myth that wetlands are wastelands. Wetlands are productive of ecosystems than that of tropical rain forests. Wetlands provide a wide range of services to mankind, some of which are listed below[5]:

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[1] *Anonymous, (2002). Brief Note on "Sambhar Wetland Conservation Project" 2002-03, Banas Project, Forest Department, Rajasthan, Government of Rajasthan,Jaipur*

[2] *Chhapgar B.F. and Manakadan, R. (Eds.). (2000). Ecology of hill streams of Western Ghats with special reference to fish community :Final Report (1996-1999). Bombay Natural History Society, Mumbai.*

[3] *David, L.Z., and Mundkur, T., (2004). Results of the Asian Waterbird Census: 1997-2001 Number and Distribution of waterbirds and wetlands in Asia-Pacific region, Wetlands International, Malaysia.*

[4] *W.J. Mitesh and J.G. Gosselink, (1986).Wetlands 283-84*

[5] *Dugan P.J. (1988). The Importance of Rural Communities In Wetlands Conservation And Development, pp. 3-11. In: Hook D.D. et al. (Eds.). The Ecology and Management Of Wetlands. Vol. 2: Management, use and values of wetlands. Timber Press, Portland, Oregon.*

1. Wetlands improve water quality by cleansing and detoxifying polluted water.
2. Wet1ands play an important role in control of floods. They store the rain water and release its run-off evenly.
3. Wetlands located in the coastal areas play an important role in shoreline stabilization and storm protection.
4. Wetlands are a rich source of bio-diversity.
5. Wetlands have a key role to play in ground water recharge and discharge.
6. Many of the species of flora and fauna found in Wetlands act as bioindicators, as they are extremely sensitive to any deterioration in their environment.
7. Many local communities depend on wetlands for their subsistence activities including livestock herding, hunting and fishing.

Wetlands are in fact water-logged wealth and need to be conserved for future generations. The wetlands are facing threats from a wide variety of source[1].

5.1. Categories of Ramsar Wetland

Wetlands are ecosystems transitional between terrestrial and aquatic, encompassing a wide variety of habitat types[2]. The terms wetlands have gained universally acceptable definition under Ramsar Convention are described below:

The Ramsar Convention of 1971 defines wetlands as areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water, the depth of which at low tide does not exceed six meters.

The Convention further provides that wetlands may incorporate riparian and coastal zones adjacent to the wetlands, and islands or bodies of marine water deeper than six metres at low tide lying within the wetlands. According to the US Fish and Wildlife Service, 'Wetlands arc lands transitional between terrestrial and aquatic system where tile water table is usually at or near the surface, or the land is covered by shallow water'.

Wetlands must have following three attributes: (i) the land supports pre-dominantly hydrophytes; (ii) the substrate is predominantly untrained hydric soil; and (iii) the substrate is rum-soil and is saturated with water or covered by shallow water at some time during the growing season of each year.[3] The US Corps of Engineers defines wetlands as 'those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do supports a prevalence of vegetation typically adapted for life in saturated soil conditions Wetlands generally include swamps, marshes, bogs and similar areas.[4]

The definition proposed by US Fish and: Wildlife Service in 1979 has been accepted by India as the official definition of wetlands. The definition proposed by Ramsar Convention also finds acceptability in India. It is evident from all the proposed definitions that they three main components: (i) Wetlands are distinguished by the presence of water. (ii) Wetlands often have unique soils that differ from adjacent uplands; (iii) Wetlands support vegetation adapted the wet conditions (hydrophytes), and conversely are characterized by an absence of flooding intolerant vegetation. These definition also reveal that the term 'wetland ecosystem' 'encompasses a wide variety of habitat types, for example, tanks, reservoirs, estuaries freshwater lakes, deltaic wetlands, lagoons marshes floodplains, mangroves etc.[5] From a legal point of view these definitions are of significance and importance at the national level to formulate a broad policy framework relating to protection and sustainable use of wetland. However so far as management and preservation of specific wetlands types or even specific wetland sites are concerned such broad definition may not be of much help.

5.2. Features of Ramsar Convention

The Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 1971 popularly known as Ramsar convention, the Iranian town of Ramsar and on February 2, 1971 dedicated to the preservation of wetlands of international importance. As of June 1992, wetlands covering an area of 6 million had been declared Ramsar sites. After ten years of Ramsar convention, 1971 in1982 when India ratified the convention it designated Chilka Lake (Orissa) and Koeladeo Ghana National Park

[1] *Edward Maltby, (1986). Water-logged Wealth: Why Waste The World Wet Places?(1986)*

[2] *Ministry of Environment and Forests,(1990). Wetlands of India: A Directory, Ministry of Environment and Forests, Government of India, New Delhi.*

[3] *Chan, T.O. and Williamson, I.P., (1979). A Model of the Decision Process for GIS Adoption and Diffusion in a Government Environment, Cowardin, L.M., Cater, V., Golet, F.C. and La Roe, E.T., 1979, Classification of wetlands and Deeper water Habitats of the United States,U.S. Fish and Wild life services, Washington D.C. pp.103*

[4] *Cowardin, L.M., Carter V., Golet, F.C. and La Roe, E. T., (1979). Classification Of Wetlands And Deepwater Habitats Of The United States. U.S.Fish and Wildlife Service, Washington, DC.*

[5] *Dugan, P.J., (1990). Wetland Conservation: A Review of Current Issues And Required Action. IUCN:Switzerland*

(Rajasthan) as Ramsar sites. Four additional Sites were designated in March, 1990 including Wular Lake. (Kashmir), Harika Lake (Punjab), Loktak Lake {Manipur) and Sambhar Lake (Rajasthan)[1].

Under the provisions of the Ramsar Convention, the contracting parties are under an obligation to formulate and implement their planning so as to promote the conservation of the wetlands included in the Ramsar list.The Convention also confers a right of information on the contracting parties and each contracting party is under an obligation to inform at the earliest possible time, if the ecological character of any wetland in its territory and included in the list has changed, is changing or is likely to change as a result of technological developments, pollution or other human interference[2].

The Convention further imposes an obligation on the contracting parties to promote conservation of wetlands and waterfowl by establishing nature reserves on wetland, whether they are included in the list or not. However the convention is a step in the right direction, it lacks an effective legal mechanism for its enforcement. The implementation of the provisions of this Convention is dependent on the will of the various contracting parties and that the Convention lacks teeth to enforce obligations under it against any of the contracting parties. The right to .information regarding the status of Ramsar sites under the convention as only been conferred upon the contracting arties. No such right accrues upon any nongovernmental organization or even an individual interested in the cause of wetland conservation.

6. Indian Legal Safeguards

India abounds in various types of wetlands. The National Conservation Strategy and Policy Statement Environment and Development also recognize the importance and significance of wetlands and- threats faced by various wetland sites in India[3]. Indian wetlands are facing threats from a wide variety of source but still there is no one Central/State legislation relating to Wetlands. There are legislations which have some bearing on wetlands protection and conservation and are discussed hereunder. There is no separate provision for specific legal instrument for wetland conservation and influenced by an array of policy and legislative measures. The traditional set of wetland related laws in pre- and post- National Environment Policy, 2006 represents varied laws competing with clash of interest in wetland conservation. The Constitution of India[4] enjoined the State to "protect" and "improve" the environment and to "safeguard" the forests, lakes, rivers and wildlife of the country. Every citizen has a "fundamental duty" to protect the environment and have compassion to living creatures[5]. In pursuance of this goal several legislations have been enacted which have relevance to wetland conservation. The peripheral enactments on the subject are broadly: Indian Fisheries Act, 1857; Indian Forest Act, 1927; Constitution of India, 1950; Bombay Wild Animals and Wild Birds Protection Act, 1951; Cruelty Against Animals Act, 1962; Wildlife (Protection) Act, 1972; Water (Prevention and Control of Pollution) Act, 1974; Territorial Water, Continental Shelf, Exclusive Economic Zone and other Marine Zones Act, 1976; Water (Prevention and Control of Pollution) Act, 1977; Maritime Zone of India (Regulation and fishing by foreign vessels) Act, 1980; Forest (Conservation) Act, 1980;Kerala Preservation of Trees Act, 1986;Environmental (Protection) Act, 1986; Coastal Zone Regulation Notification, 1991;Wildlife (Protection) Amendment Act, 1991; West Bengal Inland Fisheries Act (amended in 1994); Tamil Nadu Aquaculture Regulation Act, 1995; Biodiversity Act, 2002; Conservation of Forests and Natural Ecosystems Act of India, 2004; and Forest (Conservation) Rules, 2005

The analysis of these laws is beyond the purview of the present paper however a study of direct laws impinging wetland conservation are undertaken to focus the inadequacy and doctrinal flaws underpinned under Ramsar Convention,1971.The select study of legislative analysis covers fisheries, land acquisitions, wild life, water, environment and coastal resource zone laws. The protection of tribal and forest communities is provided under Article 46[6] which states about the promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. The constitutional goal of forestry has been augured by Forest Act, 1927, and Forest (Conservation) Act, 1980.Therefore, it is imperative here to delineate on the provisions of both enactments[7].

[1] *Gopal , B. and Sharma, K.P., (1994). Ramsar Sites on India: Sambhar Lake WWF, India.*

[2] *Choudhury, B.C. and Raghuram, T.L. (2002). The Need and Approach for a Wetland Protected Network in India In: Parikh, J. and Datye, H. (Eds.). Sustainable Management of Wetlands: Biodiversity and Beyond, SAGE Publications, New Delhi. pp. 373-388.*

[3] *Panini, D., (1998). A Case Study: The Ramsar Convention and National Laws and Policies for Wetlands in India, prepared for the Technical Consultation on Designing Methodologies to Review Laws and Institutions Relevant to Wetlands, Gland, Switzerland, 1998*

[4] *Article 48-A, Constitution of India,1950*

[5] *Article 51A (g), Constitution of India,1950*

[6] *Id Article 46 reads as: The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.*

[7] *Nomani, Zafar Mahfooz, (2011). 'Legal Dimension Of Sustainable Forestry And Wetland Habitat In India', International Journal of Environmental Consumerism, VII(13&14),57-68*

7. Forest and Wetland Conservation

7.1 Indian Forest Act, 1927

The first attempt on forest legislation was made in 1865 with the enactment of the Indian Forest Act. The Act was not comprehensive and mainly provided for the protection of trees, prevention of fire, and prohibition of cultivation and grazing in forest areas. This Act was later revised in 1878, which extended to most Provinces of British India. The 1927 Act provided enabling provisions to make rules and regulations, which makes it quite distinct from other acts of that time. It is this distinct provision that enabled this Central Act to continue when the item "forest" was made a subject of the Provincial Governments. The Act has 86 sections, and 13 chapters covering reserved forests[1], village forests[2], protected forests[3], control over forest and lands not being the property of the Government[4], duty on timber and other forest produce[5], control of timber and other forest produce in transit[6], collection of drift and stranded timber[7], penalties and procedure[8], cattle trespass[9], forest officers[10], subsidiary rules[11] and miscellaneous regulations[12].

7.2 Forest (Conservation) Act, 1980

The Forest (Conservation) Act, 1980 is manifested under slightly in Forest Policy Resolution of 1952. This is followed by the 1976 National Commission on Agriculture, strongly advocating the need to plant trees and maximize forest yields. On the recommendations National Commission on Agriculture, a new Forest Act in 1980 was passed amidst alleged to be draconian and people unfriendly legislation. Due to strong opposition from the environment lobby Forest (Conservation) Act, 1980 contained provision for the diversion of forest lands for non-forestry purposes. This Act was enacted to check indiscriminate diversion of forestland. The Act has come as an obstacle to the regularization of encroachments of forestlands. Though the 1990 Guidelines under the Act provide detailed procedure to be followed in such cases, the States have virtually given up because of prerequisites, such as provision of equal lands for compensatory afforestation, filing of proof that such regularization was agreed to as a matter of policy prior to 15 October 1980 (the date of promulgation of the Act), etc. This has also denied the opportunity to those who have been settled on forestlands by the intermediary tenure holders in pre-land reform (zamindari abolition) years, or those whose lands have been notified under the Indian Forest Act pending settlement of their claims.

7.3 Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

The Supreme Court has strengthened the administrative set up for and directed the Government to pass the Schedule Tribe (Recognition of Forest Right) Bill 2005 to promote participatory approach to sustainable forestry. The Act symbolises the culminating point departing from colonial legacy[13] and economic gains[14]. To mitigate damage of colonial policies, India has to devise pro people forest laws to impair the potential of the forest[15] and bring radical changes in forest administration and bureaucracy.[16] The Act heralded third phase of India's forest management by giving precedence to environmental and ecological concerns over economic benefits[17]. The objects of the Forest Rights Act, 2006 describes it as a law intended to correct the "historical injustice" done to forest dwellers by the failure to recognize their rights.[18] The rights recognized by the Act are summarized as under:

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1 *Section 4 of Indian Forest Act, 1927*

2 *Id Section 28*

3 *Id Section 29*

4 *Id Section 35-38*

5 *Id Section 39*

6 *Id Section 41*

7 *Id Section 45-51*

8 *Id Section 67-69*

9 *Id Section 70*

10 *Id Section 72-75*

11 *Id Section 76-78*

12 *Id Section 79-86*

13 *'Indian Forest Act, 1927- A Critique' available at <http://legalsutra.org/1066/forest-and-wildlife- administration-a-critique > (Last visited, 12th August, 2011)*

14 *Akhileshwar Pathak,(1994) Contested Domains, 18(1994)*

15 *Ramachandra Guha,(1983). 'Forestry in British and Post-British India', Economic and Political Weekly, 18(44& 46),1884*

16 *Ramachandra Guha, (1990) 'An Early Environmental Debate: The Making of the 1878 Forest Act', The Indian Economic and Social History Review, 27(1) ,75*

17 *AshishKothari,(2006).'ForLastingRights',(26)Frontline23December30,2006)[http://www.frotlineonnet.com/fl2326/stories/20070112003501400.htm.]*

18 *See: The Statement of Objects and Reasons Para 1,The Scheduled Tribes and Other Traditional Forest Dwellers Act, 2006*

- Title rights - i.e. ownership - to land that is being framed by tribal or forest dwellers as on December 13, 2005, subject to a maximum of 4 hectares; ownership is only for land that is actually being cultivated by the concerned family as on that date, meaning that no new lands are granted
- Use rights - to minor forest produce (also including ownership), to grazing areas, to pastoralist routes, etc
- Relief and development rights - to rehabilitation in case of illegal eviction or forced displacement[1] and to basic amenities, subject to restrictions for forest protection[2]
- Forest management rights - to protect forests and wildlife.[3]

The entitlements to all categories of forest land, including wildlife sanctuaries and national parks is a healthy development in people centric approach.[4] The rights and duties of the Gram Sabha have been left indistinct and unclear, especially with regard to their jurisdiction[5]. Thus, a suitable regulatory mechanism, at the village, taluka and district levels may further perpetuate economic insecurity of the several tribal regions and catchment-areas of major rivers of the country[6]. Transparent and honest implementation of the Act will impact the forest-dependent people in terms of livelihood security[7].

8. Forest Reform for Wetland Conservation

It is highly deplorable that the stringent legal safeguard did not really combat deforestation. However, ground scenario as depicted at Table-VIII shows the alarming degree of the forest area diverted since the implementation of Forest Conservation Act, 1980. Some procedural difficulties were, however, experienced in implementing the Act. In order to streamline disposal of applications under the Act, the process of decision-making has been decentralized and procedures and requirements have been rationalized. The revised and comprehensive rules and guidelines under the Act were issued in 1992[8]. This Act is, by far, the most important tool to regulate and control the change in the land use of recorded forestland. This Act has helped reduce diversion of forestland for non-forestry purposes. However, it is alleged that it has delayed developmental projects in forested districts, where the availability of land other than forestland for roads, bridges, etc., is severely restricted.[9] In general, there is urgent need for public awareness regarding this Act that it seeks to find alternatives and to compensate or minimize losses due to developmental activities and not put a stop to developmental activities altogether. The people's participation in the protection of forests and management of forests has been emphasized in the National Forest Policy, 1988. Pursuant to this policy, Government of India[10] through its resolution dated 1st June '90 formalized the Joint Forest Management (JFM) Programme[11].

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1 *Id Section 3(1) of the Act*

2 *Id Section 3(2) of the Act*

3 *Id Sections 3(1) and 5 of the Act*

4 *Madhu Sarin,(2011). 'India's Forest Rights Act: The Anatomy of A Necessary But Not Sufficient Institutional Reform', available at <http://www.ippg.org.uk/papers/dp45.pdf> (Last visited 14th August, 2011)*

5 *Forest Rights Act in Madhya Pradesh Documentation of Best Practice available at <http://indiagovernance.gov.in/download.php?filename=files/forestrights_edited.pdf>(Last Visited 16th August, 2011)*

6 *D. K. Giri,(2011). 'Forest Rights Act: Combining Conservation with Human Development', available at <http://www.cfc2010.org/papers/session13/giri_s13.pdf>(Last Visited 16th August, 2011)*

7 *Antara Roy & Sroyon Mukherjee,(2011). 'The Forest Rights Act, 2006: Settling Land, Unsettling Conservationists',Available at http://www.nujslawreview.org/articles2008vol1no2/antara_roy_and_sroyon_mukherjee.pdf> (Last Visited 16th April, 2011)*

8 *Ministry of Environment and Forests, Guidelines For Diversion Of Forest Lands For Non-Forest Purpose Under The Forest (Conservation) Act, 1980, [Government of IndiaNo. 5-5/86-FC Dated : 25.11.1994] Detailed guidelines for submission of proposal for diversion of forest land for non-forest purposes under the Forest (Conservation) Act, 1980 were issued vide this Ministry's letter of even number dated 23-6-1989. To further streamline and decentralise examination of proposals under the Forest (Conservation) Act, 1980, revised consolidated guidelines had been prepared on 25-10-1992. A review of the existing guidelines has been done and accordingly, following modifications in the procedure for processing of the proposals under the Forest (Conservation) Act, 1980 have been made in the guidelines of 25-10-92.*

9 *This has begun to change though MoEF has recently given general approval, valid for another two years (i.e. up to December 2006), for developmental projects involving up to 1 ha forest area to be cleared by the State Governments.*

10 *As per the provisions of National Forest Policy 1988, the Government of India, vide letter NO.6.21/89-PP dated 1st June, 1990, outlined and conveyed to State Governments a framework for creating massive people's movement through involvement of village committees for the protection, regeneration and development of degraded forest lands.[agritech.tnau.ac.in/forestry/forest_jfm_index.html/logged on 15.9.2011]*

11 *Tata Institut efor Energy Research, Studyon Joint Forest Management conducted by TERI for Ministry of Environment and Forests ,[www.envfor.nic.in/divisions/forprt/terijfm.html/ logged on 15.9.2011] With a view to address some important silvicultural, productivity, institutional, benefit sharing and marketing related issues in JFM, the Ministry of Environment and Forests, Government of India awarded the National Study on Joint Forest Management to the Tata Energy Research Institute, New Delhi. The objective of the study was to review the institutional framework for JFM and to study the technology and suitable silvicultural practices for increasing the productivity of degraded forests through participation of local communities. Apart from undertaking primary survey in four states - Andhra Pradesh, Orissa, West Bengal and Madhya Pradesh, experiences, literature and documentation from all the 22 states implementing JFM in India were extensively consulted to undertake this assignment*

9. Wetland under wildlife and biodiversity

9.1 The Wildlife Protection Act, 1972

The Act provides for the protection of the wild animals, birds and plants and for matters connected therewith or ancillary or incidental thereto[1]. The Act envisages the creation of National parks[2], Game reserves[3], closed areas[4] and Sanctuaries[5] to attain its avowed objective of protecting wild animals, birds and plants. The Act also provides for an administrative regime to manage these protected areas, and in its various schedules lists many plant and animal species that are wholly or partially dependent on wetlands. It is these various species listed in the schedules that are accorded protection under the scheme envisaged by the Act.

Some of the sanctuaries and National parks that have been created by state and central governments, after the enactment of this legislation, incorporated important wetlands sites within their designated areas.

a) The Act adopts a policing attitude towards the protection of wild flora and fauna. This entails massive input of resources which are not available. Therefore, most national parks and sanctuaries are under-staffed and security personnel are ill-equipped to discharge their onerous duties.

b) The role local communities in wildlife protection have been slighted and they have been marginalized.

c) Some of the provisions that permit hunting of wildlife, uprooting and cutting of wild plants are in a general phraseology and go against the overall spirit of the legislation[6].

9.2 Biodiversity and Natural Ecosystem Laws

The wetland received attention under broad rubric of biodiversity and ecosystem conservation laws enacted under The Biodiversity Act, 2002 and the Biodiversity Rules, 2004[7] and the Conservation of Forests and Natural Ecosystems Act, 2004. These laws are aimed at safeguarding the floral and faunal biodiversity, and regulating their flow from the country to other countries for research and commercial use. Thus, their provisions also contribute towards conserving, maintaining, and augmenting the floral, faunal and avifaunal biodiversity of the country's aquatic bodies.[8] The sixty-seven year-old Indian Forest Act of 1927 has been replaced by the Conservation of Forests and Natural Ecosystems Act, 1994. At the heart of the proposal is the concept of community management of the forests. The Act proposes to create new categories of forests "village forests", which would be virtually handed over the village communities for management and maintenance with rights to the forest produce. For the first time the concept of "biodiversity conservation" is being introduced into the Indian Forest Protection Act. The new law will also permit the State Government to take over "village forests" or even ancient "sacred groves" if they form part of the delicate ecosystem" where the biodiversity is at risk of being eroded. There is provision for stiffer penalties for smugglers and poachers, including powers to confiscate vehicles used by them.

Wetlands are one of the most productive ecosystems and an earnest effort should be made to conserve them through the legislative framework for protection of wetlands consists of a myriad of legislation, and suffers from some deficiencies and drawbacks.[9] The wetlands of India can only be protected by communities which live along side them and any legal strategy that is evolved to protect and preserve Indian wetlands must endow the local communities with power, ability and capability to conserve them.

10. Wetland under Water and Environment laws

10.1. Water (Prevention and Control of Pollution) Act, 1974

The Act provide for the prevention and control of water pollution, and the maintaining or restoring of wholesomeness of water[10] by the establishment of Central and the State Pollution Control Boards. The Act applies to wetlands, as wetlands would fall under the definition of 'stream' laid down in the Act[11]. Thus, the Central pollution

1 *Preamble to the Wildlife Protection Act, 1972*

2 *Section 11, Wildlife Protection Act, 1972*

3 *Id.Section 36*

4 *Id.Section 37*

5 *Id.Sections 18 & 38*

6 *Id.Sections 11, 12, 17 B*

7 *Gopal, B., (1995). Biodiversity in Freshwater Ecosystems Including Wetlands, Biodiversity and Conservation in India, A Status Report. Vol. 4, Zoological Survey of India, Calcutta*

8 *Gopal, Brij., (1991). Biodiversity in Inland Aquatic Ecosystems in India: An Overview", in: International Journal of Ecology and Environmental Sciences*

9 *Nomani,Zafar Mahfooz, (2011). 'Juridical Convergence Of Forest Wildlife & Biodiversity & Its Impact On Wetland Habitat In India', Kashmir University Law Review, XVIII,114-149*

10 *Preamble to the Water (Prevention and Control of Pollution) Act, 1974*

11 *Id.Section 2(j)*

Control Board and the State Pollution Control Boards have the power to obtain information and to plan a comprehensive programme for the prevention, control or abatement of pollution in wetlands and to secure the execution thereof. The function of the Central Board, to lay down, modify or annul in consultation with the State government concerned, the standards or level of wholesomeness of water for a 'stream' defined in the Act[1], which would also cover wetlands'. The Act itself does not lay down the standard in this respect but empowers the Central Board to determine the standards

10.2. Environment (Protection) Act, 1986

The Environment (Protection) Act, 1986 is an umbrella Act which was enacted with the objective of protecting and improving the environment and for matters connected therewith. 'Environment' as defined in Section 2 of the EP Act included water, air and land and the interrelationship which exists between water, air and land and human beings and other living creatures, plants and micro-organisms and property. The environmental pollutant and hazardous substance are regulated by the Act and indirectly protect wetland being pollutions zone and dumping grounds. The EP Act, 1986 could also be instrumental in extending legal protection to wetlands as distinct ecosystems and creating restrictions and safeguards for ensuring wise use of these areas under the omnibus power of central government and issuance of direction. At the state level, several state acts regulate use of wetlands. The Environment Impact Assessment Notification of 1994 was also issued under this Act. The power of the Central Government to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution may subsumes measures of restrictions by industries in protecting pristine characters of wetlands. The central government can also issue ecosystem specific notification for protection of environment and wetlands. This is evidenced by series of notification issued time to time most notably aqua-culture, coastal areas, eco sensitive zone like protecting Dahanu wetlands in the state of Maharashtra from environmentally harmful industries and projects. This is further substantiated by the Dahanu Taluka Environmental Welfare Association versus the Union of India[2]. The Supreme Court gave a landmark decision to conserve the biodiversity rich network of wetlands in Dahanu and limited industrialization to 500 acres in Dahanu. Furthermore, the Court ruled that the MoEF should designate and notify Dahanu as an ' ecologically sensitive' area permitting only certain types of industries in this area. Thus the Environment (Protection) Act, 1986 can be used to notify certain ecologically harmful industries, operations and processes particularly in cases of wetlands which are on the brink of extinction.

10.3. Coastal Regulation Zone Notification, 1991

Under Section 3(1) and Section 3(2) (v) of the Environment Protection Act 1986, and Rule 5(3) (d) of 'Environment Protection Rules', 1986, the coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters which are influenced by tidal action (in the landward side) upto 500 meter from the High Tide Line(HTL) and the land between the Low Tide Line (LTL) and the HTL have been declared as Coastal Regulation Zone (CRZ). The 'CRZ notification classifies the coastal stretches 500 meters of the HTL of the Landward side into four categories[3]. One of these categories (viz. Category I) includes:

a) Areas that are ecologically sensitive and important such as national parks/marine parks, sanctuaries; reserve forests, wildlife habitats, mangroves, corals/coral reefs areas close to breeding and spawning grounds of fish and other marine life, areas of outstanding natural beauty/historical/ heritage areas, areas rich in genetic diversity, areas likely to be inundated due to rising sea level consequent upon global warming and such other areas as may be declared by the Central Government or the concerned authorities of the State/Union Territory level from time to time.

b) Area between Low Tide Line and the High Tide Line.

The CRZ notification clearly provides that no new construction shall be permitted within 500 meters of the High Tide Line in category I areas. Thus the highest level of protection is afforded to category I. It is also clear from a cursory inspection of category 1 areas as specified under the notification that most of the important coastal wetland sites within 500 meters of HTL would fall within the purview of category I(CRZ - I).

11. Fishing Regulations and Wetlands

11.1. Land Acquisition Act 1894

The wetlands are both land and water come under the purview of the Land Acquisition Act. The broad definition of' land' given under the Act[4] includes 'Wetlands' within its

[1] *Id.Section 16(q)*

[2] *Dahanu Taluka Environment Protection Group v.Bombay Suburban Electricity Supply Company Limited,(1991) 2 Supreme Court Cases 539*

[3] *Para 6(1), Coastal Regulation Zone Notification, 1991*

[4] *Section 3(a), Land Acquisition Act, 1894*

ambit. The "'term 'land' includes land covered with water. A pond or a pool of water comes under the caption 'land covered with water" and is land for the purpose of the Act.[1] Under English Law the definition of 'Land' under the Land Clauses Act, 1845 is all embracing and includes other forms of property, mines, minerals, water and easement. The Acquisition of land Act, 1919 (England) further extends the definitions as 'including water and any interest in land or water, and any easement or right in or over land and water.[2] Thus 'wetlands' could come within the purview of the Land Acquisition Act of 1894 and can be acquired by the state for public purpose on payment of adequate compensation. Fishing is one of the most visible and direct use of wetlands and regulated by both Land and Water laws. Fishing in most wetland area is regulated through leases or permit systems to fisher folk' or a permit on payment of the prescribed fee.

11.2. Indian Fisheries Act, 1897

The lease and licensing system operates is the Indian Fisheries Act, enacted in 1897, to regulate certain matters relating to fisheries[3]. This Act has not been repealed by State/Central legislatures and therefore, continues to be in operation. Some Indian States, however, have adopted the Indian Fisheries Act with some modifications to deals with certain matters relating to fisheries in Indian waters {including wetlands) is remarkable for its brevity. The Act consists of only seven sections and delegates rule making power unto State Government.[4] The Indian Fisheries Act also makes it unlawful to use dynamite, explosive substance or substances, or other noxious material to catch or destroy. The general practice of most State Governments is to lease portions of areas/waters abounding in fish to individuals or communities for catching fish therein. The responsibility for issuing these licenses or lease deeds generally vests with the fisheries department of the state government or any other body that is authorized by the rules framed by the State Government to do so not all wetlands come under the purview of the Fisheries Act. In areas where the wetlands site are treated as 'land', the responsibility for issuing licenses etc., vests with the government department under whose purview that land falls. Thus in one state, so far as wetlands are concerned, there could be different Legislations and different government departments that regulate fishing in these areas.

Some wetland sites exist along the Indian Coastline. These sites are important for their marine fisheries. Fishing in marine water is generally regulated through separate legislation enacted by the State Legislature for the purpose. The Orissa Marine Fishing Regulation Act, 1981, is one such legislation. It is an Act to provide for the regulation of fishing by fishing vessels in the sea along the coastline of the state.[5] The Act authorizes the State government to "notify any area along the coastline of the state, though not exceeding the territorial waters, as 'specified areas'[6]. The governrnent is authorized by the Act to regulate, restrict or prohibit:

a) Fishing in any specified area by such class or classes of fishing vessels as may be prescribed; or

b) The number of fishing vessels which may be used for fishing in any specified area; or

c) Catching in any specified area of such species of fish and for such period as may be specified in the notification; or

d) The use of such fishing gear in any specified area as may be prescribed[7].

The Act further provides that a fisherman would need to have a license for fishing in the- specified waters[8]. The rules laid down under the Act specify the details relating to the issuance of such a licenece by the appropriate officer. Indian legislations therefore, endeavor to regulate fishing through a lease or licensing regime. This legal regime was evolved to ensure sustainable use of fisheries and to protect the interests of traditional fishermen. It has led to over-exploitation of fisheries and has not served the cause of traditional fishermen. Some drawbacks of this system are:

1. The areas that are leased out are often not clearly demarcated and at times more area is leased out than what the official records indicate

2. The licenses are at times granted on an irrational basis by officers who have no knowledge of fishing or fisheries or the ecology of the area.

3. Local communities 'or individuals who obtain lease or licenses on payment of a certain fee for the same do not treat the fisheries as their' own' common property resource. Their endeavour is to get

[1] *AIR 1940 Sindh 58*

[2] *Section 12(2), English Land Acquisition, 1919*

[3] *Preamble to the Indian Fisheries Act, 1897*

[4] *Id.Section 6*

[5] *Preamble to the Orissa Marine Fishing Regulation Act, 1981*

[6] *Id.Section 2*

[7] *Id.Section 4*

[8] *ibid*

maximum returns from' their investments. This leads to over fishing and use of explosives or resort to other destructive practices for fishing.

4. There is no uniform policy for granting leases or licenses. Thus the interests of poor, traditional fishermen get marginalized.

12. Wetland Conservation Rules

The Wetland (conservation and Management) Rule (WC & M Rule), 2008 was supplanted by Draft Regulatory Framework for Wetlands Conservation for Comments, 2010. This legal initiative also owes to Supreme Court intervention to save wetland from unplanned aqua culture and direction to MoEF under the EPAct,1986 to designate and notify fragile wetland as 'ecologically sensitive' area permitting only certain types of industries and activities. This has been also documented in environmental researches that even E P Act miserably failed in protection of wetlands. This is evident from establishment of environmentally disastrous project for a mega-port at Vadhavan in Dahanu Taluka in Maharashtra[1] and international airport in the catchments of Himayat Sagar in Hyderabad[2] without adequate requirements of the EIA law contained under the EIA Notification, 1994[3]. The basic framework WC & M Rule, 2008 was retained with major and minor changes. The Wetlands (Conservation and Management) Rules, 2010[4], are aimed at ensuring better conservation and preventing degradation of wetlands[5] to fulfill commitments of a national law under Ramsar Convention in 1982[6]. The wetland governance is basically triggered because of the complex nature of wetland ecosystems with competing uses also[7]. This also compounds multiple livelihood dependencies on wetland[8]. This is further percolated by complex governance structure due to the historical evolution hinged on a sectoral understanding of natural resources. As a natural sequel the growth of fragmented legal and institutional structure are manifested in the policies, laws and organizations of wetland governance.

The review of legal mechanism in Post NEP, 2006 phase definitely leads to focused attention to wetland conservation under the broad rubric of sustainable forestry and conservation. The need for conservation of wetland has paradigmatic shift from periphery to core central legislation. The relevance of legally enforceable regulatory mechanism for wetlands is emphatically laid down in all environmental policies and committees.[9] The NEP, 2006 and National Forest Commission, 2006 also recommended for legal and institutional review of wetland by enactment of National Wetland Conservation Act which encompasses all types of wetlands in the land use classification. Since the MoEF identified wetlands for conservation and management under the National Wetland Conservation Programme and Management Action Plans the draft law on Wetlands (Conservation and Management Draft Rules, 2008 was considered to be high priority. To give effect to long standing municipal law compliance of Ramsar Convention, 1971 the MoEF initiated delegated legislation in exercise of the powers conferred by Section 25 read along with sub-section (1) and clause (v) of sub-section (2) of Section 3 of the Environment (Protection) Act, 1986.The Wetlands (Conservation and Management) Rules, 2010 has reformed the wetland conservation in India it is to be seen with great expectation and circumspection.

13. Conclusions and Suggestions

The Wetland (Conservation and Management) Rules, 2010 has reformed the wetland conservation in India it is to be seen with great expectation and circumspection.The

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[1] *Nomani, Md.Zafar Mahfooz, (2009). 'Environment Impact Assessment Law,Satyam Law International;New Delhi, 237*

[2] *See: for Detail ananlysis of Himayat Sagar and Osman Sagar Lakes (Hyderabad)Case: Nomani, Md.Zafar Mahfooz, (2008). 'Human Right to Development and Ecologically Sound Environment in India: Premonitions and Promises', A.R.Vijapur(ed.), Implementing Human Right in the Third World: Essays on Human Rights, Dalits and Minorities,Manak Publications:New Delhi; 383-408 (2008)*

[3] *Supra note 80 at 301-2*

[4] *Wetlands (Conservation and Management) Rules, 2010[Available at moef.nic.in/downloads/public.../Wetlands-Rules-2010.pdf/ logged on 21.9.2011]*

[5] *'Centre Issues Wetland Conservation Guidelines', The Hindu Daily:New Delhi Edition, Friday, Dec 03, 2010[http://www.hindu.com /2010/12/03/ stories/2010120351592000.htm /logged on 21.9.2011]*

[6] *Ministry of Environment & Forests, (2007). Conservation of Wetlands in India: A Profile [Approach and Guidelines], Conservation Division-I, Government of India, New Delhi*

[7] *Nomani, Md.Zafar Mahfooz, (2009). 'Good Governance and Sustainable Development in India: An Assessment of Enviro-Legal Strategy and Human Right Institutional Mechanism', Indian Journal of Federalism, II ,107-127*

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environmentalist and conservationists have come up with several recommendations and suggestions dealing with wetland degradation, protection, preservation and conservation. These included scientific studies, specific wetland studies, top-bottom and bottom-top wetland management approaches as well as discussion of the status-quo of Indian wetlands vis-a-vis the global scenario. This requires systematic study to understand the source of water, sediments and nutrients and their behavior in wetlands to formulate suitable management strategies for maintaining the sound health of the wetlands.The generation and documentation of base line data and other information of Ramsar sites for their biodiversity assets including mapping and creation of inventories should be extensively carried out.The constitution of national and regional wetland management committee should consolidate on the carrying capacity of wetland studies.

The awareness progress on wetlands conservation should focus on framing of national wetland policy and establishment of national wetlands research and management institute for the development of national lakes and wetlands, information systems should clearly demarcate legal boundary for regulation of human activity and for the promotion of seed bank of all the mangrove flora and fauna for wise and sustainable use of wetland. The environmentalists and conservationists are of the view that inspite of the Wetlands (Conservation and Management) Rules, 2010 there is a need for better conservation and management law for protecting wetlands in India.

Right to Life and Personal Liberty: Call for Speedy Justice

*Dr. Pradeep Kulshrestha**

ABSTRACT

The Sixth Amendment to the U.S. Constitution guarantees all persons accused of criminal wrongdoing right to a speedy trial. Right to speedy justice though not explicitly laid down in the Constitution of India, it has been recognised by the Supreme Court of India in its many judgments as the fundamental right, as implicit in Article 21 of the Indian Constitution, providing for Right to Life and Personal Liberty. The term pendency has been differently interpreted by Bench and Bar alike, and treating a case, the moment it is filed, as pending without providing for a sufficient window period has been criticised by some judicial luminaries. Though, there have been concerted efforts to reform the justice delivery system, a lot is still left to be done to curb mounting pendency of cases.

Key words: Ameliorate, Habeas Corpus, Incarceration, Languish, Pendency, Speedy Justice.

Introduction:

Article 3 of the celebrated Universal Declaration of Human Rights, 1948 lays down, "Everyone has the right to life, liberty and security of person" and in the similar vain according to the Article 21 of the Constitution of India "No person shall be deprived of his life or personal liberty except according to the procedure established by law."

Emphasizing the need for speedy justice, in Hussainara Khatoon & Ors v. Home Secretary, State of Bihar[1] Hon'ble Justice PN Bhagwati lamented. "It is a crying shame on the judicial system which permits incarceration of men and women for such long periods of time without trial. We are shouting from house tops about the protection and enforcement of human rights. We are talking passionately and eloquently about the maintenance and preservation of basic freedom. But, are we not denying human rights to these nameless persons who are languishing in jails for years for offences which perhaps they might ultimately be found not to have committed? Are we not withholding basic freedom from these neglected and helpless human beings who have been condemned to a life of imprisonment and degradation for years? Are expeditious trial and freedom from detention not part of human rights and basic freedom? Many of these unfortunate men and women must not even be remembering when they entered the jail and for what offence? They have over the years ceased to be human beings: they are mere ticket-numbers. It is high time that the public conscience is awakened and the Government as well as the judiciary begin to realise that in the dark cells of our prisons there are large number of men and women who are waiting patiently, impatiently perhaps, but in vain, for justice a commodity which is tragically beyond their reach and grasp. Law has become for them an instrument of injustice and they are helpless and despairing victims of the callousness of the legal and judicial system. The time has come when the legal and judicial system has to be revamped and restructured so that such injustices do not occur and disfigure the fair and otherwise luminous face of our nascent democracy."

Though, Supreme Court ruling on pendency of cases came in late seventies nothing on ground seems to be happening to be adequate to curb growing pendency of cases, and at present, the pendency of cases has assumed a serious proposition. Over 42 lakh cases are pending in 21 High Courts of India and 2.7 crore cases are pending in lower courts across the country, which is very shocking. The figures appear to be quite alarming and surprisingly are growing day by day. These figures have been revealed by the Supreme Court in the context of update on pending cases and vacancies in Indian courts. The report discloses pendency in cases up to December 31, 2010 for Supreme Court and up to September 30, 2010 for High Courts and Lower Courts. The report also provides statistics on vacancies up to February 1, 2011[2].

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[1] *AIR 1979 SC 1819*

[2] *The Supreme Court of India Report dated 01 June 2011*

Table 1: Total pending cases in Supreme Court and High Courts

Courts	Type	Pending Cases during the year	
		2009	2010
Supreme Court*	Admission	34,976	32,565
	Regular	20,815	21,997
	Total	55,791	54, 562
High Courts**		4,060,709	4,217,903
Lower Courts**		27,275,953	27,953,070
Total		31,392,453	32, 225,535

*Statistics as on December 31, 2010

** Statistics as on September 30, 2010

As it is evident from table 1, the pendency of cases both in High Courts and Lower Courts has gone up by 3.8% and 2.5% respectively, however, the silver lining is that the number of pending cases in the Supreme Court has declined by 2.2%.

It remains a matter of grave concern that speedy justice remains elusive in India even after more than six decades of becoming independent. It is not only numbers and statistics but behind every delayed litigation lies shattered hope and aspiration of an individual and his/ her dependents.

One among many reasons for the protracted trial is the chronic vacancies in various Courts, which needs to be filled urgently and the Government both at Centre and State level needs to take suitable steps in order to fill up these vacancies[1].

Table 2: Number of Vacancies in Courts

Court		2009	2010	2011
Supreme Court*	Sanctioned	31	31	31
	Vacancy	4	2	2
High Courts*	Sanctioned	895	895	895
	Vacancy	265	287	291
Lower Courts**	Sanctioned	16,880	17,151	
	Vacancy	2,785	3,170	

* Statistics as on February1, 2011

** Statistics as on September 30, 2010

The process of suggesting changes in the judicial administration was initiated by the fourteenth Law Commission. However, its report on Reform of Judicial Administration submitted on 26th September,1958 did not enter into a detailed examination of either of the procedural codes or of the law of evidence but confined itself to indicating a broad outline of the changes that would be necessary to make judicial administration speedy and less expensive.

In order to suggest ways to reform the Criminal Justice, the Government of India set up by its order dated 24 November 2000 the 'Committee on Reform of Criminal Justice System' under chairmanship of Justice V.S. Malimath.[2] The committee endeavored to suggest measures to simplify judicial procedures and practices, bringing about synergy among the judiciary, the prosecution and police, thereby making the system simpler, faster, and cheaper and people friendly and restoring the confidence of common man[3].

Raising the issue of inadequate number of Judges in various courts, Malimath Committee report[4] pointed out that "there is gross inadequacy of Judges to cope the enormous pendency and new inflow of cases. The existing Judges to population ratio in India is 10.5 per million populations as against 50 Judges per million populations in many parts of the world. Even though, the Supreme Court has given directions to all the States to increase the strength of Judges by five times in a phased manner within the next five years, the vacancies in the High Courts have remained unfilled for years. This must be remedied quickly. The Committee was deeply concerned about the deterioration in the quality of Judges appointed to the courts at all levels."

As it is evident, the inordinate delay in justice delivery system is the biggest bane of the judiciary requiring urgent attention and redressal. The right to speedy trial has not been provided for in Part III of the Indian Constitution. But Apex Judiciary has interpreted the right to speedy trial implicit in Article 21 which provides for the 'Right to Life and Personal Liberty'. The Supreme Court in landmark judgment has interpreted the right to speedy trial as fundamental right within the ambit of Article 21 of the Constitution of India. In Hussainara Khatoon v. State of Bihar[5] a petition for a writ of habeas corpus was filed by number of under-trials. The Apex Court held "right to a speedy trial" as the fundamental right implicit in the guarantee of life and personal liberty enshrined in Article 21 of the Constitution and observed that the speedy trial is the essence of criminal justice. In United States also,

1 *Supra*
2 *Dr. V.S. Malimath Committee on Reforms of the Criminal Justice, 2003*
3 *Supra, p. 6*
4 *Supra p. 265*
5 *AIR 1979 SC 1819*

speedy trial is one of the constitutionally guaranteed right under the sixth amendment. Justice P.N. Bhagawati (as he then was) held that although, unlike the American Constitution speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted in Maneka Gandhi case[1]. The procedure, which does not ensure a reasonable quick trial, can not be regarded as 'reasonable, fair and just'.

In a significant judgment in Abdul Rehman Antuley v. R.S. Nayak[2] the Supreme Court has laid down detailed guidelines for speedy trial of an accused in a criminal case but it declined to fix any time limit for trial of offences. The burden lies on the prosecution to justify and explain the delay. The Court held that the right to speedy trial flowing from Article 21 of Constitution is available to accused at all stages namely the stage of investigation, inquiry, trial, appeal, revision and retrial. The concerns underlying the right to speedy trial from the point of view of the accused are:

(a) The period of remand and pre-conviction detention should be as short as possible. In other words, the accused shall not be subjected to unnecessary or unduly long detention prior to his conviction;

(b) The worry, anxiety, expense and disturbance to his vocation and peace resulting from an unduly prolonged investigation, inquiry or trial shall be minimal; and

(c) Undue delay may result in impairment of the ability of the accused to defend himself whether on account of death, disappearance or non-availability of witness or otherwise.

The Apex Court further held that the accused couldn't be denied the right to speedy trial merely on the ground that he had failed to demand a speedy trial. As regards the time limit, the Court said that it has to be decided by balancing the attendant circumstances and relevant factors, including nature of offence, number of accused and witnesses, and the workload of the Court etc. No time limit can be fixed for speedy trial. If the Court comes to the conclusion that the right to speedy trial of an accused has been infringed the charges for the conviction shall be quashed. But, this is not the only course open. The nature of offence and other circumstances may also be such that quashing of proceedings may not be in the interest of justice. In such case it may make an order that trial may be concluded within a fixed time and where it is concluded reduce the sentence. In Sunil Batra v Delhi Administration[3] Supreme Court held that the practice of keeping under trials with convicts in jail offended the test of reasonableness in Article 19 and fairness in Article 21. The under trials are presumably innocent until convicted and if they are kept with criminals in jail it violates the test of fairness of Article 21. Justice Krishan Iyer delivering the majority judgment observed, "Integrity of physical person and his mental personality is an important right of a prisoner, and must be protected from all kinds of atrocities."

Conclusions

There is a wide spread concern that the Government, Bench and Bar need to work in unison to ameliorate the sufferings of the litigants who are waiting patiently and sometimes without patient, for that ever elusive justice and also to ensure that the litigant should ordinarily get justice in his life time in a reasonable time frame. For achieving the objective of timely delivery of justice, there is need to fill vacancies at various levels with quality Judges.

[1] *AIR 1978 SC 597*

[2] *AIR 1992 SC 1630*

[3] *AIR 1980 SC 1579*

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