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Research Papers

Pragyaan: Journal of Law

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From the Chief Editor

We have more tools for conducting legal research at our disposal now; the research task has become harder rather than easier. The accessibility of the law electronically has restructured the law itself and has introduced the need to develop new skill sets and to keep ourselves constantly updated. Increase in the volume of case laws and statutory materials and exponential growth of secondary sources add to the existing sources of research.

This edition of Pragyaan: Journal of Law combines two issues and presents five research articles covering diverse areas of law.

The first article, "Law and Logic" focuses on the debate surrounding logic and experience and concludes that they are allies rather than foes in the performance of judicial function. The second paper, "Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013: An Analysis" is a comprehensive analysis of this Act, encompassing its effects, benefits as well as criticism.

For the first time in the history of international criminal justice, the path of giving reparation to victims by the convicted person was paved by the Rome Statute of International Criminal Court (ICC), 1998. The third article "Reparation to Victims under International Criminal Court: The Way Forward" provides a good perspective and analysis of the statute, with case studies of Muammar Gaddafi and Thomas Labunga.

How corruption undermines the rule of law and legitimacy of state is discussed elaborately in the next paper, "Corruption: Its Impact Upon Rule of Law In India". The fifth paper in this issue, "Law and Philosophy of Taxation with Specific Reference to Scope of Goods and Service Tax in India", dissects the tax structure of India and supports the imposition of Goods & Services Tax which would benefit industry, trade, agriculture, exporters, small entrepreneurs and small traders and common consumers and pave the way for planning based taxation leading to overall economic growth.

Pragyaan: Journal of Law welcomes contributions from legal academicians, research scholars and students. It is a refereed bi-annual journal that aims to publish high quality research in law.

The Editorial Board welcomes submissions emphasizing both qualitative and quantitative research, and of contemporary relevance in the socio-legal system of India.

Dr. Vijayan Immanuel
Pro Vice Chancellor
IMS Unison University, Dehradun

From the Desk of Editor

Pragyaan: Journal of Law is not just a collection and publication of a few Articles and Research papers of chosen experts on the subject. It is a gateway to research and expression of critical views by experts on contemporary socio-economic and politico-legal issues which shape and guide the emergence of system of governance. It is also a window of expression. Pragyaan: Journal of Law is a valued publication of the School of Law, IMS Union University, Dehradun. I feel honoured to be associated with this prestigious Journal as Editor.

To begin with, we have included eminent legal scholars from various countries on our International Advisory Board. I must put on record my thanks and gratitude to Prof. Janine S. Hiller U.S.A., Prof. Yoshitoshi Tanaka, Japan, Prof. Yousuf Dadoo, South Africa and Arnaldo Sobrinho de Morais Neto, Brazil for accepting our invitation to become honourable members of the International Advisory Board.

In the series, I also wish to thank all members of the National Advisory Board for giving their consent to be on National Advisory Board. Their participation and indulgence will add value and enhance the utility of Pragyaan: Journal of Law. I must put on record my thanks to honourable Shri. Amit Agarwal, Chairman, Board of Governors, Dr. M. P. Jain, Chancellor, Dr. Dilip K. Bandyopadhyay, Vice-Chancellor and Dr. Vijayan Immanuel, Pro Vice Chancellor for guiding me in this endeavour.

I also thank Dr. Leena Pundir and Ms. Vaishnavi Ranjana, Sub Editors and my colleagues who have worked hand-in-hand for bringing out the combined issue of June & December, 2014 of Pragyaan: Journal of Law.

With Seasons Greetings

Mr. Rituraj Sinha
Head- School of Law
IMS Unison University, Dehradun

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CONTENTS

Research Papers / Articles

Research Papers

Law and Logic: A Controversial Revisit

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ABSTRACT

In the court of law, lawyers give logical arguments to defend their client. The judges, while deciding the cases, give a reasoned decision which is supported by logic. In fact there is a close relation between law and logic. This fact is apparent from the expressions we frequently hear after the trial of a case, where the legal hawk employed on both sides fight in order to win the case. Some exponents believe that there is no place of logic in law as they understand that the judges while deciding the cases follow the deductive method where there is no place for logic. The present paper seeks to show that there is a relationship between Logic and Law, the influence of the one upon the other, and that the aforementioned expressions are not groundless.

Introduction

Whether the community lives in rural simplicity or modern complexity, whether it pins its faith to case law or to the code, the judicial method plays an important role in the development of law.

There is a general agreement regarding law as a complete rationale system[1], similarly judicial process as essentially a deductive application. Until twentieth century law was treated as coherent and complete rationale system, it was thought to contain legal rules, principles, standards and maxims; by the application of which one could deductively arrive at the appropriate decision in any given case.

Therefore we can say that the role of judges is simply to apply the existing principle of law. The judge was considered a kind of geometrician who implied that judges' decisions were bound by rules and as logically necessary as mathematical proofs.[2]

We have often seen that judges in many cases reverse a previous interpretation but we cannot consider it change in law. If we see closely, it is simply to restore the "true" rule and remove its previous misinterpretation. This atmosphere in law remained unchallenged and notion exercised dominance over the practical life of law. That it is myth is now generally recognized.

Meaning of Logic

A very natural question now arises what is logic and what do we mean by logic? Too often discussion on this subject has centered on the rather barren controversy whether legal reasoning is deductive or inductive in form.

We take the help of Kant's words to know the meaning of logic. According to him, "It is a science which has for its object nothing but the exposition and proof of the formal law of the thought. Whether it be priori or empirical, what ever its origin or its object….."[3]. In contemporary text writer's words, logic is "the method and principles used in distinguishing correct from incorrect argument…… regardless of its subject matter".[4]

Logic in this sense is still basically traditional or classical or Aristotelian logic.[5] This traditional formal logic however continues to be the system more familiar to lawyers and more apt as means of communication with them.

The Relation of Logic to Law

The myth of logic which encircled the law now seems to have changed. Logic was severely attacked by the most distinguish American judge Oliver Wendell Holmes (1841-1935). Holmes belongs to American sociological Jurisprudence who denies that the law can be understood without regard for the realities of human social life.[6]

Holmes discounting the role of logical reasoning in adjudication says:

"*The life of the law has not been logic: it has been experience*. The felt necessities of the time, the prevalent moral and political theories, intuition of public opinion, avowed or unconscious, even the prejudices which judges

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1 Leonard G Boonin, "Concerning the Relation of Logic to Law" in Legal Research and Methodology, S.K .Varma and Afzal Wani (ed),ILI 41(2001)

2 Id. at p.42.

3 Legal System and Lawyers' Reasoning (ed. Universal Law Publication Co.Pvt.Ltd) Julius Stone.p.303

4 See I.M.Copi., Introduction to Logic, (6 imp.1958)4,6.

5 See,e.g. K.Engiseh,, Logische Studien zur Gesetzesanwendung(1942).and see supra (3) p.304

6 Edgar Bodenheimer,Jurisprudence-The Philosophy and Method of the Law,5th ed. Universal law publishing co.Pvt.Ltd,2006..p.g.120

share with that fellow men, had good deal more to do than syllogism in determining the rules by which man should be governed."[7]

From above extract, Holmes can be construed as making two points which are essentially sound and true.

1. The change in the development of the legal rule cannot be explained and made intelligible in terms of purely logical analysis of legal concept.
2. That such logical analysis is not a sufficient tool for rationally deciding legal controversies.[8]

Holmes remark has been repeated in many context that impart a sharp antithesis between "logic" and "experience". If it is postulated that all problems can be solved purely by logical deduction from the actual rule in force,[9] It will be depriving the law of all power to develop. Justice Cardozo, both in his writing and legal opinion, clearly exhibited the creative role of a judge can play in the interpretation and application of law.

Due to the limitation of logic as, being rigid and inflexible, the role of formal logic diminishes in solving the legal problem. It serves as a vehicle of deductive reasoning when the statutory or judge made rule which is plain in its meaning or has been clarified by a previous authoritative interpretation, is binding on the court deciding the case.

On the other hand, when the court has some measure of discretion in interpretation of the words of a statute, recognizing certain exceptions from its command, extending and restricting the scope of judge made rule, or abandoning such a rule, syllogistic logic is of small use in the disposition of such problems.

Then comes the judge experience, inherent instincts, traditional beliefs, acquired convictions, and the conception of social need to solve the above problem.[10]

Methods of logic: Deductive, Inductive and Analogy

This part deals with the understanding of Logical Methods in detail.

1. Deductive Method

This is the method of studying a phenomenon by taking some assumption and deducting conclusions from these assumptions. In this type of reasoning we go from general to particular or from universal to individual, from the given premises to necessary conclusions.

The most known example was given by Aristotle which is called as Aristotelian syllogism:

I. All men are mortal.

II. Socrates is a man.

III. Therefore Socrates is mortal.

Aristotle's simple syllogism can be understood as "discourse in which, certain being stated, some thing other than what is stated follows of necessity from there being so."[11]

Some points to observe:

a. There must be agreement about the first premises (I), where the argument begins.

b. Second premises (II) must be correct and clear with no disputes about is validity.

c. Conclusion (III premises) be derived properly from putting these two (I &II) together.

What is important to notice about deductive argument is that the truth of the conclusion is compelling. But we are free to reject the conclusion claiming that I am acting rationally unless I prove that that there is some thing wrong with premises I and II. Issues like morality, guilt, or innocence of an accused person cannot be solved by deductive method.

2. Analogy:

Deductive arguments often make use of an analogy, i.e. a comparison with some other similar case. For example:

General principle: The attempts to prohibit the manufacture and sale of alcohol in the U.S. during Prohibition were a massive failure.

Secondary application: The present attempt to deal with illegal narcotics is as the earlier situation with alcohol.

Conclusion: Therefore the present attempts to deal with illegal narcotics will be massive failure.

Notice very carefully this type of argument (which is common).To persuade the reader or listener of the conclusion, the arguer has introduced an analogy (or comparison) between attempts to eliminate alcohol and attempts to eliminate narcotics. The strength of the argument is going to depend on the extent to which the arguer can persuade the reader that analogy is good.

Now analogies are dangerous things, simply because no two situations are same, and one can always find some difference which works against the arguer's purpose in introducing it. So they need be used with extreme care and with full attention.

3. Inductive:

Inductive is the process of reasoning for particular cases to whole group of cases, from specific instances to general rule. It is also known as historical, empirical and posteriori method. It is called empirical because the formulation of the principle is made only after an extensive compilation of

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7 The Common Law (Boston, 1923), p.i.

8 See supra (1). p.g. 45

9 This doctrine is sometimes attacked as the "jurisprudence of conception" or " mechanical jurisprudence"

10 See Supra (6) p.g.121

11 Aristotle, "Analytical Priora," in The Basic Works of Aristotle,ed R.Mc Keon (New York,1941), p.66

the raw data of experience. The data may be historical or statistical.

Inductive or inductive reasoning involves, as has been remarked already, facts, observations, experimental data, perceptions, and so on, in other words, individual acts of self experience.

The basis of all induction is repeated observation, so that the facts about similar experiences accumulate to the point where one sees a repetitive pattern and can draw a conclusion about it. Having repeatedly observed in similar circumstances the same event or one very similar, a conclusion is drawn about the pattern that has been seen.

Notice the nature of the conclusion. We have not observed all crows in the world (that would be impossible). We have only seen a sample, but we feel confident that the conclusion is the good one. You would, of course, be forced to change it, should you ever perceive a purple, white, yellow or polka-dotted crow (in scientific terms, you would have falsified the hypothesis that all crows are black).

This final point introduces a vitally important point about induction: it is never finally certain. Since the process involves making a large generalization on the basis of the limited number of observations, the conclusion is only more or less probable, rather that iron clad. Inductive can, however, provide important and conclusive negative results; that is, a particular observation or set of experimental results can serve to prove a general claim wrong (e.g. seeing a yellow crow would prove the assertion "All crows are black" false).

Use of Deductive, Inductive and Analogy in Judicial Reasoning

In *The Problem of Jurisprudence*, Richard Posner's logic does have a place in legal reasoning, but that place of logic is only in a fairly circumscribed area of law.[12] For example:

I. It is illegal to drive over 65mph on a state highway.

II. X is caught driving 85 mph in the state highway.

III. Therefore, X has broken the law and must pay the penalty.

The kind of reasoning used by the courts in these cut and dry cases is what we call syllogistic[13] or deductive reasoning. The attempt to reduce law to a definite number of legal rules and to make the judicial task one of pure deduction alone has led to a reaction. The judge does not always find his general principle ready-made, frequently it may be necessary to discover it. Hence the worship of inductive has become popular.[14]

In *Rylands v. Fletcher*[15] for instance there was no rule in existence to the effect that if the person accumulates on his land anything likely to do harm if it escapes, then he is liable if it escapes and causes damage, and the court's problem in that case was to develop just such rules then only one could apply syllogism to came to the conclusion.

Since court cannot use deductive reasoning to solve the above case, what sort of reasoning do they use? The fact that the judge reasoning is not purely deductive may tempt us to imagine it to be inductive.

It is true that judicial reasoning may to some extent resemble induction. In *Rylands v Fletcher* for example we can see that the court starting from the fact that there were rules regarding the escape of cattle and various other things and ending by positing a rule for all things who escape are liable to cause damage. But this is hardly a true case of induction. So the conflict goes on whether legal reasoning is deductive or inductive in form.

Deductive arguments often make use of an analogy which may be characterized as reasoning from one particular to another.[16] Judges usually adhered to precedent while solving the question of law in two similar case using analogies. But Cardozo believed that adherence to precedent should be the rule and not the exception in the administration of justice. "But he was willing to relax the rule in situations where faithfulness of precedence would clearly be inconsistent with the sense of justice or the social welfare." [17]

Whether or not the analogous application of a rule is legitimate does not depend on the deductive logic, but on consideration of policy and justice.

Conclusion

The law can never succeed in completely logical system, nor can it ever be said that logic will help us to discover what propositions should be selected or what their true content should be.

When Holmes said that "the life of law has not been logic: it has been experience,"[18] he was addressing himself to the problem of "determining the rules by which men should be governed."[19]

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12 Richard Posner, The Problems of Jurisprudence, (Cambridge: Harvard University Press, 1990.)

13 .Id. at p.38-42.

14 G.W.Paton, A Text Book of Jurisprudence, 4th ed. Oxford University Press. Pg. 200

15 (1868) L.R. 3 H.L.330

16 Aristotle, supra no. (11) p.103; John Stuart Mill, A System of Logic, 8th ed.(London,1872), p.365

17 See supra no (6) at p.g.121.

18 O.W. Holmes,The Common Law, Boston,1923 and See supra no (6) at p.g.392

19 Ibid

He was not discussing the situation where the judge was obligated to decide a litigated case in accordance with rule of law clearly applicable to it.

In case of this nature, formal logic serves an important tool of an equal and impartial administration of justice. It enjoins the judge to carry out the legal mandate consistently and free from bias.

Although the most troublesome questions of the legal order cannot be solved by deductive logic, this does not mean that logic and experience stand to each other in relation of contrast or opposition. Logic and Experience are allies rather than foes in the performance of the judicial function. [20]

We can conclude by saying that:

"The life of the law is not logic, but experience as structured by logic." [21]

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[20] A.G. Guest, "Logic in the Law" in Oxford Essay in Jurisprudence, ed. A.G. Guest (Oxford,1961), p.g.177

[21] See Supra no (1) at p.g. 47

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013: An Analysis

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*Prof. Arshad Hussain***

ABSTRACT

There was a heightened public concern on land acquisition issues in India. Of particular concern was that despite many amendments brought India's Land Acquisition Act of 1894, there was an absence of a cohesive national law that addressed fair compensation when private land is acquired for public use, and fair rehabilitation of land owners and those directly affected from loss of livelihoods. A need for exhaustive law was felt for a long time. Forty-Fourth Amendment Act of 1978 omitted Art. 19(1) (f) of the constitution with the net result being the right not to be deprived of one's property save by authority of law. The amendment ensured that the Right to Property is no more a fundamental right but rather a constitutional/legal right/as a statutory right and in the event of breach, the remedy available to an aggrieved person is through the High Court under Article 226 of the Indian Constitution and not the Supreme Court under Article 32 of the Constitution. Moreover, no one can challenge the reasonableness of the restriction imposed by any law the legislature made to deprive the person of his property. State must pay compensation at the market value for such land, building or structure acquired, the same can be found in the earlier rulings when property right was a fundamental right which propounded that the word "Compensation" envisaged in Article 31(2) used to imply full compensation, which is the market value of the property at the time of the acquisition. The Legislature must "ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of". The fundamental right to property has been abolished because of its incompatibility with the goals of "justice" social, economic and political and "equality of status and of opportunity" and with the establishment of "a socialist democratic republic, as contemplated by the Constitution. There is no reason why a new concept of property should be introduced in the place of the old so as to bring in its wake the vestiges of the doctrine of Laissez Faire and create, in the name of efficiency, a new oligarchy. Efficiency has many facets and one is yet to discover an infallible test of efficiency to suit the widely differing needs of a developing society such as ours.

Introduction

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 provides for land acquisition as well as rehabilitation and resettlement. It replaces the Land Acquisition Act, 1894. The process for land acquisition involves a Social Impact Assessment survey, a preliminary notification stating the intent for acquisition, declaration of acquisition, and compensation to be given by a certain time. All acquisitions require rehabilitation and resettlement to be provided to the people affected by the acquisition. Compensation for the owners of the acquired land shall be four times the market value in case of rural areas and two times in case of urban areas. The market value is based on recent reported transactions. This value is doubled in rural areas to arrive at the compensation amount. This method may not lead to an accurate adjustment for the possible underreporting of prices in land transactions. In case of acquisition of land for use by private companies or public private partnerships, consent of 80 per cent of the displaced people will be required. However, no such consent is required in case of PSUs. Purchase of large pieces of land by private companies will require provision of rehabilitation and resettlement. The provisions of this Bill shall not apply to acquisitions under 16 existing legislations including the Special Economic Zones Act, 2005, the Atomic Energy Act, 1962, the Railways Act, 1989, etc. The government can temporarily acquire land for a maximum period of three years. There is no provision for rehabilitation and resettlement in such cases.

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013[1] is a legislation that was passed on 29 August 2013 in the Lok Sabha and on 4th September 2013 in Rajya Sabha and received President's assent on 27th Sep 2013 and converted into an Act. It is published in the Gazette of India, Extraordinary, Part-II, Section-1 as Act No. 30 of 2013.The Act has provisions to provide fair compensation to those whose land is taken away, brings transparency to the process of acquisition of land to set up factories or buildings, infrastructural projects and assures rehabilitation of those affected. This legislation has been eagerly sought by both industry and those whose livelihood is dependent on land. Out of the 235 members

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[1] http://www.thehindubusinessline.com/industry-and economy/article2432609.ece

who voted on the bill, 216 backed it while 19 voted against it. The Act will replace the Land Acquisition Act, 1894, a nearly 120-year-old law enacted during British rule.

The LARR Act establishes regulations for land acquisition as a part of India's massive industrialization drive by public-private partnership and has 115 clauses.

Purpose and scope

The Act aims to establish the law on land acquisition, as well as the rehabilitation and resettlement of those directly affected by the land acquisition in India. The scope of LARR 2013 includes all land acquisition whether it is done by the Central Government of India, or any State Government of India, except the state of Jammu & Kashmir.

The Act is applicable when

- Government acquires land for its own use, hold and control, including land for Public sector undertakings.
- Government acquires land with the ultimate purpose to transfer it for the use of private companies for stated public purpose. The purpose of LARR 2013 includes public-private-partnership projects, but excludes land acquired for state or national highway projects.
- Government acquires land for immediate and declared use by private companies for public purpose.

Background

The Government of India claims there is heightened public concern on land acquisition issues in India. Of particular concern is that despite many amendments, over the years, to India's Land Acquisition Act of 1894, there is an absence of a cohesive national law that addresses fair compensation when private land is acquired for public use, and fair rehabilitation of land owners and those directly affected from loss of livelihoods[2].

The Government of India believes that a combined law is necessary, one that legally requires rehabilitation and resettlement necessarily and simultaneously follow government acquisition of land for public purposes.

Forty-Fourth Amendment Act of 1978 omitted Art 19(1) (f) with the net result being:-

1. The right not to be deprived of one's property save by authority of law has since been no longer a fundamental right. Thus, if government issues a fiat to take away the property of a person, that person has no right to move the Supreme Court under Art 32.
2. Moreover, no one can challenge the reasonableness of the restriction imposed by any law the legislature made to deprive the person of his property.

Art 31(2) in the original Constitution embodied the principle that if the Government makes a compulsory acquisition or requisitioning of private property, then it must take following actions:-

a. Make a law,

b. Such law must be for public purpose, and

c. Compensation must be paid to the owner of the property.

First, the 25th Constitutional Amendment Act, 1971 replaced the requirement of 'compensation' by 'an amount', the adequacy of which cannot be challenged in any court. Then the real killer 44th Amendment Act, 1978 came and omitted the Art 31 along with Art 19(1) (f). Thus individual's right to compensation for loss of property was also lost.

In recent times, there have been multiple incidents where farmers were protesting against the Government as it took away the land from them without paying the adequate compensation and against the wishes of many farmers. The whole debate about Right to Property needs to be re-initiated under this background. The Right to Property, which was enshrined in the original Constitution of India, as Fundamental Right should be re-instated by voiding the changes made by 44th Amendment Act of 1978 in this respect.

Definition of Public Purpose

Clauses 2 and 3 of LARR Act 2013 define the following as public purpose for land acquisition within India:[3]

a. Acquisition of land for purposes relating to the armed forces of India, national security or defence, police, safety of the people;

b. Acquisition of land for railways, highways, ports, power and irrigation purposes for use by government or by government controlled corporations (also known as public sector companies);

c. Acquisition of land for planned development or improvement of village or urban sites or for residential purpose for weaker sections of society in rural or urban areas;

d. Acquisition of land for government administered educational, agricultural, health and research schemes or institutions;

e. Acquisition of land for persons residing in areas affected by natural calamities;

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2 "The Draft Land Acquisition and Rehabilitation And Resettlement Bill (LARR), 2013 - An Overview", Ministry of Rural Development, Government of India.

3 "The Land Acquisition, Rehabilitation And Resettlement Bill, 2013 - Full Text Of Bill", Ministry of Rural Development, Government of India.

f. Acquisition of land for resettlement of affected people for any of the above government projects;

g. Acquisition of land by the government for public-private-partnership projects for the production of public goods or the provision of public services;

h. Acquisition of land for private companies for the production of public goods or provision of public services.

When government declares public purpose and shall control the land directly, consent of the land owner shall not be required. However, when the government acquires the land for private companies, the consent of at least 80% of the project affected families shall be obtained through a prior informed process before government uses its power under the Act to acquire the remaining land for public good, and in case of a public-private project atleast 75% of the affected families should consent to the acquisition process[4].

The Act includes an urgency clause for expedited land acquisition. The urgency clause may only be invoked for national defense, security and in the event of rehabilitation of affected people from natural disasters or emergencies.

Definition of 'Land Owner'

The Act defines the following as land owner:

a. Person whose name is recorded in the register of the concerned authority,

b. Person who was assigned land by the government under any of its social development initiatives,

c. Person who hold rights under India's The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, and

d. Person who has been granted such right by an order of the Court.

Limits on Acquisition

LARR Act 2013 forbids land acquisition when such acquisition would:

a. cumulatively exceed 5% of multi-crop irrigated area in any district in any state of India, or

b. cumulatively exceed 10% of single-crop net sown area in any district in any state of India, if the net sown area in that district was less than 50% of the total area of the district

Even below these thresholds, LARR 2011 requires that wherever multi-crop irrigated land is acquired an equivalent area of culturable wasteland shall be developed by the state for agricultural purposes.

These limits shall not apply to linear projects. LARR 2011 illustrates linear projects with examples such as railways, highways, major district roads, power lines, and irrigation canals.

Compensation

Clause 26 of LARR 2013 defines the method by which market value of the land shall be computed under the proposed law. Schedule I outlines the proposed minimum compensation based on a multiple of market value. Schedule II through VI outline the resettlement and rehabilitation entitlements to land owners and livelihood losers, which shall be in addition to the minimum compensation per Schedule I.

The market value of the proposed land to be acquired, shall be set as the higher of:

a. the minimum land value, if any, specified in the Indian Stamp Act, 1899[5] for the registration of sale deeds in the area, where the land is situated; or

b. the average of the sale price for similar type of land being acquired, ascertained from the highest fifty per cent of the sale deeds registered during the preceding three years in the nearest village or nearest vicinity of the land being acquired

LARR 2013 Act proposes that the minimum compensation be a multiple of the total of above ascertained market value plus a solatium. Specifically, the current version of the Act proposes the total minimum compensation be:

a. At least four times the market value for land acquired in rural areas;

b. At least two times the market value for land acquired in urban areas

In addition to above compensation, the draft LARR 2011 Act proposes a wide range of rehabilitation and resettlement entitlements to land owners and livelihood losers from the land acquirer.

For land owners, the Act proposes:

a. an additional subsistence allowance of Rs.36,000 (US$ 800) for the first year,

b. an additional entitlement of a job to the family member, or a payment of Rs.5,00,000 (US$ 11,000) up front, or a monthly annuity totaling Rs.24,000 (US$ 550) per year for 20 years with adjustment for inflation – the option from these three choices shall be

[4] Section 2(2) of the Act
[5] Indian Stamp Act, 1899

the legal right of the affected land owner family, not the land acquirer,

c. an additional upfront compensation of Rs.50,000 (US$ 1,100) for transportation,

d. an additional upfront resettlement allowance of Rs.50,000 (US$ 1,100),

e. if the land owner loses a home in a rural area, then an additional entitlement of a house with no less than 50 square meters in plinth area,

f. if the land is acquired for urbanization, 20% of the developed land will be reserved and offered to land owning families, in proportion to their land acquired and at a price equal to cost of acquisition plus cost of subsequent development,

g. if acquired land is resold without development, 20% of the appreciated land value shall be mandatorily shared with the original owner whose land was acquired.

In addition to minimum compensation explained above, and additional entitlements for the affected land owners, LARR 2013 Act proposes the following additional entitlements to each livelihood loser.

a. an additional subsistence allowance of Rs.36,000 (US$ 800) for the first year,

b. an additional entitlement of a job to the family member, or a payment of Rs.5,00,000 (US$ 11,000) up front, or a monthly annuity totaling Rs.24,000 (US$ 550) per year for 20 years with adjustment for inflation – the option from these three choices shall be the legal right of the affected livelihood-losing family, not the land acquirer,

c. an additional upfront compensation of Rs.50,000 (US$ 1,100) for transportation,

d. an additional upfront resettlement allowance of Rs.50,000 (US$ 1,100),

e. whether the livelihood loser is homeless or has a home on the proposed land to be acquired, he or she shall have a right to a house with no less than 50 square meters in plinth area.

In addition to the above compensation and entitlements under the proposed LARR 2011, Scheduled Caste and Schedule Tribe (SC/ST) families will be entitled to several other additional benefits per Schedule II of the proposed Act. India has over 250 million people protected and classified as SC/ST, about 22% of its total population. The proposed additional benefits to these families include:

a. an additional land grant of 2.5 acres per affected family,

b. an additional assistance of Rs.50,000 (US$ 1,100),

c. free land for community and social gatherings, and special Schedule V and VI benefits.

Schedule III of LARR 2013 proposes additional amenities over and beyond those outlined above. Schedule III proposes that the land acquirer shall provide 25 additional services to families affected by the land acquisition. Some examples of the 25 additional services include schools, health centres, roads, safe drinking water, and child support services, places of worship, burial and cremation grounds, post offices, fair price shops, and storage facilities.

LARR Act 2013 proposes that Schedule II through VI shall apply even when private companies willingly buy land from willing sellers, without any involvement of the government.

The Act as drafted mandates compensation and entitlements without limit to number of claimants. Thus, for clarity and as an example, if 1000 acres of rural land is to be acquired for a project, with market price of Rs.2,25,000 per acre (US$ 5000 per acre), 100 families claim to be land owners, and 5 families per acre claim their rights as livelihood losers under the proposed LARR 2013 Act, the total cost to acquire the 1000 acre would be:

a. Land compensation = Rs.90,00,00,000 (US$ 20,000,000),

b. Land owner entitlements = Rs.6,30,00,000 (US$ 1,400,000) + 100 replacement homes,

c. Livelihood loser entitlements = Rs.365,00,00,000 (US$ 70,000,000) + 5000 replacement homes.

The average effective cost of land, in the above example will be at least Rs.41,00,000 (US$ 91,400) per acre plus replacement homes and additional services per Schedule III to VI of the Act. Even if the pre-acquisition average market price for land were just Rs.22,500 per acre (US$ 500 per acre) in the above example, the proposed R&R, other entitlements and Schedule III to VI would raise the effective cost of land to at least Rs.33,03,000 (US$ 73,400) per acre.

The LARR Act of 2013 proposes the above benchmarks as minimum. The state governments of India, or private companies, may choose to set and implement a policy that pays more than the minimum proposed by LARR 2013.

For context purposes, the proposed land prices because of compensation and Resettlement &Rehabilitation LARR 2013 may be compared with land prices elsewhere in the world:

a. According to The Financial Times, in 2008, the farmland prices in France were Euro 6,000 per hectare ($2,430 per acre; Rs.1,09,350 per acre).[6]

b. According to the United States Department of Agriculture, as of January 2010, the average farmland value in the United States was $2,140 per acre (Rs.96,300 per acre). The farmland prices in the United States varied between different parts of the country, ranging between $480 per acre to $4,690 per acre.[7]

A 2010 report by the Government of India, on labour whose livelihood depends on agricultural land, claims[8] that as per 2009 data collected across all states in India, the all-India annual average daily wage rates in agricultural occupations ranged between Rs.53 to 117 per day for men working in farms (US$ 354 to 780 per year), and between Rs.41 to 72 per day for women working in farms (US$ 274 to 480 per year). This wage rate in rural India study included the following agricultural operations common in India: ploughing, sowing, weeding, transplanting, harvesting, winnowing, threshing, picking, herdsmen, tractor driver, unskilled help, mason, etc.

Benefits and Effects

The 2013 LARR Act is expected to affect rural families in India whose primary livelihood is derived from farms. The Act will also affect urban households in India whose land or property is acquired.

As per an April 2010 report,[9] over 50% of Indian population (about 60 crore people) derived its livelihood from farm lands. With an average rural household size of 5.5,[10] LARR Act 2011 R&R entitlement benefits may apply to about 10.9 crore rural households in India.

According to Government of India, the contribution of agriculture to Indian economy's gross domestic product has been steadily dropping with every decade since its independence. As of 2009, about 15.7% of India's GDP is derived from agriculture. LARR Act 2011 will mandate higher payments for land as well as guaranteed entitlements from India's non-agriculture-derived GDP to the people supported by agriculture-derived GDP. It is expected that the Act will directly affect 13.2 crore hectares (32.6 crore acres) of rural land in India, over 10 crore land owners, with an average land holding of about 3 acres per land owner. Families whose livelihood depends on farming land, the number of livelihood-dependent families per acre varies widely from season to season, demands of the land, and the nature of crop.

LARR Act 2013 proposes to compensate rural households – both land owners and livelihood losers. The Act goes beyond compensation; it mandates guaranteed series of entitlements to rural households affected. According to a July 2011 report from the Government of India, the average rural household per capita expenditure/income in 2010, was Rs.928 per month (US$ 252 per year).[11]

For a typical rural household that owns the average of 3 acres of land, the LARR 2013 Act will replace the loss of annual average per capita income of Rs.11,136 for the rural household, with

a. four times the market value of the land, and

b. an upfront payment of Rs.1,36,000 (US$ 3,000) for subsistence, transportation and resettlement allowances, and

c. an additional entitlement of a job to the family member, or a payment of Rs.5,00,000 (US$ 11,000) up front, or a monthly annuity totaling Rs.24,000 (US$ 550) per year for 20 years with adjustment for inflation – the option from these three choices shall be the legal right of the affected land owner family, not the land acquirer, and

d. a house with no less than 50 square meters in plinth area, and

e. additional benefits may apply if the land is resold without development, used for urbanization, or if the land owner belongs to SC/ST or other protected groups per rules of the Government of India.

If the affected families on the above rural land demand 100% upfront compensation from the land acquirer, and the market value of land is Rs.1,00,000 per acre, the 2013 LARR Act will mandate the land acquirer to offset the loss of an average per capita 2010 income of Rs.11,136 per year created by this 3 acre of rural land, with the following:

a. Rs.18,36,000 (US$ 41,727) to the rural land owner; which is the total of R&R allowances of Rs.6,36,000 plus Rs.12,00,000 – which is four times the market value of the land, plus

b. a house with no less than 50 square metres in plinth area and benefits from Schedule III-VI as applicable to the rural land owner, plus

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6 "European farmland hits record prices". The Financial Times.

7 "Land use, value and management: Agricultural Land Values". USDA Economic Research Service.

8 "Wage Rates In Rural India". Ministry of Labour and Employment, Government of India. 30 March 2010.

9 "Agriculture Census - All Social Groups, 2005-2006, India". Ministry of Agriculture and Cooperation, Government of India. April 2010.

10 "Consumption Expenditure of Farmer Households, India". Ministry of Statistics and Programme Implementation.

11 "Key Indicators Of Household Consumer Expenditure In India, 2009-10". Government Of India, Ministry Of Statistics And Programme I mplementation, National Sample Survey Office. 8 July 2011

c. additional payments of Rs.6,36,000 each to any additional families claiming to have lost its livelihood because of the acquisition, even if they do not own the land.

d. The effects of LARR Act 2013, in certain cases, will apply retroactively to pending and incomplete projects. The Act exempts land acquisition for all linear projects such as highways, irrigation canals, railways, ports and others.

Criticisms

The proposed Act, LARR 2013, is being criticized on a number of fronts:

a. It is heavily loaded in favour of land owners and ignores the needs of poor Indians who need affordable housing, impoverished families who need affordable hospitals, schools, employment opportunities and infrastructure. For example, ASSOCHAM, the Indian organization that represents the interests of trade and commerce in India, with over 2,00,000 small business and large corporate members, claims that LARR 2013 in its current version, prevents a conducive environment for economic growth.[12]

b. Economists who have studied LARR 2013 as tabled in India's parliament suggest it as well intentioned but seriously flawed. Its principal defect is that it attaches an arbitrary mark-up to the historical market price to determine compensation amounts, along with its numerous entitlements to potentially unlimited number of claimants. Such an Act, some claim, will guarantee neither social justice nor the efficient use of resources. For example, Ghatak of London School of Economics[13] and Ghosh of Delhi School of Economics claim that the Act places unnecessary and severe conditions on land acquisition which will stifle the pace of India's development without promoting the interests of farmers. They suggest that the Act should be amended to allow free market dynamism, such as competitive land auction. These economists claim that India's greatest challenge in enacting laws and opening up to international markets is to balance the needs of economic growth, equitable distribution and human rights, while rescuing complex and sometimes conflicting objectives from the demagoguery of single issue advocates and political opportunists. The current Act, they claim, fails to do so.

c. LARR 2013 as proposed mandates that compensation and rehabilitation payments to land owners and livelihood losers be upfront. This misaligns the interests of land acquirer and those affected. Once the payment is made, one or more of the affected families may seek to delay the progress of the project to extract additional compensation, thereby adversely affecting those who choose long term employment in the affected families. The Act, these economists suggest, should link compensation and entitlements to the progress and success of the project, such as through partial compensation in form of land bonds. These success-linked infrastructure bonds may also help poor states reduce the upfront cost of land acquisition for essential public projects such as hospitals, schools, universities, affordable housing, clean drinking water treatment plants, electricity power generation plants, sewage treatment plants, flood control reservoirs, and highways necessary to bring relief to affected public during fires, epidemics, earthquakes, floods and other natural disasters. The state of Kerala has decided to pursue the use of infrastructure bonds as a form of payment to land owners.[14]

d. LARR 2013 places no limit on total compensation or number of claimants; nor does it place any statute of limitations on claims or claimants.[15] The beneficiaries of the Act, with guaranteed jobs for 26 years, will have no incentive to be productive. The Act should place a limit on total value of entitlement benefits that can be annually claimed per acre, this entitlement pool should then be divided between the affected families, and the government should run this program if it is considered to be fair.

e. LARR 2013 as proposed severely curtails free market transactions between willing sellers and willing buyers. For example, DLF Limited – India's largest real estate developer – claims that the current Act may limit private companies such as DLF from developing affordable housing for millions of Indians. DLF suggests that direct land transactions with owners on a willing voluntary basis, at market-determined rate, should be kept out of the purview of the Act.[16] There should be no conditions imposed on free market transactions between willing sellers and willing buyers.

f. Amartya Sen, the India-born Nobel Laureate in economics, claims prohibiting the use of fertile agricultural land for industries is ultimately self-defeating.[17] Sen claims industry is based near cities, rivers, coast lines, expressways and other places for logistical necessities, quality of life for workers, cost of operations, and various reasons. Sen, further suggests that even though the land may be very fertile, industrial production generates many times more than the value of the product produced by agriculture. History of industrialisation and global distribution of industry

[12] "Assocham seeks review of Land Acquisition Bill". The Times of India. 6 September 2011
[13] Ghatak & Ghosh (September 2011). "The Land Acquisition Bill: A Critique and a Proposal".
[14] "Kerala: Govt nod for land acquisition rehabilitation policy". The Times of India, 23 November 2011.
[15] "Industry against proposed law on land acquisition", Chennai, India: The Hindu. 14 November 2011.
[16] "DLF calls for some changes in the new Land Acquisition Bill". CNBC, India.
[17] "Farmland acquisition for industry - Interview with Amartya Sen", Calcutta, India: The Telegraph. 23 July 2007

hubs, Sen claims, show that the locations of great industry, be it Manchester, London, Munich, Paris, Pittsburgh, Shanghai or Lancashire, these were all on heavily fertile land. Industry always competes with agriculture, Sen claims, because the shared land was convenient for industry for trade and transportation. Amartya Sen further argues that in countries like Australia, the US or Canada, where agriculture has prospered, only a very tiny population is involved in agriculture. Agriculture prospers by increasing productivity and efficiency. Most people move out to industry. Industry has to be convenient, has to be absorbing. When people move out of agriculture, total production does not go down; rather, per capita income increases. For the prosperity of industry, agriculture and the economy, India needs industrialisation. Those in India, who in effect prevent industrialisation, either by politically making it impossible for entrepreneurs to feel comfortable in starting a business, or by making it difficult to buy land for industry, do not serve the interest of the poor well, claims Sen. The proposed LARR 2013 Act prohibits the acquisition of fertile agriculture land beyond 5% per district.

g. An article in The Wall Street Journal claims that the proposed LARR 2013 rules will apply even when any private company acquires 100 acres of land or more.[18] For context, POSCO India seeks about 4000 acres for its US$12 billion proposed steel manufacturing plant in the Indian state of Orissa. In most cases, even small companies planning US$10-US$300 million investment, seeking 100 or more acres will be affected by the compensation plus rehabilitation effort and expenses of LARR 2013. The WSJ article further claims that the proposed LARR 2013 Act doesn't actually define the word “acquisition,” and leaves open a loophole that could allow government agencies to continue banking land indefinitely.

h. The Observer Research Foundation's Sahoo argues that the Act fails to adequately define "public purpose".[19] The current definition, he claims, can be interpreted vaguely. In leaving public purpose too vague and porous, it would ensure that land acquisition will remain hostage to politics and all kinds of disputes. More clarity is needed, perhaps with the option that each state have the right to hold a referendum, whereby the voters in the state can vote to approve or disapprove proposed public purpose land acquisitions through the referendum, as is done through local elections in the United States for certain public acquisition of private or agricultural land.

i. The Confederation of Real Estate Developers' Association of India claims that the proposed LARR 2013 Act is kind of one-sided, its ill-thought-out entitlements may sound very altruistic and pro-poor, but these are unsustainable and will kill the goose that lays the golden egg.[20] This group further claims that the Act will increase the cost of acquisition of land to unrealistic level. It will be almost impossible to acquire 50-acre or 100-acre land at one place for planned development. They suggest that if India does not facilitate urbanization in an organized manner, all the incremental population will be housed in disorganized housing developments such as slums with dire consequences for Indian economy. In the long run, even farmers will suffer as fringe development of urban centre will largely be in the form of unauthorized developments and they will not realize the true economic potential of their lands.

j. The Act inflates the cost of land to help a small minority of Indians at the cost of the vast majority of Indian citizens, as less than 10% of Indian population owns rural or urban land.[21] The LARR Act 2013 favors a privileged minority of land owners as the Act mandates above market prices for their land plus an expensive rehabilitation package. The Act does not consider the effect of excessive costs upfront, and expensive rehabilitation mandate over time, on the financial feasibility of large-scale, socially necessary infrastructure projects needed by more than 90% of Indians who are not landowners. In an editorial, Vidya Bala writes that the most important weakness in the Act is bringing non-government transactions too under its purview. Private players buying more than 50 acres of urban land tracts or more than 100 acres of rural areas would be required to comply with the R&R package stated in the Act.[22]

k. LARR 2013 Act's sections 97, 98 and 99 are incongruous with other laws of India in details and intent. Section 98, for example, says that the provisions of the Act shall not apply to the enactments relating to land acquisition specified in the Fourth Schedule of the Act. According to Indian Legal Code, the Fourth Schedule referred to by LARR 2013 Act, consists of 16 bills, including the ancient monuments and archaeological sites and Remains Act, 1958, the Atomic Energy Act, 1962, The Special Economic Zones Act, 2005, The Cantonments Act, 2006, The Railways Act, 1989 amongst others. Laws can not be in conflict with each other. The LARR Act carved out through Sections 97, 98 and 99 adds confusion, offering a means for numerous citizen petitions, law suits and judicial activism. The LARR 2013 Act thus fails to deliver on the goals motivating it.[23]

[18] Lahiri, Tripti (4 August 2011). "Jairam Ramesh Speaks on Land Acquisition". The Wall Street Journal, India Real Time.
[19] Sahoo (Sept 2011). "The New Land Acquisition Bill: A Critique".
[20] "Builders call land acquisition bill anti-development", The Times of India, 7 September 2011.
[21] "Proposed land acquisition Bill seen as a retrograde step", the Hindu Business Line, 15 November 2011.
[22] "Land Acquisition Bill - Short of expectations", The Hindu, October 2011
[23] "Jairam Ramesh controversial land bill draws flak", India Today, 20 November 2011.

Reparation to Victims Under International Criminal Court: The Way Forward

Dr. Rashmi Salpekar[*]

ABSTRACT

The Rome Statute of International Criminal Court (ICC), 1998 paved way for giving reparation to victim/s by the convicted person for the first time in the history of international criminal justice. Article 68, 75, and 79 are the most relevant provisions of Rome Statute and Rule 85 and Sub-section 4 of the Rules of Procedure and Evidence of ICC. Thus, it expanded the responsibility of an individual from punitive to making reparation and established the legal relationship between individual to individual under international law. Success of reparation is linked with the success of ICC by the ICC chamber in Thomas Lubanga's case. In this background, it is required to analyse the challenges to move forward.

Introduction

Victims of abuse of power are one of the most vulnerable categories of victims. They are exploited and destroyed by those who are required to protect them. It can be done by internal forces as well as external forces. The plight of victims of internal armed conflict and international armed conflict is similar. The crimes of international nature mainly crimes of genocide, crimes against humanity, war crimes and the crimes of aggression are the types of crimes where one common element can be observed i.e. 'abuse of power'.

History is evident that victims of abuse of power could be victimisers in future. The Nazis in Germany who were the victims of First World War were one of the main causes of Second World War. If one looks into the sanctions imposed against Germany, one can imagine how arbitrary those sanctions were. Thus, to restore peace after any type of conflict, the perpetrators of crimes should get punishment; in addition, justice to victims is also one of the key factors.

Considering the importance of restorative justice to the victims, reparation[1] to victims is incorporated in many domestic laws either through a separate Act or as a result of judicial activism. For example, Indian judiciary has awarded the compensation by interpreting "Right to life and personal liberty' stipulated in Article 21 of the Indian Constitution actively in various cases where the states have abused their powers against individuals. Moreover, the Indian judiciary has not only awarded compensation to its citizens for the violation of fundamental rights but also to foreigners whose fundamental rights guaranteed by the Indian constitution have been violated[2]. It may be noted that India has ratified International Covenant on Civil and Political Rights, 1966 but adopted reservation for the provision relating to right to compensation.

Thus, one may infer that state practices support the principle of reparation to victims. However, in international scenario, it is the ICC who made reparation to victims as an integral part of its statute and thus, international criminal justice system.

Though, domestically this principle is well-supported and well-tested, but it is required to assess the response towards reparation to victims in international scenario. In the present paper, the reparation system of ICC is analysed as lot many expectations are associated with this as this is the only reparation system available in international criminal justice.

Reparation as a State Responsibility

State is the primary subject under Public International Law, and thus has rights under international law mainly pertaining to right to sovereignty and equality. From this, inherent fundamental principle, one more fundamental principle that emerged, and was accepted strongly, is state responsibility. International law imposes responsibility on state to give reparation in case of breach of obligation.

The states have a civil responsibility under international

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[1] For the purpose of this paper reparation will include restitution, compensation and rehabilitation. Art 75 (2) of Rome Statute of ICC

[2] Nilabati Behra v State of Orissa,1993 (2) SCC,746; The Chairman, Railway Board and others v Mrs Chandrima das, AIR 2002 SC 2000

law and civil responsibility includes the reparation. In Spanish Zone of Morocco Claims case[3] it was stated by Justice Huber: "Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.[4]"

The basic principle with regard to reparation or the remedy of a breach of an international obligation, for which the state concerned is responsible, was laid down in the Chorzow Factory case[5]. It was stated that: " It is a principle of international law, even a greater conception of law, that any breach of an engagement involves an obligation to make reparation."[6] Similarly, it is also stated that:"Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish situation which would, in all probability, have existed if that act had not been committed."[7] Thus, it can be stated that state responsibility was limited to the obligation to compensate to the states, thus it was limited to civil responsibility.

Responsibility of Individual in International Law

The rights of individual have been recognised in various international conventions mainly after the Second World War. In fact, at present, right to reparation to victims is one of the recognized human rights. The provisions providing a right to a remedy for victims of violations of international human rights law exist in numerous international human rights and humanitarian law instruments[8]. The provisions providing a right to a remedy for victims of violations of international human rights found in the human rights instruments, which are enforceable at regional level[9]. However, these international instruments impose responsibility on states to pay reparation to victims and not individuals.

As far as obligations are concerned, international law has imposed direct responsibility upon individuals in certain specified matters. Further, Nuremberg Tribunal recognised and imposed criminal responsibility on individuals by stating that international law imposes duties and liabilities upon individuals as well as upon states. This was because "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[10]

Thus, until recently, or more specifically, before adoption of the Rome Statute of ICC, in Public International Law, a sharp distinction was made between the responsibility of states and the responsibility of individual.[11] While the principle of individual criminal responsibility for committing international crimes has been accepted since World War II, obligation to make reparation rested solely with the states.

Reparation as an Individual Responsibility

Historically speaking, neither victims nor reparations were mentioned in the Nuremberg and Tokyo Charters explicitly. However, there was scope to order of reparation by referring mainly Article 27 and Article 28 of the Nuremberg Charter.[12] The Statute of the Ad-hoc International Criminal Tribunal of Yugoslavia (ICTY) 1991 and International Criminal Tribunal for Rwanda (ICTR) 1993 provide that, in addition to imprisonment, a Trial Chamber may order the return of any property and proceeds acquired by criminal conduct to their rightful owners.[13] Thus, restitution was the only form of reparation that could be ordered. The Rules of the ICTY and ICTR set

[3] 2 RIAA, 1923, p 615

[4] Ibid, p 615

[5] 9PCIJ, Series A, no. 17, 1928

[6] Ibid, p 29

[7] Ibid, pp 47-8

[8] Mainly, article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977

[9] Mainly article 7 of the African Charter on Human and Peoples' Rights, article 25 of the American Convention on Human Rights, and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms

[10] Landmark judgement given by Nuremberg Tribunal, 1945

[11] see e.g., Art 58 ILC Draft Articles

[12] Article 27 of Nuremberg Charter: "the Tribunal shall have the right to impose upon the a defendant on conviction, death or such other punishment as shall be determined by it to be just". Article 28 states: "In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany". Similar provisions were contained in the Tokyo Charter.

[13] See Article 23 (3) ICTR and Article 24 (3) ICTY

forth that the Trial Chamber can determine the matter of restitution of property only after a judgement of conviction of the accused and here the judgement contains a specific finding that the unlawful taking of property by the accused was associated with the crime[14]. However, there is no case in the jurisprudence of either Tribunal where a Chamber has ordered an individual that it convicted to return stolen property or criminal proceeds. Moreover, the scope of reparation was found to be narrow, for example, ICTR provides restitution for gender based crimes only.

Thus, it can be inferred that the international law has developed a legal relationship between state to state, state to individual, but not individual to individual, mainly in giving reparation.

Significance of Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 (1985 Declaration)

This is a first international document meant explicitly and exclusively for victims adopted by General Assembly in 1985. In this Declaration, victim of crimes and victims of abuse of power both have been defined as follows:

Victim: Any person who has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member states, including those laws proscribing criminal abuse of power.

Victim of abuse of power: Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

It is stated that victims should be treated with compassion and respect. They should get justice and fair treatment. Restitution, compensation and assistance, mainly these three types have been incorporated in the Declaration.

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005 (2005 Basic Principles)

This document of Basic Principles 2005 was adopted by the General Assembly in 2005. In this, reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Victims should be provided with full and effective reparation, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition in accordance with domestic law and international law, and taking account of individual circumstances as appropriate and proportional to the gravity of the violation and the circumstances of each case. Its Principle 15 expressly incorporates the possibility that reparations may not only be made by states but also by "a person, a legal person, or other entity found liable for reparation to a victim". Further, Principle 17 provides that "States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations".

Analysis

1985 Declaration and 2005 Basic Principles talk about justice to victims including reparation. However, both of the above are not binding in nature as they are the resolutions adopted by General Assembly. In addition, whether both 1985 and 2005 documents reflect existing international law is disputed.

This missing link has been established by Rome Statute of ICC with its provisions regarding reparation to the victims by the convicted individual.

Rome Statute of International Criminal Court 1998

In July 1998, the Rome Statute of International Criminal Court was adopted which came into enforcement in 2002. In its Preamble, it is stated that "mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity"[15] and thus, "determined to put an end to impunity for the perpetrators of these crimes and thus, to contribute to the prevention of such crimes"[16]. It may be noted that this statement mentioned in the Preamble reflect the growing emphasis on the importance of justice to victims in international human rights law,

[14] See Rule 105 ICTY, ICTR, Rule 98 ICTY and Rule 88 of ICTR

[15] See second paragraph of Preamble, ICC Statute, 1998

[16] See fifth paragraph of Preamble, ICC Statute, 1998

international humanitarian law and an important trend in criminal justice towards restorative justice, and an assertive approach that is victim – oriented.

The Rome Statute 1998 of ICC paved way for giving reparation to individuals[17]. A unique feature adopted by Rome Statute is that an individual, who is found guilty for committing international crime[18], is liable to pay reparation to victim(s) of that crime. Article 68 and Article 75 of ICC statute for the first time enable ICC to actually order the individual perpetrator to make direct reparations to the victims of crimes, an order that is based on international law.[19] Report of the Court on the strategy in relation to victims, 2009 adopted by the Assembly of member states stated that key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but also a restorative function. It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims. Rome statute is the first to recognise right to reparation of victims explicitly. It has expanded the responsibility of an individual; responsibility of an individual is now not limited up to criminal but also includes responsibility to make reparation.

Definition of Victim under ICC

Victims have not been defined in the Statute but only in the Rules of Procedure and Evidence of the ICC. Rule 85 (a), ICC Rules of Procedure and Evidence defined victims as-

"Natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court."

Rule 85 (b), ICC Rules of Procedure and Evidence stated that victims may include organisations or institutions -that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Analysis

The definition of victim is inclusive and much wider. It is not limited only to victims of sexual exploitation and children; as in ICTR statute only victims of sexual exploitation have been identified. It has provided the protection to all victims of international crimes irrespective of their age and gender.

Reparation to Victims

Rome Statute of ICC: Article 75

This provision is devoted to the reparation to victims. It states that the Court will establish principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation.[20] Court will give directions to the convicted person to give reparation to the victims based on their requests or without request from the victims explicitly.[21] The ICC statute states the nature of reparation. It provides, "to make reparations to, or in respect of victims including restitution, compensation and rehabilitation".[22] It also states that the reparation to victims can be done through Trust Fund[23] as well. The Court may invite victims with representations.[24] The ICC statute states the pre-conditions while making reparation.[25] It states that the perpetrator should be convicted for the offence recognized by ICC statute by the Court, then only reparation can be given to the victims.[26]

Analysis

Article 75 of ICC statute provides reparation to victims explicitly, which is binding on member states. It is stronger than 1985 Declaration and 2005 Principles regarding victims. Definition and scope of reparation is wide but it is curtailed by its pre-conditions. Only individual perpetrator convicted by ICC for the crimes mentioned in Art 5,6,7,8[27] and within the jurisdiction has responsibility to pay reparation to the victims directly or to the Trust Fund. No accused person has responsibility to pay reparation. Also no provision found to obtain reparation from the

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[17] Reparation to victims is one of recognized rights in national and international law. Provision for reparation exists in customary international law and also international conventional law. In Rome Statute of ICC the main provisions dealing with reparation system are- Articles 68: Protection of victims and witnesses and their participation in the proceedings, Article 75: Reparation to Victims and Article 79: Trust Fund as also Article 43 (6): Setting up Victims and Witnesses Unit by the office of the Registrar of ICC.

[18] ICC has accepted individual criminal responsibility as one of the main principle. Art 25 Rome Statute, 1998

[19] Refer also Article 68, 7(3), 43(6), 75, 79Rome Statute, 1998

[20] See Art 75 (1) Rome Statute, 1998

[21] Art 75 (1) Ibid

[22] Art 75 (2) Ibid

[23] Refer Art 79 Ibid

[24] Art 75 (3) Ibid

[25] Art 75 (4) Ibid

[26] Ibid

[27] These provisions explained the crimes which are punishable under ICC statute.

successors of convicted person, who, if dies immediately after his conviction.

Trust Fund: Article 79

Trust fund is established for the benefit of victims of crimes within the jurisdiction of the Court and of the families of such victims. The property collected by fines and forfeiture are required to be transferred to the trust fund by the order of the court. The Trust Fund will manage the funds as per the criteria set by Assembly of State Parties.

Sub Section 4 of Rules and Procedure of ICC is devoted to reparation to victims. Rule 94-98 provides the procedure to be followed in awarding reparation to the victims as follows:

Rule 94: Procedure upon request - A victim is required to give a request mentioning all details regarding himself and also about loss and injury.

Rule 95: Procedure on the motion of the court - A court can also move a motion regarding reparation to victims. The directions are given to the Registrar for the same.

Rule 96: Publication of Reparation proceedings - To notify the victims and legal representative reparation proceedings are published.

Rule 97: Assessment of reparation - By respecting rights of victims and convicts, an assessment is done in which the scope of loss and injury is determined and also if reparation is to be given on individual basis or on collective basis. The opinion of legal experts can also be sought in determination process.

Rule 98: Trust fund - A convicted person is required to give reparation directly. However, when there are large numbers of victims, then court may give order to deposit reparation to trust fund.

The trust fund will be responsible to give reparation to the victims directly or through approved inter -governmental or international organisation to the victims.

Other relevant provisions of ICC Statute

The Court can ask state parties to give effect to fines and forfeitures.[28] The Court can review the sentence.[29] Various grounds are mentioned in ICC Statute for reducing the sentence. One of those ground is Court may reduce the sentence if it finds that the voluntary assistance has been given by the convicted person in enabling the enforcement of the judgements; in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims.[30]

Analysis

The arrangement regarding reparation system gives victims right to get reparation. In the opinion of Chamber, the success of the Court is, to some extent linked, to its reparation system. It is also asserted that Rome Statute is a victim-centered Statute, in which the position of victims is one of the most distinctive and unique features. However, reparation system is still untested. Expectations are building up from Thomas Lubanga's verdict in which 129 victims have been identified who had participated in the proceedings. Thomas Lubanga was declared as guilty of war crimes on 14 March 2012.

First Verdict of ICC: Thomas Lubanga[31]

The judges found that Thomas Lubanga was the President of the militia group known as the Union of Congolese Patriots/Patriotic Forces for the Liberation of Congo (UPC/FPLC) in the eastern region of the Democratic Republic of Congo during the non-international armed conflict from September 2002 to August 14, 2003. He was found guilty of recruiting/using of children as soldiers in his army. Further, on 10 July 2012, Thomas Lubanga was punished by 14 years imprisonment. The period will be calculated from the day he is in the custody of ICC i.e.six years. Thus, in totality he was required to spend only eight years in imprisonment.

Regarding reparation, the Court has identified legal representatives of victims. The judges have also requested submissions from the prosecution, defense, and victims regarding how consideration of potential reparations ought to be conducted.[32] On 7 August 2012, the principles were adopted to decide the reparation. This will be the first time when the system of reparations created in ICC statute, was used by the ICC.

The Way Forward

In this background, a thinking process has to be initiated towards the way forward. ICC statute is victim-centric statute. Following are some of the concerns required to be voiced while moving forward:

a. Scope and definition of victim

b. Jurisdiction and admissibility

c. Responsibility to pay reparation

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[28] Art. 109 Rome Statute, 1998

[29] Art. 110 Ibid

[30] Ibid

[31] The Prosecutor v Thomas Lubanga, www. Icc-cpi.int, visited on 11 April 1977

[32] See official website of ICC, last visited on 11 April 2013

d. Time limits

e. Protection of victims in non-member state of ICC

Scope and Definition of Victims

In the definition of victim, no qualification of natural person is added as they have added for organisation, except the terms "within the jurisdiction". It means, as per the Statute, whosoever is victim, he/she, must be a natural person and should come within the jurisdiction. Thus, the victims are protected irrespective of their age and gender. However, it does not protect victims irrespective of their nationality. It means, due to international law principle regarding the consent of the states, the victims are dependent on the state to get benefits of reparation system.

The suggestion is why not victims of abuse of power should be identified and recognised as a separate group as refugees, women, children, etc., are recognized under international law. In this perspective, the researcher believes that the definition of victim will be more inclusive which can be incorporated in ICC Statute or Rules in addition to present one.

Jurisdiction and Admissibility

The ICC has jurisdiction to exercise its power when one or more crimes have been committed mentioned in Article 5 and the member - state is referring the situation, or , the Security Council is referring the situation, or the prosecutor has initiated an investigation on that situation[33]. However, if it is evident that the state is taking action against the perpetrators willingly, then that case or situation is inadmissible in ICC, as ICC has complementary jurisdiction only.[34]

Suggestion is that in the inadmissibility criterion stated in Article 17, it may also be added that if it is evident that state has willingly started prosecution against the perpetrators including giving relief to the victims by reparation, then the case can be inadmissible in ICC. It may be noted that ICC statute has made victim's rights and reparation to victims as an inherent part of justice delivery system. If it is, then the criterion of giving reparation to victims should also be included on every step.

Responsibility for Reparation: Case Study of Muammar Gaddafi

As per the ICC Statute, convicted persons are liable to give reparation to the victims directly or through the Trust Fund, however, if an accused dies before conviction, then what will be the course of action? For example the case of Muammar Gaddafi of Libya can be discussed. The situation in Libya is referred by the Security Council through its Resolution 1970 dated 26 February 2011. On referral of the situation by Security Council, the Pre-trial Chamber I of ICC issued arrest warrant to three persons, namely Muammar Gaddafi, his son- Saif Al-Islam Gaddafi and Abdullah Al-Senussi on 26 June 2011 for crimes against humanity –murder and persecution- across Libya from 15 February till 28 February 2011.In arrest warrant it is stated that there are reasonable grounds to believe that the suspects have committed the crimes against humanity mainly murder and persecution, and that their arrests appear necessary. However, the case against Muammar Gaddafi was dropped by ICC on account of his death. No ruling was made regarding reparation while dropping the case. At present the case against Saif Al Islam Gaddafi and Abdullah al- Senussi is going on in ICC. Considering the arrest warrant issued by Pre Trial Chamber I of ICC in which they found reasonable grounds against him, it is strange that after the death of Gaddafi, why no ruling was made for victims.

Responsibility to Pay Reparation- Exclusion of State and Corporation

Only convicted person is required to pay reparation. However, no provision in ICC statute is speaking anything about role of convict's state to pay reparation. When convicted person is liable to pay reparation, a vicarious responsibility will fall on his/her state too. However, vicarious state responsibility is also not recognised in ICC Statute. ICC statute speaks about the cooperation of state for many reasons, for eg. investigation and prosecution[35], however, the state has not been involved for reparation purpose.

International community is aware about the growing influence and involvement of corporations in international politics and business. However, the Rome statute of ICC has restricted its jurisdiction only to natural persons and thus to individuals, and thus even in paying reparation as well no responsibility is found of corporations. In 2005 Victims Principles, it is provided that legal person or other entity if found liable then they should pay reparation to a victim[36]. In 'Norms on the Responsibility of Transnational corporations and Other Business Enterprises with regards to Human Rights, 2003' drafted by UN Human Rights Economic and Social Council, the responsibilities and obligations of corporations have been stated explicitly.

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[33] Art 13 Rome Statute, 1998

[34] Art 17 Ibid

[35] Article 93 Rome Statute, 1998

[36] Principle 15, 2005 Victims Principles

Moreover, the ICC Chief Prosecutor announced an investigation into the activities of corporations in a number of states who are suspected of helping to finance ethnic violence in the Congo, expressing the intention that corporate executives who knowingly trade with the perpetrators of war crimes shall be prosecuted as "participants in crimes".

The suggestion is this approach should convert into a principle for the reparation proceedings as well.

Responsibility to Pay Reparation: Setting of Principles

The suggestion regarding setting of principles for victim and reparation to them under Article 75 (1), the ICC should see to fulfil the expectations of victims regarding reparations; the other ways to get funds should be enriched. A voluntary contribution to Trust Fund by corporations and states may be helpful in this direction. Especially in the case, where convicted person had acted as a representative of the state or corporations while committing crimes, the involvement of state or corporation in giving reparation to victims is required.

Time Limits – Conviction

On conviction of accused, victims are liable to get reparation. From the proceedings against Thomas Lubanga, it may be inferred that process is long. For example, Thomas Lubanga, Congo warlord's case started in 2006 but its verdict came in 2012. Yet sentencing has not been done.

The researcher would like to put forward a concern why reparation to victims is dependent on the conviction of accused in ICC. It may be noted that before admitting any situation, the ICC is required to ensure reasonable grounds, and then only they may admit the case. In addition, though victims could not be identified against an individual perpetrator, but however, the victims can be identified against the situation. To illustrate, the victims of a situation XYZ can be identified without conviction, only to know if they are the victims of crimes done by A or B or C may not be identified without conviction.

The suggestion is, in this scenario Trust Fund may take active step in favour of situation based victims. As stated in 1985 Declaration, a person may be considered a victim, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim[37]. If this meaning will be accepted, then delay to give assistance can be avoided and the purpose to give relief to victims will not be affected.

Time Limits: Assessment of Loss and Injury

One more possibility of delay in awarding reparation to victims is its evaluation and assessment[38]. Rule 94 equips victims to request for reparations, but not a request to determine the damage, loss and injury. The court has power to give reparation only by determining the scope and extent of any damage, loss and injury to the victims[39]. This process seems to be time-consuming. As per the recent development in the case of Thomas Lubanga, now the judges have requested submissions from the prosecution, defense, and victims regarding how consideration of potential reparations ought to be conducted.

The suggestion is that proceedings against the accused and evaluation of damage, loss and injury of victims should go hand in hand. With this also, time can be saved.

Time Limits- Undue Delay

As per the Section 67 (1) (c), accused has a right to be tried without 'undue delay'. However, in getting reparation to the victims, no such provision found except Rule 101 which speaks about time limits. Rule 101 says that in making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims.

Beyond this, no provision found for time limits in awarding reparation and executing the same. The suggestion is that victims should have right to get reparation without 'undue delay'. With this victims would get reparation timely as a right rather than an obligation made on them.

Conclusion

ICC expressed their determination to end impunity for the perpetrators and enforce international justice in its Preamble. Giving reparation to victims is one of the steps towards the achievement of this determination. However, the identification of victims is limited only up to the member states of ICC or a situation referred by the Security Council or the Prosecutor.

Human rights groups estimate that in civil war of Sri Lanka up to 40,000 civilians were killed in the final months of the war. The government of Sri Lanka recently released its own estimate, concluding that about 9,000 people perished during that period.[40] What about those victims? Why their

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[37] See A 2, 1985 Declaration

[38] Rule 97 Rules and Procedure of ICC

[39] Article 75 (1) and (2) Rome Statute and Rule 97 Rules and Procedure of ICC

[40] See the report on www.genocidewatch.org visited on 11 April 2013

situation has not been referred to the ICC? Many people are the victims of armed conflict in Iraq as also in Afghanistan. However, those victims are not entitled to get protection and reparation as their situations have not also not been referred by Security Council and the Prosecutor. Why victims are not entitled to protection and reparation in case they happen to be belonging non-member states of ICC and in cases that are not referred by Security Council and Prosecutor?

It is provided in 1985 Declaration that, the provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability. This wide approach is required to be assimilated in ICC statute.

The suggestion is discrimination of victims based on nationality should not be done if ICC would like to be victim centric institution.

Suggestion is, on this juncture, the ICC should make its victim oriented approach more strong and assertive to protect victims. A convention on the protection of victims of abuse of power should be adopted in tune with the ICC statute as also considering the established customary and conventional international law. It should be referred as the source of law in ICC statute.

Let's hope, in future, ICC will develop a strong international criminal jurisprudence to give justice to victims.

Corruption: Its Impact Upon Rule of Law in India

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ABSTRACT

Democracy is the foundation of freedom, justice, equality, and fraternity; which is intended for the welfare of the society and its citizens. This welfare of society and its citizens can be achieved by the people through the rule of law. Rule of law is a cardinal principal of democracy. It is essential for inherent dignity, equality and prosperity of the members of the society.The constitutional values, such as constitutionalism, absence of arbitrary powers and liberty of the people are imbibed in the concept of rule of law. There is a universal growth of broad discretionary powers of the administrative authorities to implement the developmental policies in India. It has generated the opportunities to misuse and abuse such discretionary powers by public authorities, resulting in corruption and a tendency to disregard individual rights and rule of law also. This paper seeks to assert that corruption undermines the rule of law and legitimacy of state itself.

Introduction

Law is considered an element of 'Dharma' in the ancient Indian traditions. Dharma was superior to all the rules and regulations. Dharma was king of kings. It was believed that it was not the king who ruled but 'dharma' which ruled the people. Every administrator was under the law. It was expected that the officials would function in accordance and compliance with the law already laid down.

After the independence, the Indian constitution has become the supreme law of the land. It is hoped that every Indian and official would work only in accordance with the constitution and would uphold its legitimacy and supremacy. Before entering into an office of importance, the individual takes an oath of allegiance and loyalty towards the constitution. Corruption is violation of that oath.

The exact meaning of corruption can't be drawn with accuracy and its meaning is still a matter of debate. There is no global consensus over the specific elements that constitute corruption leading most scholars to argue that attempting to define corruption in general is a futile exercise.[1] The generally accepted meaning in contemporary literature focuses on the abuse of public office or power for private gain.[2] Nevertheless though, this definition is quite wide in its import and generic in nature yet it serves a purpose. Corruption has a crucial bearing in India at all levels of decision- making processes in governance. There is no denying that the social, economic and political consequences of corruption are disastrous for India.

Corruption has become the greatest menace to the public and political life in India. When India became free Jawaharlal Nehru in his historic tryst with destiny speech stated: "Long years ago we made a tryst with destiny and now the time comes when we shall redeem our pledge not wholly or in full measure but very substantially. The service of India means the service of the millions who suffer, it means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye"[3].

But the history after independence tells another story. Corruption in public life has increased by leaps and bounds. When the British had enslaved India to make it its colony, its servants amassed wealth by corruption. The mischievously corrupt Warren Hastings was impeached by the British Empire for corruption. Edmund Burke in his address of the impeachment of Warren Hastings orated:

"I impeach him in the name of the people of India, whose rights he has trodden under foot, and whose country he has turned into a desert. Lastly, in the name of human nature itself, in the name of both sexes, in the name of every age, in the name of every rank, I impeach the common enemy and oppressor of all!"[4].

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1 See, for example, S.L. Joseph et al., Castan Centre for Human Rights, Human Rights Translated: A Business Refrence Guide (2008).

2 Asian African Legal Consultative Org., Combating Corruption: A Legal Analysis 9 (2005).

3 http://en.wikipedia.org/wiki/Tryst_with_Destiny.

4 C.Raj Kumar, Corruption and Human Rights in India (Comparative Perspectives on Transparency and Good Governance), New Delhi : Oxford University Press-2011. p.xxi

But the millions of poor in India are still suffering due to high level of corruption in governance in India. Despite nearly six decades of independence, we have not got clean administration in India till date. One of the unavoidable consequences of corruption is violation and disrespect for rule of law and human rights. The Indian statesmen are confronted with a serious challenge to make its administration and politics untouched by corruption. Dishonesty, partiality, animosity and insensitivity in the process of governance undermine the very constitutional goals and rule of law in India. Corruption has seeped into all layers of society. There have been many major scams[5]. Unfortunately, most of the people accused of corruption are not apprehended. No prosecution is launched in majority of cases. Hardly any case ends in conviction and deterrent punishment[6]. A civil society is one that is rooted in the rule of law and therefore it is quite inconsistent with any form of corruption, since corruption not only depends and thrives on law-breaking but promotes law-breaking all the way[7]. The very fact that more and more people have begun to accept corruption as an unavoidable and ineradicable evil is a measure of a corrupt policy that has resulted in legitimizing corruption and countering all resistance to it[8]. If we the people of India are to be true to its cultural heritage, we must struggle to win Swaraj and jettison corruption. The administrators have betrayed Indian's supreme cultural past. India's sublime value- system in the words of Max Muller was :

"If we were to look over the whole world to find out the country most richly endowed with all the wealth, power, and beauty that nature can bestow, in some parts a very paradise on earth; I should point to India. If I were asked under what sky the human mind has most fully developed some of its choicest gifts, has most deeply pondered over the greatest problems of life and has found solutions of some of them, which will deserve the abstention even of those who have studied Plato and Kant, I should point to India. If I were to ask myself from what literature we here in Europe, we who have been nurtured almost exclusively on the thoughts of Greeks and Romans and of one Semitic race the Jewish, may draw the corrective which is most wanted in order to make our inner life more perfect, more comprehensive, more universal, in fact more truly human a life not for this life only, but a transfigured and eternal life, again I should point to India"[9].

The foundation of constitutionalism, rule of law and democracy in India are now severely threatened and in fact continuously damaged by the all round corruption in all spheres of life. Corruption in governance hits at the roots of both the statehood and civil society[10]. Corruption generates discrimination and it is violative of the idea of fairness as decisions are taken in an arbitrary manner favoring bribe-givers against the people who are legally entitled. Corruption in all sectors of administration is a very big challenge to establishing rule of law society in India. Corruption in India is a much more fundamental problem that undermines the very social fabric, the political and bureaucratic structure of the Indian society. Further, corruption in India violates the constitutional foundations of Indian democracy, on the basis of which a rule of law society in India was meant to be established. However the promises made by the constitution makers have been broken over the years by the scourge of corruption in every institution, which has led to a scourge in the governance apparatus from top to bottom[11].

The magnitude and the kind of the corruption that prevails in countries in the Asia- Pacific region is a red threat to the rule of law regime prevailing in society. Laws are constantly violated; creating a vicious cycle of bribery and influence peddling that has resulted in a cynical public attitude towards law enforcement[12]. Even when anti-corruption laws are occasionally enforced, they become political ploys on the part of politicians[13]. This has given rise to vicious circle of the 'criminalization of politics' and 'politicization of crime'[14]. It is fruitful to comprehend the jurisprudential foundations of the rule of law in order to establish a proper nexus with the issue of corruption. In its rule of law project, the International Commission of Jurists[15] defines the rule of law as the principles, institutions

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5 Das, H.N. (2011), The Fight Against Corruption, Dialogue, Q. 3(12) P.67.

6 Ibid.

7 Bezboruah, D.N. (2011), Corruption in Governance, Dialogue. Q. 3 (12) p.61.

8 Ibid.

9 Quoted in C.Raj Kumar, Corruption and Human Rights in India (Comparatives on Transparency and Good Goverance) New Delhi: Oxford University Press-2011. p.xxii.

10 Ibid. p.2.

11 Ibid.p.3

12 See Sondhi, Combating Corruption in India.

13 C.Raj Kumar, Democracy and Rule of Law in India, The Hindu (21 Sept., 2007).

14 Deepak Sanyal, Maintenance of Public Law and Order in Human Rights Manual for District Magistrate 22 (New Delhi: National Human Rights Commission, 2007).

15 Int'l Comm'n of Jurists, "The Dynamic Aspects of Rule of Law in the Modern Age" (1965).

and procedures, not always identical but broadly similar, which the experience and traditions of lawyers in different countries of the world often themselves having varying political structure and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man[16].

Corruption and its Entanglement for the Rule of Law

Protecting the rule of law is essential for progress and development in all societies. Most countries, including countries in Asia, have laws against corruption[17]. However, there is a threshold problem that the countries in Asia face concerning the protection of rule of law. The laws relating to corruption are violated like many other laws, and the enforcement machinery is too weak to pursue action against the violators. A scholar has traced the relationship of the rule of law to corruption in three stages[18].

First: There is wide disregard for the law and its instrumentalities, and consequently, a lack of respect for law. This includes a lack of respect for laws relating to corruption.

Second: Corruption is used as a method to violate laws, abuse powers and also exercise discretion in a wrongful manner. In all these aspects the regulatory framework of the state apparatus is made dysfunctional due to institutionalized corruption across all departments of the government.

Third: Laws, legal institutions and enforcement mechanisms are manipulated by corruption in such a manner that corruption itself becomes a tool for promoting lack of respect for the rule of law.

Thus, the many violations and violators defeat the purpose of legal scrutiny and law enforcement by paying bribes and engaging in other various forms of corrupt behavior. This has created a situation where the rule of law is replaced by the rule of powerful people, be it politicians, bureaucrats, business persons, or other powerful interest groups who are able to manipulate the law enforcement machinery through corruption[19]. Even when anti- corruption cases came before the courts, there is a strong element of non-legal and political factors in play that undermines the neutrality of the criminal justice system and all the legal and judicial processes related to fighting corruption[20]. The rule of law is protected only when there is a fairly predictable legal system that responds to needs and problems in a fair, non- discriminatory and effective manner and when there is access to justice[21].

The problem of law enforcement attacks the very basis of democracy and the time has came to tackle it in a systematic manner in countries in the Asia – Pacific region[22]. While there is no cut and dry solution, it is desirable that steps are taken to emphasize the inculcation of values of respecting law among citizens[23]. This means that all legal, institutional, judicial and constitutional measures to ensure the rule of law should be oriented towards imparting a respect for law on the basis of the belief that it will be enforced equally and fairly[24]. As corrupt acts are primarily violations of law, they have serious implications for the protection of the rule of law[25]. The rule of law regime can be created with a belief that a society should be built around people transacting their business in a lawful and transparent manner, the government being run on the basis of law, and rules and regulations being formulated and their enforcement being done in a non-arbitrary, fair and reasonable manner.

Summarizing the various conceptions of the rule of law given by the modern theorists, Hernandez Truyol has observed that there are three characteristics central to a cogent notion of the rule of law[26]:-

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16 Ibid.p. 17.

17 Kumar, Reports of the Consultant for the UNDP Project for Strengthening of the Commission to Investigate Allegations of Bribery or Corruption, p.15.

18 C. Raj Kumar, Corruption and Human Rights in India (Comparative Perspective on Transparency and Good Governance), New Delhi- Oxford University Press-2011. p.31

19 Ibid.

20 Ibid.

21 C.Raj Kumar, "National Human Rights Institutions and Economic, Social and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights" 28 Hum. Rts Q. 775 (2003).

22 Press Release, General Assembly, 'Secretary-General Lauds Adoption by General Assembly of United Nations Conventions Against Corruption' UN Press Release SG/SM/8977 9(3November 2003).

23 C. Ray Kumar, Rule of law and legal Education" The Hindu, 4 July, 2006

24 C. Raj Kumar, Corruption as a Human Rights Issue in South Asia: Law, Development and Governance, Paper presented at Human Rights 2006: The Year in Review Conference, Môn ash University (2006).

25 For a very interesting reading on the impact of corruption on the rule of law in India, see, Jaffrelot, 'Indian Democracy'.

26 Quoted in C.Raj Kumar Corruption and Human Rights in India (Comparative Perspectives on Transparency and Good Governance): New Delhi- 2011.

a. The absence of arbitrary power on the part of the government,

b. The administration of ordinary law by ordinary tribunals, and

c. The existence of a general rule of constitutional equality resulting from the ordinary law of the land.

With these characteristics, the rule of law serves three purposes –

a. It protects against anarchy,

b. It allows persons to rely on laws and plan their lives in a way by which they can predict what consequences will flow from their actions and,

c. It protects against arbitrary and capricious actions of the government.

It is useful to see how corruption affects the fulfillment of the rule of law and thereby undermines law and justice.

Despotic Decision- Making Process as a Violation of the Rule of Law

The state and its instrumentalities which are entrusted with responsibility of distributing social goods, services and resources in a fair and non – discriminatory manner, often conduct their activities in an arbitrary and whimsical way[27]. This arbitrariness is further accentuated by irrelevant criteria adopted for taking the decisions in order to indulge in corruption. This is violative of the rule of law and compels the Indian citizenry to lose faith in the administrative system. Thus, arbitrariness on account of corruption has got institutionalized in India[28]. Right to equality guaranteed under the Indian constitution has been interpreted to mean as a guarantee against arbitrariness of the administration. As the Supreme Court has held in Royappa[29] from a positivistic point of view, equality is antithetic to arbitrariness. Any action that is arbitrary must necessarily involve the negation of equality. Abuse of power is hit by Art.14.The authority endowed with power must be free from political interference. The new dimension being given to Art.14 by the Supreme Court in the case of Bachan Singh vs. State of *Panjab*[30] is that the rule of law which permeates the entire fabric of the Indian constitution excludes arbitrariness. Wherever we find arbitrariness or unreasonableness there is a denial of rule of law.

In Srilekha Vidyarthi vs. State of U. P.[31], the Supreme Court quashed the order of the government of U. P. terminating the appointments of government advocates throughout the entire state characterizing it as arbitrary. The court stated that: "It is now well settled that every state action in order to survive, must not be susceptible to the vice of arbitrariness". The Supreme Court has culled out of Art.14 a principle which that every action of the government or any of its instrumentalities must be informed by reason. Any state action which is not informed by reason cannot be protected as it would be easy for the citizens to challenge such an action as being arbitrary and violative of equality clause. Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public agency acting in whatever field must be informed by reason not humour, whim, caprice or personal predilections of the persons entrusted with the task on the behalf of the state and exercise of all powers must be for public good instead of being an abuse of power[32.]

The OECD conducted a study on the state procurement of goods meant for the public at large and it has found that it is the area in which arbitrariness in decision- making leads to corruption[33]. A number of countries in Asia have taken steps to address this[34]. It may be worthwhile to note that government procurement in South Korea is worth USD 83 billion a year[35]. The government of South Korea has introduced many reformatory measures to curb corrupt practices in the procurement process. It has adopted a code of conduct that supports high standards of behavior in government procurement personnel, and also rotates its public procurement agents every two years[36].

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[27] Harsh Mander & Abha Joshi : Movement for Right to Information in India: People's power for control of corruption, available at http : www. human right simitiative org/progams/ai/ rti/ india/ articles.

[28] Ibid.

[29] E.P. Royappa vs. State of Tamil Nadu, AIR 1974 SC 555 ; (1974)3 SCC 3.

[30] AIR 1982 SC 1325; (1982)3 SCC 24.

[31] AIR 1991 SC 537.

[32] Style (Dress Land) vs. Union Territory, Chandigarh (1999) 7 SCC 89,100; AIR 1999 SC 3678.

[33] OECD, Fighting Corruption and Promoting Integrity in Public Procurement.

[34] See OECD Policy Brief, Keeping Government Contracts Clean (2008).

[35] ADB/OECD Anti-Corruption Initiative for Asia and Pacific, Anti-Corruption Policies in Asia and Pacific: Progress in Legal and Institutional Reform in 25 Countries 69 (2006).

[36] Ibid. p.70.

Discriminations in Administration affects the Rule of Law

One of the disturbing results of corruption is undoubtedly widespread discrimination. Power managers exercise their discretion in doling out favorable treatment to bribe givers and the people who do not give bribes are being unfairly victimized[37]. This promotes a sense of frustration and helplessness among the victimized as there are no effective mechanisms for redressal and overwhelming majority of the victims of this discrimination tend to be the poor whose capacity to give bribes is far less than that of the middle or upper classes[38].

Abuse of Discretionary Powers Breaks the Rule of Law

Despite the fact that economic reforms have reformed or abolished some of the conventional rules pertaining to the exercise of the discretion by government officials, there are still left a number of contact points in which the government continues to hold the sole authority for exercising discretion. While privatization is not the only answer to removing corruption, it is important to infuse enforceable mechanisms of transparency and accountability that will promote fair, non-discriminatory, and reasonable exercise of discretion[39].

Discretionary power for government officials becomes a fertile ground for abuse and thus, corruption becomes a norm[40]. In many countries in Asia, where a large portion of the populace is unaware of its rights it is essential to ensure that abuses of discretion are not allowed to take place. Even if corrective mechanisms in the form of institutions and anti-corruption agencies are in place and are effective, it is important to create accountable structures for the administrators, particularly when they have discretionary powers. Further, as far as possible these discretionary powers should be limited and in due course made on the basis of objective and determinable criteria so that opportunities for bribery and other forms of corruption are reduced, if not altogether eliminated[41].

Uncertainty in Law Enforcement Process undermines the Rule of Law

In recent times, the corruption has assumed an institutionalized form in a great number of Asian countries. It is for this reason corruption in Asia has created a lot of uncertainty and unpredictability so far as the enforcement of anti- corruption laws is concerned. Further, due to the lack of independence of anti-corruption institutions, the level of uncertainty when it comes to cases relating to investigation, prosecution and conviction of people who are charged on grounds relating to corruption, is high[42]. The criminal justice administration is informed by many extraneous factors like the political significance of the particular anti-corruption case to the group holding power and the availability of manpower, training and experience of the investigating agency in inquiring the particular case. Jon Quah has observed that the low risk of detection and punishment of acts of corruption in Asia is one of the major causes for rampant corruption[43]. To substantiate this point, he has compared the prosecution rates in Hong Kong and the Philippines. Thus a civil servant committing a corrupt offence in Hong Kong was 35 times more likely to be detected and punished than his counterpart in the Philippines[44].

Inefficiency and ineffectiveness of the criminal justice system has infused unpredictability in corruption cases, which ought to be investigated with a sense of professionalism, integrity, and fairness.

Conclusion and Suggestions

The soul of fundamental rights is violated and assaulted by each and every act of corruption. Corruption like a river flows downwards. Therefore, a serious attempt must be made to curb corruption at the highest point of administration. Every personnel in the administration should pay solemn allegiance to rule of law and justice. Any deviation from the rule book should be taken seriously and the deviator must be punished and should also earn incapacity to hold any post. Establishment and maintenance of rule of law should be the primary

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37 Kumar, "Corruption and Human Rights"

38 Ibid.

39 See Anne Marie Goetz and Rob Jenkins, "Hybrid Forms of Accountability: Citizen Engagement in Institutions of Public-Sector Oversight in India, 3 Pub. Management Rev. 363 (2001).

40 Fidel V. Ramas, Good Governance Against Corruption, 25 Fletcher for World off (2001), available at http:// fletcher tufts edu) forum/ archives/42.

41 Yulike Mike, Revealing Corruption through Japan's Information Disclosure Law in Global Corruption Report 2003 (Transparency International, 2003)

42 UNDP/ UNODC. 'Report of the Regional Forum on Anti- corruption Institutions' (2005) available at. http:// europeandcies undp.org.

43 Jan S.T. Quah, Curbing Asian Corruption: An impossible Dream? 105 Current History 176 (2006) available at http:// iis-db.standford.edu/ pubs/47

44 Ibid. p.177.

obligation and duty of each governmental official. Good governance and vibrant democracy are nurtured through rule of law. The holder of a public office should not treat his official position as his fiefdom or status symbol. Dedication to the rule of law should be a main criterion for judging suitability and efficiency of an administrative official. The basic ideas of rule of law, justice and good governance may be included in the school education and also at the University level curricula.

The need for a political will in the form of commitment of the leaders of a particular state or government becomes essential for the eradication of corruption. In this regard, Quah notes, success occur where three condition are met: comprehensive anti corruption legislation is enacted, an independent anti-corruption agency is provided with sufficient personnel and resources and the independent agency fairly enforces the anti-corruption laws[45]. This would require governance to be based upon the underlying ideals, goals, objectives aspirations and values of the constitution, which have been undermined by the corruption. It is important to note that anti-corruption laws will not be effective if the law enforcement machinery and the rule of law culture in a society is weak. Hence, there is need for taking efforts to protect the rule of law and empowering the law enforcement machinery against corruption.

[45] Ibid.

Law and Philosophy of Taxation with Specific Reference to Scope of Goods and Service Tax in India

Prof. Kshamendra Mathur[*]

ABSTRACT

What is tax and why it is required? How the concept of tax has evolved? What is the history and justification behind the taxation? What is Goods and Services Tax (GST)? How does it work? Why GST is required? How can the burden of tax, in general, fall under GST? How will GST benefit industry, trade, agriculture, exporters, small entrepreneurs and small traders and common consumers? Why is Dual GST required? What is the concept of providing threshold exemption for GST? Why does introduction of GST require a Constitutional Amendment? How are the legislative steps being taken for Central Goods and Services Tax (CGST) and State Goods and Services Tax (SGST)? How will the rules for administration of CGST and SGST be framed? These and many other questions would enlighten the future development of taxation, and specially role of Goods and Services Tax (GST) in devising improved uniform policy and planning based taxation for overall economic growth.

Law and Philosophy of Taxation- An Introduction

There is a very ancient Indian saying that,

"It was only for the good of his subjects that he collected taxes from them, just as the Sun draws moisture from the Earth to give it back a thousand fold."

--Kalidas in Raghuvansh eulogizing King Dalip

It is a matter of general belief that taxes on income and wealth are of recent origin but there is enough evidence to show that taxes on income in some form or the other were levied even in primitive and ancient communities. The origin of the word "Tax" is from "Taxation" which means an estimate. These were levied either on the sale and purchase of merchandise or livestock and were collected in a haphazard manner from time to time. Nearly 2000 years ago, there went out a decree from Ceaser Augustus that the entire world should be taxed. In Greece, Germany and Roman Empires, taxes were also levied sometime on the basis of turnover and sometimes on occupations. For many centuries, revenue from taxes went to the monarch. In Northern England, taxes were levied on land and on moveable property such as the Saladin title in 1188. Later on, these were supplemented by introduction of poll taxes, and indirect taxes known as "Ancient Customs" which were duties on wool, leather and hides. These levies and taxes in various forms and on various commodities and professions were imposed to meet the needs of the Governments to meet their military and civil expenditure and not only to ensure safety to the subjects but also to meet the common needs of the citizens like maintenance of roads, administration of justice and such other functions of the State[1].

Indian Tax Structure

The tax regime in India has undergone elaborate reforms over the last couple of decades in order to enhance rationality, ensure simplicity and improve compliance. The tax authorities constantly review the system in order to remain relevant. India has a federal system of Government with clear demarcation of powers between the Central Government and the State Governments. Like governance, the tax administration is also based on principle of separation therefore well defined and demarcated between Central and State Governments and local bodies.

The Constitution (One Hundred and Fifteenth Amendment) Bill, 2011, Bill No. 22 of 2011proposed insertion of new article 246A, after Article 246 of the Constitution, namely:-

Special provision with respect to Goods and Service taxes:

"246A. Notwithstanding anything contained in Articles 246 and 254, Parliament and the Legislature of every State have power to make laws with respect to goods and services tax imposed by the Union or by that State respectively:

Provided that Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of

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1 http://www.incometaxindia.gov.in/history/ last access on 18 December 2013

inter-State trade or commerce.

Explanation - For the purpose of this article, "State" includes a Union territory with Legislature."[2]

Article 246 of the Indian Constitution, distributes legislative powers including taxation, between the Parliament and the State Legislature.

"Article 246 -Subject-matter of laws made by Parliament and by the Legislatures of States:

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State] notwithstanding that such matter is a matter enumerated in the State List."

Schedule VII enumerates these subject matters with the use of three lists -

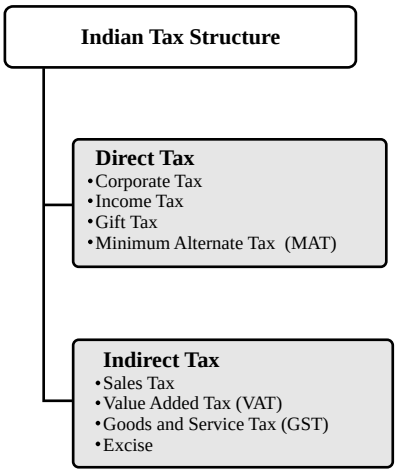
List - I entailing the areas on which only the parliament is competent to makes laws,

List - II entailing the areas on which only the state legislature can make laws, List - III listing the areas on which both the Parliament and the State Legislature can make laws upon concurrently.

Separate heads of taxation are provided under lists I and II. There is no head of taxation in the Concurrent List (Union and the States have no concurrent power of taxation). There are the list of thirteen Union heads of taxation and the list of nineteen State heads in our Indian Constitution[3].

As India is a federation, where the responsibility of taxation is shared by the Union and the States, the proposed model envisions a dual system of GST. Therefore, in keeping with the constitutional mandate of fiscal federalism, both levels have distinct responsibilities to perform. Thus, a Central GST, which replaces the current CENVAT and a State GST, which replaces the current State VAT, will come within the ambit of the GST. Although this proposal has diluted what was said to be the greatest plus point of GST, i.e., to have a uniform tax slab for the State and the Centre, this system is certainly more pragmatic as it will help to phase out the multiplicity of indirect taxes in India in a slow and steady fashion[4].

The tax on incomes, customs duties, central excise and service tax are levied by the Central Government. The state Government levies agricultural income tax (income from plantations only), Value Added Tax (VAT)/ Sales Tax, Stamp Duty, State Excise, Land Revenue, Luxury Tax and Tax On Professions. The local bodies have the authority to levy tax on properties, entry tax and tax for utilities like water supply, drainage etc.



Taxation is imposition of compulsory levies on individuals or entities by governments. Taxes are levied in almost every country of the world, primarily to raise revenue for government expenditures, although they serve other purposes as well.

The present paper will concerned with taxation in general, its principles, its objectives, and its effects; specifically, the article discusses the nature and purposes of taxation, whether taxes should be classified as direct or indirect, the history of taxation, canons and criteria of taxation, and economic effects of taxation, including shifting and

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2 Proposed The Constitution (One Hundred And Fifteenth Amendment) Bill, 2011, Bill No. 22 of 2011.

3 P.M.Bakshi's The Constitution of India, Eighth Edition Universal Law Publishing Co. P.220

4 Ruma Dubey, GST - India's most ambitious Indirect Tax Reform, June 22, 2010 at http://www.premiuminvestments.in/cover-feature/45364p106/45318.html

incidence (identifying who bears the ultimate burden of taxes when that burden is passed from the person or entity deemed legally responsible for it to another). For further discussion of taxation's role in fiscal policy, see government economic policy. In addition, see international trade for information on tariffs.

"Historically, India's indirect tax system is unique given that under the Constitution, the Union government has the authority to impose a broad spectrum of excise duties on production or manufacture while States are assigned the power to levy tax on the sale of goods. Due to this dichotomy of authority under the Constitution, India has been rather slow in the adoption of VAT. Today, India has adopted a model of dual VAT, replacing Union excise duty with CENVAT and sales tax with State VAT. From an economic stand point, there is hardly any difference between the taxation of commodities and that of services. Therefore, under this system of dual VAT, it is of paramount importance that in addition to goods, services also come under its net. The exclusion of services causes many administrative problems and paves the way for evasion of tax."[5]

Purposes of Taxation

During the 19th century the prevalent idea was that taxes should serve mainly to finance the government. In earlier times, and again today, governments have utilized taxation for other than merely fiscal purposes. One useful way to view the purpose of taxation, attributable to American economist Richard A. Musgrave, is to distinguish between objectives of resource allocation, income redistribution, and economic stability. (Economic growth or development and international competitiveness are sometimes listed as separate goals, but they can generally be subsumed under the other three.) In the absence of a strong reason for interference, such as the need to reduce pollution, the first objective, resource allocation, is furthered if tax policy does not interfere with market-determined allocations. The second objective, income redistribution, is meant to lessen inequalities in the distribution of income and wealth. The objective of stabilization implemented through tax policy, government expenditure policy, monetary policy, and debt management is that of maintaining high employment and price stability.

There are likely to be conflicts among these three objectives. For example, resource allocation might require changes in the level or composition (or both) of taxes, but those changes might bear heavily on low-income families-thus upsetting redistributive goals. As another example, taxes that are highly redistributive may conflict with the efficient allocation of resources required to achieve the goal of economic neutrality.

Concept of GST

India is at the threshold of implementing an indirect tax reform. Indian Goods and Service Tax (GST), as the new levy would get referred to in the future, is stated by many leaders to be by far the most radical reform which the Government of India is said to have ever implemented. Whether GST would be a re-formation of the Indian indirect tax system or not would be evident as the time unfolds.[6] GST, as the term refers to, is a composite tax on goods and services. Every transaction undertaken at every stage i.e. production, distribution, consumption or supply, when effected by one person to another or when effected, otherwise than by way of sale of goods or services, from one State to another, would be subjected to GST at a specified rate. The tax, commonly referred also as consumption tax, is levied on the value added at each stage. In an ideal GST, the credit of taxes paid on purchase of inputs, input services and capital goods are seamlessly allowed for set-off against the tax payable on subsequent sale of goods that are either sold as such or sold upon conversion, or in the context of services, are supplied. GST is a tax on goods and services, which can be levied whenever there is a sale or provision of service, provided that at that time, the seller or service provider can claim the input credit of tax which he has paid while purchasing the goods or procuring the service. This comprehensive tax seeks to eliminate the distinction between taxable goods and taxable services[7].

The current taxation system in India is laced with complexity, multiplicity and ambiguity. The plague of cascading effect of taxes, was eradicated to some extent with the advent of CENVAT (was referred to previously as MODVAT) in the year 1986 at the Central level and further with the introduction at the State level of a Value Added Tax (VAT) system for most part of the Country, in the year 2005. Considering multiple taxes levied by the Centre and the State and absence of the facility to offset the incidence of one tax with another in most cases, the effect of cascading gets built into the transaction cost. VAT was introduced in the Indian taxation system from April 1, 2005 in an effort to

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5 For a detailed discussion refer to the article in Financial express, by Mahesh C Purohit-'State VAT should include more services', URL: http://www.financialexpress.com/...vat...services/ 210017/ - United States

6 'GST Reforms and Intergovernmental Considerations in India'(March 2009) by Satya Poddar and Ehtisham Ahmad, Working Paper No.1,Department of Economic Affairs, Ministry of Finance, Government of India, p-8.

7 Satya Poddar, Ehtisham Ahmed, Department of Economic Affairs, Ministry of Finance, Government of India, GST Reforms and Intergovernmental Considerations in India (Working Paper No.1/ 2009-DEA, March, 2009)http://finmin.nic.in/WorkingPaper/GST%20Reforms%20and%20Intergovernmental%20Considerations%20in%20India.pdf.

address the problems associated with the earlier Sales Tax. India is one of the 123 countries across the world that is following the VAT mode, which is an improvement in several respects[8].

Moreover no step has yet been taken to capture the value added chain in the distribution trade below the manufacturing level in the existing scheme of CENVAT. Further under the State level VAT scheme CENVAT load by way of excise duty paid on goods is included in the value of goods to be taxed under State Vat which needs to be removed.

A major problem with VAT is the way it taxes inputs and outputs. Inputs are taxed at 4 percent and outputs at 12.5 percent. Taxing inputs and outputs at different rates are problematic because what is input in one case can be output in another. For instance, sugar is an input for a restaurant but for a household it is an output. Therefore, there is a potential tendency to avoid output tax as the tax is relatively higher than input tax (a margin of 8.5 percent)[9]. Despite of lacunae the introduction of Value Added Tax at Central and State level has been considered as a major step in indirect taxes reforms in India. With VAT the problem of taxes on taxes which is called as the cascading effect of taxes is removed. Further since there is a provision to avail the credit only when duty is paid on previous purchase of inputs (in case of Central VAT) and on previous purchases in case of State VAT as set off against the liability at succeeding stages it also provides a check on the tax compliance at the central and state level. This results in better tax compliance.

No taxing system can completely eradicate the effect of cascading, but implementation of GST, will certainly minimize the effect. GST seeks to provide a simple structure to levy, collect and administer the taxes in the Country. GST also seeks to consolidate many and different taxing statutes at the Central and the State level into a comprehensive tax structure, enabling the exchequer to have a larger taxing base and consequently reducing the compliance cost of the assessee. The concurrence of all States would be must and inevitable to implement GST at a national level.

The commitment to implement GST in India was first made in Budget 2006 by the then Hon'ble Finance Minister Mr. P Chidambaram. He proposed to implement GST on April 01, 2010. Consequently, the empowered committee of State Finance Ministers and the Central Government joined hands to set the roadmap for its implementation. As a first initiative, the Empowered Committee in consultation with the Central Government, agreed to set up a Joint Working Group (JWG) to recommend a GST model for India based on the constitutional framework of India and study of GST models that have been implemented globally. The first discussion paper of the Empowered Committee of State Finance Ministers has been issued to the public on November 10, 2009. Pursuant to this, the National Council of Applied Economic Research and 13th Finance Commission have submitted their report on the GST system. The Report of The Task Force on Goods and Service Tax published on December 15, 2009, however, recommended its implementation to be delayed till October 1, 2010[10].

There was a burden of "tax on tax" in the pre-existing Central excise duty of the Government of India and sales tax system of the State Governments. The introduction of Central VAT (CENVAT) has removed the cascading burden of "tax on tax" to a good extent by providing a mechanism of "set off" for tax paid on inputs and services up to the stage of production, and has been an improvement over the pre-existing Central excise duty. Similarly, the introduction of VAT in the States has removed the cascading effect by giving set-off for tax paid on inputs as well as tax paid on previous purchases and has again been an improvement over the previous sales tax regime.

But both the CENVAT and the State VAT have certain incompleteness. The incompleteness in CENVAT is that it has yet not been extended to include chain of value addition in the distributive trade below the stage of production. It has also not included several Central taxes, such as Additional Excise Duties, Additional Customs Duty, Surcharges etc. in the overall framework of CENVAT, and thus kept the benefits of comprehensive input tax and service tax set-off out of the reach of manufacturers/ dealers. The introduction of GST will not only include comprehensively more indirect central taxes and integrate goods and services taxes for set-off relief, but also capture certain value addition in the distributive trade.

Similarly, in the present State level VAT scheme, CENVAT load on the goods has not yet been removed and the cascading effect of that part of tax burden has remained

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[8] VAT in India was initiated at the Central level for a particular group of commodities through the Modified Value Added Tax (MODVAT) scheme on March 1, 1986. It was converted to Central Value Added Tax (CENVAT) in 2002. Likewise, State Sales Tax has been replaced by State VAT.

[9] 'Goods and Services Tax: Some Progress towards Clarity' (December 19, 2009) by M Govinda Rao, Economic & Political WEEKLY, Vol. XLIV No 51.

[10] Mr. Pranab Mukherjee, Finance Minister of India, Speech at the Union Budget 2010-11, February 26, 2010, at http://www.thehindu.com/business/Economy/article113901

unrelieved. Moreover, there are several taxes in the States, such as, Luxury Tax, Entertainment Tax, etc. which have still not been subsumed in the VAT. Further, there has also not been any integration of VAT on goods with tax on services at the State level with removal of cascading effect of service tax. In addition, although the burden of Central Sales Tax (CST) on inter-State movement of goods has been lessened with reduction of CST rate from 4% to 2%, this burden has also not been fully phased out. With the introduction of GST at the State level, the additional burden of CENVAT and services tax would be comprehensively removed, and a continuous chain of set-off from the original producer's point and service provider's point upto the retailer's level would be established which would eliminate the burden of all cascading effects, including the burden of CENVAT and service tax. This is the essence of GST. Also, major Central and State taxes will get subsumed into GST which will reduce the multiplicity of taxes, and thus bring down the compliance cost. With GST, the burden of CST will also be phased out[11].

Thus GST is not simply VAT plus service tax, but a major improvement over the previous system of VAT and disjointed services tax a justified step forward. GST is a tax on goods and services with comprehensive and continuous chain of set-off benefits from the producer's point and service provider's point up to the retailer's level. It is essentially a tax only on value addition at each stage, and a supplier at each stage is permitted to set-off, through a tax credit mechanism, the GST paid on the purchase of goods and services as available for set-off on the GST to be paid on the supply of goods and services. The final consumer will thus bear only the GST charged by the last dealer in the supply chain, with set-off benefits at all the previous stages[12].

The illustration shown below indicates, in terms of a hypothetical example with a manufacturer, one wholeseller and one retailer, how GST will work. Let us suppose that GST rate is 10%, with the manufacturer making value addition of Rs.30 on his purchases worth Rs.100 of input of goods and services used in the manufacturing process. The manufacturer will then pay net GST of Rs. 3 after setting-off Rs. 10 as GST paid on his inputs (i.e. Input Tax Credit) from gross GST of Rs. 13. The manufacturer sells the goods to the wholeseller. When the wholeseller sells the same goods after making value addition of (say), Rs. 20, he pays net GST of only Rs. 2, after setting-off of Input Tax Credit of Rs. 13 from the gross GST of Rs. 15 to the manufacturer. Similarly, when a retailer sells the same goods after a value addition of (say) Rs. 10, he pays net GST of only Re.1, after setting-off Rs.15 from his gross GST of Rs. 16 paid to wholeseller.

Thus, the manufacturer, wholeseller and retailer have to pay only Rs. 6 (Rs. 3 + Rs. 2 + Rs. 1) as GST on the value addition along the entire value chain from the producer to the retailer, after setting-off GST paid at the earlier stages. The overall burden of GST on the goods is thus much less. This is shown in the table below. The same illustration will hold in the case of final service provider as well[13].

Table

Stage of supply chain	Purchase value of input	Value addition	Value at which supply of goods and services made to next stage	Rate of GST in %	GST on output	Input Tax Credit	Net GST = GST on output- Input Tax Credit
Manufacturer	100	30	130	10	13	10	13–10 = 3
Whole seller	130	20	150	10	15	13	15–13 = 2
Retailer	150	10	160	10	16	15	16–15 = 1

[11] "First Discussion Paper on Goods and Services Tax in India" by The Empowered Committee of State Finance Ministers, published on 10th November 2009

[12] Ibid

[13] Ibid

The most important ten elements of a pure GST are the following:-

a. The base should extend to all goods and services including immovable property.

b. There should be a single low rate.

c. The tax should be destination based.

d. The tax should be designed on invoice-credit method.

e. Full and immediate input tax credit in respect of capital goods.

f. The GST must replace all transaction based taxes on goods and services and factors of production.

g. There should be seamless flow of the tax through all stages of production and distribution so as to stick on "final" consumption.

h. The exports should be zero rated and imports should be fully taxed.

i. There should be a threshold exemption for small dealers.

j. Full computerization of the compliance and administrative systems.

Which Central and State Taxes are Proposed to be Subsumed under GST

The various Central, State and Local levies were examined to identify their possibility of being subsumed under GST. While identifying, the following principles were kept in mind:

a. Taxes or levies to be subsumed should be primarily in the nature of indirect taxes, either on the supply of goods or on the supply of services.

b. Taxes or levies to be subsumed should be part of the transaction chain which commences with import/ manufacture/ production of goods or provision of services at one end and the consumption of goods and services at the other.

c. The subsumation should result in free flow of tax credit in intra and inter-State levels.

d. The taxes, levies and fees that are not specifically related to supply of goods & services should not be subsumed under GST.

e. Revenue fairness for both the Union and the States individually would need to be attempted[14].

On application of the above principles, the Empowered Committee has recommended that the following Central Taxes should be, to begin with, subsumed under the Goods and Services Tax:

a. Central Excise Duty

b. Additional Excise Duties

c. he Excise Duty levied under the Medicinal and Toiletries Preparation Act

d. Service Tax

e. Additional Customs Duty, commonly known as Countervailing Duty (CVD)

f. Special Additional Duty of Customs - 4% (SAD)

g. Surcharges, and

h. Cesses.

The following State taxes and levies would be, to begin with, subsumed under GST:

a. VAT / Sales tax

b. Entertainment tax (unless it is levied by the local bodies).

c. Luxury tax

d. Taxes on lottery, betting and gambling

e. State Cesses and Surcharges in so far as they relate to supply of goods and services

f. Entry tax not in lieu of Octroi[15].

Purchase tax: Some of the States felt that they are getting substantial revenue from Purchase Tax and, therefore, it should not be subsumed under GST while majority of the States were of the view that no such exemptions should be given. The difficulties of the food grain producing States was appreciated as substantial revenue is being earned by them from Purchase Tax and it was, therefore, felt that in case Purchase Tax has to be subsumed then adequate and continuing compensation has to be provided to such States. This issue is being discussed in consultation with the Government of India.

Tax on items containing Alcohol: Alcoholic beverages would be kept out of the purview of GST. Sales Tax/VAT

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[14] "First Discussion Paper on Goods and Services Tax in India" by The Empowered Committee of State Finance Ministers, published on 10th November 2009

[15] Ibid

could be continued to be levied on alcoholic beverages as per the existing practice. In case it has been made VAT able by some States, there is no objection to that. Excise Duty, which is presently levied by the States may not also be affected.

Tax on Tobacco products: Tobacco products would be subjected to GST with ITC. Centre may be allowed to levy excise duty on tobacco products over and above GST with ITC.

Tax on Petroleum Products: As far as petroleum products are concerned, it was decided that the basket of petroleum products, i.e. crude, motor spirit etc. would be kept outside GST as is the prevailing practice in India. Sales Tax could continue to be levied by the States on these products with prevailing floor rate. Similarly, Centre could also continue its levies. A final view whether Natural Gas should be kept outside the GST will be taken after further deliberations.

Taxation of Services: As indicated earlier, both the Centre and the States will have concurrent power to levy tax on goods and services. In the case of States, the principle for taxation of intra-State and inter-State has already been formulated by the Working Group of Principal Secretaries/Secretaries of Finance/Taxation and Commissioners of Trade Taxes with senior representatives of Department of Revenue, Government of India. For inter-State transactions an innovative model of Integrated GST will be adopted by appropriately aligning and integrating CGST and IGST[16].

In the light of the above, Task Force on Goods and Services Tax have recommended a 'flawless' GST in the context of the federal structure which would optimize efficiency, equity and effectiveness. The 'flawless' GST is designed as a consumption type destination VAT based on invoice-credit method. It provides for a comprehensive base including financial services and immovable property. To the extent there are exemptions, albeit limited to items covered for distribution through the public distribution system, and health and education services, the purity of the GST is diluted. A threshold exemption of Rs. 10 lakh has also been provided for small businesses. Imports into the country are proposed to be taxed in the same manner as domestically produced goods. Like intermediate inputs, full and immediate credit for tax paid on capital goods will also be provided. Further, it also provides for a single rate of tax of 12 percent for all general goods and services across all states, comprising of 5 percent by the Centre and 7 percent by the States62. However, products of high value like gold and platinum will be subject to tax at the rate of 1 percent each by the Centre and the States and exports will be zero rated[17].

There is empirical evidence to suggest that the switchover from the present distortionary taxation of goods and services to a 'flawless' GST will, amongst others, increase productivity of all factors of production and hence enhance GDP. The switchover has also been analyzed to be pro-poor and therefore, further the cause of poverty reduction. Further in the Indian context, a dual VAT type tax concurrently levied by both the Centre and the States would enable the creation of a common market.

Given the benefits of the changeover to the flawless GST, it would be economically rational for all levels of Government to introduce and successfully implement the flawless GST and for the Central Government to invest in incentivising the State Government to adopt the flawless GST. Task Force on Goods and Services Tax have, therefore, recommended that the Central Government should provide a sum of Rs 30,000 crores over the next five years which will be used to compensate the States for revenue loss, if any, and the balance for distribution between the States on the basis of the same formula applicable for tax devolution to the States. However a systematic discussion on coordinated consumption tax system was initiated in the Report on Reform of Domestic Trade Taxes in India prepared by the National Institute of Public Finance And Policy (NIPFP)[18].

Task Force on Goods and Services Tax has recommended that the implementation of the GST should be postponed to 1st October, 2010. Task Force on Goods and Services Tax believe that it should be possible to adhere to this timeline. The benefits from the switch over to the GST are contingent upon the purity of the GST design. In the context of VAT, international experience shows that any design-related 'VAT mistakes are very hard to rectify'. Therefore, it must be ensured that there are no design related mistakes at birth. However, if there is a trade-off between the timeline and the design of the GST, the dilemma must be resolved in favour of design. Further, in order to implement the 'flawless' GST it would be necessary to undertake constitutional amendments to enable both the Centre and the States to exercise concurrent jurisdiction over the taxation of all goods and services, creation of the proposed Council of Finance Ministers and assignment of part of the GST proceeds to the third-tier of government. These amendments must, inter alia, provide that the

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16 Ibid

17 "Report of Task Force on Goods and Services Tax" by Thirteenth Finance Commission, Government of India, published on 15th December 2009.

18 Report on Reform of Domestic Trade Taxes in India, National Institute of Public Finance and Policy, New Delhi, 1994

taxation of goods and services by both the Centre and the States should be a consumption-type, destination based GST[19].

The introduction of the 'flawless' GST is one of the most important reform agenda which can provide a new impetus to Indian industry and inclusive growth. It is an economic game changer. All stakeholders must unite and develop the necessary will to cooperate in introducing the flawless GST. It would be worthwhile to make greater political investment in this endeavor[20].

Conclusion

Goods and Services Tax (GST) in India is yet to be implemented, there is no such judgments of Hon'ble Apex as well as various High Courts. It is need of time to work over GST and that's why since 2004 all government have been trying to implicate flawless GST in India. GST is going to be the tax regime of 21st century further it would result in abolition of multiple types of taxes on goods and services. Going by global experience, the GST can be a big boon if it has right kind of rate and legislation. It is high time for all concerned, including Lawyers, to start preparing for smooth introduction, implementation and operation of GST. When we have VAT in almost the whole country and the system of central excise and service tax is well equipped with the CENVAT credit, then why is there a need of GST? Well, this is needed to match the international phenomenon. It is needed to reduce the burden of Central excise. The introduction of GST will certainly change the Federal system of Governance in our country in which states also have the right to collect taxes on goods.

[19] Ibid

[20] Ibid

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