ISSN 0522-0815

The Banaras Law Journal

Vol. 39 Jan. 2010 – Dec. 2010

ARTICLES

M.P. Singh	Reservation : The Judicial Construction
Abdul Haseeb Ansari	Right to a Healthful Environment in Islam and Position in Muslim Countries : An Expository Study
Guru Gyan Singh	Qualifications for University Teachers and Constitutional Contours
Pradeep Singh	Probation of Offenders in India : A Modern Measure to Tackle the Problem of Crime and Criminality
Sibaram Tripathy	Privatisation of Insurance Business in India and Its Impact on Insurance Industry - With Special Reference to Life Insurance Business in India
Chandra Pal Upadhyay	Medical Negligence : The Concept Redefined
Manoj Kumar Padhy	Gender Discrimination in Land Rights under the U.P. Zamindari Abolition and Land Reforms Act, 1950
Golak Prasad Sahoo	Online Jurisdiction : Perception and Reality
Rajnish Kumar Singh	Enforcement of Foreign Arbitral Awards: Is the Public Policy Exception in Indian Law Consistent with the Global Trends?
Rajneesh Kumar Patel	Credible Mechanism for Disciplining the Judges

THE

BANARAS LAW JOURNAL

Cite This Issue

as

(2010) 39, B.L.J.

Editor
Prof. D.P. Verma

Executive Editor
Dr. M.N. Haque

BANARAS LAW JOURNAL EDITORIALCOMMITTEE

- **Prof. D.P. Verma (Head & Dean)** – **Editor**
- **Dr. M.N. Haque** – **Executive Editor**
- **Dr. Sibaram Tripathi**
- **Dr. Ajendra Srivastava**
- **Dr. V.K. Pathak**
- **Dr. V.P. Singh**

The Banaras Law Journal is published annually by the Law School, Banaras Hindu University since 1965.Articles and other contributions for possible publication are welcomed and these as well as books for review should be addressed to the Editor, Banaras Law Journal, Law School, Banaras Hindu University, Varanasi – 221005, India. Views expressed in the Articles, Book Reviews, Notes, Comments and all other contributions published in this Journal are those of the respective authors and do not necessarily reflect the views of the Board of Editors of the Banaras Law Journal.

In exchage for Banaras Law Journal, the Law School, Banaras Hindu University would appreciate receiving Journals, Books and monographs, etc. which can be of interest to Indian specialists and readers.

Composed and Printed by B.H.U. Press, Banaras Hindu University, Varanasi-221005

Law School
Banaras Hindu University

Visitor	:	The President of the Republic of India (Ex-officio)
Vice-Chancellor	:	Prof. D. P. Singh
Rector	:	Prof. B. D. Singh
Registrar	:	Dr. K. P. Upadhyay
Librarian Incharge	:	Prof. D. K. Singh
Head of the Department & Dean, Faculty of Law	:	Prof. D. P. Verma

The Faculty Staff

Sl. No.	Name & Qualifications	Designation
1.	Baeraiya, Babita, B.A., LL.M.	Lecturer
2.	Gupta, Shailendra Kumar, B.A., LL.M., Ph.D. (Banaras)	Reader
3.	Haque, Md. Nasimul, B.Sc., LL.M., Ph.D. (Banaras)	Associate Professor
4.	Kumar, Adesh, B.Sc., LL.M., LL.D.	Lecturer
5.	Kumar, Ajay, LL.M., Ph.D. (Rohatak) (On leave)	Associate Professor
6.	Majhi, Raju, B.Com., LL.M. (Banaras)	Assistant Professor
7.	Malaviya, M.K., B.A., LL.M., M.Phil.	Lecturer
8.	Mehdi, Ali, B.Sc., LL.M., Ph.D. (Delhi)	Professor
9.	Mehra, Surendra, B.A.(Hons.), LL.M.	Lecturer
10.	Mishra, Dharmendra Kumar, B.A., B.Ed., LL.M., Ph.D. (Banaras)	Associate Professor
11.	Mishra, N. K., B.Sc., LL.M., Ph.D.	Lecturer
12.	Mishra, Vinod Shankar, B.Sc., LL.M., Ph.D. (Banaras)	Associate Professor
13.	Murali, R. K., B.Sc., LL.M.(Andhra), Dip. In IRPM (Tirupati), Ph.D.	Associate Professor
14.	Nirmal, B. C., B.Sc., LL.M., Ph.D. (Banaras)	Professor
15.	Padhy, M. K., B.Sc., LL.M. (Berhampur), Ph.D. (Banaras)	Reader
16.	Pandey, Akhilendra Kumar, B.Sc., LL.M., Ph.D. (Banaras)	Associate Professor

17.	Pandey, B. N., B.Sc., LL.M., Ph.D. (Banaras)	Professor
18.	Patel, R. K., B.A.(Hons.), LL.M., Ph.D.	Lecturer
19.	Pathak, V. K., B.Sc., LL.M., Ph.D.	Lecturer
20.	Rai, J. P., B.A., LL.M., Ph.D. (Purvanchal)	Reader
21.	Rai, R. P., B.Sc., M.A., LL.M., Ph.D. (Rewa)	Professor
22.	Rai, S. P., B.Sc., LL.M. (Banaras)	Associate Professor
23.	Ram Jee, B.A., LL.M. (Banaras)	Associate Professor
24.	Sahoo, G. P., B.A., LL.M. (Utakal)	Assistant Professor
25.	Saroj, V. K., B.A., LL.M. (Banaras)	Assistant Professor
26.	Sharma, D. K., LL.M., LL.D. (Meerut)	Professor
27.	Kumar, Parveen, B.A., LL.M.	Lecturer
28.	Singh, A. K., B.Sc., LL.M., LL.D.	Lecturer
29.	Singh, M. P., B.Sc., LL.M., Ph.D. (Kashividyapith)	Professor
30.	Singh, P. K., LL.M., Ph.D. (Agra)	Associate Professor
31.	Singh, R. K., LL.M., Ph.D. (Delhi)	Assistant Professor
32.	Singh, S. P., B.Sc., LL.M., Ph.D. (Banaras)	Professor
33.	Singh, V. P., LL.B.(Hons.), LL.M., Ph.D.	Lecturer
34.	Srivastava, Ajendra, B.A., LL.M., Ph.D. (Delhi)	Associate Professor
35.	Srivastava, D. K., B.Sc., LL.M., Ph.D. (Banaras)	Associate Professor
36.	Tewari, J., M.A., LL.M., Ph.D.	Research Assistant
37.	Tripathi, Bibha, B.A., LL.M., Ph.D. (Banaras)	Reader
38.	Tripathi, K. M., B.A.(Hons.), LL.M., Ph.D.	Lecturer
39.	Tripathy, Sibaram, LL.M., Ph.D.	Associate Professor
40.	Trivedi, Abha, B.A.(Hons), LL.M. (Banaras)	Associate Professor
41.	Upadhyay, C. P., LL.M., Ph.D. (Agra)	Associate Professor
42.	Verma, D. P., M.A., LL.M. (Dalhousie)	Professor
43.	Verma, G. P., M.A., LL.M., Ph.D. (Banaras)	Professor
	Library Staff	
1.	Nazim, Mohammad, B.A.(Hons.), M.Lib. & I. Sc.	Assistant Librarian
2.	Kumar, Prabhat, M.A., M.Lib. & I. Sc.	Semi Prof. Asstt.
3.	Lal, Chunni, B.A., B.Lib. & I. Sc.	Professional Asstt.
4.	Nath, Shobh, Inter, C.Lib.Sc.	Semi Prof. Asstt.
5.	Pal, Brij, M.A., M.Lib. & I. Sc.	Semi Prof. Asstt.

THE BANARAS LAW JOURNAL

Vol. 39 **Jan.2010-Dec.2010** **ISSN 0522-0815**

ARTICLES

Reservation: The Judicial Construction – 7-19
M.P. Singh

Right to a Healthful Environment in Islam and Position in Muslim Countries: An Expository Study – 20-44
Abdul Haseeb Ansari

Qualifications for University Teachers And Constitutional Contours – 45-74
Guru Gyan Singh

Probation of Offenders in India: A Modern Measure to Tackle the Problem of Crime and Criminality – 75-98
Pradeep Singh

Privatisation of Insurance Business in India and Its Impact on Insurance Industry - With Special Reference to Life Insurance Business in India – 99-116
Sibaram Tripathy

Medical Negligence: The Concept Redefined – 117-132
Chandra Pal Upadhyay

Gender Discrimination in Land Rights under the U.P. Zamindari Abolition and Land Reforms Act, 1950 – 133-154
Manoj Kumar Padhy

Online Jurisdiction: Perception and Reality – 155-174
Golak Prasad Sahoo

Enforcement of Foreign Arbitral Awards: Is the Public Policy Exception in Indian Law Consistent with the Global Trends? – 175-190
Rajnish Kumar Singh

Credible Mechanism for Disciplining the Judges – 191-212
Rajneesh Kumar Patel

SHORT ARTICLES

Mining in Bauxite Mines on Niyamgiri Hilltop in Orissa: Government's Action in Harmony with the Nature – 213-218
Ali Mehdi

Service Tax: A Profitable Imposition – 219-226
M.N. Haque

Platonic Concept of Justice *vis-a-vis* Indian Varna Dharma: A Fresh Look – 227-234
Anshu Mishra & Dharmedra Kumar Mishra

Justice and Truth: An Analysis with Special Reference to Criminal Justice System in India – 235-242
Arun Kumar Singh

Concept of Plea Bargaining in India – 243-257
Adesh Kumar

BOOK REVIEWS

Basantilal Babel Forensic Science (Hindi) – 258-264
Akhilendra K. Pandey

FE Noronha Private International Law in India : Adequacy of Principles in comparison with Common Law and Civil Law System – 265-266
Ajendra Srivastava

M. Monir, Law of Evidence – 267-272
Adesh Kumar

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 07-19

Reservation : The Judicial Construction

M.P. Singh*

Abstract : *For the constituent assembly and Dr. B. R. Ambedkar the policy of reservation was to create a balance between equality of opportunity and history specific design of oppression and social exclusion. However, this extreme form of affirmative action has become an instrumentality to gaining political power sacrificing the other values of constitutionalism. Judiciary while constructing reservation has fused class into caste. Judicial determination of Backward Classes seems to be a kind of helplessness against the backdrop of first backward classes commission. While interpreting 'socially, and educationally backward classes', courts have held that the economic criterion alone cannot be the basis of backwardness although it may be a consideration along with or in addition to social backwardness. Such judicial construction of caste based reservation has, ultimately, become an instrument of symbolic caste solidarity being used for management of political support and fissiparous formations. Therefore, other forms of affirmative actions like developmental preferential treatment need serious consideration in a non-political mood in the larger interest of modern constitutional democracy.*

Key Words : *Judicial construction, Affirmative action, Oppression, Social exclusion, Plural society. Equality of opportunity, Backward classes, Class poverty, Scheduled castes, and Scheduled tribes, Backwardness, Creamy layer, Socially and educationally backward classes, Nehru- Mahlanobis model, Other backward classes, Disparate impact of reservation.*

Introduction

Reservation: The idea

Caste and class

* Professor, Law School, Banaras Hindu University

Evaluation of Reservation:

(i) Disparate impact

(ii) Temporary Measure

(iii) Impact on those who benefit

Conclusion

...To lend immortality to the reservation policy is to defeat its raison d'etre, to politicize this provision for communal support and Party ends is to subvert the solemn undertaking of Article 16(1)

–Krishna Iyer

Introduction

Reservation or the quota system in jobs and educational institutions is the extreme limit to which the doctrine of affirmative action can be extended. For the Constituent Assembly and Dr. B.R. Ambedkar, as Chairman of the 'Drafting Committee, in particular, the policy of reservation was to create a balance between the cherished modern values of equality of opportunity and a demand by certain communities to demolish the history specific design of oppression and exclusion. In fact, the object of such an extreme form of affirmative action was to achieve the equality of results and to maintain numerical and qualitative or relative equality by ensuring sufficient representation of all classes of citizens. For power oriented politicians, off late, reservation is becoming an instrumentality of aggrandizement to gain power resulting in the creation of a myth and a dangerous illusion ultimately distorting the basic constitutional values of a co-existent plural society with a goal of justice to all. Locked into such extremities the judiciary confronted with the issue and extent of reservation as a custodian of the Constitution has assumed the role of a true social engineer in sociological juristic traditions to strike a balance between the competing interests of puritan equalitarian and emancipatory communitarians celebrating differences.

Our purpose, here, is limited only to highlighting the judicial response through some landmark judgments and to see as to how it has constructed the idea of reservation in our constitutional democracy.

---

1 Akhil Bhartiya Soshit Karmachari Sangh v. Union of India, (1981) 1SCC 246.

Reservation : The Idea

In *Indra Sawhney v. Union of India*[2], *Justice* P.B. Sawant observed that the aim of any civilized society should be to secure dignity to every individual. There cannot be dignity without equality of status and opportunity. The absence of equal opportunities in any walk of social life is a denial of equal status and equal participation in the affairs of the society and, therefore, of its equal membership. The democratic foundations are missing when equal opportunity to grow, govern and give one's best to the society is denied to a sizable section of society. He went further in asserting that inequality ill-favours fraternity, and unity remains a dream without fraternity. The goal enumerated in the preamble of the constitution, of fraternity assuring the dignity of the individual and the unity and integrity of the nation will, therefore, remain unattainable so long as the equality of opportunity is not ensured to all.

It is no longer necessary to emphasize that the equality contemplated by Article 14 and other cognate Articles including Articles 15(1), 16 (1) 29(2) and 38(2) of the constitution, is secured not only when equals are treated equally but also when unequals are treated unequally. Conversely, when unequals are treated equally, the mandate of equality before law is breached. To bring about equality between the unequals, therefore, it is necessary to adopt positive (affirmative) measures to abolish historically imposed inequality. the principle of affirmative action (though not exactly in the Indian style) has been accepted by the U.S. Supreme court also in various celebrated cases.[3]

Caste and Class

Judicial determination of the sphere of 'Backward class', in India,

---

2 AIR 1993 SC 477

3 See, *Oliver Brown v. Board of Education of Topeka*, 347 US483; *S.T. Bolling v. C.M. Sharpe*, 347 US 497; *M. Defunis V. Charles Odeggard*, 416 US 312; *Regents of University of California v. Allan Barkke*, 438 US 265; *N. Earl Fullilove v. P.M. Klutznic*, 448 US 448; *Metro Boradcasting v. Federal Communication Commission*, 497 US 447;

from 1968 came as watershed and, in fact, a fusion emerged of 'class' with caste. This must have occurred due to historical specificity of caste based oppression and exclusion but in the context of political economy of the country it took away the Marxian sharpness of 'class' and forced even the communist movement into a compromising position rather it put them into the corner of bourgeouis charivari and collaborative exercises with caste based political outfits. Justice Wanchoo's opinion in the Supreme Court[4] is supportive of this inference:

> a caste is also a class of citizens and if the caste as a whole (*emphasis added*) is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4)...[5] "
>
> ...Caste and economic situation, reflecting each other as they do are the *deus ex machina* of the social status occupied and the economic power wielded by an individual or class in rural society. Social status and economic power are so, woven and fused into the caste system in Indian rural society that one may without hesitation, say that if poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste.

To determine the scope of 'Backward classes' reliance on caste, ultimately, seems to be a kind of helplessness right from the First Backward classes Commission's Report (Kaka Kalelkar Commission Report) wherein it was observed:

> We tried to avoid caste but we find it difficult to ignore caste in the present prevailing conditions. We wish it were easy to dissociate caste from social backwardness at the present juncture. In modern time anybody can take to any profession. The Brahmin taking to tailoring, does

4 *P. Rajendran v. State of Madras*, AIR 1968 SC 179

5 Emphasis is ours.

> not become a tailor by caste, nor is his social status lowered as a Brahmin. A Brahmin may be a seller of boots and shoes, and yet his social status is not lowered thereby.

We could locate a catena of decisions rendered by the Supreme Court wherein tremendous ambivalence could be discerned regarding the exclusive relevance of caste in determination of the true import of the phrase 'backward classes of citizens', which took the centre-stage in the Central Educational Institutions (Reservation in Admission) Act, 2006 and the construction of Article 15(5) in this regard. For example Ray C.J. in *State of U.P.v. Pradeep Tandon*[6] observed:

> "It is true that Article 15(i) forbids discrimination only on the ground of religion, race, caste but when a classification takes recourse to caste as one of the criteria in determining socially and educationally backward classes the expression 'classes' in that case violates the rule of *expressio unius est exclusio alterius*. The socially and educationally backward classes of citizens are groups other than groups based on caste".

Tired with this judicial vacillation, perhaps, the state of Karnataka requested the Supreme Court to give clear guidelines on this vexed question in *K.C.Vasanth Kumar v. State of Karntaka*. But ironically five judges of the Supreme Court expressed five separate opinions on the question. Chandrachud, C.J. said that the backward classes should be comparable to the Scheduled Castes and the Scheduled Tribes in the matter of their backwardness and 'they should satisfy the necessary test laid down by the state government such as a State Government may lay down in the context of prevailing economic conditions'. Desai, J. Said 'The only criterion which can be realistically devised is the one of economic backwardness.' Chinappa Reddy, J. concluded: 'Class poverty, not individual poverty, is therefore the primary test...Despite individual exceptions, it may be possible and

6 (1975) 1 SCC 267
See also, *Triloki Nath v. State of J & K*, (1969) 1 SCR 103; *Akhil Bhartiya Shoshit Karmachari Sangh v Union of India*, (1981) 1 SCC246; *K.C. Vasanth Kumar v. State of Karnataka*, 1985 Supp. SCC 714.

easy to identify social backwardness with reference to caste, with reference to residence, with reference to occupation or some other dominant feature.' In the opinion of Sen, J. 'The predominant and the only factor for making special provisions under Article 15(4) or for reservation of posts and appointments under Article 16(4) should be poverty, and caste or a sub-caste or a group should be used only for purposes of identification of persons comparable to Scheduled Castes or Scheduled Tribes.' Finally, Venkataramiah, J. seems to be favouring a test in which the lowest among the castes similar to Scheduled Castes and Scheduled Tribes, the means or economic condition and the occupation may all the counted in making a determination of backwardness. From this divergence of opinions we may conclude that except Desai, J; who would consider poverty as the only test of backwardness, all others consider caste also a relevant consideration at least at this stage of the Indian society.[7]

Once again the caste-class discourse embroiled the nine judges' constitutional bench of the Supreme Court in *Indra Sawhney v. Union of India*[8] (The Mandal Commission Case). The Second Backward classes commission report (Mandal Commission) which was submitted on December 31, 1980 constructing an arithmetical quagmire, notwithstanding gave twelve weightage points to social factors alone making Educational and economic factors irrelevant, thus, relying mainly on caste as the sole determinant of 'Backward classes' considering its devastating effect on the social fabric of the country the governments at the centre preferred to shelve the report.

On the front of political economy, particularly after the death of Mrs. Indira Gandhi, socialism even as a rhetoric was made to be forgotten and under her son Rajiv Gandhi a new managerial politics started with neo-Liberal accent. With the beginning of seemingly the end of ideology in India politicians were in a massive hunt for an agenda to manage votes. Caste based reservation relying upon the Mandal Report was used by V. P. Singh as a political S.O.S. by issuing a circular on August 13, 1990 making twenty seven percent reservation in civil posts and services. Soon after the issuance of the

7 *V.N. Shukla's, Constitution of India,* Edited by M.P. Singh (Lucknow : Eastern Book Company 2006) at 78-80.

8 AIR 1993 SC 477

memorandum there was widespread protest in certain northern states against it resulting into loss of life and massive damage to property. After the change of the government at the centre another modifying office memorandum was issued on September 25, 1991 wherein out of twenty seven percent ten percent posts were to be reserved in favour of other economically backward sections of the people. All this was challenged before the Supreme Court of India in the Mandal Case through writ petitions, which, however, went before a nine judges bench. The reason for the reference being that the several judgments of the Supreme Court have not spoken in the same voice on the issue of reservation and final look by a larger bench should settle the law in an authoritative way.

Before taking up the authoritative and final view of the Supreme Court in the Mandal Judgment a submission addressed to the politicians would be worthwhile regarding the locale of the Supreme Court in a constitutional democracy:

> "The sweep and width of judicial power and authority exercised by this (Supreme) court is much extensive and deep as constitutional provisions mandate it to be so. Test for interference is constitutional violation. Due regard to legislative measures or executive action directed towards welfare measures or executive action directed towards such measure has never been disputed but when they are overshadowed with extraneous compulsions or are arbitrary then "judicial interpretation gives better protection than the political branches"[9]... Even the most reactionary of American Presidents, Thomas Jefferson once said, "The Law of the land administered by upright judges would protect you from any exercise of power unauthorized by the constitution of United States". Faith in the judiciary is of prime importance. Ours is a free nation. Among such people respect for law and belief in its constitutional interpretation by courts require and extra ordinary degree

9 A Cox , The Court and the Constitution at 372 as quoted in *Indra Sawhney v. Union of India,* (1992) SCC (L&S) Supp at 280

of tolerance and cooperation for the value of democracy and survival of constitutionalism"[10].

The Court held that 'class' in Articles 15(4) and 16(4) respectively are not to be construed in the Marxist sense. The Constitution does not define these classes nor does it lay down any methodology for their determination. The Court could also not devise any method for determination. The central idea and overall objective, the Court said, should be to consider all available groups, sections and classes in the society. Since caste represented an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one could, according to the Court, well begin with it and then go to other groups, sections and classes. Caste, However, ws not an essential factor for determing the social and educational backwardness. It is also not necessary that SEBCs should be similarly situated as SCs and STs. Within SEBCs classification between the backward and more backward is permissible. To maintain the cohesiveness and character of a class the 'creamy layer' can and must be excluded from SEBCs. The Court also clarified that 'backward class of citizens' in Article 16(4) is a wider category than SEBCs in Articles 15(4) and 340 In the former accent is on social backwardness while in the latter it has to be both social and educational. It also held that the economic criterion alone cannot be the basis of backwardness although it may be a consideration along with or in addition to social backwardness. The Court also suggested creation of a permanent body at the central and state levels to look into the complaints of over and under inclusion as well as to revise the lists of SEBCs periodically.

Following the Court's directions the Centre and the States have appointed backward class commissions for constant revision of such classes and for the exclusion of creamy layer from amongst them. However, unreasonably high standard for determining the creamy layer have been invalidated[11] and wherever any government has failed to implement the requirement of appointing a commission and exclusion of creamy layer it has issued necessary directions

[10] *Indra Sawhney v. Union of India* Supreme Court Mandal Commission Case, Eastern Book Co.(1992) at 280

[11] *Ashok Kumar Thakur v. State of Bihar*, (1995) 5 SCC 403

compelling them to do so.[12]

With this larger Bench decision, the matter seems to have been settled that caste can be an important or even sole factor in determining the social backwardness and that poverty alone cannot be such a criterion. If the primary intention of the Constitution-makers was, as it appears to be, to compensate for the handicaps from which certain sections of the society have suffered under our social arrangements then caste cannot be ignored as an important factor in determing backwardness. It is only when distributive justice or utilitarian principle and not compensatory justice become the basis of protective discrimination that poverty and alienation may become important factors in determining backwardness.

By 1990, however, the Nehru-Mahlanobis model was pushed back for ceremonial remembrances and the capitalist class supported also even by the middle class started becoming autonomous from state intervention. In such a situation, the caste-based rhetoric of social justice was constructed to help the non-ideological political formations and combinations. Even the leftists started singing to the tune of the promises of neo-liberal campaigns. For example, Senior Advocate Shri R.K.Garg appearing for the Communist Party of India, an intervener, submitted in the Mandal Commission case that caste plus poverty plus location plus residence should be the basis of identification and not-mere caste (emphasis added). According to the communist learned counsel, a national consensus was essential to introduce reservations for 'other backward classes' and that efforts must have been made to achieve such a consensus. But now when a crusade was launched to reserve seats in central educational institutions in favour of other backward classes the entire left ultimately became wise enough to become share-holders of the solely caste based political designs for management of votes, perhaps, in the' Hindi Belt' of India. A political consensus was forged even to do away with the rider of creamy layer in this pursuit.

They even did not care to refer to the caveat of Dr. B.R. Ambedkar in the constituent Assembly in this regard. Dr. Ambedkar was unequivocal when he declared that reservation must be confined

[12] *Indra Sawhney v. Union of India*, (2000) 1 SCC 168

to a minority of available posts, lest it should destroy the very concept of equality and thus undermine democracy. Any excessive reservation or any unnecessary prolonged reservation will result in invidious discrimination.[13]

Evaluation of Reservation

In India during a journey of at least five decades the caste based quota system has been politicized to such an extent that majority of people are situated in emotional and symbolic extremities leaving no space for any scientific discourse. When K.R. Naryanan, the then President of India who had the opportunity to work with a doyen like Harold J. Laski, suggested to reconsider the Indian quota system with a viable form of affirmative action or a developmental preferential treatment, it could not come on the political agenda. Now in spite of the intent of Supreme Court to settle the issues finally in an authoritative manner, the matter has again been referred to the five judges constitutional bench of Supreme Court. This is a moment when the following issues must seriously be discussed.

(i) Disparate Impact

Disparate impact of quota system of reservation should be studied with reference to its effect on the target groups and also the devaluation of educational and job standards and efficiency as contemplated of Article 335 of the Constitution. Whether reservation or preferential treatment to SC/ST and other backward classes should have a different modus operendi for historical reasons and the differential modes of exclusion and oppression. It has been observed that " There can be little doubt that most of the S.C. and S.T beneficiaries of India's reservation policies in university admissions do indeed come from 'creamy layer' of the dalit and adivasi population it could hardly be otherwise, given the immense obstacle faced by the poor in any effort to persist in school through to higher education. There is also much evidence that beneficiaries tend to come disproportionately from the better off castes and tribes within the SC and ST categories. Thus, in their direct impact, reservation policies have increased inequalities within the SC and ST populations. It has

[13] See, Dr. B.R. Ambedkar 's speech in the Constituent Assembly on 30.11.1948

also been reported that the average academic performance and graduation rates of SC and ST students is distinctly worse then that of other students.[14] With reference to subjugated groups position of women may also be evaluated visa-vis other backward classes so far the nexus of backwardness is held to be occupation and land holdings.

(ii) Temporary Measure

At the time of the introduction of the idea of quota system of reservation it was advocated to be a temporary measure but due to its continued use as a symbolic political component it does not seem to cease. This attitude has adversely affected the welfare obligation of the state towards backward classes and other weaker sections like women and children. With indiscriminate and massive privatization of jobs and educational opportunities how the majority of such 'classes' would be emancipated from historical injustices must be an important item on the agenda of any political discourse, If the scheme has still longer life, there shall be proliferation of such reservation and those covered under them. There may be a competitive race for backward labeling. The recent violent demands made by 'Gujjars' of Rajasthan, Bengalis of Uttarakhand and Rajbhars of U.P. are a testimony to it. One can find large number of identifiable victims, who have lost out on a position or opportunity not because their expectations were faltered by a history of benefiting from discrimination, but rather because, in such a case, somebody lowered their standard or simply imposed a quota.

(iii) Impact on Those Who Benefit

The stigma attached to the beneficiaries of affirmative action is an issue often raised in relation to affirmative action. It is a most valid one, affirmative action affects the 'backward pysche' in two important ways. First, affirmative action creates a feeling of inferiority because of the lowering of traditional standards, such as test scores and qualifications that are often an accompaniment to the policy. Such a practice inevitably sends the message 'you are not good enough to do it on your own'. When a 'person belonging to reserved category receives a position, whether it be in high demand or not, there is the

[14] Thomas E Weisskopf, "Impact of Reservation on Admissions to Higher Education in India", *Economic and Political Weekly, Vol. XXXIX No.39, 4339* at 4347

suspicion, by such persons and others alike, that he has received the position as a result of lowered standards and preferential treatment. The validity of whether either has in fact occurred is irrelevant--perception is more important than reality. They have, in this way, been collectively exposed to an "enlargement of self-doubt" that handicaps them in a way much more subtle and profound than acts of direct discrimination.[15]

Second, the idea of the individual (individual worth and responsibility) is lost in group identity. The individual is lost with the new philosophy of Group justice, group solidarity, and group identification has become the focus. This is not surprising because the social sciences, that have played such a crucial role in developing theories related to affirmative action, are necessarily interested in groups, not individuals. Their studies and research are made of groups, not individuals. However, it is the individual who is entitled to justice. The individual in seeing himself as part of this victimized group, begins to expect less of himself and instead transfers responsibility for his life to others. For these reasons, much more attention needs to be paid to individuals and their inherent rights, and their personal worth–not their worth as a reflection of collective worth. There is a dangerous trend of feeling pride and worth in the accomplishments of others classified to be in the same group.

In addition, the individuals receiving benefits from such programs are the most able and ambitious individuals and the program of class / caste reservation does not affect those marginalized individuals that it is supposed to help. As a result, a phenomenon called 'creaming' takes place–where the cream of the crop so to speak, are placed in available positions. Thus constitutionally large number of castes could be grouped together as backward classes but functionally due to creaming a new ruling and power sharing elite has emerged and shall continue to emerge leading to fissiparous tendencies and conflict among and between the reservation based divided classes.

Conclusion

The idea of quota centred reservation, originally, seemed to be a temporary measure to compensate for history specific discriminatory

[15] Steele Shelby, *The Contents of Our Character*, (New York: St. Martin's Press 1990)

practices of the stratified and exclusionary social order designed to provide result equality to scheduled castes/tribes and other backward classes. However, gradually it has become an instrument of symbolic caste solidarity being used for management of votes by politicians and also introducing fissiparous formations. As it is impinging upon our constitutional promise of equality of opportunity, the judiciary has been engaged in a balancing modernist's exercise between the rights of the discriminated classes and the equality clause. It may have compelled the judiciary to prescribe a ceiling on quota and exclusion of creamy layer from reservation programmes. Reservation is losing its significance due to shrinkage of the welfare sphere of our state in the name of privatizing and restructuring of economy. In this context the other forms of affirmative actions like developmental preferential treatment or non-discriminatory preferential treatment by providing infrastructural facilities, free or subsidized education and training and a preferential treatment in educational opportunities and posts need serious consideration in a non-political mood and larger interest.

●

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 20-44

Right to a Healthful Environment in Islam and Position in Muslim Countries : An Expository Study

Abdul Haseeb Ansari*

Abstract : *Right to a healthful environment, which is also known as a clean and healthy environment, a decent and healthy environment, or an adequate environment, is an inherent right to man as it falls within the ambit of right to life, which is now guaranteed by almost all constitutions of secular and Islamic states. The Islamic approach of right to a healthful environment is not limited only to man. There is a divine command to have harmonious relations with other living creatures (flora and fauna) as they also have to play their assigned roles in the nature. They are subservient to man, but their wasteful use is prohibited as they adore God all the time. So is the case of other natural resources. Humankind has been ordained to use and utilize natural resources in a sustainable manner so that interests of coming generations in them could be fulfilled. These are governed by the following three basic principles: that all that exit between the skies and the earth are in trust (amanh) with man; that man being a part of a moderate community (ummatan wasatan), has to be modest and avoid wasteful use and utilization; and that man is duty bound to maintain the balance in the naturally existing ratio among all creations (qadr) in all components of the nature. There are clear commands to this effect in the Qur'an and the Prophetic traditions (Sunnah). As a vicegerent (Khalifa) of God, he has to do what has been ordained by Him and what is in the interest of the general public (maslahah mursalah) together with performing duties assigned to him, as every right has a correlative duty. Both are in the form of commands, and man is bound to carry them out. As in Islam sovereignty is with God and governments are simply representative governments, all that have been ordained by Him have to be implemented by them. Hence, governments are duty bound to ensure a healthful environment to its people, and take appropriate actions against those who impair the environment. The paper discusses the three cardinal points given above, in light of the position in some Muslim countries and international legal instruments, and concludes that if Islamic injunctions are added with man-made laws, right to a healthful environment and its enforcement will receive strength in the Muslim world.*

Key Words : *Healthful environment; trust, moderate ummah; vicegerent, Sunnah of the Prophet; public interest litigations.*

* Coordinator of LATEM and Professor, Faculty of Laws, IIUM, Malaysia, ahaseeb@iiu.edu.my

Contents:

Introduction
Islamic Perspective
The Holistic Approach of Right to a Health Environment
Animal Rights
Plant's Rights
Duty of Man to Ensure Rights of Others
Position in Some Muslim Countries
Indian Perspective
Position in Bangladesh
Position in Pakistan
Malaysian Position
Position in Indonesia
Position in some other Muslim Countries
International Human Rights Instruments
Conclusion

Introduction

Right to a healthful environment, which is also known as a clean and healthy environment, a decent and healthy environment, or an adequate environment, is an inherent right to man.[1] This right is vital for ensuring right to life, for without a healthy environment it will not be possible to sustain an acceptable quality of life or even life itself. There is no definite meaning to this right; but for ensuring this human right, conservation of the environment and its processes is imperatively required. It is for this reason that this right should be understood as a right to have the present environment in its sustainable form so that it could serve the purpose of the present generation and of

[1] The author is of the opinion that all words and phrases, in effect, mean right to a healthy or healthful environment.

all generations to come.[2] Exhaustible natural resources, thus, have either to be conserved for the benefit of coming generations, or alternatives to them should be discovered that have competence to serve them. Guaranteeing this right and its proper enforcement is a *sine qua non* for achieving environmental justice.[3] There are a number of international legal instruments that guarantee human rights, in effect, and at the same time, also ensure right to a healthful environment as they are not separable. The best example is the right to life. Conservation of the environment and its processes enhances right to life; on the contrary, a degraded environment and its deleterious processes will certainly impair the quality of life, and a highly polluted environment or highly imbalanced environment may even take lives. There are some international legal instruments which guarantee right to a healthful environment. The paper briefly discusses about these international legal instruments. It also examines the Tehran Declaration on Human Rights and the Environment and the Cairo Declaration on Human Rights in Islam. In order to have the holistic approach of right to a healthy environment, its Islamic aspect also becomes necessary to be investigated.

Right to a healthy environment, at state level, generally falls within the ambit of right to life, which is now guaranteed by almost all constitutions of secular and Islamic states. Some countries, including Indonesia and Sudan, have provided it as a constitutional right enforceable directly or through an appropriate legislation. In some other countries, including Iran, Palestine, Saudi Arabia and Kuwait, for maintaining clean environment, there is a constitutional duty of their citizens, and there are directions to the government to protect the environment and ensure the ecological balance. The cotemporary trend is to widen the scope of the right to a healthful environment in order to make it eco-centric so that the ecological balance could be maintained and each component of the environment could perform its assigned functions sustainably.[4] Efforts are also being made for encouraging

[2] Patricia Birnie and Alan E. Boyle (eds.), *Basic Documents on International law and the Environment* (Oxford: Clarendon Press, 1995), pp. 188-189; Abdul Haseeb Ansari, "Right to A Healthful Environment as a Means to Ensure Environmental Justice: An Overview with Special Reference to India, Philippines and Malaysia", [1994] 4 *Malayan Law Journal* XXV.

[3] *Ibid.*

[4] R.S. Pathak, "The Human Rights System as a Conceptual Framework for Environmental Law", in: E.W. Weiss edited by E.W. Wein, *Environmental Changes and International Law: New Challenges and Dimensions* (Washington: United Nations University Press, 1992), at 205.

judges to take cognizance of serious environmental degradation cases and entertain public interest litigations, where a large group of people suffer, by relaxing the requirement of *locus standi* so that NGOs could help in bringing environmental justice to doorsteps of indigent people, who cannot bear the cost of justice. The paper discusses constitutional provisions of some of the Muslim states, including India, and concludes that the rights to healthful environment enshrined in constitutions of Muslim states are in line with the Islamic law. The paper offers suitable suggestions so that right to a healthful environment could get prominence in the Muslim world.

Islam guarantees a clean environment that is healthy to all, to the people and to flora and fauna. Thus, the Islamic approach of right to a healthful environment is not limited only to man. There is a divine command to have harmonious relations with other living creatures (flora and fauna) as they also have to play their assigned roles in the nature. They are subservient to man, but their wasteful use is prohibited as they adore Allah all the time. So is the case of other natural resources. Humankind has been ordained to use and utilize natural resources in a sustainable manner so that interests of coming generations in them could be fulfilled. These are governed by the following three basic principles: all that exit between the skies and the earth are in trust (*amanh*) with man; that man being a part of a moderate community (*ummatan wasatan*), has to be modest and avoid wasteful use and utilization; and that man is duty bound to maintain the balance (in the ratio, *qadr*) in all components of the nature. There are clear commands to this effect in the Qur'an and Prophetic traditions (*Sunnah*). As a vicegerent (*khalifa*) of God, man has to work in the interest of general public (*Malahah Mursalah*). He cannot serve his interest at the cost of others. In Islam also, rights and duties go together, i.e. every right has a correlative duty. Both are in the form of commands, and man is bound to carry them out. As in Islam sovereignty is with Allah, government, which constitutes a *Khalifa* (head of the state) and *Shura* Council (Parliament or any similar body), is simply there to uphold and implement his injunctions. Hence, governments are duty bound to ensure a healthful environment to its people, and take appropriate actions against those who impair the quality of the environment or create imbalance among creations. The paper discusses the three cardinal points given above, and concludes

that if Islamic injunctions are added with man-made laws, national and international, right to a healthful environment and its enforcement will receive strength in the whole world in specific and in the Muslim world in particular.

Islamic Perspective

Basically, human rights in Islam have the basis of the divine wisdom. If any right has clearly been stated in definitive terms in any of the primary sources of Islamic law, e.g. the Qur'an and the Prophetic traditions (*Sunnah*), it is universal, eternal and immutable, and it has to be accepted as it is. As there is both permanence and continuity in Islamic law, definitive legal rules *nusus* (plural of *nuss*) cannot be diluted or abrogated; whereas, new rights can be developed on the basis of human wisdom by various means, e.g. consensus among Muslim jurists (*ulama*) (*ijma*), analogical deduction (*Qiyas*), interpretation (*ta'weel*), equity (*istihsan*), consideration of public interest (*maslahah mursalah*), personal efforts to deduce a law (*ijtihad*), juristic opinion (*ra'y, fatwa*). *Ra'y* and *ijtihad* are not binding *per se*. But people have to follow *fatawa* (plural of *fatwa*), provided there are not conflicting *fatawa*. Nevertheless, man-made human rights for their validity have to be in conformity with the Qur'an and *Sunnh*. Thus, any right developed on the basis of human wisdom if contradicts any of the injunctions based on divine wisdom, is out of the realm of Islamic law.

Right to life is the first and the foremost human rights guaranteed by Allah. The Qur'an lays down: "Whoever kills a human being without (any reason) like man slaughter, or *corruption on the earth*, it is thought he had killed all mankind..."[5] It also commands: "Do not kill a soul which Allah has made sacred except through the due process"[6] In these Qur'anic verses (*ayaat;* singular, *ayah*), there is a clear command that no one will be killed by any human being, save as provided by law.[7] If anyone has killed a human being, it is as if he has killed the entire humankind. This has been accentuated by a Prophetic saying (*hadith*) that 'the greatest sins are to associate something to Allah and kill human beings'. There are two other injunctions in these *ayaat*: One, killing by causing mischief (it includes polluting

5 Qur'an, 5:32.
6 Qur'an, 6:151.
7 For a detailed account, see Syed Abul A'la Maudoodi, *Human Rights in Islam* (Leicester: Islamic Foundation, 1980), Chapter 2.

activities)[8] on the earth (*corruption on the earth*) falls in the same category. Two, people have been commanded by Allah to abstain from causing mischief (pollution) on the earth, which can sooner or later be deadly to others. Since rights and duties are correlated, this duty has a corresponding right to live in a mischief (pollution) free environment. The later part of ayah 32 says: "...And whoever saves a life it is as if he has saved the lives of all mankind."[9] This Qur'anic injunction strengthens the duty not to kill by degrading the condition of the environment. Rather, it is a duty of everyone to save human lives. Because of this Qur'anic injunction people should resort to more and more preventive measures so that no one is killed because of their activities that might cause imbalance in the ecology or make the environment so deleterious that it might take lives. All divine commands are for the whole human kind. This is because the above mentioned *ayaat* have used the words *all human kind* and *human soul*. It means they have general application. Clarifying the *Shari'ah* position on it, Caliph Ali said, "...their (non-Muslims) lives may be like our (Muslims) lives and their properties like our properties." On this, Syed Abul A'la Maudoodi comments: "In other words, their lives and properties are as sacred as the lives and properties of Muslims. Discrimination of people into different classes is one of the greatest crimes..."[10] This also gets strength from the Islamic principle that Islam is at peace with other religions.

Right to life can be enforced by an appropriate government official, by the aggrieved party, or by any other person. It means, in Islamic law, there is no requirement of *liucus standi*. This opinion gets strength from a *hadith* that Usama bin Zaid, a companion of the Prophet, killed a non-Muslim. His (the diseased person) family members did not come to the Prophet for justice. When the Prophet came to know about the incidence, he summoned Usama bin Zaid and decided the matter.[11] This *hadith* can be a good justification for instituting public interest litigations (PIL cases), representative suits by relaxing the requirement of *locus standi*, so that poor and indigent

8 *infra*.
9 Qur'an, 5:32.
10 Maudoodi, *Supra* note 7, Chapter 12.
11 Muslim, Abu al- Husayn ibn al-Hajjaj al-Nushaburi, *Sahih Muslim* (Beirut: al-Maktab al-Islami, 1982), English Translation by Ahmad Zidan and Dina Dizan (Egypt: Islamic Inc. Publishing and Distribution, 2000), Vol. 1, book 41, *Hadith* No. 96. Hereinafter, Muslim.

people, who cannot bear the cost of justice, could also get justice. This is because PIL cases are entertained under the original jurisdiction of the courts. Actually, for such matters the courts should take cognizance; but it is for this reason that when a case is brought before them by a third person, who does not have the *locus standi*, they relax this requirement in the interest of general public. That is why it is said that PIL cases can flourish only when judicial activisms supports them. On the contrary, instead of taking cognizance of these matters, the courts can simply reject the pray for representative suits.

The Holistic Approach of Right to a Health Environment

We know that for ensuring right to a healthy environment, there has to be a holistic approach, which is not simply human-centric. It encompasses conservation of all components of the environment, allows only sustainable development, guarantees rights of animals and trees also, and prescribes sufficient preventive and punitive measures against those who do not adhere to or violate the divine commands pertaining to these. For this approach, it will be appropriate to discuss about them in brief.

Animals' Rights

Islam not only guarantees lives of humans, but also protects lives of animals by protecting their right to life. This gets support from the Qur'anic declaration that 'We sent thee not, but as a Mercy for all creatures."[12] Animals have been created by Allah for the benefit of the humankind. They are, thus, subservient to man, but man has been ordained to have a harmonious relations with them, because they also construe classes like men and adore Allah like humans. Killing them for fun or in sport, using them as target, and beating and torturing them are sinful acts. Planting trees for them, saving their lives, and increasing their numbers in case of imbalance are good deeds. This is because the earth is a living place for all;[13] and all have to be in a naturally balanced form so that they could render their assigned jobs.[14] There are a number of *ahadith* pertaining to these. Some of them are as follows:

1. If a man plants a tree and a human being or an animal takes benefits from it, he will be rewarded as if he has given that much

[12] Qur'an, 21:107.
[13] Qur'an, 55:10.
[14] For maintaining the natural balance, culling is allowed.

in charity.[15]

2. "He who is not merciful to others (including animals), will not be treated mercifully."[16]
3. When people enquired from the Prophet about rewards for serving animals, he replied 'there is a reward for serving any living being'.[17]
4. Beating animals on the face is prohibited.[18]
5. Cutting any body part of an animal while the animal is alive is prohibited.[19]
6. Using animals as a target of shooting is prohibited.[20]
7. A woman was tortured and was put in Hell because she locked a cat until she died.[21]
8. Inciting animals against each other, which is generally done for animal fights, is prohibited.[22]
9. Even dogs have to be treated nicely. They can be kept for hunting, protection of herds and agricultural purposes.[23] However, animals if cause danger to human life, can be killed. For example if a snake is about to bite someone, it can be killed; but if it goes away, it has rather to be protected.[24]
10. Killing animals for using their skin and fur is prohibited.[25]

On the basis of above Qur'anic *ayaat* and *ahadith*, we can

[15] Al-Bukhari, Muhammad b. Ismail, *Sahih al-Bukhari*, English Translation, Muhammad Muslim Khan (Lahore: Qazi Publications, 1979), Vol. 8, Book 73, *Hadith* No. 41. Hereinater, Bukhari.
[16] Bukhari, Vol. 8, Book 73, *Hadith* No. 42.
[17] Bukhari, Vol. 8, Book 73, *Hadith* No. 38; Muslim *Hadith* No. 5577.
[18] Bukhari, Vol. 7, Book 67, *Hadith* No. 449; Muslim, *Hadith* No. 5281.
[19] Bukhari, Vol. 7, Book 67, *Hadith* No. 424.
[20] Bukhari, Vol. 7, Book 67, *Ahadith* Nos. 421 and 422; Muslim, *Hadith* No. 4813.
[21] Bukhari, Vol. 3, Book 40, *Hadith* No. 553. Aslo see, Bukhari, Vol. 4, Book 56, *Hadith* No. 689.
[22] Abu Dawud al-Sijistani, *Sunan Abu Dawud*, English Translation by Ahmad Hasan (Lahore: Ashraf Press, 1984), *Hadith* No. 2562. Hereinafter, Abu Dawud. Cocks, bulls and sheep are incited even now to fight against each other for the purposed of entertainment, and because of that many animals die at the spot.
[23] Muslim, Book 4, *Hadith* No. 3814.
[24] Bukhari, Vol. 3, Book 29, *Hadith* No. 56. Abdullah reported: "While we were in the company of the Prophet in a cave at Mina...suddenly a snake sprang and the Prophet ordered us to kill it. We ran to kill but it escaped quickly. The Prophet said 'it has escaped your evil and you too have escaped its evil'."
[25] Abu Dawud, Book 27, *Ahadith* Nos. 4117 and 4120.

conclude that Islam has granted rights to animals also. If anyone violates their rights, he will be accountable on the Day of Judgment. This is different than the civil law approach of animal rights. Since animals are not legal persons, they do not have rights independent from the rights of the society. According to Austin, there are absolute duties (it means duties without correlative rights) of men towards animals. Their rights are actually rights (according to Salmond, interests) of the society. His approach is, thus, contrary to the Islamic approach on animals' rights.

Plants' Rights

The Islamic worldview of trees is based on religious tenets and compassion. Trees are also subservient to man; thus, man can exploit them for their benefits. But wasteful use of trees is prohibited. This is because every tree, like other creatures of God, adores Him.[26]Reducing the number of trees means reducing His worshippers. We have already noted above that if a person plants a tree and a human being or an animal eats from it, he will be rewarded as if he had given that much in charity.[27] Islam encourages people to plant trees rather than felling them unnecessarily. There are *ahadith* to this effect: 'do not pluck even leaves without any useful purpose'; 'he who cuts a lot of trees without any justification, Allah will send them to the Hellfire. Planting trees is a virtuous act. On one occasion, the Prophet said, 'On the day of resurrection, if a person has a palm shoot in his hand, he must make sure to plant it.[28]A companion of the Prophet (s.a.w.) by the name of Umar advised an old man to cultivate his land and grow trees on it regardless of the fact that he was an old man. He said to him' "What stops you from giving its benefits to others while you receive reward from it."[29] The Prophet also encouraged people, who could not cultivate their lands, to give away to others and share crops grown on

[26] Qur'an, 55:6.
[27] Bukhari, Vol.3 Book 39, *Hadith* No. 513; Muslim, Book 10, *Hadith* No. 3764.
[28] Ahmad Muhammad Shakir (Bayrut: Dar al-Sahabah, 1988), Musnad Ahmad Ibn Hanbal, Vol. 3, *Hadith* No. 13004. For Urdu Edition of Musnad Ahmad Ibn Hanbal See, Qari Fida Husain (Lahore: Farid Book Stall, 1997). For *ahadith* on cutting and planting trees, see Bukhari, Chapter on *al-Adab al-Mufrad*. Also see, Abdul Haseeb Ansari and Parveen Jamal, "Towards an Islamic Jurisprudence of Environment: An Expository Study, *Religion and Law Review*, Vol. X-XI: 2001-2002 at 79-103.
[29] Yusuf Al-Qardhawi, *Ri'ayah Al Bi'ah fi Shari'ah Al Islam* (Arabic) (Bairut: Dar Al Shuruq, 2001), at 61.

them.[30]

Islam approves for establishment of reserve forests and sanctuaries. The Prophet created inviolate zone (*hima*) bordering water courses, utilities and towns. *Hima* literally means 'guarded' or 'forbidden'. It is actually a conservation measure and protection of peoples' rights pertaining to natural resources. Within these prohibited zones, the Islamic law (the *Shari'ah*) restricts or prohibits developments in order to ensure that valuable resources are protected. Such zones were maintained around wells, ponds, streams and rivers so that they could serve the people and other creatures. If such reserves are not created, these water courses will be polluted, and their water, then cannot be used for drinking, washing, irrigating agricultural fields. They were also created to protect the flora and fauna of reserved zones so that all species are conserved for flourishing. Around Medina, he created *hima* for protection of vegetation and wildlife. He declared private reserves for exclusive use of individuals as prohibited acts. Forests, postures and flowing water are the common heritage of the mankind; their restrictive use is prohibited. All reserves, therefore, should only be in the interest of general public (*maslahah mursdalah*). Reserving natural resources for serving personal interests of landlords was already there in pre-Islamic Arab peninsula. After the advent of Islam, Prophet restricted it only in public interest (*maslahah mursalah*). A number of Muslim Jurists have suggested that the validity of the measures taken the Prophet's successors was not tenable as according to a *hadith* there could be no *hima* save for Allah and his Apostle. But this *hadith* if widely interpreted for protecting the interest of general public, it will, in effect, protect the interests of Allah. Perhaps, it is for this reason that Umar allowed it to be practiced for public interests. Ibn Qudama narrates that an Arab approached Umar questioning the reason for protecting *hima*. The following conversation took place between them: "O prince of believers, we fought for our lands before Islam, and when Islam came, we became Muslims while we were standing on it, why do you protect it? Umar replied saying, 'wealth belongs to Allah, and all creatures belong to Allah. Had it not been for those mounts that I use for the sake of Allah, I would not have protected it." On one occasion, Omar instructed Haniyya, the person-in-charge of Rabdha hima: "O Haniyya take the public under your wing, and beware of the

[30] Bukhari, Vol. 3, Book 39, *Ahadith* Nos. 532 and 533.

oppressed persons prayers. It is the prayer that Allah will answer. Only allow the animals of Allah (animals of poor and indigent people) to enter, and do not let animals of Ibn 'Awf and Ibn 'Affin, for their cattle perish as they have lots of properties; but if the poor man's cattle die, he will come to me crying 'O prince of believers, which is more important, the vegetation or the gold that people will give me?' It is their land which they fought for before Islam and when Islam came, they became Muslim while they were standing on it. They think that (by protecting the land) we are being unjust, but I only protect the lands because of the mounts."[31] The *Encyclopedia of Islam* supports this view in these words: "... lands can be made into reserves and charges can be levied upon them. To reserve lands is to protect them from revivification and private ownership, so that they may remain accessible to all and so that the cattle of (poor) can posture on them."

There can be the following five types of *hima*:

1. Reserves in which grazing is prohibited;
2. Reserves in which grazing is restricted;
3. Reserves for protecting forests with prohibition or restriction on felling trees, so that flora and fauna of these forests could be enriched;
4. Reserves prohibiting grazing for encouraging beekeeping;[32] and
5. Reserves managed for the welfare of a particular village, town or tribe.

Duty of Man to Ensure Rights of Others

All that have been created between the skies and the earth are in trust with man (*amanah*). As a trustee (*ameen*), man has two environmental-related duties: duty to protect interests of others, including interests of plants and animals; and duty to maintain the ecological balance (*qadr*) that naturally exists in the nature.[33] If a man

[31] Mawie Izzi Dien, *The Environmental Dimension of Islam* (Cambridge: the Butterworth Press, 2000) at 42-44.

[32] Ziauddine Sardar, "Towards an Islamic Theory of Environment" in *The Touch of Midas: Science, Values and Environment in Islam and the West* (Kuala Lumpur: Pelanduk Publications, 1988), at 229; Abdul Haseeb Ansari and Parveen Jamal, footnote 28, at 92-93.

[33] Qur'an in 25: 2 and 87:2, states, "...It is He who created all things and ordered them in due proportion".

does not protect rights of others, he will be caught on the Day of Judgment for misappropriation (*khayanah*). Man is the vicegerent (*khalifa*) of Allah and the best creation of Allah (*ashraful makhluqat*). And in this capacity, he has to fulfill his needs moderately, as he is a moderate follower of Islam (*ummatan wasatan*), and he is duty bound to protect interests of all, including animals and plants, as he is a trustee (*ameen*). If rights of others are not protected, the divine command of maintaining harmonious relations with other creations, equity (*istihsan*) in human life, and public interest (*maslahah mursalah*) are also violated. This will be possible also because man has been ordained - as being a trustee of all creations of Allah, he has to protect his interest along with interest of all coming generations, and as a vicegerent, he has to maintain the balance among all creations - to practice the idea of sustainable development. If development is not environmentally responsible, rights of others are bound to be abrogated. If man does against these divine commands, he will be committing mischief on the earth, which is not liked by Allah.[34]

Position in some Muslim Countries

Indian Perspective[35]

Among the third world counters, right to a health environment of citizens, duties of the state to improve the environment, and duty of citizens to protect and improve the environment, have supposedly best been spelled out by the Indian constitution. The Indian courts have also played a proactive role in enforcing them via PIL cases. It will, thus, be appropriate to briefly discuss the Indian law, and then to thrash out details in some of the Muslim countries. The Supreme Court of India included right to a healthy environment within the right to life

[34] For relevant Qur'anic *ayaat*, relevant *ahadith* and juristic opinions pertaining to them, see Seyyed Hossein Nasr, "Islam and the Environmental Crisis", 4 *The Islamic Law Quarterly*, at 218; Majorie Hope and James Young, "Islam and Ecology", http://www.crosscurrents.org/islamicology.htm (6.7.2009); Ismail Faruqi, "Islam and the Theory of Nature", 26 *The Islamic Quarterly*, 1999, at 34; G. Eaton, *Man in Islamic Spirituality* (London: Islamic Foundation, 1987), Chapter 19; Abdul Haseeb Ansari, footnote 2; and Abdul Haseeb Ansari and Parveen Jamal, footnote 28; Abubakr Ahmad Bagader and others, *Environmental Protection in Islam*, IUCN, Policy and Law Paper No. 20, 1994, Chapter on Plants and Animals.

[35] Indian position is being discussed for two reasons: one. It has around 150 million Muslims; and second, it has strong constitutional backing for right to pollution free environment and duty not to pollute it.

guaranteed as a fundamental right in Article 21 of the Constitution of India. There are clear directives to the state under Article 48A of the Constitution of India that 'state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country'. The constitution also gives directives under Article 51A to citizens 'to protect and improve the natural environment including forests, lakes, rivers, and wildlife, and to show compassion towards living creatures'. While interpreting this Article in *Virendra Gaur and Others* v. *State of Haryana*[36], the Supreme Court of India said that it was not only the duty of the state to keep the environment clean, but also a duty of every citizen to maintain a hygienic environment. While elaborating on the scope of Article 51A, the Court said, "...We can call article 51A ordinarily as the duty of citizens as it creates the right in favour of the citizen to move the court to see that the state performs its duties faithfully, and the obligatory and the primary duties are performed in accordance with the law of the land ...Article 51A gives a right to the citizens to move the court for the enforcement of the duty cast on the state instrumentality, agencies, departments, local bodies, and statutory authorities..." It is notable here that the Part III, which enshrines fundamental rights and Part IV, which has directive principles of state policy, are complimentary to each other. It means directives to the state and citizens are not less important than fundamental rights.[37] In *Subhash Kumar* v. *State of Bihar*[38], the Supreme Court categorically said that right to live was a fundamental right under Article 21 of the Constitution, and it included the right of enjoyment of pollution free water and air for enjoyment of life. It also relaxed the requirement of *lucus standi* and said that Article 32 (writ jurisdiction) can be invoked 'by social workers and journalists'.[39] It is

36 (1995) 2 SCC 577, at 580.

37 *Kesawananda Bharati* v. *State of Kerala*, AIR 1973 SC 1506 may be referred.

38 AIR 1991 SC 420.

39 The Indian environmental law, in fact, has developed through Public Interest Litigations. Those who argue against PIL bring an argument, along with other arguments, that because of them disposal of regular cases impedes. But contra arguments did not gather much value and the Indian courts kept on relaxing *locus standi* in cases where interests of general public were involved. In fact, through these cases justice has been brought to a large number of poor sufferers who could not bear the cost of justice. The purpose of PIL cases has been highlighted by the Supreme Court in *S.P. Gupta a & Ors* v. *President of India & Ors*, AIR 1982 SC 149, and *Bangalore Medical Trust* v. *Mudappa & Ors*, AIR 1991 SC 1902. In these cases, the Supreme Court stressed on entertaining PIL cases only if matters are genuine.

a fact that for PIL cases, judicial activism is an essential requirement; otherwise, courts can strictly adhere to *locus standi*, and reject the representative petition.[40] This was reaffirmed by the Supreme Court in several PIL cases.[41] In *Virendra Gaur and Ors* v. *State of Haryana*[42], the Supreme Court of India clearly ruled that right to a healthful environment fell within the ambit of Article 21 of the Constitution. The Court ruled: "Article 21 protects the right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance, free from pollution of air and water and sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water pollution etc should be regarded as amounting to violation of Article 21."[43] The Court further held: "...hygienic environment is an integral facet of the right to healthy life and it would be impossible to live with human dignity without a healthy environment."[44] In most of public interest litigations (hereinafter PIL cases), the Supreme Court and High Courts have issued summons to both state authorities and polluters, which, in effect, enforce Articles 21, 48A and 51A of the Indian Constitution.[45]

40 S.P. Sathe, "Judicial Activism: The Indian Perspective", 29 *Wash U. J. of L*, 2001, at 40; Jona Razzaque, "Human Rights and the Environment: the National Experience in South Asia and Africa", Background paper for the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002, Geneva; Jona Razzaque, "Human Rights and the Environment: National Experience", *Environmental Policy and Law*, 32/2 (2002)

41 It is notable that most of the PIL cases in India pertaining environmental degradation and sufferance of general public have been brought by a stalwart lawyer and social activist Mr. M.C. Mehta, who is now operating therough an NGO headed by him. .

42 (1995) 2 SCC 577.

43 *Ibid* at 580.

44 *Ibid.*

45 The following cases may be referred: *M.C. Mehta* v. *Union of India*, (1987) 4 SCC 463; *Kinkri Devi* v. *State of Himachal Pradesh*, AIR 1988 HP 4; *L.K. Koolwal* v. *State of Rajasthan*, AIR 1988 Raj. 2; D.D. Vyas v. *Ghaziabad Development Authority*, AIR 1993 All 57; *Banvasi Seva Ashram* v. *State of Utter Pradesh*, AIR 1987 SC 374; *Virendra Gaur* v. *State of Hyderabad*, (1992) 2SCC 577; *T. Damodar Rao* v. *Special Officer, Municipal Corporation of Hyderabad*, AIR 1987 AP 171; *Charan Lal Sahu* v. *Union of India*, AIR 1990 SC 1480; *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161; *Subhash Kumar* v. *State of Bihar*, AIR 1991 SC 420; *M.C. Mehta* v. *Union of India*, AIR (1991) SC 813; *M.C. Mehta* v. *Union of India*, (1996) 4 SCC 750; *M.C. Mehta* v. *Union of India*, AIR 1988 SC 1037; *Forum Tirupathi* v. *State of*

An extended meaning of Article 41 of the Indian Constitution, which is also a directive principle, puts a check on government action in relation to an environmental impact that has threatened dislocation of poor and disrupts their livelihood." There is, thus, a strong connection between Articles 21 and 41 of the Constitution. The Indian courts have given all encompassing perspective of the right to a healthful environment, which can be emulated by courts in other countries. It has also emphasized of striking a meaningful balance between environment and development, magnitude and measures for attaining sustainable development and intergenerational equity. In the light of the judicial solicitude, executive authorities can take appropriate measures in different types of environmental deleterious activities, which ultimately affect the quality of human life. It will be wrong to say that judicial decisions do not have clear and identifiable rights and obligations; and offer limited guidance to determine right to a healthful environment in clear terms so that they could be adhered to by executive authorities.[46] However, it will be better if right to a healthful environment is put in a separate Article of the Part III of the Constitution of India, which clearly spells out the right. It will be in the greater interest of the environment if the definition is eco-centric rather than human-centric. This can also be done by amending the existing article 21. If we do so, the scope of 'sustainable development' strategies contained in the Agenda 21 and the Local Agenda 21 will be determined in the country in that light. This requires striking a meaningful balance between conservation of the environment and developmental activities. This has clearly been stated by the Supreme Court of India.[47] These cases are required to be emulated courts of

A.P., (2006) 3 SCC 549; *Kirloskar Bros. Ltd.* v. *ESI Corporation*, (1996) 2 SCC 682; *Virendra*; *Shanti Star Builders* v. *N.K. Totame*, (1990) 1 SCC 520; *Narmada Bachao Andolan* v. *Union of India*, (2000) 1 SCC 577; *Vellore Citizens Forum* v. *Union of India*, (1996) 5 SCC 647; *In Re Noise Pollution – Implementation of the Laws for Restricting Use of Loudspeakers and High Volume Producing Sound Systems*, (2005) 5 SCC 733.

46 S. B. Shah, "Illuminating the Possible in the Developing World: Guaranteeing the Human Rights to Health in India", 32 *Vanderbilt J. of Transnational L.* 1999, at 468.

47 *Vellore Citizen Welfare Forum* v. *Union of India*, AIR 1996 SC 2715; *People United for Better Living in Calcutta-Public and Another* v. *State of West Bengal and Others*, AIR 1993 Cal. 215; *Law Society of India* v. *Fertilizers and Chemicals Travancore Ltd.*, AIR 1994 Ker 308; *Goa Foundation and Another* v. *Konkan Railway Corporation*, AIR 1992 Bom 471; *Bombay Environmental Action Group & Another* v. *State of Maharashtra*, AIR 1991 Bom 301.

other countries. However, the right to a healthful environment cannot properly be enforced without public participation in matters which might affect the environment. For granting that right to the citizen, right to information is a prerequisite. It is unfortunate that both these rights are not appropriately provided to them.

Position in Bangladesh

Articles 31 and 32 of the Constitution of Bangladesh, which guarantee right to life, have been interpreted by the courts to include right to a healthy environment. In *Dr. M. Farooque* v. *Secretary, Ministry of Communication, Government of People's Republic of Bangladesh and 12 others*[48], a public interest litigation, the Supreme Court ruled that the right to life included right to a safe and healthy environment. This was categorically spelled out by the Division Bench of the Court in *Dr. Muhiuddin Farooque* v. *Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and Others* [49] that "Articles 31 and 32 of the constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of the environment, ecological balance free form pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life". Right now, *Khushi Kabir and Others* v. *Government of Bangladesh and Others*[50], a public interest litigation, which has similar issues under Articles 31 1ne 32, is pending before the High Court Division. It is expected that the observation of the Division Bench will further shed some light on it. It is submitted that the court should further extend the right to healthful environment by stating that the right includes right to information and right to participation in decision-making in environmental matters which might affect the environment, or the people or both. It is a healthy development of law in Bangladesh that the courts now are encouraging public interest litigations. It is hoped that this attitude of the courts will continue, and more and more people will get justice through PIL cases. It is a positive development in Bangladesh that in few cases, the courts have emphasized on striking a balance between

48 Unreported.

49 (1997) 49 *Dhakaq Law Reports* (AD) 1.

50 W.P. No. 3091 of 2000.

development and protection of the environment.[51]

Position in Pakistan

Article 9 of the Constitution of Islamic Republic of Pakistan guarantees the right to personal liberty. It is similar to that of provisions in constitutions of various countries. Article 14 guarantees the dignity of man subject to law; it also makes the privacy of home as inviolable. In *Shehla Zia* v. *WAPDA*[52], the Supreme Court decided that Article 9 'includes all such amenities and facilities which a person born in free country is entitles to enjoy with dignity, legally and constitutionally.' In this case, Justice Saleem Akhtar raised a question: "If both (Articles 9 and 14) are read together, a question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without food, clothing, education, health care, *clean atmosphere and unpolluted environment*." While interpreting Article 9, the Supreme Court states that "...life is a larger concept which includes the right of enjoyment of life, maintaining adequate level of living..." It was re-affirmed by the Court in *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewara, Jhelum* v. *The Director, Industries and Mineral Development.*[53]It was stated by the Court that 'right to have water free form from pollution and contamination is a right to life itself; and right to have unpolluted water is the right to every person wherever he lives'. In Pakistan, the phenomenon of public interest ltigation is gaining prominence as is evident by a number of important cases where Supreme Court of Pakistan has delivered significant ruling by taking *suo moto* actions. Nonetheless, it is said that in exercising jurisdiction, the court must be careful to remain within the allotted sphere and should not interject into the domain of executive or legislature. This is a healthy development. It will encourage representative suits, where due to impairment of the environment people in general suffer. Likewise, the courts in Pakistan have also duly emphasized on maintaining a sustainable balance between environment and development.[54]The author is of the opinion that if like India and Bangladesh, if the courts

[51] *Sharif N. Ambiah* v. *Bangladesh* (W.P. No. 937 of 1995); *Khushi Kabir and Others* v. *Bangladesh* (W.P. No. 3091 of 2000). These cases have been quoted form Jona Razzaque, footnote 40.

[52] PLD 1994 SC 693,

[53] 1994 SCMR 2061.

[54] *Shehla Zia* v. *Pakistan*, PLD 1994 SC 693.

of Pakistan also invoke their original jurisdiction and entertain public interest litigations, the rights to healthful environment can be ensured to a larger number of people who cannot afford the cost of justice.[55]

Malaysian Position

Article 5(1) of the Malaysian Federal Constitution states that 'no person shall be deprived of his life or personal liberty, save in accordance with law'. Justice Gopal Sri Ram in *Tan Kek Seng* v. *Suruhanjaya Perkhidmatan Pendidikan*, explained the scope of Article 5(1) in these words: "I have reached the conclusion that the expression 'life' appearing in Article 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the rights to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment." This case clearly states that 'right to life' includes right to a healthy environment.[56]It is notable that due to strict adherence to *locus standi*, there is least scope for public interest litigations in the country.[57] However, there is enough scope in the law for public

[55] It is notable that in Pakistan, the Supreme Court has exercised its original jurisdiction, contained in Article 188(3) of the constitution, in a number of cases. However, public interest litigations could not gain popularity because Article 199 of the constitution came in its way. *Benazir Bhutto* v. *The Federation of Pakistan*, PLD 1988 S.C. 416 and *Shehla Zia* v. *WAPDA*, PLD 1994 S.C. 693, were public interest litigations, but they could not provide impetus for further development of such cases. The author feels that the problem can only be solved when the Supreme Court interprets Article 199 in favour of public interest litigations and shows enough activism for its flourishing in the country.

[56] Andrew Harding, "Practical Human Rights, NGOs and the Environment in Malaysia", in Alan E. Boyle and Michael R. Anderson (eds.), *Human Right Approaches to Environmental Protection* (Oxford: Oxford University Press, 1998), at 227; Abdul Haseeb Ansari, "Towards an Islamic Jurisprudence of Environment: An Expository Study", *Religion and Law Review*, 2001-2002, at 79-103; Sonny Zulhuda, "Right to Life: In the Light of Qur'anic Injunction" at: http://www.islamic-world.net/islamic-state/rightful_islam.htm. (6.29.2009)

[57] In *Tan Sri Haji Othman Saat* v. *Mohammad bin Ismail*, [1982] 2 MLJ 97, Abdoolcader J. pleaded for liberalizing representative suits. He said, "A private individual may sue for a declaration if he has a cause of action in common law or to protect a statutory right, or if he sufferer or will suffer special damages as a result of the defendant's action." But in later cases the Supreme Court in *United Engineers (M) Bhd* v. *Lim Kit Siang*, [1988] 2 MLJ 12, and the Court of Appeal in *Ketua Pengarah Jabatan Alam Sekitar & Anor* v. *Kajing Tubek & Ors*, [1997] 3 MLJ 23, strictly applied *locus standi* rule. See Abdul Haseeb Ansari,

participation in environmental matters, especially in finalizing environmental impact assessments (EIAs).[58]

Position in Indonesia

In Indonesia, in the process of development of environmental law in general and the constitutional right of a healthful environment in particular, Article 28 H of the Constitution of Indonesia has undergone several amendments. The present position is that the Article ensures good and healthy environment. Article 28 H reads: "(1) Every person shall have the right to live in physical and spiritual prosperity to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care. (2) Every person shall have the right to receive facilitation and special treatment to have the same opportunity and benefits in order achieve equality and fairness. (3) Every person shall have the right to special security in order to develop oneself fully as a dignified human being. (4) Every person shall have the right to own personal property, and such property may not be unjustly held possession of ..." The constitutional right 'to enjoy a good and health environment' has been enforced by the Environmental Management Act 1997. It provides as a matter of right to every person the right to an environment which is good and healthy. Although the Indonesian law does not define the term 'good and healthy environment', it can be understood in the light of laws in other countries, especially India, the United States and South Africa. It can appropriately be said here that the law should also provide for public participation in environmental decisions and easy enforcement of the right to pollution free environment via public interest litigations.

Position in Some Other Muslim Countries

The Constitution of the Islamic Republic of Iran guarantees a pollution free environment to all and prescribes a duty of the state to ensure a healthy environment. Article 22 of the Constitution guarantees 'dignity, life, property... except in cases sanctioned by law'. Article 40 states that 'no one is entitled to exercise his rights in a way injurious to others or detrimental to public interest'. These two

"Environmental Protection through Law of Torts: A Critical Appraisal", [2004] 4 MLJ lxxxi; Abdul Haseeb Ansari, "Right to a Healthful Environment as a Means to Ensure Environmental Justice: An Overview with Special Reference to India, the Philippines and Malaysia", [1998] 4, MLJ xxv, at xiii.

[58] Abdul Haseeb Ansari, *Supra note* 2.

Articles by implications ensure right to a healthy environment. The constitution also prescribes a public duty to preserve the environment, in which the present and the future generations have a right of flourishing social existence. Article 50 to this effect states: "The preservation of the environment, in which the present and as well as the future generation generations have a right of flourishing social existence, is regarded as a public duty in the Islamic Republic. Economic and other activities that inevitably involve pollution of the environment or cause irreparable change to it are, therefore, forbidden." The preamble of the 2004 Constitution of Afghanistan ensures a 'prosperous life and a sound environment for all those residing in this land'. Article 15 states that 'the state is obliged to adopt necessary measures for ...proper exploitation of natural resources and the improvement of ecological conditions'. The 1992 Constitution of the Kingdom of Saudi Arabia provides that '...the state would work for the preservation, protection, and improvement of the environment, and for the prevention of pollution'. Article 10 of the Interim National Constitution states: 'the people of Sudan shall have the right to a clean and diverse environment'. Article 23(20) (h) says that 'every one shall have to preserve the natural environment. It directs the state to define under what conditions and to what extent the perpetrator of damage is obliged to make restitution for damage to the living environment. Article 73 commands the state and local communities to ensure the preservation of the natural and cultural heritage.

The constitutions of Muslim states have failed to specify in clear terms the right to a healthful environment and the duty of the states and citizens not to impair the environment and its processes. They have also, except Bangladesh, failed to realize the importance of public interest litigations. Muslim states, which consider divine law revealed to man as fundamental, universal, eternal and immutable, must adhere to the relevant divine injunctions and give a holistic approach to a healthful environment not only for the human kind, but also to animals and trees. In Islamic jurisprudence also rights and duties are considered as correlated to each other. However, it will be appropriate to specify duty to protect the environment also. There should be duty of the state, in specific, to maintain sustainability of the environment and duty of individuals not to impair its quality. In an Islamic judicial system, a *qadi* can take cognizance of wrongdoings and provide appropriate remedy. This may pave the way of public

interest litigations. (See *supra*)

International Human Rights Instruments

For a comparative understanding of the right to a healthful environment in Islam and the international human rights instruments, it will be appropriate to have a brief account of the position of this right in international law vis avis the right in Islamic law. Early international law did not, in specific, recognize right to a healthy environment because environmental problems those days were not so serious. States' right to development received prominence. Although the 1972 Stockholm Declaration by its Principle 1 ensured '...an environment of quality of a human right that permits a life of dignity and well-being', and as a matter of principle it required the international community to take steps for preventing pollution of the environment by substances that affect human health. The 1986 United Nations Generally Assembly Declaration on the Right to Development[59] provided impetus for holistic development of states rather than talking about a restricted approach of development, which strikes a balance between environment and development. The need of balancing these two came in concrete form in the following international legal instruments: Principle 10 of the Rio Declaration, which requires public participation in environmental decisions; the Aarhus Convention[60], which requires for dissemination of information, public participation in environmental decisions, and access to justice; and the Agenda 21 and the Local Agenda 21, which contain general principles for sustainable development and sustainable principles applicable to town and country planning and development respectively. Nevertheless, these instruments indirectly protect the right to a healthful environment. So is the case of some of the international legal instruments on human rights, as these instruments also indirectly ensure right a healthful environment.[61] Perhaps it is

[59] UNGA Res. 41/128 (1986).

[60] The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus 1998. For a critical appraisal of Principle 10 and the Aarhus Convention see, Abdul Haseeb Ansari, "Principle 10, Aarhus Convention and Status of Public Participation in Environmental Matters in the Malaysian Laws with Special Reference to EIAs", *IIU Law Journal*, 2009, at 34-56.

[61] Notable International Human Rights instruments are: The Universal Declaration of Human Rights, 1948; the International Covenant on Economic, Social and Cultural Rights 1966; the Declaration of the United Nations Conference on Human Environment, 1972; the United Nations World Charter for Nature, 1982; the Declaration of the United Nations Conference on the Human Environment,

understood that right to a healthful environment is inherently subsumed in them and can well be deduced. There is a rightful belief that right to life can be extended to encompass right a healthful environment.[62] It is for this reason that in 1994, a Sub-Commission of the United Nations Commission on Human Rights headed by F.Z. Kesentini on its terms of reference of exploring possibility of a human right to environment concluded that 'environmental rights are part of the existing human rights because human rights and environment are indivisible'.[63] Contrary to this, there are few international legal instruments that specifically mention about right to a health environment. Among them are: the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador", 1988 (Sal Salvador Protocol); African Commission on Human and Peoples' Rights (ACHPR). Art. 24 of the ACHPR reads: "All people shall have the right to general, satisfactory environment favorable to the development". Although it is a third generation right, as it refers to the community, it does not guarantee for a right to a healthful environment in clear terms. It is, thus, indeterminate, narrow and vague.[64] Contrary to the ACHPR, Article 11 the Sal Salvador Protocol specifies right to a healthy environment in Member States in the following specific terms: "1. Everyone shall have the right to live in a healthy environment and to have access to basic public services; and 2. The States Parties shall promote the protection, preservation, and improvement of the environment." The Tehran Declaration of Human Rights and

1993; the Vienna Declaration on Human Rights, 1993; the United Nations Draft Declaration of Principles on Human Rights and the Environment, 1994; the Declaration of Bizkaia on the Right to the Environment, 1999; the United Nations Millennium Declaration, Adopted by the UN General Assembly on18 September 2000, A/55/L.2; the Johannesburg Plan of Implementation, 2002; the Convention for the Safeguarding of the Intangible Cultural Heritage, 2003; the Draft IUCN International Convention on Environment and Development, 2004 (Third Edition); the Earth Charter, 2004; and the Convention on the Protection and Promotion of Diversity of Cultural Expression.

[62] Michael .R. Anderson, "Human Rights Approaches to Environmental Protection: An Over View" in Alan .E. Boyle and Michael R. Anderson (eds.), *Human Right Approaches to Environmental Protection* (Oxford: Oxford University Press, 1996), Chapter 1.

[63] UN Doc. E/CN.4/Sub.2/1998/C23 (1989); U.N. Doc. E/CN.4/Sub.2/1994/9. For a detailed account on the Report, see Alan E. Boyle and Michael R. Anderson, footnote 56, at 3.

[64] R.R. Churchill, "Environmental Rights in Existing Human Rights Treaties", in Alan .E. Boyle and Michael .R Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford: Oxford University Press, 1996), Chapter 5.

Environment on the Conclusion of the International Conference on Human Rights and the Environment held in Tehran, Islamic Republic of Iran, 14 May 2009, clearly states that 'individuals and communities have the right to live in a clean and health environment'. The author is of the opinion that at international level, right to a healthy environment should be stated by the United Nations in more clear terms in a global convention, which should require all states to enforce this right through appropriate legislations. It is because guaranteeing this right is not enough unless it is properly enforced through an appropriate agency and people are given right to information and easy access justice. It is, therefore, suggested that all states should have an appropriate and efficient mechanism for enforcing this right. States should also be encouraged to allow public interest litigations. All these imperatives must be enshrined in the convention. It is also suggested that regional legal instruments should also specify this right in clear terms, and states should broaden cooperation among themselves to ensuring proper enforcement of this right.[65]

Most of the provisions of international human rights instruments, which do not violate the injunctions contained in the Qur'an and the Prophetic traditions (*Sunnah*), are acceptable rights in Islamic law (*Shari'ah*). Provisions pertaining to right in international legal documents, which include right to a healthy environment, are in line with the Islam law pertaining to this. This is testified by the Tehran Declaration on Human Rights and the Environment. It has noted that 'Islam provides valuable principles that contribute to the protection of the environment'. Similarly, the Cairo Declaration on Human Rights in Islam, along with right to life, in its article 17 clause (a) states that 'every one shall have the right to a clean environment,...an environment that would foster his self-development and it is incumbent upon the state and society in general to afford that right.'[66] The Caro Declaration is the clearest among all international legal instruments. It is notable that although right to a healthy environment by itself requires conservation of all components of the environment and its processes, Islam has, in specific, guaranteed right of plants and animals and all other living and non-living creations of God as well.[67]

---

65 H. J. Vibopuu, "The Internationally Guaranteed Right of an Individual to a Clean Environment", 1 *Comparative Law Year Book*, 1977, at 107.

66 http://www.oicun.org/articles/54/1/Cairo-Declaration-on-Human-Rights-in-Islam/1.html (1 July 2009)

67 International environmental law recognizes rights of migratory birds and marine lives. But their rights, in effect, are rights of the community as they are not rights and duty bearing entities.

Islam, thus, has all-encompassing definition of right to a healthful environment.[68] The Organization of Islamic Conference (OIC) and other international human right organizations, including the United Nations and International NGOs, including the International Union for Conservation of Nature and Natural Resources (IUCN) and Green Peace, should persuade states to have constitutional provisions similar to the Islamic injunctions on right to a healthful environment, and to have a fast and efficient enforcement mechanism.[69]It is suggested that the proposed UN global convention should give input of the Islamic approach stated above, so that the right to a clean environment does not remain human-centric, rather it becomes nature-centric.

Conclusion

In Islam, saving life is a great virtue and taking a life and risking a life is a big sin. Right to a healthful environment can very well be justified under the right to life. But Islam presents a comprehensive approach of right to a healthy environment. Although all other creations between the skies and the earth are for the benefit of the humankind, man has been ordained to abstain from their wasteful use, and to maintain the balance in the ecology, so that all creations are able to play their assigned role in the nature. As a vicegerent of Allah (*khalifa*) and as a trustee (*ameen*) of all creations, man is duty bound to protect rights of others in them along with exploiting them for his own benefit. In Islam, sovereignty of the state is with Allah and there is a representative government, which is duty bound to enforce divine commands. Since Islam guarantees right to a healthful environment to man and also to animals and trees, it is the duty of the government to enact and courts are duty bound to enforce such preventive and punitive laws that protect rights of all of them pertaining the environment, including the conservations of the environment. If there is imbalance in any part of the environment, it is the duty of the state and courts to ensure the balance. So, states have to practice culling and *ex-situ* and *in-situ* breading. So is the case of forests. In order to maintain sustainability, logging and reforestation activities must go hand-in-hand.

In light of the Islamic perspective, the definition of a healthful environment comprises:

---

68 *Supra.*

69 *Supra.*

(A) The present generation and all coming generations, and other living creations have the right to a health environment. This right has a correlated duty on the present generation to use and utilize environment and its resources in a sustainable manner.

(B) It is the duty of the state and courts to ensure a healthful environment for all. For achieving this, they will have to maintain ecological balance, to conserve biological diversity, and to enforce principles of sustainable development.[70]

(C) In order to attain these, states may adopt both preventive and punitive measures.

(D) People should have right to information, right to participate in environmental related decisions, and easy access to justice.

Any definition containing these elements is similar to the definition suggested by D. Shelton, A. Kiss[71] and the definitions of the United States and South Africa.[72] The author is of the opinion that instead of a human-centric definition, a nature-centric definition should be preferred. Along with a pollution free environment, there should be a duty on the state and individuals not to impair the environment and its processes. The definition suggested by the author in the light of the Islamic perspective the right to a healthful environment and duty to conserve the environment, covers these.

●

[70] This is because in Islam, sovereignty is with Allah, and states have representative governments. In this capacity, they have to implement what He has ordained.

[71] D. Shelton and A. Kiss, *Judicial Handbook on environmental Law* (UNEP, 2005).

[72] For a detailed discussion of the South African and some other similar definition, see L. Ferris, Constitutional Environmental Rights: An Under-Utilized Resource, paper presented at the 5th IUCN Academy of Law Colloquium, Parati, Brazil, 2008; J. May, Fundamental Environmental Rights (2005-2006), 23 *Pace Environmental Law Review* 113; Kate Watson, *Constitutional Rights to a Clean and Health Environment: Critical Elements*, research findings presented to the Constituent Assembly of Nepal, 2009, research conducted for drafting the Constitution of Nepal. (Unpublished). The author is thankful to her for providing a copy of her research.

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 45-74

Qualifications for University Teachers and Constitutional Contours

Guru Gyan Singh*

Abstract : *A good deal of litigation in higher education involves determination of meaning and scope of the qualifications-academic and otherwise - prescribed for appointment on the cadre posts of teachers different descriptions and those fixed for granting of higher pay scales, advance increments, and promotion on higher posts under CAS (Career Advancement Scheme) as amended from time to time. Nature and scope of Ph.D. degree has often been subject of inquiry in such kinds of disputes. Practically benefit of advance increments is available to every teacher who happens to possess Ph.D. irrespective of the fact that it forms integral part of the scheme of minimum qualification for the relevant post Ph.D. or higher thereto. In the similar fashion, Ph.D. has been prescribed, as an essential qualification for promotion on the post of Professor under CAS It has been done having no regard to the fact that this benefit is available to the Readers appointed directly on cadre posts and, also, to those promoted on the post of Reader under CAS and that expression "Ph.D. or published work of the equivalent standard" forms integral part of the schemes of statutorily prescribed minimum qualifications of the Readers of the aforesaid descriptions. It is settled beyond doubt that the expression "matters relating to public employment" has been repeatedly interpreted and explained to cover incentives in form of advance increments and qualifications. Therefore, any scheme of advance increments, other benefits and qualifications for the teachers of the different kinds is bound to be in keeping with the requirements of Articles 14 & 16 (1) of the Constitution. In this article an attempt has been made to examine and appreciate this state of law in relation to concrete facts and circumstances. Study reveals that the individuals, institutions and organizations responsible for framing the relevant*

* Reader, Department of Law, University of Allahabad, Allahabad. (U.P.)

rules, interpreting and applying them pay scant attention to the relevant constitutional provisions. They, also, appear to be highly indifferent and extremely reluctant to relevant judicial decisions even if they are brought to their notice. The way provisions providing for grant of benefit of advance increments have been and are being applied could not wholly survive on the touchstone of the twin test of reasonable classification. Same would be fate of the law making Ph.D. an essential qualification for promotion on the post of Professor under CAS. For, Ph.D. is undoubtedly an important degree and an academic achievement. However, it is subject to the rule of law. It should not be treated as matter of faith and believe.

Key Words : *Job description, job specification, direct and inevitable effect, educational planning,*

Contents :

Introduction

Provisions of Advance Increments, service and other Benefits for Ph.D.

Framework of Benefits

Analysis

Effects and Implications

Ph.D. and NET (National Eligibility Test)

General

Ph.D. and Exemption from Requirement of Clearing NET

Ph.D. and Provisions of Benefits

Ph.D. as minimum Qualification for Promotion on the Post of Professor under CAS

Scheme of Qualifications as Prescribed by the U.G.C. Regulation 2000

Qualifications under University Laws

Job specification, Job-description, and Equality Clause of the Constitution- Relationship

Qualification Based Classification – With Reference to Promotion – Judicial Approach

Tests of Violation of Fundamental Rights

Meaning and Scope of the term " Equivalent"

Ph.D. and its Retrospective Application

Conclusion

Introduction

Commissions and committees set up from time to time to enquire into the problems of education in general and higher education in particular have invariably underlined the role and importance of teacher factor in the development of the system of education and its contribution in national development.[1] It has, always, impelled and inspired the individuals, institutions and organizations entrusted with educational planning, administration and management of the universities, institutes and colleges to devise ways and means to attract the most qualified and best suited persons in the field of higher education as teachers and ensure their retention. Periodic revision of pay scales of the university and college teachers is one of them . Pay revisions have, generally, introduced some changes in academic and other qualifications for the teachers of the different descriptions relating to direct appointment, promotion etc. Ph.D. degree has always been accorded a pride of place in the schemes of revised pay-structures promulgated from time to time. Provisions have been made for advance increments, service benefits and other preferential treatments for the candidates possessing Ph.D. degree. Relationship between NET (National Eligibility Test) and Ph.D. degree is quite confusing and inviting litigation[2]. Ph.D. degree has been prescribed as minimum qualification for promotion, under CAS (Career Advancement Scheme), on the post of Professor [3] in different subjects, despite the fact that the expression 'Ph.D. or published work of its equivalent standard' continues to be integral part of the statutorily prescribed minimum qualifications for the post of Reader in case of cadre appointment[4] as well as promotion on the post of Reader under

---

1 Report of Education Commission 1964-66, published by National Council of Educational Research and Training 1971 at 497.

2 *Naresh Kumar v. H.P. University*, 2008 Lab. I. C. 989 (Him. Pra.) *Biju, I.C. & others v University of Kerala*, 2008 Lab. I. C. 872 (Ker.) Sumithra Devi v. State Kerala, 2010 Lab. I.C. 103 (Ker) http://timesofindia.indiatimes.com \Nagpur\ net holders plea hearing on June\articleshow\2736211Cm.

3 Ordinance XLV (6) (a) (ii) of the University of Allahabad, framed under University of Allahabad Act, 2005.

4 Ordinance XXXIX (5) (a) (i) of the University of Allahabad , Allahabad, U.P.

CAS[5].

This article aims to critically examine the schemes of preferential treatment for Ph.D., its relationship with NET and the scheme prescribing Ph.D. as minimum qualification for promotion on the post of Professor under CAS.

Provision of Advance Increments, Service and other Benefits for Ph.D. Degree.

Frame work of Benefits

Provision of preferential treatment for Ph.D degree in form of advance increments and benefit of service at the time of promotion to higher pay scales and posts under CAS has been examined in my earlier article[6]. However, in view of changes taking place in different fields of higher education, it needs a fresh investigation. Schemes of preferential treatment for Ph.D. degree are closely related with revised pay-structures based on Reports of Sen, Mehrotra, Rastogi and Chadha Committees'. In the scheme of qualifications, based on the Sen Committee Report, expression 'Ph.D. or published work of the equivalent standard' formed integral part of the statutorily prescribed minimum qualifications for the post of lecturers in most of the subjects. There was, also, a provision for relaxation from the requirement of 'Ph.D or published work of the equivalent standard' in well defined situations and subject to specified conditions. One of them was that candidates selected and appointed on the basis of provision of relaxation would acquire the relevant qualification in the fixed time limit otherwise they would be deprived of the benefit of annual increment till attaining thereof[7].

---

5 Ordinance XLV (5) (a) (i) of the University of Allahabad.

6 Singh, Guru Gyan, 'Provisions of Preferential Treatment For Ph.D. Holder Teachers in Higher Education-Effects and Implications—An Analysis', *University of Allahabad Studies (NMS) 2 No. 1*, 2003 at 28 Singh, Guru Gyan, 'A fraud On Public' 2003 *(2) ESC* at 4, Journal Section

7 *Rekha Chaturvedi v. University of Rajsthan*, 1993 Lab.I.C. 1250 (SC) at p.1253 "However, this relaxation could be given on condition that the candidate would obtain a Doctorate Degree or give evidence of research of high standard within eight years of his appointment. If he did not satisfy the second requirement, all

'Ph.D. or published work of equivalent standard' did not form part of the scheme of minimum qualifications in the subjects like Law, music and Fine Arts. It happened because of unavailability of adequate research facilities in these subjects in the country. Nor, the lecturers in the said subjects were under any legal obligation to acquire Ph.D. and to be subjected to denial of annual increments.[8]

Next pay-revision was introduced on the basis of the Mehrotra Committee Report. This scheme of qualifications for the post of lecturers in the most of subjects did not retain the expression 'Ph.D. or published work of the equivalent standard'. However, a detailed structure of incentives for acquiring Ph.D. degree was laid out. Candidates entering in service with Ph.D. were to get benefit of three advance increments and service benefit of corresponding number of years at the time of grant of senior\selection grade\promotion on higher post of Reader and Professor. Benefit of advance increment was, also, extended to the existing lecturers who possessed Ph.D. at the relevant point of time or acquired it during their service. Its direct and inevitable effect was that existing lecturers equipped with 'Published work of standard equivalent to Ph.D.' were denied benefit of advance increment and service benefit for no fault on their part. On the other hand, lecturers who entered in service on the basis of relaxation from requirement of Ph.D. or published work of the equivalent standard were eligible for the said benefits even if they succeeded in acquiring Ph.D in the 13th year of their services. Benefits were, also, denied to the lecturers in the subjects like Law, Music and Fine Arts who had entered in service possessing the requisite qualifications and were neither under legal obligation to acquire Ph.D. nor to suffer denial of annual increments.

Even after introduction of NET as a requirement of eligibility for lecturer ship in the universities and colleges, preferential treatment for Ph.D. continues. Candidates possessing Ph.D. are to be given five marks at the time screening\selection and benefit of five advance increments at the time of appointment and service benefit at the time

---

that he could be visited with was a handicap that he would not be able to earn future increments until he fulfilled the said requirement."

8 *Ibid*

of grant of higher pay scales and at the time of promotion.

Analysis

Article 14 speaks of the equality before law and equal protection of laws. It permits classification based on intelligible differentia that has rational nexus with the object to be achieved thereby. Basic tenor of the provision is that equals are to be treated equally. Conversely unequal are not to be treated equally. Article 16 (1) is a derivative of Article 14. It guarantees 'equality of opportunity in matters relating to public employment'. Provisions of pay scales, advance increments and other benefits relating to Ph.D. are well within the ambit of the expression 'matters related with public employment'[9]. In order to be lawful and valid such provisions must survive on the touchstone of the twin test i.e. Ph.D. is an intelligible differentia and has rational nexus with the object sought to be achieved thereby. In the cases where Ph.D. is higher qualification provision of preferential treatment therefor, could be said to be valid[10]. For, in such situation Ph.D. constitutes intelligible differentia and has rational nexus with the object of enhancing the quality of teaching and research in comparison to that of lecturer possessing only minimum qualification i.e..Master's

[9] V.N. Shukla, Constitution of India, Revised by Mahendra P. Singh, Tenth Edition Reprint, August, 2003 at 87

[10] Classification based on higher education could be said to have rational nexus. See, D.D Joshi v. Union of India, AIR 1983 SC 420 at 424, *Rajsthan Electricity Board Accountant Association, Jaipur v. Rajsthan Electricity Board & others*, 1997 Lab. I.C. 863 (SC), *Madhya Pradesh Electricity Board v. M. S. Modh & others*, 1997 Lab. I.C. 3369 (SC), *H.P. Gupta & others v. Union of India*, J.T.2001 (9) SC 8, *V. Ganga Ram v. Regional Joint Director*, 1997 Lab.I.C.2856 (SC), *Sitesh Bhattacharya v. State of Tripura*, 2000 Lab.I.C.1950 (Gau), *Ashok Kumar Gulati v. Punjab Housing Board, Chandigarh*, 1998 Lab.I.C.2634 (P & H), *State of M.P. v. Shakri Khan*, AIR 1996 SC 2247. *In State of Haryana v. Sumitra Devi*, 2004 Lab. I.C 87 (SC). It was held that benefit of advance increment was not admissible to the employees who entered in service being equipped with higher qualification, as it was not in existence at the relevant point of time. Benefit was an incentive to encourage the employees to acquire higher qualification. Also see-*Dr. B.C. Parikh v. Ahemadabad Municipal Corporation*, 1997 Lab.I.C.2566 (Guj.), *Dr. Javed Chaudhary v. State of J & K*, 1998 Lab.I.C.80 (J&K).

degree in the relevant subject.[11]

But, the same is not true when it forms integral part of the scheme of minimum qualification[12] even if in alternative. Generally, preferential treatment is not given just for being equipped with statutorily prescribed minimum qualification, which is condition precedent to be eligible to apply for the post concerned. However, if there is any provision to the effect, it must conform to the mandates of Articles 14 and 16 (1) of the Constitution[13]. In the scheme of revised pay scales based on Mehrotra Committee Report, benefit of advance increment was, also, extended to the then existing lecturers appointed in accordance with scheme of minimum qualification based on Sen Committee report. It is pertinent to state here at the cost of repetition that expression 'Ph.D. or Published work of equivalent standard' formed integral part of the then scheme of minimum qualification[14]. Undoubtedly, it was based on expert opinion formed after taking into account the job specification and job requirement of the post concerned. Obviously, experts were satisfied that a lecturer credited with published work of the standard equivalent to Ph.D. was fully qualified, capable and competent to discharge the duties, perform the functions and shoulder the responsibilities of the concerned post as one

[11] Incentive to acquire higher qualification is permissible as it helps increase in efficiency and productivity. *In K. Narayan v. State of Karnataka*, 1992 Lab. I.C. 792 at 794 a Division Bench of the High Court has aptly observed-"…. incentive is nothing but a payment made by the Government out of its own free will unconnected with service conditions. It is given with a view to encourage efficiency and standard of work to be turned out by an official by acquiring higher qualification, *'P. S. Sawhney v. R.K. Agrawal*, 1989 Lab. I C 43 (SC), Karnataka Electricity Board v. Shri S Bhashakar, 1994 Lab.I.C.1143 (Kant.)

[12] In State of *M.P. v. Shakri Khan* AIR 1996 SC 2247 there was a provision for giving benefit of two advance increments to the Lower Division Clerks who passed typing test. Benefit was withdrawn after making typing part of eligibility criteria for the said post. It was held that persons selected and appointed on the basis of new eligibility criteria were not entitled for advance increments.

[13] In *Kerala State Government Ayurvedic Medical officers Association v. State of Kerala 1995 Lab. I.C. 2491 (Ker.)* Degree and Diploma holder doctors were given equal pay on the ground that they performed duties and functions of the same standard and quality.

[14] *Rekha Chaturvedi Supra note* 7 at 1253 "…Doctorate Degree was not a must and the lack of Doctorate Degree could be made up by either of the qualifications laid down above"

possessing Ph.D. It establishes beyond doubt that with reference to the quality and quantum of work and performance of functions, lecturers equipped with either of the academic distinctions were equally situated and deserved to be treated equally. In this context Ph.D. could neither be said to be intelligible differentia nor to have any rational nexus with the object sought to be achieved i.e. enhancing the quality of teaching and research.

Arguments that purpose of preferential treatment for Ph.D. was to promote Ph.D. studies or to compensate for the time, money and energy spent for three years could not be said to be sustainable in law. For, the either of the situation is focused to the process employed for acquiring Ph.D. or its equivalent qualification. When quality and quantum of knowledge and experience earned by following different processes is substantially at par with reference to the discharge of duties, performance of the functions of a particular post, any of those processes alone cannot constitute intelligible differentia. It is submitted that, howsoever, higher be the objectives sought to be achieved by the provisions of benefit for Ph.D., they can not be immune and insulated from the invocation and application of the provisions of Articles 14 & 16 (1) of the Constitution. Apex Court has developed direct and inevitable test to assess and examine violation of fundamental rights[15]. Arguments are, also, advanced that preferential treatment could be given only to academic qualifications like degrees and diplomas. It cannot be extended to the academic achievements and distinctions that are not degrees and diplomas in the strict sense of the term as clearing of NET[16]. 'Published work of the standard equivalent to Ph.D' is, also, not a degree. Therefore, it does not deserve to be given benefits meant for Ph.D. This approach has no relevance in view of the observation of the Supreme Court made in this regard in Delhi University v Ram Singh[17]. UGC (University Grants Commission) and UMHRD (Union Ministry of Human Resource Development) were party thereto and had fiercely fought to establish that NET was integral part of eligibility criteria for the post of lecturer. Expression 'published work of the standard equivalent to Ph.D.' also, formed part of the

15 Shukla, *Infra note* 77

16 Naresh Kumar v H.P.Universiy, 2008 Lab.I.C. 989 (Him. Pra.) at 991

17 A I R 1995 S C 336 at 347-48

eligibility criteria as was in force at the material point of time.

Existing lecturers appointed under the relaxation clause were under statutory obligation to acquire Ph.D or to suffer denial of annual increments[18]. Their liability continued even after enforcement of revised pay scales based on Mehrotra Committee Report[19]. Any other interpretation of the matter would mean and imply effecting change in qualifications retrospectively. And, there is nothing to this effect in the scheme in express or by way of implication.

Extending of several benefits to Ph.D. degree holder at the time of selection and there after and denial thereof to the candidates clearing NET, also, suffers from the vice of arbitrariness and unreasonableness and can not withstand the rigor of twin test[20] as discussed herein above.

Effects and Implication

Provision of unqualified preferential treatment for Ph.D. has entailed serious adverse effects on the standard of higher education in one or the other way. It has accelerated race for acquiring Ph.D. just for the increments and accounts for devaluation of reputed academic achievement. Instances are in galore that Readers and Professors without Ph.D. got enrolled for Ph.D. even after being supervisor to guide research. NET has been introduced as a result of erosion in the value and reliability of Ph.D. degree itself. Precisely, the way Ph.D. is being treated is entirely against its very spirit and essence i.e. "ability to make critical analysis, to draw suitable inferences and to present the findings in clear, logical and scientific way."[21]

18 Supra note 7

19 Section 6 (c) of the General Clauses Act, 1897

20 Matter has been examined in depth in an article captioned as "Preferential Treatment to Research Degrees And Right to Equality" accepted for being published in Journal of Legal Studies by the department of Law of the University Of Rajasthan, Jaipur, Rajsthan

21 Kothari Commission Report, 1964 at 580. Also see, Pathak, Harbans, 'Recruitment of Teachers: Problems and Remedies', *Indian Journal of Public Administration, XXXII, July – September1986 No. 3* at 684 "A Ph.D. is Ph.., and D.Litt. is D.Litt. it does not matter as to what the quality of his thesis is. No body even bothers to find out as to who have been examiners of his thesis. Some

Ph.D. and NET (National Eligibility Test)

General

System of NET has been evolved and is being operated with the objective to contain the trend of deterioration in general in the standards of higher education and adversely impacting the induction of the most qualified and best-suited persons in the field of higher education. Exempting of Ph.D. degree holders from the requirement of NET and scheme of benefits for the M.Phil. and Ph.D. degrees have been examined in context of the constitutional guarantee of 'equality of opportunity in the matters relating to public employment'[22]. Here, enquiry will be confined to a brief analysis of the provisions dealing with exemption and other benefits.

Ph.D. and Exemption from Requirement of Clearing NET

Initially NET was to have an unqualified application. Even Ph.D. degree holders were required to clear it. However, within a very short period of its enforcement, exemption was made for a class of persons. It was done on the ground of 'legitimate expectation' of the said class of persons to enable them to be eligible to be considered. Supreme Court has upheld its validity[23]. Decision deserves criticism. There were reports of the expert bodies that university examinations had lost their relevance and reliability. Standards of the Masters' and research degrees were not uniform all over the country. Some of the universities

research journals are not the worth the papers they are printed on. There is a craze among the teachers about the number of Ph.D.s they 'produce'. The rat race goes on unchecked. There are fixed examiners who receive thesis for evaluation and it is rare to see a person who, if offered a thesis for evaluation, refuses it on the ground that he is not conversant with the topic. In such a setting, to adjudge research work becomes a futile exercise. As for experience, mere lapse of years hardly means anything. A donkey becomes an experienced donkey; it does not become a horse after a lapse of 20 years."

22 Singh, Guru Gyan, "Preferential Treatment to Research Degrees and Right to Equality." Accepted for publications in the Journal of Legal Studies published by Department of Law of the University of Rajsthan vide Letter No.UDL\2010\703, 24th July

23 *University Grants Commission v. Sadhana Chaudhary & others*, Judgement delivered in Civil Appeal No. 12284 of 1996 on 17-09-1996, (1996) 10 SCC536.

were maintaining it, while many others were suffering from steep decline in the standard of degrees awarded by them. In this backdrop scheme of NET was evolved and enforced. Precisely, NET came as measure to avert the ill effects of decline in the standards of degrees awarded by a large number of universities. Importance of the standard of higher education is evident from the fact that it is in the exclusive domain of the Parliament. Apex Court has observed that 'Democracy depends for its life on the high standards of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs'.[24] Maintenance of the standard of higher education is matter of great social and national importance, particularly in this era of knowledge economy, globalization and liberalization. NET is an endeavor with regard thereto. Exemption from clearing NET means and implies creating conditions for induction of academically inferior persons in higher education as teachers.[25] Qualified observance of the requirement of NET inevitably involves classification. In order to be valid it must be based on intelligible differentia and have rational relationship with the object to be achieved. Ph.D. does not satisfy the test. Firstly, it is the decline in the standard of academic degrees including PhD that led to forging of the new weapon in form of NET to fight against the trend of deterioration in standards. Secondly, in ordinary course Ph.D. is above Master's degree in the order of merit and importance of academic degrees. It does not mean and imply that Ph.D. always and in every set of circumstances continues to be higher qualification[26]. Originally, Ph.D. holders were required to clear NET

24 *University of Delhi v. Ram Singh*, AIR 1995 SC 336 at 345

25 Ibid at 349 Supreme Court has observed that 'The said Regulations are thus intended to have the widest possible applications, as indeed they must have if they are to serve the purpose intended, namely, to ensure hat all applicants for the post of lecturer, from whatsoever university they may have procured the minimum qualificatory degree, must establish that they possess the proficiency required for lecturers in all Universities in the country.' It has been, also, said that 'all who have cleared it stand at the same level'. ibid.

26 *Budge Budge Municipality v. P.R. Mukerjee*, A I R 1950 SC 58 at 60 "The same words may mean one thing in one cotext and another in different context. This is the reason why the decision on the meaning on the meaning of particular words or collection of words found in other statutes are scarcely of much value when we have to deal with specific statute of our own; they may be helpful but can not

simply because qualitatively Ph.D. was not considered even at par with the standard of eligibility criteria that included clearing of NET. Thirdly, the very first scheme of exemption from clearing NET was not based on the standard and importance of Ph.D. It was because of the 'legitimate expectation' that stood created in the persons who were pursuing their research studies at the time of introduction of NET and UGC itself conceded that it had not intended thereby to frustrate those expectations. In this context, exempting of Ph.D. holders from clearing NET is obviously against the very objectives of its introduction.

Provision of exempting Ph.D. acquired by following the process laid down by UGC Regulation of 2009 is, also, not free from legal infirmities. UGC itself gave a detail account of the facts and circumstances leading to adoption of NET[27]. It included steep decline in the standard in the Master's degree as well as that of Ph.D. '...because of unplanned growth, inadequate faculty and lack of infrastructure facilities[28].' Continuance of NET means that those situations continue to exist. In case there is adequate evidence to establish significant and perceptible change in those conditions, NET itself would become irrelevant, and, academic achievements including Ph.D. would be treated as to have regained their quality, standard and lost glory. UGC is vested with authority to implement its Regulations of 2009 vigorously and rigorously and get the standard of Ph.D. restored to that of national level. In this way NET will itself wither away. But, situation appears to be otherwise. There is strong opinion against exempting of the Ph.D. holders from the requirement of NET[29].

be taken as guide or precedent." Also see, Weeramantry, C.G. 'The Law in Crisis', CAPEMOSS, London, 1975 at 132 "Words are not passive agents meaning the same thing and carrying the same value at all times and in all contexts. They do not come in standard shapes and sizes like coins from the mint, nor do they go forth with a decree to all the world that they shall mean only so much, no more and no less."

27 *University of Delhi Supra note* 24.

28 *Ibid* at 342.

29 Times of India, Allahabad, April 1, 2010 at 8 coln.7-8 'HRD, Don't exempt any one from NET.

Ph.D. and Provision of Benefits

It is, now, established beyond doubt that benefits in form of advance increment and weight age by way of marks at the stage of selection are wholly covered by the meaning and scope of the expression "matters related with public employment" as interpreted and explained by a catena of cases. Benefits must be based on an intelligible differentia that has a rational nexus with the object intended to be achieved. Undoubtedly, Ph.D degree does not form part of current minimum qualification prescribed for the post of Lecturer. On this count alone it could not be termed to be higher qualification. For, a person just possessing Ph.D. is not eligible to apply for the post of lecturer. It means and implies that Ph.D. is not included in the statutorily laid down eligibility criteria - expressly or by way of implication. Under the scheme of exemption candidates credited with Ph.D. acquire eligibility. Even if this situation is treated as eligibility in alternative, Ph.D. could not be said to be higher than its alternative i.e. having qualified NET and possessing Master's degree in the relevant subject with 55% marks[30]. In appreciating relationship between NET and Ph.D one should not be oblivious of the circumstances that led to emergence of NET. Dominant cause was continuing decline in the quality and standard of Ph.D. There is an appreciable and perceptible difference between valued and devalued Ph.D. They cannot be treated at par just for sake of name.

Generally, benefits in forms of advance increments etc. are given as an incentive to encourage the aspirants and the existing employees to acquire relevant higher qualifications so that quality of work and performance could be enhanced. A qualification is higher or not must be ascertained in the facts and circumstances of the particular case. If law prescribes Ph.D. as minimum qualification, it could not be said to be higher in context of that very case. NET is a measure evolved to avert the ill effects of decline in the standard of degrees awarded by

30 In *Saroj Rani v. State of Punjab* (1999 Lab.I.C.3269 (SC), a Full Bench of the Supreme Court has ruled that in case of promotion the candidates who have passed prescribed test within or without prescribed time limit and those exempted from the fulfillment of the condition of passing of the test, constitute a class and can not be discriminated or treated unequally.

many of the universities. Therefore, provision of preferential treatment for Ph.D. in the existing system could not survive on the touchstone of Articles 14 & 16 0f the Constitution.

Ph.D. as Minimum Qualification for Promotion on the Post of Professor under CAS

Scheme of Qualifications as Prescribed by UGC Regulation of 2000.

UGC is empowered[31] to prescribe qualifications for the posts of the different descriptions of the teachers of the universities and colleges. This section of the article primarily aims to examine the scheme of qualifications as laid down by the UGC Regulation of 2000[32]. The said Regulation prescribes qualifications for direct appointment of different kinds of teachers on the cadre posts and, also, prescribes eligibility criteria for grant of higher pay scales and promotion on the posts of Reader and Professor under CAS. Expression 'Good academic record with Doctoral degree or equivalent published work' interalia, forms integral part of minimum qualification for the post of Reader (cadre)[33] in Humanities, Social Sciences, Science Commerce, Education, Physical Education and Law.

Scheme dealing with details of Career Advancement provides, at one place that for movement into grades of Reader and above, the minimum eligibility criterion would be Ph.D. Those without PhD can go up to the level of Lecturer (Selection Grade)[34]. On the other place it speaks of Reader (Promotion). And, qualification fixed therefor includes the expression 'Obtained a Ph.D. degree or has equivalent published work[35]'. Obviously this is an anomalous and conflicting situation. Once Ph.D has been positively prescribed as an essential qualification for promotion on the posts of Reader and Professor under CAS, there is no need to employ the expression 'equivalent published work' in the scheme of qualifications for promotion as Reader. There is nothing to warrant an inference that it has happened by sheer

[31] Sec. 26 (1) (e) of the University Grants Commission Act, 1956.
[32] No.F.3-1\2000 (PS) dated 04-04-- 2000 along with Annexure.
[33] *Ibid*, Sub-paragraphs 1.3.2, 1.4.2. and, 1.5.2. at 5,6 and 7 respectively.
[34] *Ibid*, Para graph 2.1.2 of the Annexure at 8.
[35] *Ibid*, Paragraph 2.4.1 of the Annexure at 9.

mistake. Regulation is a piece of delegated legislation, so needs to be understood and explained in accordance with principles of interpretation of statutes. Principles in this regard appear to be at variance. One, view is that the last provision should be preferred in case of conflict with the earlier one[36]. Second opinion is that leading provision needs to be followed. As, it guides the whole course and embodies the policy of the statute and the provision[37]. There is a third principle to steer of such conflicting and contradictory course. It is to choose the interpretation that 'accords with other parts of the statute and ensures its smooth and harmonious working[38]. It is an established principle and practice that qualifications –academic and otherwise – for a post\ position are laid down by taking into account the nature and scope of duties, powers, functions, liabilities and other relevant factors related therewith.[39] It means and inevitably implies that candidates credited with published work of the standard equivalent to Ph.D., are as much qualified, competent, capable and efficient to discharge the duties, perform the functions and shoulder the responsibilities of the concerned post as those possessing Ph.D. Therefore, they are equally situated with reference to the job requirement.

Qualifications under University Laws.

Expression 'Ph.D. or Published work of equivalent standard' forms integral part of the scheme of minimum qualifications

[36] Singh, G.P., *Principles of Statutory Interpretation*, Third Edition 1983 at 109. "If two sections of an Act cannot be reconciled, as they may be absolute contradictions, it is often said that last must prevail. But this should be accepted only in the last resort…it is no doubt if two sections of an Act of Parliament are in truth irreconcilable, then prima facie the later will be preferred."
[37] *Ibid* at 109-10 " In case of conflict between two sections of the same Act a more logical approach is indicated by Lord Herscell, L.C., 'You have to try and reconcile them as best as you may. If you can not, you have to determine which is the leading provision , and which the subordinate provision and which must give way to the other'
[38] *Ibid* at 112. "Where two alternative constructions are possible, the court must choose the one which will be in accord with the other parts of the statute and ensure its smooth, harmonious working and eschew the other which leads to absurdity, confusion or friction, contradiction and conflict between its various provisions, or undermines or tends to defeat or destroy the basic scheme and purpose of the enactment.'
[39] *Infra note* 43

prescribed for the posts of the two streams of Readers- directly appointed on the cadre post[40] as well as promoted on the post of Reader under CAS[41]. Benefit of promotion on the post of Professor under CAS is open to the Readers of the either description. However, Ph.D. has been made an essential qualification for promotion on the post of Professor[42] under CAS. It is evident from the above that Readers of the either category- cadre post and promotion under CAS- credited with the qualification minimum in alternative i.e. published work of the standard equivalent to PhD degree- are not eligible to be considered for promotion on higher post till they acquire Ph.D. While Readers of the both categories equipped with Ph.D. are eligible therefor. It is obvious that classification is based on Ph.D. that is only a minimum qualification in alternative. It needs an in-depth enquiry.

It is a well-settled principle and practices in the field of personnel administration and management that qualifications- educational and otherwise – relating to any post\position are fixed on the basis of an analysis and appreciation of its job description. That is, the nature, scope and extent of powers, functions, duties, liabilities, responsibilities and other relevant requirements pertaining thereto. Term 'job specification' stands for educational and other qualifications i.e. the quality and quantum of knowledge, experience, skill and other requirements requisite for efficient and effective discharge of duties, performance of functions and shouldering of responsibilities related with the relevant post\position[43].

Job Specifications, Job Description and Equality Clause of the Constitution - Relationship

Expression 'matters related with public employment'[44] has been interpreted and explained as to include qualifications- educational and otherwise- with reference to any post\position. It inevitably means and

[40] Supra note 3
[41] Supra note 4
[42] Supra note 5
[43] Dessler, Gary, *Human Resource Management*, Tenth Edition (Prentice-Hall of India Pvt. Ltd. 2005) at 112, also see Dwivedi, R.S., *Managing Human Resources Personnel Management In Indian Enterprise* (New Delhi : Ashok Galgotia Publishing Co. 2000 Reprint) at 84-85
[44] Article 16 (1) of the Constitution

implies that qualifications fixed with reference to any post \position must conform to the mandates of Articles 14 & 16 (1) of the Constitution i.e. requirement of intelligible differentia and its rational nexus with the object sought to be achieved. In Karnataka, State Government prescribed knowledge of general law as part of the eligibility criteria for promotion on the post of Principals of the Government Colleges in the State. It was assailed in the High Court as to be arbitrary and irrelevant with reference to the post of the Principal of a college. Upholding the validity of the rule, a Division Bench of the High Court observed[45]:

"State is entitled to prescribe eligibility by Rule, is a proposition that can not be disputed. But, if the eligibility prescribed is wholly unrelated to the post for which promotion is to be made, and then the Rule will be arbitrary or unreasonable. If the prescription of eligibility under Rule is such as impossible of attainment under normal circumstances, rendering chances of promotion entirely illusory, Rule will invite nullification under Articles 14 and 16 of the Constitution."[46]

In a recent decision[47], Gauhati High Court has, also, supported the power of the State Government to prescribe qualifications for various posts\positions under the State subject to the well-defined legal and constitutional constraints. The relevant observation is as following:

"It is settled proposition of law that the Government has every right\ jurisdiction to lay down certain terms and conditions or guidelines for filling up the said upgraded posts in absence of service rules. Thus, it is policy matter of the Government to frame guidelines for filling up the upgraded posts and eligibility criteria of the candidates. Of course policy matters of the Government are, also, subject to judicial review and such policy matters can be interfered with on the grounds of irrationality or opposed to constitutional or legal provisions or suffer from manifest arbitrariness, unreasonableness or unfairness or ultra vires."

In Madhya Pradesh, State Government issued an order to the

[45] *V. Kamalamma v. State of Karnataka*, 1988 Lab.I.C.870 (Kant.)
[46] *Ibid* at 877.
[47] *Implemjen Tsudir & others v. State of Nagaland*, 2010 Lab. I.C 233

effect that persons having pursued their studies at the level of higher secondary or graduatation in the State would be eligible for the State Civil Services. The said order was assailed before the High Court. And, that was declared to be unconstitutional on the ground:

"The object of any State Civil Service Examination is to recruit the best possible candidates for the State civil services. We fail to see as to how the aforesaid differentia has reasonable nexus with the object to be achieved by any State Service Examination... it is not necessary that only those who have passed Higher Secondary examination or obtained graduate degree from schools and colleges in the State of M.P. will have better knowledge of geography, history and culture of State Of M.P."[48]

T.N. Electricity Board & another v T.N. Electricity Board Thozhilalar Akkiya Sangam[49], also, involved issue of relationship between qualification and job requirement of posts. Apex Court examined qualification in context of Article 19 (1) (g) of the Constitution and recorded its conclusion as following:

"...the Board has decided to lay down a qualification for appointment to the post of helper i.e. NTC\NAC and provided a channel of promotion for such persons in the higher posts on technical side, such provisions can not be said to be ultra vires of Articles 14 and 16"[50].

In Roshan Lal v State of Himanchal Pradesh & others[51] High Court was confronted with relevance of degree in Mechanical Engineering and degree of Automobile Engineering in relation to a post. Hon'ble High Court has opined that the vires of Rules can be challenged only if they violate any constitutional provisions including Articles 14 and 16 of the Constitution or any other statutory provision. Petitioner has failed to establish that amendment carried out in the Recruitment and Promotion Rules 1974 vitiates either Article 14 or 16 of the Constitution of India. Persons holding qualification in the

[48] *State of M.P. v. Ritesh Kumar Sharma & Others*, 2006 Lab.I.C.2525 at 2528

[49] 2008 Lab.I.C.3851 (SC)

[50] *Ibid* at 3853

[51] 2008 Lab.I.C.3400 (H.P.)

subject of Mechanical Engineering constitute a different class and cannot be compared with the persons holding qualifications in the field of Automobile Engineering[52]

Qualification Based Classification -With Reference to Promotion-Judicial Approach

There is a rich harvest of judicial decisions dealing with classification in promotion on the ground of qualifications- educational and otherwise. Validity of this sort of classification has been invariably examined and evaluated with reference to their relationship with the job description of the post concerned. State of J & k v T.N. Khosa[53] is a Constitution Bench decision. In this case Court was confronted with question of the validity of an order providing for promotion of degree holder Assistant Engineers on higher post of Executive Engineer excluding Diploma holder Assistant Engineers. Order was held to be valid for the reason that degree level qualification was higher than diploma and it was introduced with the aim to enhance administrative efficiency. Apex Court has observed:

'The classification according to the appellant was made with view to achieve administrative efficiency in engineering services. If this be the object, classification is clearly co-related to it, for higher educational qualifications are at least presumptive evidence of higher mental equipment."[54]

Referring the aforesaid decision along with other ones, another Constitution Bench has made it amply clear in Mohd. Shujat Ali v

[52] Ibid at 3402. Also see *T. R. Kothanandaraman v. T.N. Water Supply & Drainage Board (1994) 6 SCC 282*, *S.S. Srivastava v. State of M.P & others*, 2006 Lab. I.C.774 (M.P.), *J. Ashok v. University of Agricultural Sciences, Banglore & others*, 2006 Lab. I.C. 485 (Karnt.).

[53] A.I.R. 1974 SC 1

[54] *Ibid* at 12, Recently in *G.B. Gagare v. Municipal Corporation, Greater Bombay & others*, 2006 Lab. I.C. (NOC) 101 (Bom.) Junior engineers, who entered in service after being equipped with the qualification higher than the prescribed minimum for the relevant post, were being denied opportunity to be considered for promotion. While those acquiring that very qualification in course of service were to be considered for promotion High Court held that it was discriminatory.

Union of India[55] that-

"...from these decisions it could not be laid down as an invariable rule that whenever any classification is made on the basis of variant educational qualification, such qualification must be held valid, irrespective of nature and purpose of classification or quality and extent of differences in the educational qualifications. The test of reasonable classification has to be applied in each case on its peculiar facts and circumstances,"[56]

Roop Chand v Delhi Development Authority [57] has developed some new dimensions of law relating to qualification-based classification. "If the effect and intent of the rules were such to treat Diploma as equivalent to a Degree for purpose of further promotion then any further discrimination brought about by subjecting the Diploma holders alone to a more onerous and less advantageous situation for such promotion would violate the constitutional pledge of equality."[58] It has further been observed that 'There may, conceivably, be cases where difference in educational qualification may not be sufficient to give preferential treatment to one class of candidates as against the another."[59] In Food Corporation of India v Om Prakash Sharma[60] Supreme Court surveyed some of its important decisions bearing on qualification based classification and again underlined that reasonableness of qualification in a case must be judged in the very facts and circumstances of that very case. In this case court enquired into and appreciated job requirements of the posts in respect of which classification was being made between graduate and non-graduate employees. It emerged that graduation was not to have any appreciable effect in improving the efficiency. Hence classification was quashed[61].

---

55 AIR. 1974 SC 1635

56 *Ibid* at 1272,

57 1989 Lab.I.C. 1268 (SC)

58 *Ibid* at 1272

59 *Ibid*, also see, *M. Rathinaswami & others v. State of Tamilnadu*, 2009 Lab. I. C. 2900 (SC)

60 1998 Lab.I.C. 2995 (SC), Also see, *State of Mysore v. B. Basavalingappa*, 1987 Lab.I.C.234 (SC)

61 Ibid at 3000. In *Disrtict Regiastrar, Palghat & others v. M.B. Koya kutty*, 1979 Lab I.C. 803 (SC) it was found that principles laid down in *T.N. Khosa*

There are cases reinforcing the view that it is the quality of qualification that contributes to the increase in efficiency of the functions related with the promotional post and only that matters, not the expression employed to represent the qualifications laid down as eligibility criteria. In M.L. Vankar & others v State of Gujarat[62] selections were made on the posts of Surveyors and Planning Assistants. Persons holding Bachelor degree in Art, Geography, Sociology, Economics and Law were eligible to apply and were accordingly selected. High Court extensively examined the matter and reached to the conclusion that qualifications prescribed for the relevant posts had no nexus with the nature of work required to be done with reference thereto, so they could not survive on the touchstone of Articles 14 and 16 of the Constitution. B. Mallaiah & others v M\S Electronic Corporation of India Ltd[63], explains the matter under investigation in wider and clearer terms. Respondent Corporation had two classes of employees. One possessing Engineering degree and another equipped with Non-engineering degree. Corporation required the Non –engineering degree holder employees to be equipped with postgraduate degree in any faculty to be eligible to be considered for promotion on the post of Purchase Manager. The same requirement was not applicable to the Engineering degree holder employees. Employer Corporation contended that eligibility criteria aimed to enhance efficiency in discharge of duties and functions of the higher post of Purchase manager. Petitioners' argued that requirement had no nexus with the nature of duties and functions related with the higher post of promotion. High Court expressed its inability to agree with the Corporation's contention and ruled that the requirement of postgraduate degree in any faculty did not have any nexus with the nature of duties and functions to be performed in the higher post of promotion. It was also, observed that Engineering degree holder employees were discharging the same duties as the petitioners;

AIR 1974 SC 1 were not applicable thereto., as there was nothing on record to show that duties discharged by the clerks of the Upper Division were substantially different from those in the lower division . In *Dilip Kumar Garg & an others v. State of U.P. & others*, 2009 Lab.I.C.1967 (SC) Degree and Diploma holders were held to be equally entitled to be considered for promotion.

62 1998 Lab.I.C. 2483 (Guj)

63 1992 Lab. I.C. 1892 (A.P.)

however, they were not required to possess any such qualification. Thus, there was an amount of discrimination between the two and consequently rule was violative of Article 14 of the Constitution[64].

In K. Krishnamurthy & others v Electronics Corporation of India Ltd.[65] provision of promotion was confined to the employees possessing B.Sc. degree. It did not aim to cover other employees of the same description possessing B.A. and B.Com. Degrees. Following a Supreme Court decision[66], High Court held that discrimination was not valid[67]. J.N. Goyal & others v Union of India[68] is quite special. In this case eligibility criteria for promotion on the post of Executive Engineer consisted of successful service of a specified number of years with Degree in Engineering. And, alternative thereto was that Diploma holders in Engineering were required to be credited with outstanding ability and record. It was found to be valid for the reason that the "focal point of qualification is ability and suitability to discharge the duties and responsibilities and perform the functions of higher post."[69]

In Abdul Basher v K. Karunakaran[70] dispute involved fixing of quota for promotion on higher post between graduate and non-graduate employees. It was held that provision of quota between two categories of employees based on their qualifications was violative of Article 14 as the conditions of employment and incidence of service recognized no distinction between graduates and non- graduates, and for all material purposes they were effectively treated as equivalent. T.N. Khosa[71] was distinguished.

Importance of alternative qualification in promotion has been explained by a single Judge of Andhra Pradesh high Court[72].

---

64 Ibid at 1896

65 1996 Lab.I.C. 2372 (A.P.)

66 *State Bank of India v. Mohd. Mynuddin*, 1987 Lab. I. C. 1627 (SC)

67 Supra note 65. at 2379 "...Respondent Corporation has not placed any material to show that a body of Technical Experts has been appointed and that body opined that only graduates in B.Sc. can only discharge the duties of Technical Officer Systems Analyst."

68 1997 Lab.I.C.558 (SC)

69 *Ibid* at 561

70 *Ibid* at 561-62

71 Supra note 53

72 *G. Lakshmanan (Petitioner) v. Executive Officer Tirumala Tirupati Devasthanam, Tirupati & others*, 1996 Lab I.C.2401 (A.P.)

Qualification for the post of lecturer in Music was 'Diploma in Music or regular training under a teacher of repute'. Petitioner possessed the latter. At the time of promotion he was required to be credited with diploma to be eligible. High Court held that petitioner was duly qualified and was not required to obtain diploma to be eligible. The relevant part of the decision is as following:

"Admittedly petitioner was appointed as lecturer by direct recruitment. For the said post, he was required to possess either of the qualifications; i.e. either he should have undergone training under a teacher of repute or he should possess diploma in Music. Thus, the diploma is made an alternative qualification. If one possess the qualification of having undergone training under a teacher of repute, he need not possess diploma thereby the said training was treated as a qualification in diploma. Once, the petitioner is appointed as lecturer having undergone a regular training under a teacher of repute, which was equated with diploma in Music by implication it is to be necessarily understood that petitioner is put at par with a diploma candidate. In view of this, it would not be necessary for the petitioner to again possess diploma in music. Therefore, a person who gets appointment to the post of lecturer by virtue of having undergone training under a teacher of repute he need not possess diploma while seeking promotion to the post of Principal. In view of this finding, the contention of respondent that petitioner does not have the requisite qualification of diploma has to be rejected. Therefore, petitioner is entitled for grant of 15 years Special Temporary Promotion Post on the completion of 15 years of service. Accordingly, the direction shall be issued to Ist respondent to grant the said promotion and consequent arrears of wages and other benefits." [73]

It is apposite to refer Apex Court's observation made in Badrinath v State of Tamilnadu[74] that under Article 16 of the Constitution right to be considered for promotion is a fundamental right. It is not the mere "consideration" for promotion that is important but the "consideration" must be fair according to established principles governing service jurisprudence.

---

73 *Ibid* at 2404

74 2000 (8) SCC 395

Test of Violation of Fundamental rights

Courts often come across the question whether in a given conditions fundamental rights are being violated. Development of law on this matter is quite evident. In Bennet Coleman Co. v Union of India[75] majority held that ' pith and substance' of the subject matter or the object of the legislation are irrelevant to the question of infringement of fundamental rights and the true test was 'direct effect' of the impugned State action on particular fundamental right. The word 'direct' goes to the quality or character of the effect to the subject matter. In Maneka Gandhi v Union of India[76] it has been said that what the court must consider is the direct and inevitable consequence of the State action. If the effect of State action on the fundamental right is direct and inevitable, then a fortiori, it must be presumed to have been intended by the authority taking action, hence the doctrine of direct and inevitable effect has, also, been described as 'the doctrine of intended or real effect'.[77] Test is squarely applicable to the fact of denial of equality of opportunity to be considered for promotion to the Readers adjudged by experts to be credited with the 'published work of the standard equivalent to Ph.D'.

Meaning and Scope Of The term 'Equivalent'

Readers adjudged by subject experts to be credited with 'published work of the standard equivalent to Ph.D' are not eligible to be considered for promotion on the post of Professor under CAS[78]. Validity of such a provision is, inter-alia, closely related with the meaning and scope of the term 'equivalent'. It is not defined in the relevant provisions dealing therewith. Therefore, dictionary meaning could be of immense help. According to a dictionary[79] term 'equivalent is adjective. It means 1.equal in value, force, amount, effect, or significance. 2. Corresponding in effect or function, nearly

75 AIR 1973 SC 106
76 AIR 1978 SC 597
77 *V.N. Shukla's Constitution of India*, Revised by Dr. Mahendra P. Singh, Tenth Edition (Lucknow : Eastern Book Co. 2003) at 33-34. Also see *Delhi Transport Corporation v. D.T.C. Majdoor Congress, 1991* Lab. I.C 91(SC) at 185
78 Supra notes 3,4, &5
79 Black's Law Dictionary, Eighth Edition at 581

equal, virtually identical. Another dictionary explains the term as "1.equal in value, measure, force, effect or significance: His silence is equivalent to an admission of guilt.2.Corresponding in position, functionetc.3.having the same extent, as triangle and squire of same area."[80]

Km. Neelima Mishra (Appellant) v Dr. Harinder Kaur Paintal & others[81] is an important case relating to the meaning and scope of the expression 'equivalent qualification'. In this case, except the appellant all of the applicants were equipped with 'Ph.D. degree'. However, selection committee unanimously preferred the appellant as she was adjudged to be credited with the 'published work of the standard equivalent to Ph.D.' that was an alternative qualification for the post of Reader as per relevant statutory provisions of law. Supreme Court upheld appellant's selection as to be valid and observed that Executive Council was wrong in holding that it was a case of relaxation in essential qualifications[82].

In the University of Mysore v Govinda Rao[83] University had prescribed the qualification for the post of Reader to be, among other things, "a high first or second class Master's degree of an Indian University or equivalent qualification of a foreign University in the subject concerned". University appointed a person possessing 50.2 % marks at M.A. Examination of Durham University as a Reader in English. Govinda Rao, an unsuccessful candidate, challenged the appointment on the ground that 50.2 % was not "a first or high second class Master's degree". High Court allowed the petition. Supreme Court speaking through Justice Gajendragadakar upheld the validity of the selection and appointment on the ground that the two parts of the qualification were independent and in alternative. Candidates satisfying the either were equally eligible and competent.

Tariq Islam v The Aligarh Muslim University, Aligarh[84] is, also, an important case on the subject. Appellant possessing B.Sc. (Hons.)

80 Random House College Dictionary, (New York : Random House) at 446
81 1990 Lab. I.C. 1229 (SC)
82 *Ibid* at 1239-40
83 A.I.R. 1965 SC 491
84 A.I.R. 2001 SC 3058

degree with more than 55% marks from the Council of Academic Award; London sought admission in Aligarh University to pursue M.Phil. Studies. Question of equivalence was examined in detail and appellant was allowed to pursue M.Phil. and Ph.D. studies in the respondent University. He, also, worked as lecturer in Philosophy in temporary capacity. He was selected against a post along with another teacher respondent no.7. Executive Council did not approve appellant's selection on the sole and solitary ground that he did not possess Master's degree in the relevant subject and directed to appoint the respondent no.7. Appellant lost at the level of the High Court. Supreme Court allowed appellant's appeal and set aside the order of the High Court. Apex Court underlined the importance of equivalence of qualifications and required it to be determined at the earliest possible point of time. There are decisions[85] that have, also, dealt with various aspects of equivalence of qualifications.

In this backdrop, it is quite rational and fair to conclude that Readers adjudged to be credited with published work of the standard equivalent to Ph.D. degree and those possessing Ph.D. are equally situated and deserve to be treated alike with respect to promotion on the post of Professor under CAS. Obsession with Ph.D. as an embodiment of supreme knowledge needs to be subjected to the concept of rule of law.

Ph.D. And it's Retrospective Application

Employers' power to prescribe qualifications for various posts\positions is not unqualified[86]. There are well-settled legal and constitutional restrictions. Qualifications being covered by the meaning and scope of the expression 'matters related with public employment' are to conform to the contours of Articles 14 & 16 of the Constitution. Courts have consistently ruled that retrospective change

85 *Dr. Rana Pratap Sahi v. Director, Higher Education, U.P., Allahabad*, 1989 Lab.I.C.1622 (All.), *Basanti Das v. State of West Bengal*, 2004 Lab. I.C. 2658 (Cal.), *Dr. Rajbir Singh Dalal v. Ch. Devilal University, Sirsa*, 2008 Lab.I.C.3608 (SC), *University of Punjab v. Narinder Singh*, 2000 Lab.I.C.2117 (SC)

86 Supra notes 45 and 56. Also see *P.U. Joshi & others v. Accountant General, Ahemedabad*,(2003) 2 SCC 632

in promotional qualifications is not permissible when it divests one of his accrued or acquired rights[87]. Delay does not defeat rights acquired or accrued[88]. Once the selection process has begun, changes effected in the requisite qualifications, if there be any, could not be applied to the candidates involved therewith[89]. Selection can be made according to the new Rules, but only after terminating the on going process of selection. Instances are that Acts incorporating universities have made express provisions[90] to the effect to avoid doubts and disputes. Ph.D. could not be made an exception to this established legal position.

Conclusion

It emerges from the above that pivotal factor is standard and the quality of the eligibility criteria prescribed for appointment\promotion on a post, that is directly related with the nature and scope of the

87. *T.R. Kapur v. State of Haryana*, 1987 Lab.I.C.238 (SC), *Union Of India v. Tushar Ranjan Mohant*, 1995 Lab.I.C.1768 (SC), *Karnataka Electricity Board, Banglore v. Y. V. Venkat Krishna & others*, 1986 Lab.I.C.1176 (Karn.), *N. C. Singhal v. Director General Armed Forces*, AIR 1972 SC 628 (SC), *Om Prakash Sharma v. State of Rajsthan* 2005 Lab. I.C.2470 (Raj.). S. Parmar v. State of Haryana, 1984 Lab. I.C.350 (SC). *State of Gujarat v. Ramanalal Keshavalal Soni*, A I R 1984 SC 161, In *Chandra Prakash Madhava Rao v. Union of India*, 1998 Lab. I.C. 3565 Supreme Court has observed in paragraph 53 that 'change in essential qualification made in 1991 and 1980 or additional functions now required to be performed by the appellants could not retrospectively affect the initial recruitment of appellants. Recruitment qualifications could not be altered or applied with retrospective effect so as to deprive the recruits of their right to the post to which they were recruited nor it could affect their confirmation.'

88 *M\s Dehri Rohtas Light Rly. Co. v. Disrict Board Bhojpur*, AIR 1993 SC 802, also see *Union of India v. K.V. Janakiramaan* 1991 Lab. I.C. 2045 (SC), *Sudershan Kumar v. State of Harayana*, 1997 Lab. I.C. 1946 (P & H)

89 *Abdul Hi Ahmed & others v State of Assam* 2009 Lab. I.C. (NOC) 518 (Gau). In this case promotion process began under 1982 Rules. Advertisement was made on 08-02-2003. On 12-08-2003 Rules were changed. Court held that process of selection was to be continued under 1982 Rules. There was nothing in the 2003 Rules to make it retrospective. Also see *Shankar Lal v. Punjab & Sindh Bank*, 2008 Lab I.C. (NOC) 655 All,. *Momd. Nazim & others v. State of Jharkhand*, 2009 Lab. I.C. (NOC) 599 Jhar. *Sanjay Vishvakarma v. State of Jharkhand*, 2008 Lab. I.C. 878 Jhar. *Alok Kumar Tewari v. State of U.P.*, 2009 Lab.I.C. (NOC) 424 All. *Debbrat Das Gupta v. State of Jharkhand*, 2009 Lab.I.C.1327 (Jhar.)

90 Section 44 (3) of the University of Allahabad Act, 2005

duties, powers, functions, responsibilities, liabilities and other relevant factors closely connected therewith. The terms used to denote and describe the qualifications forming part of eligibility criteria are irrelevant and immaterial. Decisive and conclusive component is the quality and quantum of knowledge, experience, capacity and capability acquired thereby for effective and efficient discharge of duties, performance of functions and shouldering of responsibilities related with the concerned post.

UGC is a specialized agency set up by a Central law with the avowed objective to ensure 'co-ordination and maintenance of the standard of higher education' in the country. It is vested with authority to prescribe qualifications for the different categories of the university and college teachers. Generally, qualifications are fixed on the basis of the recommendations of the expert bodies consisting of eminent educationist and experienced educational administrators. This process invariably takes into account the job descriptions of the relevant posts\position. Qualifications for direct appointment on the cadre post of Reader, promotion on the post of Reader as well as on the post of Professor under CAS must have been prescribed accordingly. It inevitably means and implies that Readers adjudged by the subject experts to be credited with 'published work of the standard equivalent to Ph.D' are as much qualified, competent and capable to discharge the duties, perform the functions and shoulder the responsibilities of their posts as those possessing Ph.D.degree. In other words, the quality and quantum of knowledge, experience and other relevant distinctions acquired by a Reader adjudged by subject experts to be credited with 'published work of the standard equivalent to Ph.D' is equal to that of one earned by those possessing Ph.D. Thus, they are equally situated.

In this state of facts and circumstances, the direct and inevitable effect of prescribing Ph.D. as an essential qualification to be eligible to be considered for promotion on the post of Professor under CAS is denial of equality of opportunity to be considered for promotion to the Readers who are equipped with "published work of the standard equivalent to Ph.D." and have not acquired Ph.D. It is treating equally situated Readers unequally. Precisely, operation of the provisions of

the UGC Regulations[91] and that of the University laws[92] culminating in denial of equality opportunity to be considered for promotion on the post of Professor under CAS to the Readers adjudged to be credited with 'published work of the standard equivalent to Ph.D.' is entirely against the mandates of the constitutional guarantee of equality in matters relating to public employment.

On the basis of the above analysis it appears that individuals and institutions entrusted with educational planning, administration and management are not very particular to ensure compliance of the relevant legal and constitutional provisions involved therein. Deliberate and designed defiance of the law declared by the Supreme Court[93] seems to have become an established practice[94]. Ph. D degree appears to be treated as the knowledge incarnate[95] and above the

---

91 Supra note 32

92 Supra note 3

93 Supra note 77 at p.455 "The law declared by the Supreme Court is binding on the State and its officers and they are bound to follow it whether respondents in a particular case were parties or not to the petition. Even the directions issued by the Supreme Court in a decision constitute binding law. In *Nand Kishore v. State of Punjab*, 1996 Lab. I.C. 610, also. Apex Court has opined that law declared thereby is as binding as law enacted by legislature.

94 In *Dr. J.P. Kulshreshtha v. Allahabad University* AIR 1980 SC 2141, a Full Bench of the Apex Court has observed in reply to the contention that 'court should not substitute its judgment for that of academicians when dispute relates to the educational matters'. That "While there is no absolute ban, it is a rule of prudence that courts should hesitate to dislodge decisions of the academic bodies. But university organs, for that matter any authority in our system is bound by the rule of law and cannot be a law unto itself. If the Chancellor or any other authority lesser in level decides an academic matter or an educational question, the court keeps its hands off, but where a provision of law has to be read and understood, it is not fair to keep the court out." Allahabad University has forgotten the decision. There are concrete cases to establish that officers and authorities of the university are not particular to comply with Articles 14 & 16 of the Constitution.

95 In his introduction to Dr. I. P. Massey's book 'Administrative Law' (6th Edition 2005, Eastern Book Company, Lucknow) at p. XVII under foot note 14 eminent scholar and jurist Prof. Upendra Buxi has referred to a case of Delhi University involving determination of relation ship between published work and Ph.D. degree. For the expression 'published work of equivalent standard' term 'constructively holding Ph.D.' has been used. It appears that he is not ready to accept that 'published work equivalent to the standard of Ph.D.' could be and

Constitution. Provisions of preferential treatment for Ph.D. degree in form of advance increments, service benefits etc. do not reflect the real object sought to be achieved thereby. The authors of the expression 'Ph.D. or published work of the equivalent standard' must have been aware of its meaning and scope that they are minimum in alternative and of the same value and importance. So, either of them cannot be basis for unequal treatment. Universities are said to be the conscience keeper of the nation. They are to play a very vital role in the realization of the constitutional aspirations and objectives. It postulates that the institutions of higher education and other organizations related therewith should not be callous to the conscience of the Constitution.[96]

●

should be treated equal in importance to Ph.D. For, Ph.D. is the highest degree a university could confer. It is submitted that subject experts contribute in formulation of qualifications for different kinds of teachers. Howsoever, important Ph.D. may be, it could not be above the Constitution. As a qualification in public employment it would have to be subject to Articles 14 & 16 (1) of the Constitution. Expression " matters relating to public employment' forms integral part of the basic features of the Constitution. *Secretary, State of Karnataka v. Uma Devi*, (2006) 4 SCC 1. In view of the classical Kothari Commission Ph.D. degree "...should be regarded as the beginning of the real research career of the student rather as its climax or end."

96 Instances are in abundance to establish that even on being provided with the photocopies of the landmark and historical decisions of the Apex Court, officers and authorities of the university pay no heed at all to the principle of law laid down thereby. Officials are least aware of the role and importance of the provisions of the Constitution in the administration of the university. Vide letter No. RTI-125\2009 –10 Dated Feb. 08, 2010, Central Public Information Officer of the Allahabad University has informed, "University of Allahabad is bound by the Articles of the Constitution of India, though the office does not have expertise\ information on this point." Indian Parliament cannot do any thing that is against the basic feature of the Constitution, but universities appear to be quite free of such inhibitions.

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 75-98

Probation of Offenders in India : A Modern Measure to Tackle the Problem of Crime and Criminality

Pradeep Singh*

Abstract : *Problem caused by Crime and Criminality is becoming more and more menacing requiring immediate attention of legalists, Jurists and academicians to analyse the causation of crime and to find out appropriate and effective measures to tackle it properly. Previously crime and criminality was seen and tackled in mechanistic manner but now with the development of criminal science it has been completely proved that crime and criminality are due to the individualized causations and needed to be tackled by individualized treatment methods. Probation is very modern and enlightened individualized treatment measure. Ultimate goal of probation is to tackle the problem of criminality and it is attempted to be attained through reformation and rehabilitation of offenders particularly first offenders. In this present study attempt is made to analyse the law relating to probation with a purpose to find out whether law in force is satisfactory to achieve the goal of tackling the problem of crime and criminality properly.*

Key Words : *Criminality, Probation, Probation Officer, Prisonisation, Socialsation, Reformation, Rehabilitation.*

Contents

1. Probation Defined.
2. Advantages of Probation.
3. Procedure of Releasing on Probation in India.
4. Probation Officer.
5. In Probation Minimum Deterrence is Provided.
6. Relationship Between Probation of Offenders Act and Sec. 360 of Criminal Procedure Code

* Associate Professor, Law School, Banaras Hindu University, Varanasi, India,

7. Applicability of Probation Measure in Cases of Socio-Economic Offences
8. Concluding Remarks

Now a day's problem of criminality poses a greater menace to the societal existence, needed to be immediately tackled. Crime problem may be tackled and checked only when criminals and near criminals would be treated properly. Previously the criminal law was mainly concerned to punish the criminals that were based on retributive and deterrent theory of punishment. Without considering the impact of punishment on individual, criminality, society and particularly etiology of crime, punishment was imposed in mechanistic manner.[1] Even today law and law enforcement machinery are adhering to mechanistic punitive approach. Crime rate is increasing without any restrain and civilized people fear that they may become victim of crime. Therefore, in this horrific situation of criminality it is needed that crime reaction and restrain modalities should be remodeled.

In modern era with the development of criminal science causation of crime has been much studied and it has been found that the criminal is the person because of need and necessity, not properly socialized by which he has not internalized social mores and not knowing about importance of society and societal values resultant is committing act in violation of social values, friendship circle having more criminogenic forces and stresses of competitive society. Crime and criminality may only be checked when the crime causation in particular case be considered and reaction be formulated accordingly. Therefore, for tackling the problem of criminality it is better to tackle the problem not in mechanistic manner but should be tackled by individualized treatment method. Now in criminal legal science the

[1] In mechanistic manner of tackling criminality individual traits and etiology of crimes are not considered but for all the criminals of the same crime, inflicted with same amount of Punishment. This is mainly based on hedonistic theory in which criminality is attempted to be Checked by inflicting a sufficient amount of pain upon the offender. Pain undoubtedly has some values in the control of behaviour, but the value is more or less balanced by the antagonism, isolation and group loyalties which it produces. Further, the infliction of punishment upon the offender does not change the situations which produced the criminality resulting into unchecked and increased criminality.

view is coming by making comparison with medical science that the criminal is socially ill person as the person with physical ailment is in need of cure, so the person who have not internalized social mores should be cured, resocialised, treated, reformed and rehabilitated ultimately by which criminal be transformed into a law abiding civilized person. Probation of offenders is one of the most enlightened and modern method for tackling the criminality through reformation of near criminals.[2] After the completion of probation period successfully probationer is completely absolved from the criminal liability.

(1) Probation Defined

Probation is an enlightened attempt to cope with crime and criminality by which offender is regained, reclaimed and rehabilitated. The word Probation is derived from Latin term *'Probatio'*. Its meaning is *'to test'*, *'to prove'* and *'to try'*. In this process during a specified time period criminal attempts and ultimately proves and testifies that he has been reformed and become a civilized person and not needed to be imprisoned. In simple sentence Probation of offenders may be defined:

> "As applied to modern courts, probation seeks to accomplish the rehabilitation of persons convicted of crime by returning them to society during a period of supervision rather than sending them into the unnatural and too often socially unhealthful atmosphere of prisons and reformatories."

Probation is the status of convicted person during a period of suspension of sentence in which he is given liberty conditioned on his good behaviour and in which state by personal supervision attempts to assist him to maintain good behavior. Probationer is convicted person

[2] For the purpose of use of probation measure criminals may be divided in two categories : Criminals and near criminals. Criminal is the person who has matured in criminal culture and have complete concretized criminal mentality; it may be evident by recidivism. He has no prospect of reformation. Probation method is not used in cases of such offenders. Another category of criminals are of near criminals who have committed crime due to some reasons and he has prospect reformation. Probation may be used in his case and may be modified into a civilized person. Majority of crimes are committed by near criminals also called situational offenders or first offenders.

and in case of convicted person normally he is send into Jail. But in case of probation Jail is not considered as proper place to resocialise an individual. In Jail convicted persons mature in criminal culture having criminalistic mind are lodged. When a person though he is a convicted person but with a prospect of reformation would be lodged in Jail, he would come in contact with hardened criminals and criminogenic forces would increase resulting in prisionisation[3] and ultimately the person with prospect of reformation send there for reformation will become real criminal after completion of term of Jail. In Probation method a convicted person is not send into the Jail but during specified period of probation send in the society under supervision of probation officer. Therefore, with object that the person with prospect of reformation, resocialisation and to make him law abiding good citizen attempt is made that he should not come in contact with hardened criminals. For reformation in probation probationer is resocialised under the supervision of probation officer. Morrison Committee in England observed:

> "Probation is the submission of an offender while at liberty to a specified period of supervision by a social case worker who is an officer of the court."[4]

Probation of offender is based on individualized treatment and for this purpose when a person is convicted and court finds that the convicted person has prospect of reformation and committed the crime only due to some circumstances, he is released on probation under the

[3] Prisonisation is the process of socialization of prison inmates in prison subculture. Due to the circumstances of deprivation of liberty, deprivation of goods and services, deprivation of heterosexual relationship, deprivation of autonomy, deprivation of security lead to the adaptation of prison sub-cultural by the inmate. Due to the prisonisation pressurization prison inmate internalises prison values which causes secondary deviation and person accepts a criminal self image. Secondary deviation involves commitment to a deviant behaviour *per se*, so that deviance no longer arises out of the situations and circumstances of person's life (Primary deviation which is found in case of situational criminals or near criminals), but is generated by the person's definition of himself (Secondary deviation, which is found in case of criminals).The redefinition of self opens the door to the full participation in criminal activities.

[4] Ahmad Siddique, *Criminology*, 4th Edition (Lucknow : Eastern Book Company 1997) at 191.

supervision of probation officer for certain specified period. Sutherland and Cressey observed:

> "Although probation is to a large extent a non-punitive method of handling offenders, it has developed within the framework of a legal system which is basically punitive. Probation methods represent a distinct break with the classical theory on which the criminal law is based, for an attempt is made to deal with offenders, as individuals rather than as classes or concepts, to select certain offenders who be expected with assistance, to change their attitudes and habits while residing in the free community.... Probation thus is a system for implementing the treatment reaction to law breaking. It does not attempt to make the offender suffer; it attempts to prevent him from suffering."[5]

Probation is the suspending of sentence against an offender during which suspension he is bound over to a probation officer to be of good behavior. By this way problem of crime and criminality is attempted to be tackled through the reformation, resocialisation and rehabilitation of an offender.

(2) Advantages of Probation

Probation is modern enlightened method to tackle the problem of criminality. It is based on premise that the majority of crimes are committed by situational or near criminal, they may be reformed and saved from becoming real criminals or recidivists and by this way the problem of criminality may be checked effectively. This method is very advantageous:

(a) From the standpoint of the person on Probation:

(i) It affords him another chance of reformation. The sole intention of the legislature in passing probation law is to give person of a particular type a chance of reformation which they would not get if sent to Jail. The types of the persons who are in the contemplation of legislature under

[5] Sutherland and Cressey, *Principles of Criminology*, 6th ed., (Chicago University Press, 1960) at 421.

the probation law are those who are not hardened or dangerous criminals.

(ii) It makes possible a continuation of those life habits that meet the approval of society. Such habits include his work, meeting family obligations and participating in recreational activities and any other pursuit that have meaning to him as a person in the community.

(iii) It averts the stigma of Jailed person. By placing the offender on probation court saves him from the stigma of Jail life. Stigmatisation and branding of the person is major causation for secondary deviance and preparation of a recidivist.

(b) From the standpoint of Community:

(i) Overcrowding in Jail creates dehumanizing situation and criminogenic surrounding is created. In probation convicted person is returned back in the society therefore it also provides measure to tackle the problem of overcrowding in Jail and saves the person from criminogenic environment and contaminating influence of hardened prison inmates.

(ii) It can be assumed that the community has a definite interest in well adjusted individuals who are carrying on a constructive life plan. The well being of a community depends on how many of individual members of the community are leading a reasonably well integrated life. If convicted person is sent to prison, he becomes liability on the community for his fooding, lodging and clothing but when he is released on probation and reformed, he becomes asset for the community and does constructive work.

(iii) Financially probation is much less expensive than keeping convicted person in Jail or other reformatories.

(3) Procedure of Releasing on Probation in India:

Criminological studies have now proved that criminal attitude is outcome of faulty socialization process. It has now been realized that social forces and society are, directly or indirectly, responsible for the

preparation of the person committing crimes, so there has been a gradual recognition that criminals can be and if possible should be reformed. It is most effective method to tackle the problem of crime and criminality. In India provisions for releasing convicted person on probation have been given in Probation of Offenders Act 1958 and Criminal Procedure Code – SS.360 and 361.

Probation of Offenders Act 1958 provides that when any person is convicted of an offence not punishable with death or imprisonment for life and the court is of opinion after taking into consideration circumstances of the case including nature of offence and the character of the offender, it is expedient to release him on probation of good conduct then the court may instead of sentencing him direct that he be released on probation not exceeding three years and in the meantime he will keep peace and be of good behaviour.[6] In criminal trial after conviction of offender at the time of considering about imposition of sentence court attempts to find out whether the person has prospect of reformation and for this purpose the provision gives direction that the circumstances of the case, nature of offence and antecedent character of offender should be calculated, it gives indication about extent of criminality in the offender. If the person has found having prospect of reformation, he may be directed to be released on probation.[7] In India maximum period of probation is of three years and during this specified period probationer will keep peace and be of good behaviour. After successful probation he is completely absolved from criminal liability.

---

6 Sec.4 (1) of Probation of offenders Act, 1958.

7 In Probation method at the sentencing stage of criminal trial if person is found having prospect of reformation, he may be released on probation. For this purpose there may be either suspension of imposition of sentence or suspension of execution of sentence. In India the measure adopted is suspension of imposition of sentence. In India when any convicted person is found fit to be released on probation court not pronounce the sentence for the case but the person is released on probation. In such a situation if the person violates terms and conditions of probation or he is not reformed, the court then considers about the sentence to be imposed. The countries which have adopted the another measure that is suspension of execution of sentence, before releasing on probation sentence is pronounced but the execution is suspended. As soon as it is found that probationer has not reformed the sentence already pronounced is executed.

Younger persons are considered more appropriate cases in which probation method should be freely used. In case of convicted person is under the age of 21 years, the court is bound to release him on probation. Section 6 provides that when any person under 21 year age is convicted for the offence punishable with imprisonment but not for life imprisonment the person shall be released on probation. Only in exceptional cases after considering nature of offence and character of offender, it may not be desirable to release the person on probation and in this situation court shall record its reason for so doing. For taking decision about probation in case of younger offenders probation officer's report must be considered.

Indian Law of probation is much different than the common notion of probation. In common parlances during probation period for the resocialisation, reformation and rehabilitation of convicted person, he is supervised, guided and directed by probation officer. In Probation of offenders Act, 1958 main provision for releasing on probation is contained in Sec.4(1) and Sec. 4(3). Analysis of these provisions makes clear that probation order may be with or without supervision order. Sub-section (3) of Section 4 provides:

> "When an order under Sub-Sec.(1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer..."[8]

Legally probation order may be with or without supervision but practically whenever a person is released on probation he comes under the supervision of probation officer.[9] In case of probation order with supervision probation period shall not be less than one year. So in this situation probation period may be one year to maximum three years.[10] The Probation of offenders saves a convicted person from the stigma

[8] Sec.4 (3) of Probation of Offenders Act, 1958.

[9] In India in every state government appoints a probation officer in each districts as government servant. He looks after all the reformatories, parolees and probationers in the district territorial area.

[10] Sec.4 (3) of Probation of Offenders Act, 1958.

of Jailed life, but nobody can claim the benefit of Sec.3 and Sec.4 of Probation of offenders Act as a matter of right and the court has to pass appropriate orders in the fact and circumstances of each case having regard to the nature of the offence, its general effect on the society and the character of the offender etc.[11]

(i) Courts which can release the person on probation

Sec.11 enumerates the courts which are empowered to pass probation order after the conviction of an offender –

(a) Order may be passed by any court empowered to try and sentence the offender. If the trial court is empowered for trial but has no capacity to sentence, such court cannot release the person on probation. Only that court which is empowered both to make trial and impose sentence can only take decision about releasing on probation.

(b) High Court may as a court of original, Appellate and revisional jurisdiction may take decision about probation.

(c) Appellate and revisional court when the case comes before the court in appeal or revision, may release convicted person on probation of good conduct. When a person is required to be released compulsorily on probation[12] and trial court did not release u/ss. 4 and 6 of the Act and sentence was imposed which is not appellable, even in that case court to which appeal ordinarily lies against the order of trial court – either on its own motion or on application by the convicted person or probation officer, may hear the case and pass appropriate order as it thinks fit.[13]

Order of releasing the person on Probation is appellable and appeal against probation order is made to that court to which appeal is made against sentence if imposed by that court. Appellate or revisional court may set aside the order of release on probation and sentence may be imposed, but appellate or revisional court cannot inflict greater punishment that might be inflicted by the trial court.[14]

[11] *Dalbir Singh v. State of Haryana*, AIR 2000 SC 1677.

[12] In case of convicted person is below 21 years of age, Sec.6 of Probation of Offender Act provides that he shall be released on probation.

[13] Sec.11 (3) of Probation of Offenders Act, 1958.

[14] Sec.11 (4) of Probation of Offenders Act, 1958.

(ii) Bond and conditions of probation order

When court decides to release the person on probation, it is needed that he should be made bound that he will attempt to undergo resocialisation process and will not repeat the offences during probation period and ultimately he be reformed. For this purpose court will direct the person going to be released on probation to furnish bond with or without sureties conditioned with, in case of not be of good behviour, to appear and receive sentence whenever he will be called by the court during probation period. The bond furnished is given for good behaviour and for appearance for maximum period of three years. It is essential that offender or surety if any must have fixed place of abode or regular occupation within the territorial jurisdiction of releasing court or where offender will live during probation period. When all these requirement of furnishing bond are satisfied the person is released on probation of good conduct and keeping peace.[15]

When supervision order u/s. 4(3) has been passed, before releasing person on probation it is required to furnish a bond with or without sureties to observe the conditions specified in the order. Without supervision order condition is that probationer will be of good conduct and keep peace. In order with supervision some additional conditions may also be imposed what the court thinks appropriate for proper supervision, guidance, direction by probation officer, for these conditions probationer gives the bond. Some conditions are specifically mentioned in the Act to be imposed. Conditions in respect of residence, abstention from intoxicants and other conditions may be imposed by the court if it considers appropriate for preventing repetition of the same offence or commission of other offences by the offender.[16]

(4) Probation Officer

Probation is an enlightened measure to cope with crime and criminality by which a convicted person is regained, reclaimed and

[15] Sec.4(1) of Probation of Offenders Act, 1958.
[16] Sec.4(4) of Probation of Offenders Act, 1958.

rehabilitated in real sense. In probation it is to the community rather than to prison, convicted person is assigned for treatment.[17] The treatment of the person means person is considered as socially ill person and he is reformed with the help of probation officer. He is very important personnel in probation method. Whole probation method of tackling criminality revolves around the probation officer. Probation Officer is the person who is well trained in human behaviour problem, helpful, person of well integrated personality, thoroughly acquainted not only with the case but also with the facilities the community has to offer in the struggle to recapture self respect and becoming law abiding citizen.

(i) Appointment of probation officer

Probation Officer is administrative officer working under the control of judiciary. Since probation measure originated in the suspended sentence and hence is regarded as an extension of the judicial function. But a probation officer is appointed, he is administrative officer. The main problem for court to function as probation officer is–

(i) The work of supervision is essentially administrative not judicial.

(ii) The judge cannot effectively handle the probation work. He has other duties which could interfere in the supervision of probationer.

[17] Treatment of offender is based on individualized considerations. Attention is focused on the criminal rather than on the crime, crime may be considered only for the getting information about the offender's malfunctioning. Generally an attempt is made to diagnose the cause of criminality and to base the technique of reformation upon the diagnosis. An analogy is made with the method of diagnosis, prescription and therapy for medical patients. The probation method and functioning of probation officer is based on this analogy. This is commonly called clinical method of reformation and it has become similar to clinical medicine in theory and content as well as in procedures. Criminality is considered as a defect or disorder or as a 'symptom' of a defect or disorder which can be treated on individual basis and can be cured only, when the actual cause of disorder is treated symptom (criminality) will be tackled.

Therefore, a probation officer who is administrative officer is appointed who works under the control of judiciary. Appointment of probation officer shows this situation very clearly.

Section 13 talks about appointment of probation officer that he is appointed by state government or recognized as such by state government. NGO and social spirited may also be recognized by state government as probation officer. Court has also been enabled to appoint any specific person as probation officer in a specific case.[18] Court or District Magistrate may at any time change the probation officer named in the probation order and appoint a new person as probation officer.[19] In exercise of duty of supervision, reformation and rehabilitation of offender probation officer is answerable to court and functions under the control of District Magistrate. These aspects make clear that the probation work is controlled by judiciary and also by executive particularly the work is administrative in nature.

(ii) Duties of probation officer

Probation Officer is very crucial person in probation work around whom the whole probation measure of tackling the problem of criminality revolves. When court, at sentencing stage of criminal trial, considers about releasing convicted person on probation, probation officer gives report about desirability and fitness of the person to be released on probation - what is antecedent character, what is extent of criminality in the person and what is prospect of reformation.[20] If the convicted person is under the 21 years age, it is mandatory for court to call the report and consider it. Report of probation officer is very crucial for deciding whether the person should be released on probation. When court decides to release the person on probation, probation officer gives another report that what measure should be adopted during probation period for the reformation of probationer.[21] The word treatment used for probation refers to the effort of the

[18] Sec.4 (3) and Sec.13 (1)(c) of Probation of Offenders Act, 1958.
[19] Sec.13 (2) of Probation of Offenders Act, 1958.
[20] Sec.4 Sub-Sec.(1) and (2) of Probation of Offenders Act, 1958.
[21] Sec.14 (a) of Probation of Offenders Act, 1958.

probation officer to guide,, supervise and assist the probationer in regaining, reclaiming and reforming. Probation Officer is preacher, teacher, guide, friend, psychologist, pathologist, doctor, administrator and supervisor for the probationer. He is expert in human behaviour problems and curing it. His functioning techniques are:

(a) Manipulative

Probation Officer inquires about the home surrounding and friendship circle of probationer. These factors are major factors in determining the behaviour of person and his socialization, what the value any person is having coming from his intimate personal group. If the personal group of probationer is law violating, probation officer will supervise him and place him in law abiding group. For this purpose his group is manipulated either he is taken and placed from law violating group to law abiding group or his group is kept intact but it is made law abiding by introducing law abiding new members in the group. By changing the intimate personal group and supervision in this reference by probation officer, probationer is resocialised and ultimately he becomes a good citizen.[22]

(b) Executive

Convicted person's reformation is incomplete until the person is not earning for his basic necessities. There is always a greater chance

[22] Personality of any person is situation determined rather than trait determined. The behaviour of an individual is product of his group relationship. In criminology the differential association theory given by Edwin H. Sutherland is consistent with this conception of individual behaviour. The general implication of differential association theory for reformation of criminals adopted in probation measure is that the relations in the culture of law abiding groups must be promoted and relations in the culture of law violating groups must be discouraged – (a) criminal who is to be reformed and the persons who are to exert pressure must have strong sense of belonging to the same group. The two general process in reformation are the alienation of the criminal from group which support values conducive to criminality and concurrently assimilation of criminal into the group supporting values conducive for law abiding behaviour. (b) The more attractive the group, greater is the influence that the group can exert on the criminal. The group should be so constituted that the criminal may desire and can achieve status in it.

to reinvolve in the crime, so the duty has been imposed on probation officer to make endeavour to find suitable employment for probationer and also probationer is to be advised and assisted in payment of compensation and costs ordered by court.[23] For this purpose probationer may be provided with vocational training etc.

(c) Guidance and counseling

In supervising, guiding and directing the probationer probation officer makes psychological analysis of his mentality to find out causation of his criminality and gives counseling how probationer can reform himself. The psychiatric school of criminology has a conception that for treatment insight to the person to be reformed about reasons for criminality is very crucial. The probationer who attains this insight will try to cure his problem and ultimately he may become a law abiding person.

(5) In Probation Minimum Deterrence is Provided

Probation of offenders is the measure based on reformation of offenders. For reformation of offender it is essential that the probationer himself make striving to reform himself and for this purpose take directions and guidance from the probation officer. A person cannot observe the directions of another and undergo the reformation process unless there is some deterrence. Therefore, for successful probation minimum deterrence is provided in probation. Probation of offenders is compromise between punitive approach and reformative - rehabilitative approach concerned to reform the offender. Success of probation rests basically on the fear of punishment and fear of probation officer because he has power to recommend for imposition of sentence.

Section 4 of Probation of Offenders Act 1958 provides that when court finds that the convicted person, not punishable by life imprisonment or death penalty, is fit to be released on probation, then court may *instead of sentencing him at once* to any punishment direct

[23] Sec.14 (b) and (c) of Probation of Offenders Act, 1958.

he be released on probation of good conduct for maximum three years probation period. It shows that sentence is only suspended; he is not completely absolved from criminal liability. If during probation period he do not behave in accordance with conditions of probation or he commits any offence in other words if he is not reformed, court may impose the sentence. At the time of releasing on probation court imposes conditions for proper reformation of the convicted person particularly that he should not commit the same offence or other offence. If needed in the circumstances that the conditions should be modified or varied, court may do so on the report of probation officer.[24] Sec.8 of the Act provides that on the report of probation officer, court which passed order for release on probation is of opinion that it is expedient or necessary in the interest of offender and public may vary the conditions of probation, court may also vary the probation period by extending or diminishing the duration but it should not exceed the maximum period of three years. When variation is made before that offender and surety should be notified and heard. If any surety is not consenting to varied conditions, the probationer will give fresh surety, failing which court may sentence him for the offence of which he was found guilty.[25] If the probation officer is reporting that the person has been reformed and there is no need of further supervision, court may discharge from the bond and probation comes to an end and he is completely absolved from the liability.[26]

On the report of probation officer or otherwise court satisfies that offender has failed to observe the conditions of bond entered into by him particularly when he has committed any other crime, the court may issue warrant of arrest or may issue summon to him and his sureties. The person may be put into custody or given bail with or without surety until case is concluded. If after conclusion court finds that he failed to observe the conditions of bond, court may (a) sentence him for the original offence or (b) where failure is for the first

[24] Sec.8 of Probation of Offenders Act 1958.

[25] *Ibid.*

[26] *Ibid.*

time impose upon him a penalty not exceeding Rs.50/-. If penalty is not paid within fixed period court may sentence the offender for the original offence. Probation of offender is the measure for reformation of offender and making him a law abiding person. For achieving this object minimum deterrence has been prescribed by which probationer will be compelled to participate in reformation procedure and ultimately be reformed.

(6) Relationship between Probation of Offenders Act and Sec. 360 of Criminal Procedure Code

In India provisions relating to probation have been mainly contained in Probation of offenders Act, 1958. Sec.360 of Criminal Procedure code also makes provision for releasing a person on probation. It provides that when a person not under the age of 21 years, is convicted for an offence punishable by fine only or with imprisonment for a term of seven years or less; any person who is under 21 years of age or woman convicted of an offence not punishable with death sentence or life imprisonment, in such a case if court after taking into consideration age, character and antecedents of the offender and circumstances of the case, is of opinion that it is expedient to release the person on probation of good conduct, the court instead of sentencing him at once to any punishment may release the person on probation of good conduct for the maximum period of three years. On the same subject matter there are two legislations, therefore it becomes essential to find out differences between the legal provisions, relationship between them and to analyse which law will apply in a case before the court:

(i) Differences between the provisions

(a) Probationer released on probation

In the Act of 1958 Sec.6 makes it obligatory for the court to release the person on probation when convicted person is below 21 years of age. The person who is above 21 years of age may also be released on probation. Sec.4 is making provision to release any person on probation regardless of his age. Therefore under Act of 1958 any

person of any age if convicted for an offence not punishable by life imprisonment or capital punishment may be released and in case of person below 21 years of age, court is bound to release. Act 1958 makes provision in gender neutral term – there is no genderisation, not making differentiation between male and female for releasing, whether male or female is convicted he or she may be released if found guilty of offence not punishable by death sentence or life imprisonment.

In case of Sec.360 it makes differentiation of the offender on the basis of age and sex. *In case of male* when the age of offender is above 21 years, if he is convicted of an offence punishable with fine only or imprisonment for a term of seven years or less, the person may be released on probation. When the age is below 21 years if he is convicted for offence not punishable with death sentence or life imprisonment, he may be released on probation. *In case of female* regardless of her age, whether below 21 years or above she may be released on probation if she is convicted for offence not punishable with death sentence or life imprisonment.[27]

Under Sec.360 of Criminal Procedure Code the benefit of provision can only be granted in favour of first offender while under the Act of 1958 even the person who is repeater if found fit to be released, may also be released.

(b) Court which may release on probation

In exercise of jurisdiction under Act of 1958 any convicted person may be released on probation of good conduct by the court which has competency to try and sentence in its original jurisdiction. Appellate and revisional court is also empowered to release the offender on probation of good conduct. Under Sec.360 of Cr. P.C. Court of magistrate first class or magistrate second class if specially authorized by High Court in exercise of its original jurisdiction may release the convicted person on probation. Magistrate second Class not authorized by High Court cannot release, if at the sentencing stage

[27] Sec.360 (1) of Criminal Procedure Code.

magistrate second class is of opinion that the person should be released on probation, he shall forward the case to magistrate first class for taking decision about releasing on probation.[28] Appellate and revisional courts are also empowered to release on probation.

(c) Probation officer

Convicted person is released on probation for resocialisation, reformation and rehabilitation. For this purpose it is necessary that the person should be supervised, guided and directed by some expert social case worker. Offender undergoes the treatment and cure during probation period; it is probation officer who makes his treatment by which ultimately he is reformed and transformed into a law abiding good citizen. Probation of Offenders Act 1958 is incorporating much elaborate provision about supervision of offender during probation period, for aforesaid purpose appointment of probation officer, his powers and duties. Sec. 360 of Criminal Procedure Code has no such measures of supervision and appointment of probation officer. Without probation officer without his supervision a mal-functional person not knowing about society and societal norms, cannot effectively and efficiently be reformed. It seems only piece meal legislation and half hearted effort for reforming the offender.

(ii) Applicability of Act of 1958 and S. 360 of Cr. P.C.

On the same subject there are two different legislation prescribing varied situations for release on probation then problem comes which provision should and can be applied in the case when court after conviction is of opinion that the person is fit person to be release on probation. Both enactments are beneficial legislation but out of these two Probation of Offenders Act is more modern and enlightened prescribing every measure necessary for reformation and rehabilitation. Therefore Act of 1958 should be implemented instead of taking recourse of S.360 of Cr. P.C. In case of *Chhanni Vs. State of U.P.*[29] appellant convict contended that he should be directed to be

[28] Proviso to Sub.Sec.1 of Sec.360 of Criminal Procedure Code.

[29] *AIR* 2006 SC 3051. See also *Ramesh Das v. Raghu Nath & Others*, *AIR* 2008 SC 1298.

released on probation under Section 4 of Probation of Offenders Act or in alternative under Section 360 of the Code of Criminal Procedure. Court refused to release him on probation and observed:

> "Two statutes with such significant differences could not be to co-exist at the same time in the same area. Such co-existence would lead to anomalous results. The intention to retain the provisions of section 360 of the code and the provisions of the Probation Act as applicable at the same time in a given area cannot be gathered from the provisions of Section 360 or any other provision of the Code. Therefore, by virtue of Section 8(1) of the General Clauses Act where the provisions of the Act have been brought into force. The provisions of Section 360 of the Code are wholly inapplicable. Enforcement of Probation Act in some particular area excludes the applicability of the provisions of Section 360 and 361 of the Code in that area."[30]

Provisions contained in Probation Act 1958 and Sec. 360 of Criminal Procedure Code clears the situation regarding applicability of these enactments. Sec. 4 of Probation Act makes non-obstant clause and provides that "*notwithstanding anything contained in any other law for the time being in force*" – it gives overriding effect over Sec. 360 of Cr. P.C. also. Previously in Criminal Procedure Code of 1898 Sec. 562 was containing provisions what now is contained in Sec.360 of Criminal Procedure Code of 1973. Sec. 19 of Probation Act 1958 provides that the Criminal Procedure Code shall cease to apply in those territories where Act of 1958 is brought into force. Sec.360 of Cr. P.C. also makes provision that the provision contained in Sec.360 will not affect the provisions of Probation of Offenders Act.[31] In other words, where as soon as Act of 1958 will be implemented, in those territories Sec.360 of Cr.P.C. will cease to have any force.

[30] *Id.*, at 3053.

[31] Sec.360 (10) Criminal Procedure Code.

Sec.1 of Act 1958 gives authority to state governments to announce the date on which the Act will come in force in its state territorial area. It may be the situation that some states may not enforce the Act of 1958 then in that situation reformative zeal of criminal law should be carried out by this provision contained in Sec. 360 of Cr.P.C. It is the potent reason why Sec.360 is making provision for probation inspite of fact that there is Probation of Offenders Act already enacted by parliament.

(7) Applicability of Probation Measure in case of Socio-Economic Crimes

All the crimes may be divided in two classes: (i) Traditional Crimes and (ii) Socio-economic Crimes. Traditional Crimes are mostly committed by lower and lower-middle class of the society. These persons may have suffered from socially unhygienic and unhealthy environment, not properly socialized and crimes are mostly committed in unplanned manner. Therefore, they are considered deserving for reclaimation, restoration, reformation and rehabilitation. Socio-economic crimes[32] are committed by the upper strata of the society. They violate the law deliberately, dexterously and out of sheer rapacity and greed for money. They well know about social values, society and importance of the society. The socio-economic criminals also know about his activity and its impact on society. They perpetrate the crime in planned and secretive manner. Therefore in case of socio-economic criminal they have no prospect of reformation. Socio-economic offences are not of trifling nature they have probability of disturbing and disrupting the entire socio-economic fabric of the community. These crimes not only affect a particular individual but the whole society becomes victim of socio-economic criminal activity. Considering all these facts it would not be appropriate to apply probation law in case of socio-economic criminals.

[32] Sutherland used the term white collar crime for socio-economic crime and defined it that "while collar crime is crime committed by a person of respectability and high social status in the course of his occupation." (E.H. Sutherland, *White Collar Crime* (Dryden Press, 1949) at 10.

In case of *M.H. Haskot vs. State of Maharashtra*[33] a reader in Saurashtra University was found guilty of an attempt to concoct degree certificates of the Karnataka University. Session Court convicted and inflicted one day imprisonment. On appeal High Court enhanced the period of imprisonment to three years and in appeal Supreme Court upheld the sentence awarded by High Court. Supreme Court pointed out seriousness and impact of socio-economic crimes needed to be meted with deterrent punishment:

> "Social defence is the criminological foundation of punishment. That court which ignores the grave injury to society implicit in economic crimes by the upper berth 'mafia' ill serves social justice. Soft sentencing is gross injustice where many innocents are the potential victims… it is functional failure and judicial pathology to hold out a benignly self defeating non-sentence to deviants who endanger the morals and morale, the health and wealth of society."[34]

Pyarli K. Tejani vs. Mahadeo Ramchandra Dange[35] is case related with food adulteration. This is very common socio-economic crime which causes a great health hazard to society at large. Supreme Court in this case observed that probation measure should not be resorted for tackling criminality in such type of cases. Court was of view that the kind application principle is negatived by the imperatives of social defence and the improbabilities of moral proselytisation. No chance can be taken by society with a man whose anti-social operations, disguised as a respectable trade, imperil numerous innocents. He is security risk. These economic offences are committed by white collar criminals who are unlikely to be dissuaded by gentle probationary process.

For considering the matter of application of probation in case of socio-economic crime Law Commission was requested and it

[33] (1978) 3 SCC 544.
[34] *Ibid.*
[35] *AIR*, 1974 SC 228.

submitted its 47th report and observed that probation should not be granted to socio-economic criminals except the younger persons under the age of 18 years.

> "...The justification of all sentencing is the protection of society. There are occasions when an offender is so anti-social that his immediate and sometimes prolonged confinement is the best assurance of society's protection. The consideration of rehabilitation has to give way, because of the paramount need for the protection of society. We are, therefore, recommending suitable amendments in all the Acts, to exclude probation in the above cases."[36]

Probation of Offenders Act is not crime specific; it is based on individualization of crime tackling method and concerned with treatment of offenders by which he should ultimately be reformed. In this situation technically even those persons who have been convicted for committing socio-economic crimes may be released on probation. But keeping in view seriousness of socio-economic crime and its devastating effect on society at large and also that the criminals are such persons who have no prospect of reformation probation measure is not applied in such cases. Now special penal statutes are containing the express provisions prohibiting releasing offenders on probation in socio-economic crimes.

(8) Concluding Remarks

From time immemorial every society has been confronted with the problem of criminality. Now days the extent of the problem of criminality has increased in menacing proportion causing fear psychosis of victimization in the mind of every law abiding citizen. This situation has created greater challenge before law enforcement machinery to tackle properly the problem of criminality and to save the society. Only by deterrence and retribution criminals cannot be prevented from committing the crime. Better method to prevent the

[36] Law Commission, 47th Report, at 85.

crime is to make individualization of crime tackling measure. For this purpose, criminals should be classified in two categories, one who has prospect of reformation, he should be reformed and made law abiding citizen, and other category is of hardened criminals who have no prospect of reformation, he should be segregated and inflicted with severe punishment.

Probation is most enlightened and modern method to reform the criminals who have prospect of reformation. If the law relating to probation is properly implemented by the court, first offenders may be reformed and they will not transform into hardened criminals but become law abiding civilized citizen. Thus, the problem of crime and criminality will be properly tackled and upto great extent the rate of crime will decrease. For the success of probation measure in tackling the problem of criminality it is required that the courts, state governments and probation officers should always calculate some considerations:

(i) At the time of taking decision about releasing a convicted person on probation, court should very carefully make balancing between individual and social interest. Court should calculate the various fact and circumstances of case and antecedent of offender to find out his prospect of reformation. Only the convicted person who has prospect of reformation should be released on probation.

(ii) The reformation of a criminal completely depends on the work of probation officer. Therefore, only those persons should be appointed as probation officers who are honest, person of well integrated personality, expert in human behaviour problems, helpful and well informed about social and governmental facilities which may be used for reformation and rehabilitation of probationer.

(iii) For proper reformation close contact between probation officer and probationer is much required, because of which probation officer should have proper opportunity to keep vigil on probationer and his problems and properly supervise and guide him. For this purpose it is much

required that the number of probationer under supervision of probation officer should be kept to minimum.

(iv) In Probation Law probation period has been fixed for maximum three years. It is much required that there should be provisions and measures to keep vigil on the person and his problems even after the expiration of probation period. Therefore, in case of probation there should be provision for after care of probationers.

(v) Poverty and unemployment are major causes of crime committing therefore for successful probation and reformation of probationer, there should be proper facilities for vocational training during the probation period.

Selected References

Barness and Teeters, *New Horizones in Criminology*, (Prentice Hall, New York, 1966).

Baxi, Upendra, *The Crisis of the Indian Legal System*, (New Delhi : Vikas Publishers, 1982).

Clemmer, Donald, *The Prison Community*, (Boston : The Christopher Publishing Hose, 1940).

Deshpande, V.V., "Crime and Correction of Criminals in Dharma Shastra", *Lucknow Law Journal, Vol. XIII and XIV, 1967-68.*

Law Commission of India : 47th Report.

Raj, A.S., "Correctional Treatment of Offenders" *Lucknow Law Journal, Vol. XIII and XIV, 1967-68.*

Siddiqui, Ahmad, *Criminology*, 4th ed., (Lucknow : Eastern Book Compay, 1997).

Sutherland Edwin H., *Principles of Criminology*, 6th ed., (Chicago : Lippincott, 1960).

Thomas, D.A., *Principles of Sentencing*, (London : Heinemann, 1970).

Vold, George B., *Theoretical Criminology*, 3rd ed., (New Jersey : University of Delaware Press, 1958).

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 99-116

Privatisation of Insurance Business in India and Its Impact on Insurance Industry – With Special Reference to Life Insurance Business in India

Sibaram Tripathy*

Abstract *: Liberalization, Privatization and Globalization have become a much talked of subject among economists, businessmen, politicians and professionals in modern days. Privatization is expressed as the supporting pillar on which is the edifice of new economic policy of our Government has been erected and implemented since 1991. The introduction of private players in the industry has added colours to the dull industry. The initiatives taken by the private players are very competitive and have given immense competition to the on time monopoly of market LIC. Since the advent of the private players in the market the industry has seen new and innovative steps taken by the players in the insurance sector. The new players have improved the service quality of the insurance. As a result of which LIC has seen the declining in its career. The market share was distributed among the private players. Though LIC still holds 75% of the insurance sector the upcoming nature of these private players are enough to give more competition to LIC in the near future. LIC market share has decreased from 95% (2002-03) to 81% (2009-10).*

Key words : *Liberalization, Privatization, Globalization.*

Contents:

1. Introduction
2. Definition, meaning & implication
   2.1 Definition
   2.2 Meaning and implication of Privatization, Globalization and Liberalization

* Associate Professor, Law School, B.H.U.

3. Background of Privatization
3.1 Ways of privatization
4. Contribution of Private Sector
5. Role of Government in promoting Private Sector
6. Liberalization required for privatization
7. Effects of Globalization
8. Privatization of Life Insurance Business
8.1 Private Life Insurance operating in India
8.2 Performance of private life insurance
9. Future trends in the Indian Insurance Industry
10. Challenges before the industry
11. Opportunities ahead
12. Impact of Globalization
13. Conclusion

1. Introduction

The Indian life insurance industry has its own origin and history. Since its inception, it has passed through many obstacles, hindrances to attain its present status. The income earning capacity of an individual citizen of a nation and the eagerness and awareness of the general public are the two key determinants of the growth of any insurance industry. As a result wider mass employment opportunities and sound educational system should be made available. In addition, the general public must be kept abreast of more knowledge and importance of life insurance, as these steps help to boost the growth of insurance industries. In this Indian context, insurance habit among the general public during the independence decade was quite rare and in the following decades, it increased slowly. There was a remarkable improvement in the Indian insurance industry soon after the acceptance and adaptation of liberalization, privatization and globalization (LPG) in the year 1991. After 1991, the Indian life insurance industry has geared up in all respects, as well as it being

forced to face a lot of healthy competition from many national as well as international private insurance players. The fall in the savings rate and increased competition in the primary market and particularly the aggressive mobilization by the mutual fund posed serious challengers to nationalized sectors.

2. Definition, Meaning and Implication

2.1.1 Definition : The word Liberalization, Privatization and Globalization has no comprehensive and concrete definition. So different writers have defined the term differently. According to Barbara Lee and John Nellis[1] "Privatization is a general process of involving the private sectors in the ownership and operation of state owned interprises.

2.2 Meaning and Implication of Privatization, Globalization and Liberalization : Privatization, globalization and liberalization are interrelated terms. Privatization is often referred to as the pillar on which the structure of new economic policy of our government has been standing since 1991. Privatization is used in different senses. In its narrow sense, it may mean the introduction of private ownership in publicly owned enterprises, while in a broader sense, it also suggests the introduction of private management and control in the public sector enterprises with or without ownership. The rationale behind the government policy towards privatization is the growing dissatisfaction with the performance of the public sector undertakings and state owned enterprises. Liberalization is an essential prerequisite for meaningful privatization. Without liberalized rules and regulations, the private players would not feel motivated enough to undertake the risk of business.

The term globalization refers to the expanding interrelationships and interdependence among organizations belonging to different countries of the world. It means that the entire world is deemed as one entity, one unit & thus one market. Under this one market model, the

---

[1] Fredricke G. Crane, Insurance Principle and Practice, (England : John Wiley and Sons Publication, 1980) at 8.

business in any part of the globe can be considered as a global business, which is always extremely competitive in a free market.

Globalization and liberalization are closely linked terms, liberalization has got two facets, namely, domestic liberalization consisting of general curbs & guides on productions, investment, prices, the role of market, resource allocation etc and external sector liberalization on international flow of goods and services technology and capital. Globalization is branded with external sector liberalization. Globalization of the Indian insurance industry, therefore, means that while global companies and multinationals enter the Indian market, Indian companies too should have the chance to carry out its business in a foreign country without much limitation. The government attempts at liberalization and privatization have indeed set a trend towards a global business environment in Indian and this trend is expected to further progress in the future.

3.1 Background of Privatization

Privatization, which has gathered momentum since around the 1980 has become the hallmark of the new wave of economic reforms sweeping across the world. More than 8,500 state owned enterprises have been privatized in over 80 countries during 1980-92.

Privatization means transfer of ownership and/or management of an enterprises from the public sector to the private sector. It also means the withdrawal of the state from an industry or sector, partially or fully. Privatization marks a change from dogmatism to pragmatism and amounts to a reversal of policy.

The trend towards privatization has been observed in developed and developing economics in market oriented and socialist, induding communist countries; and acts across socio cultural systems.

The fundamental reason for the reversal of policy from nationalization to privatization is the growing disappointment with the functioning of the public sector undertaking and state owned enterprises. In 1960, there was a trend towards nationalization in

Britain. But since 1970, this trend has been reversed and privatization gathered ground by selling state owned enterprises. Besides U.K. : Countries which announced the policy of privatization included Argentina, Bangladesh, Brazil, Germany, France, Italy, Japan, Maxico, Nigeria, Spain, Turkey etc. A number of other countries including India have deregulated or liberalized the industrial sector in varying degrees. In late 1970 China also started privatization and it spread to other communist countries like former USSR, East European countries and Cuba.

3.2 Ways of Privatization

There are several ways of achieving privatization and each country adopted its own method. In Britain, the staff of the privatized company had the priority in buying shares and were entitled to a discount. For instance 96 percent of British telecom employees took a share in their company in defiance of the trade union opposition. Although some of them later sold them at a higher rate, they derived certain benefits financially through privatization. One of the important method of privatization is divestiture or privatization of ownership through the sale of equity. In countries where there are well functioning capital markets, this entails selling stock to the public. In industrial countries privatization had taken place mainly through divestiture of government economic activities. Bangladesh, Pakistan, Brazil, Peru and Sudan are some of the examples of this method. According to Elliot Berg, divestiture has become so common in the Western Europe that, "hardly a week or month goes by without some new evidence of sale of state enterprise by such Western European countries as France, Italy, Sweden, the Federal Republic of Germany and of course, the champion industrial company privatiser, Britain."

There is another way of privatization. It takes the form of denationalization or reprivatization. Several large enterprise were denationalized in Pakistan, Bangladesh and Chile. Franchising is also one of the methods of privatization. It this, certain services are designated in certain geographical areas which will be delivered by

private companies. This is common in utility services and transport. Contracting is also common in public works. Where suppliers complete for contract and there is no less economics of scale, contracting is efficient. But there is no scope for corruption in contracting. Long term contracts tend to encourage monopolistic tendencies in private companies.

Privatization may also take the form of privatization of management, using leases and management contracts. A public enterprise while retaining ownership may lease out to a private bidder for a specific period for use.

4. Contribution of Private Sector

Private Sector has played a great role in the Indian economy, It may include :

a) Promotion of economic growth.

b) Contribution of national exchequer.

c) Working to solve the problem of unemployment.

d) Contribution to global business.

e) Promoting research and development.

f) Contribution to ancillary development.

g) Concern for rural industrialization.

h) Export development.

i) Acting as complementary and providing patronage to small scale and medium scale sectors.

j) Stimulating the over all economic activity in India.

k) Motivating capital formation and

l) Stimulating resource mobilization.

5. Role of Government in Promoting Private Sector

In promoting and developing the effective private sector, the Government plays a crucial role in India. Some of the important

measures adopted by the Govt. for promoting and developing a responsible private sector includes :

1) Providing financial assistance to private entrepreneurs.

2) Developing infrastructural facilities.

3) Industrial area development.

4) Promoting raw materials, particularly scarce raw materials.

5) Developing a market, particularly export market.

6) Tax incentives are provided for new units, sick units and units in industrially backward areas.

7) Providing assistance for the revival of sick units.

8) Governments liberalization process in envisaged to encourage private sector.

9) Appropriate industrial policy resolution and regulatory measures are adopted.

10) Providing incentives for industrial and business development, particularly to unemployed youth women, technician.

11) Rationalization of the tax structure.

12) Providing assistance to entrepreneurs and industrialists through District Industrial Centres and Industrial Development Centres.

13) Providing special incentives and assistance for small scale, village and tiny industries.

6. Liberalization required for Privatization

Liberalization is an essential pre-requisite for successful privatization. In the absence of liberalized rule and regulations, the private sector will not be willing to venture, due to several restrictions which would hinder the independent growth of the private sector institutions. The Government under former Prime Minister Narashima Rao and former Finance Minister Dr. Manmohan Singh chose the path of liberalization. Immediate factors which backed this policy change

include i) Global change ii) Position of Indian economy and iii) Trade deficit. As a part of liberalization a new industrial policy was announced by Govt. of India in two parts in July 24, 1991 and 6th August 1991 respectively. This liberalization has tremendously expanded the scope of the private industry in India. As a result of liberalization, a new international economic relationship has emerged which has three aspects, viz, a multilateral business approach, regionalism and unilateralism, resulting in an international business philosophy. Even in the industries are open to private sector several regulations like industrial licensing clearance from MRTP Act and Foreign Exchange restrictions liberalization policy, these restrictions were removed. Liberalization also facilitates unilateral trade and business relationships. Further an outcome of liberalization, automatic approval of foreign investments upto 51 percent and foreign technology agreement are permitted for priority sectors.

7. Effects of Globalization

Globalization of the market investment, production process, technology, upgradation, competitive environment and a global vision are necessary as a part of globalization. While global companies and multinationals enter the Indian market, Indian companies should have the opportunity to conduct overseas business successfully. All the efforts for liberalization and privatization have paved the way for a global business environment in India, which is expected to progress further in the years to come.

8. Privatization of Life Insurance Business

As part of the wide-ranging economic reforms announced in 1991, industrial policy measures were initiated by the Govt. of India to liberalize the MRTP and FERA regulations. The most important aspect of the MRTP Act was amended to totally remove pre-entry restrictions on establishments of new undertaking and expansion of the existing firms.

As part of the liberalization process, the Govt. had to review the

role of insurance sector and Govt.'s investments in it. Accordingly the Malhotra Committee set up to study the insurance sector suggested in 1944 in its reports among other things the privatization of the insurance sector while praising the workdone in achieving many of its objectives, the committee was critical about the low insurance coverage unresponsiveness to customers needs, poor service costly insurance cover with low returns, hierarchical management and an excessive lapse ratio policies. It stated that there was a large untapped potential for insurance in the country and this led to the first step being taken towards opening up of this sector to private player. As the results of the committees recommendation to open up the sector to participation was implemented by the Govt. in 2000. The key element in the reform process was the participation of overseas insurance companies through restricted to 26 percent of capital.

8.1 Private Life Insurance Operating in India

The Indian insurance sector was opened for private insurance sectors when the Govt. enacted the Insurance Regulatory and Development Authority Act 1999 leading to the establishment of IRDA. The main objective of setting up the IRDA was to protect the interest of policy holders and to regulate promote and ensure orderly development of the insurance sectors. It is also aimed at ending the monopoly of the Life Insurance Corporation (LIC) and General Insurance Corporation (GIC) in the insurance sector of the company. The first private life insurance company was registered with IRDA in October 2000 and started operations shortly thereafter, there by ending 44 years of public sector monopoly. Since then many more private companies have been registered bringing the total number to a dozen as of July 2002 all of which are joint ventures between major business houses or banks in India and renowned international insurance giants. Today, after nearly fifty years, the insurance sector is a buyer's market where the consumer has the choice to select from, varieties of insurers. The table shows the lists of new entrants of insurers are associated with foreign shareholders to sell insurance products in India as on 2002 is given.

List of Private Life Insurance in India

Sl. No.	Company	Foreign Shareholder	Major Local Shareholder	Business of Local Shareholder
1.	Allianz Bajaj Life	Allianz	Bajaj Auto	Auto Manufacture
2.	AMP Sarmar	AMP	Sanmar	Diversified conglomerate
3.	Birla Sunlife	Sunlife of Canada	Birla Global Finance	Diversified conglomerate
4.	Dabur (G)	CGNU	Dabur	Medical & Consumer Products
5.	HDFC Standard Life	Standard Life	HDFC	Investments Finance
6.	ICICI Prudential Life	Prudential (U.K.)	ICICI	Investment & Finance
7.	ING Vvsyalife	ING	Vvsya Bank	Bank & Other Investors
8.	Max New York Life	New York Life	Max India	Diversified Conglomerate
9.	Met Life India	Met Life	Jammu & Kasmir bank : Pallonji Group	Bank & Diversified Conglomerate
10.	OM Kotak Mahindra	Old Mutual	Kotak Mahindra	Investment & Finance Bank
11.	SBI Life	Cardiff	SBI	Bank
12.	TATA-AIG Life	AIG	TATA	Diversified Conglomerate

8.2 Performance of Private Life Insurance

The healthy development of the insurance industry in India has been boosted by the private insurers which has contributed substantially high percentage in over all performance. The private sectors brought with them international experience, cutting edge technology, new products and had the advantages of starting off in the current regulated environment rather than changing over from an old environment. A report brought by Boston consulting grow in 2003 given the performance of some of the private insurers fully operational in the year 2001-2002. The first year (2001-2002) premium income of ICICI prudential was Rs. 115.9 Crores; Max New York Life, 38.1 Crores HDFC standard Life Rs. 36.1 Crores; Birla Sun Life was Rs. 36.1 Crores and OM Kotak was 12.83 Crores, Allianz Bajaj was 18.5 Crores SBI Life was 15.20 Crores respectively. According to IRDA

Life council given the report in the year ended May 2002, more than 3,00,736 policies were issued by the private players in India. It was contributed by 1.30 percent of the combined market share of private insurers. The same year the total policies were issued by LIC was 2,31,88.144. The total premium of LIC in 2001-2002, including renewal premium was Rs. 49,614 Crores with a growth rate of 42.25 percent. It indicates that LIC, the premier life insurer and one of the most stable financial institutions in the country during the forty six years of its existence has been through several trails and tribulation, but has managed to grow and metamorphose into the giant it is today.[2]

9. Future Trends in the Indian Insurance Industry

The crucial impetus, intensified through evolving reforms in the financial sector in India since the early 1990s, has accelerated overall economic growth. The govt. is making all efforts to refurnish the existing basic laws to enable the industry to perform in line with the global trends & expectations. The market is developing and is expected to improve in the days to come.

The latest form of insurance is the cyber-insurance, which is the result of increasing dependence of the modern business organizations on electronic media. Most companies three days conduct their business through the internet and are therefore, exposed to security risks involving cyber crime. Such crimes have become world wide phenomena. No organization whose internal computer systems are connected to the internet is absolutely safe from the deadly curse of cyber criminals. Moreover, the probable loss from cyber crimes can be gigantic. The risk cover through cyber-insurance involves the probability of loss as a result of computer related criminal activity. The risks covered include alleged defamation, violation of privacy rights, copyrights and trademarks infringement. Risks due to negligent acts, errors and ommissions in the provision of internet services, loss of interception of service as also transmission of computer viruses are all insured under cyber insurance policies, besides errors of omission in programming, consulting, data processing, system installation and

---

2 P. Periaswami, *Principal and Practice of Insurance*, 2nd Edition, (Himalya Publishing House 2008).

training. In India Tata AIG is the first private insurance player to provide insurance cover against cyber threats. The company occupies nearly 70 percent of the global e-insurance market, having written arround 1500 policies for different companies. Cyber-insurance is offered in tailor-made packages to suit the varying needs of the customers.

Presently India is one of the lucrative markets for the business of insurance. According to associated chambers of Commerce & Industry of India (ASSOCHAM) general insurance industry grew by 20 percent in the first five months of 2006-07 due to strong performance by private players. The 12 non-life players collected Rs. 10.427 crore in premium during April-August 2006 as compared to Rs. 8.668 crore in the corresponding period last. The chamber has projected a 500 percent increase in the size of current Indian insurance business from US $ 10 billion to US $ 60 billion by 2012 particularly in view of contribution that the rural and semi urban insurance will make to it. Rural and semi-urban life insurance business is expected to touch US $ 20 billion figure in next 4 years from current level of less than US $ 5 billion now as rural and semi-urban folk will want themselves to ensure them for better future and their rising purchasing power will motivate them to move towards insurance sector. In view of ASSOCHAM, the non life insurance will rise to US $ 15 billion by 2012 from its negligible size now and in urban areas, life insurance businesses are anticipated to reach US $ 15 billion & that of non life insurance US $ 10 billion.[3]

The evaluation is quite encouraging; taking into view the fact that nearly 80 percent of India, despite being second most populous country in the world, is still unisured. More over, India also ranks fifth in the world in terms of purchasing power parity (PPP). With the average annual GDP growth rate of 6 percent and a saving ratio of approximately 26 percent over GDP, the Indian market surely offers rewarding prospects for the global players.[4]

---

3 Globalization and Its Impact of Insurance Industry in India by Bala Monugan 2010 Ezuxe Articles.com.

4 www.banknetindia.com, paper on insurance sector : Its future spective associated chambers of commerce & industry of India.

10. Challenges Before the Industry

New age companies have started their business as discussed earlier. Some of these companies have been able to float 3 or 4 products only and some have targeted to achieve the level of 8 or 10 products at present, these companies are not in a position to pose any challenge to LIC and all other four companies operating in general insurance sector, but if we see the quality and standards of the products which they issued, they can certainly be a challenge in future. Because the challenge in the entire environment caused by globalization and liberalization, the industry is pacing the following challenges.

The existing insurer, LIC & GIC, have created a large group of dissatisfied customers due to the poor quality of services. Hence there will be shift of large number of customers from LIC and GIC to the private insurers.

LIC may face problem of surrender of a large no. of policies, as new insurers will woo them by offer of innovative products at lower prices.

The corporate clients under group schemes & salary savings schemes may shift their loyalty from LIC to the private insurers.

There is a likelihood of exit of young dynamic managers from LIC to the private insurer, as they will get higher package of remuneration.

LIC has overstaffing and with the introduction of full computerization, a large no. of the employees will be surplus. However they cannot be retrenched. Hence the operating costs of LIC will not be reduced. This will be a disadvantage in the competitive market as the new insurers will operate with lean office and high technology to reduce the operating costs.

GIC and its four subsidiary companies are going to face more challenges, because their management expenses are very high due to surplus staff. They can not reduce their number due to service rules.

Management of claims will put strain on the financial resources to GIC and its subsidiaries since it is not up to the mark.

LIC has more than 60 products & LIC has more than 180

products in their kitty, which are outdated in the present context as they are not suitable to the changing needs of the customers. Not only they are not competent enough to complete with the products offered by foreign companies in the market.

Reaching the consumer expectations on par with foreign companies such as better yield & much improved quality of service particularly in the area of settlement of claims, issue of new policies, transfer of the policies and revival of policies in the liberalized market is very different to LIC & GIC.

Intense competition from new insurers in winning the consumers by multi-distribution channels, which will include agents, brokers corporate intermediaries bank branches, affinity groups & direct marketing through telesales & interest.

The market very soon will be flooded by a large no. of products by fairly large no. of insurers of operating in the Indian Market. Even with limited range of products offered by LIC & GIC, the consumers are confused in the market. The existing level of the consumers for insurance products is very low. It is so because only 62% of the Indian population is literate even the educated consumers are ignorant about the various products of the insurance.

The insurance will have to face an acute problem of the redressal of the consumers, grievances for deficiency in products & services.

Increasing awareness will bring number of legal cases filled by the consumers against insurers is likely to increase substantially in future.

Major challenges in canalizing the growth of insurance sector are product innovation, distribution network, investment management customer service and education.

11. Opportunities Ahead

A state monopoly has little incentive to innovative or offers a wide range of products. It can be seen by a lack of certain products from LIC's portfolio and lack of extensive risk categorization in several GIC products such as health insurance. More competition in

this business will spur forms to offer several new products and more complex & extensive risk categorization. It would also result in better customer services and help improve the variety and price of insurance products. The entry of new players would speed up the spread of both life and general insurance. Spread of insurance will be measured in terms of insurance penetration and measure of density with the entry of private players, it is expected that insurance business roughly 400 billion rupees per year now. More than 20 percent per year even leaving aside the relatively under developed sectors of health insurance. More importantly, it will also ensure a great mobilisation of funds that can be utilized for purpose of infrastructure development that was a factor considered for globalization of insurance with allowing of holding of equity shares by foreign company either it self or through its subsidiary company or nominee not exceeding 26% of paid up capital of Indian partners will be operated resulting in to supplementing domestic savings & Increasing economic progress of nation. It has been estimated that insurance sectors growth more than 3 times the growth of economy in India. So it is natural, that foreign companies would be fostering a very strong desire to invest something in Indian insurance business. Most important not the least tremendous employment opportunities will be created in the field of insurance which is burning problem of the present day today issues.

12. Impact of Globalisation

While nationalized insurance companies have done a commendable job in extending the volume of the business, opening up insurance sector to private players was a necessity in the context of globalization of financial sector. If traditional infrastructural and semipublic goods industries such as banking, airlines, telecom power etc. having significant private sector presence, continuing a state monopoly in provision of insurance was indefensible and therefore, the globalization of insurance has been done as discussed earlier. Its impact has to be seen in the form of creating various opportunities challenges.

The introduction of private players in the industry has added colours to the dull industry. The initiatives taken by the private players

are very competitive and have given immense competition to the on time monopoly of the market LIC. Since the advent of the private players in the market the industry has been new and innovative steps taken by the players in the sector. The new players have improved the service quality of the insurance. As a result LiC down the years have seen the declining in its career. The market share was distributed among the private players. Though LIC still holds 75% of the insurance sector the upcoming nature of these private players are enough to give more competition to LIC in the near future. LIC market share has decreased from 95% (2002-03) to 81% (2009-10). The following company holds the rest of the market share of the insurance industry.

Table

Impact of Globalisation

Name of the Player Market Share (%)

LIC 82.3

ICICI Prudential 5.63

Birla Sun Life 2.56

Bajaj Allianz 2.03

SBI Life 1.80

HDFC Standard 1.36

Tata Aig. 1.29

Max New York 0.90

AVIVA 0.79

OM Kotak Mahindra 0.51

ING Vyasa 0.37

AMP Sanmar 0.26

Met Life 0.21

13. Contribution

1. The growth scenario in the insurance sector has created numerous employment opportunities in the economy. There is an upsurge in the demand for marketing experts, finance specialists, human resource professionals, statisticians, etc. Experts in the new specialty areas like underwriting, claims managements, actuarial management, etc. are also being occupied in the industry.

2. The Indian economy has been witnessing huge inflow of funds since the deregulation of the insurance sector. There is a huge influx of foreign players in the insurance sector in India in the recent past.
3. Insurance related service domains like training, workshops risk assessment and rating and risk management too have positively changed making it possible for the industry to explore new policy covers. Besides, the increase in the insurance players will significantly boost up related fields like advertising, brand building etc., which in turn would promote the ancillary industries. Further, the intense competition caused by the presence of innumerable insurance companies would compel these companies to follow customer-friendly pricing structure that would foster healthy competition throughout the insurance industry.
4. Before deregulation of the insurance industry, the purpose of life insurance policies in India was merely to seek tax benefits and very little attention was paid to the risk covers. But now most of the new entrants have shifted the focus from tax benefit to protection.
5. The developments in the insurance industry have created the need for widening the channels of distribution of insurance products. The new players have started an extensive variety of products that calls for need based selling technologies. Banks too have been involved in the task of distributing insurance products. The traditional sales producers have been substituted with modern techniques like bancassurance to sell insurance products to customers, so that the insurance companies are entering into tie-ups with the manufacturers of consumer goods in order to speed up the process of reaching the customers at their doorsteps.
6. The need for quicker delivery of insurance products has provoked the competing insurance players to follow more sophisticated, automated systems. This has taken IT sector to new heights.

Conclusion

Thus, in the last on basis of above discussion we can conclude that need for private sector entry is justifiable on the basis of enhancing the efficiency of operation, achieving greater density and insurance coverage in the country and for greater mobilization of long-term savings for long guestation infrastructure projects. In the wake of such competition it is essential for the govt. monopolies (LIC and GIC) that they quickly up grade their technology, restructure themselves on more efficient lines and operate as board run enterprise. New players should not be treated as rivalries to govt. companies, but they can supplement in achieving the objective of growth of insurance business in India.

●

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 117-132

Medical Negligence: The Concept Redefined

Chandra Pal Upadhyay*

Abstract : *In present context due to commercialization of pathology the noble profession of medical practice is deteriorating day by day. Consequently a drastic change is seen in the old classical concept of doctor patient relationship. Patients as consumer are frequently resorting to legal remedy against doctors. In this background the study examines the basis of liability of medical practitioners. The development of past 20 years and role of judiciary in development of law relating to medical negligence has undergone many changes. Recent judgments of Supreme Court of India has almost redefined the concept of medical negligence in India. Thus we are approaching towards the standard maintained by the western countries in this field. The paper analyses the approach of Judiciary of tilting the balance between two opposite interests of doctors and patients.*

Keyword : *Medical Negligence, consumer jurisprudence, standard of care, mistaken diagnosis, error of judgment, contract of personal service, professional services.*

Contents :

i - Introduction
ii - Evolution of concept of medical negligence
iii - The basis of liability
iv - Criminal liability
v - Civil liability
vi - Liability under consumer protection act
vii - Conclusion

Introduction

Medical profession is considered a 'noble profession' due to its nature of duties. This profession enjoys faith and belief of people at

* Associate Professor of Law, Banaras Hindu University, Varanasi.

large and of patients particularly. Doctors are held in high esteem in society because they provide medical care to patients in the moment of crisis. At the outset doctor patient relationship was sacred one. However with the increasing commercialization of the medical profession, this relation has become subject of stresses and strains. In recent years the cases of medical negligence have increased due to commercialization of profession resulting in large scale mushrooming of hospitals and nursing homes. This paper aims to provide a gradual development of concept of medical negligence in India, and to discuss the approach of judiciary to redefine the concept in new context. Effort has also been made to discuss the basis of liability of medical practitioners under Consumer Protection Act as well as under traditional civil and criminal law. In its recent judgments Apex Court has tried to tilt a balance between rights of patients as consumers as well as reasonable measure of autonomy to doctors.

The classical concept of doctor patient relationship born in the golden days of family physicians has gone drastic change due to advancement in medical technology, availability of sophisticated instruments and machines and preponderance of new diseases. Due to technological development, health care has emerged as a profitable sector attracting investors from the persons of different back ground in our country and doctors are spending less and less time with their patients. Doctors do not communicate adequately with the patients and the patient dissatisfaction is on the rise. Naturally the disgruntled patients are resorting to legal remedy. Today the doctor-patient relationship has come under serious stress which is becoming more and more precarious day by day.

Evolution of the Concept of Medical Negligence

Since the ancient times certain duties and responsibilities have been cast on persons who adopt the sacred profession as exemplified by Charak's oath (1000 B.C.) and Hippocratic Oath (460 B.C.) Jurisprudential notions of duty to take care, standard of care, reasonable care, due care etc. evolved from the concept of 'care' inherent in the Hippocrates Oath.[1] The instance of doctor being held

[1] Hippocrates (about 460-377 B.C.) the most celebrated physician of antiquity is regarded as the 'Father of Medicine'. Medical men pay homage to Hippocrates by taking oath in his name.

liable for adversely affected patient dates back to around 1727 B.C. in the city of Babylon, where code of Hammurabi was in operation. This regulatory code prescribed the operating fees to be taken by doctors as well as fixed penalties, in case the doctor inadvertently caused loss or death of a patient during operation. Such parameters developed the concept of accountability of doctors and from there developed the field of medical negligence leading to doctor's liability under Civil Law and Law of Crimes.[2]

The Jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to criminal negligence the degree of negligence should be much high. A negligence which is not of such a high degree may provide a ground for action in civil law but can not form the basis for prosecution. In order to understand the basis of liability of doctors for medical negligence, it is necessary to understand the professional negligence and doctor patient relationship.[3]

Prima facie negligence is a legal and not a medical concept. Medical negligence means negligence committed by members of medical profession. Obviously to appreciate the concept, a proper understanding of the meaning of the term 'negligence' in general law is necessary. There are two opinions about meaning of term negligence. According to subjective test negligence is a state of mind, this view was adopted by Sir John Salmond. He said that careless person is a person who does not care. Negligence is a mental attitude of indifference towards one's conduct and its consequences.[4]

According to other view i.e. objective test negligence is not a state of mind but merely a type of conduct. It is breach of duty tc take care i.e. failure to achieve the standard of care. This view is supported by Sir Fredrick Pollock. To take care means to take precautions against the harmful results of one's actions.[5] Negligence is the contrary of diligence. This view makes clear the distinction between intention and negligence.

[2] Dr. Poornima Advani, *Doctor Patient and the Law* at 72.
[3] *Malay Kumar Ganguli* v. *Sukumar Mukherjee & Ors.*, AIR 2010, S.C. 1162.
[4] Salmond on Jurisprudence, (12th Ed.) at 390.
[5] Pollock, Torts (15th ed.) at 336.

Negligence discussed here is quite different from one which denotes a state of mind. Negligence as a separate tort means a conduct which creates a risk of causing damage. It consists in a duty to take care and as such should be distinguished from negligence as a mode of committing certain torts.[6] At this place the definition of term 'negligence' given by Baron Alderson in an English case,[7] appears to be relevant : "Negligence consists in the omission to do something which a reasonable man would do or doing something which a reasonable and prudent man would not do." Thus negligence is lack of care but no man can be punished for mere lack of care. In order that negligence may become actionable, it must result in injury or damage to another person involving a breach of duty towards that person. As Justice Brett, M. R. has rightly observed : "actionable negligence consists in the neglect of use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury, to his person or property".[8]

Basically medical negligence means negligence resulting from the failure on the part of doctor to act in accordance with medical standards in vogue. It has long been regarded that a medical practitioner owes duty to take care towards the patients. He must act towards the patients with the utmost good faith keeping in view the best interest of the patient in his mind. It was rightly observed : "If a medical practitioner holds himself out to be a skilled practitioner, he is under an obligation to use the due caution, diligence, care, knowledge and skill in the treatment of the patients. Failure in performance of art of medicine with due care, skill and diligence makes the doctor blameworthy.[9]

Thus medical negligence denotes want of reasonable degree of care and skill of a medical practitioner in the treatment of a patient with whom a relationship of professional attendance is established. Law presumes that a doctor will use reasonable degree of care, skill and knowledge in the treatment of his patient to the best of his

6 *Donoghhue* v. *Stevenson* (1932) A.C. 562.
7 *Blyth* v. *Birmingham Water Works Comp.* (1850) II Exch. 781
8 *Heaven* v. *Pender* (1883) II QBD 503.
9 *R* v. *Bateman* (1925) 94 LJKB 791.

judgment. Law expects that a person who holds himself out to give medical advice and to provide medical treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. If he accepts a case which is beyond his skill, his conduct amounts to gross negligence. Doing something positive which a sane or sober doctor in similar circumstances would ever do is rashness. Similarly if a doctor neglects his duty to be careful about the patient's safety, commits negligence. Thus medical negligence covers the cases of rashness and negligence.

The Basis of Liability

Liability is the bond of necessity that exists between the wrongdoer and the remedy. A doctor owes duty to take care of his patients because he is under responsibility to treat the patient with due care and diligence. The word duty connotes the relationship between the parties, imposing on one an obligation for the benefit of that other to take reasonable care in all circumstances. Duty to take care originates from the fact of acceptance of responsibility towards another person. The liability of a doctor will attach not only to a negligent act but also to a negligent failure to act. The liability for the medical negligence could be either civil or criminal. Furthermore under departmental liability medical practitioners are governed by the provisions of Medical Council of India Act 1956.

Criminal Liability

In criminal liability medical professional shall be prosecuted and punished under penal provisions. There are two conditions to be fulfilled for criminal liability : one is doing of an act the other is *mens rea* or guilty mind with which the act is done. But there are two exceptions to this rule : 1) negligence, and 2) strict liability cases. In culpable negligence or wrongs of negligence *mens rea* assumes a less serious form of carelessness. A person may be held responsible for some crime if he did not do his best as a reasonable man to avoid the consequences. Inevitable accident and mistake are grounds of exemption from criminal liability.[10]

10 Salmond on Jurisprudence, at 350.

In India generally Sec. 304-A[11] of the IPC is relevant provision under which a complaint against a medical practitioner for alleged criminal medical negligence is registered. Supreme Court in its classic judgment reasoned that in every mishap or death during the medical treatment, the medical man can not be criminally liable for punishment. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence. The verdict of the Supreme Court has opened a new vista for medical ethics in India and provided relief to the medical community in India. In the case of *Dr. Suresh Gupta* v. *Government of NCT of Delhi*,[12] the appellant a doctor was in the dock for causing death of his patient. The patient died during surgical operation for removing his nasal deformity. Supreme Court very clearly made following observations on the law of negligence. The legal position is almost firmly established that where a patient dies due to the negligent medical treatment by the doctor, the doctor can be made liable in civil law for paying compensation and damages in tort and at the same time, if the degree of negligence is so gross and his act was reckless as to endanger the life of the patient, he would also be made criminally liable for offence under Section 304 of IPC."[13]

Apex Court said for fixing criminal liability of the doctor, the standard of negligence should be proved to be "gross negligence or recklessness".[14] The Supreme Court relied on the principles laid down by House of Lords in *R. V. Adomako*,[15] : "The laws of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established, the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterized as gross negligence and therefore a crime. This will depend on the seriousness of the breach of duty committed by the defendant".

---

11 This Sec. provides that whoever commits culpable homicide not amounting to murder shall be punished for life or imprisonment for a term upto 10 years and fine as well.

12 AIR 2004 SC 4091.

13 *Id.* at 4094.

14 *Id*, at 4095.

15 (1994) 3 All ER 79.

Further the apex court followed the above principle in the case of *Dr. Jacob Mathew* v. *State of Punjab*,[16] and held that a simple lack of care, an error of judgment or an accident, even fatal will not constitute culpable negligence. If the doctor had followed a practice acceptable to the medical profession at the relevant time, he can not be held liable for negligence merely because a better alternative or method of treatment was also available. Court said the word gross has not been used in Section 304-A of IPC. However as far as professionals are concerned, it is to be read into it so as to insist on proof of gross negligence for finding of guilty. For the purpose of criminal liability different standard can be applied to the medical professionals and they can be placed on higher pedestal because medical profession renders a noble service, it must be shielded from frivolous or unjust prosecutions.

Supreme Court realizing that doctors have to be protected from frivolous complaints of medical negligence has laid down certain rules in this connection[17] :

(1) A private complaint should not be entertained unless the complainant has produced prima facie evidence before the Court supported by opinion of a competent doctor.

(2) The investigating officer should before proceeding against the doctor obtain independent and competent medical opinion.

(3) A doctor should not be arrested in a routine manner or unless it is necessary his arrest should be withheld.

(4) Statutory rules incorporating definite guidelines governing the prosecution of doctors need to be framed by the government in consultation with Medical Council of India.

(5) The maxim *Res ipsa loquitur* has limited application in trial of criminal negligence. It is only rule of evidence and operates in domain of civil law and should not be used in domain of criminal law.

In *Martin F. D'Souza* v. *Mohd. Ishfaq*,[18] following the judgment of Jacob Mathew case Supreme Court held that simply because a

---

16 2005 S.C. CL Com 456.

17 *Id*, Para 52.

18 2009, Ind Law S.C. 174.

patient has not favourably responded to a treatment or a surgery has failed, the doctor can not be held straight way liable for negligence by applying the doctrine of *res ipsa loquitur*. No sensible doctor would intentionally cause harm to patient since his professional reputation would be at stake. Court directed that before issuing notice to the doctor or hospital against whom the complaint was made, the criminal court should first refer the matter to a competent doctor or committee of doctors and after the report that there is a prima facie case of negligence, notice should be issued to the concerned doctor.

Again in the latest judgment Supreme Court further followed the above principle and absolved the doctors from liability of criminal negligence. In *Malay Kumar Ganguly* v. *Sukumar Mukherjee & Ors.*,[19] due to negligence on the part of several doctors and also of hospital the patient died ultimately. Supreme Court held doctrine of cumulative effect is not available in criminal law. Complexity involved in the case and also different nature of negligence exercised by various doctors made it difficult to distil individual extent of negligence with respect to each of them.

By the above judgments of apex court it is much clear that court has tried to tilt a balance between the right of patients and autonomy of doctors. Doctors have been put on high pedestal for the purpose of liability for criminal negligence and negligence should be gross one for holding them liable. Court has given directions for the government to make specific provisions and investigating officers should not arrest the doctors in routine way unless acute necessity arises.

Civil Liability

Civil liability means that aggrieved party shall be compensated for the wrong suffered by him. As far as civil liability for medical negligence in India is concerned, initially the alone remedy available was for tort of negligence in civil court. A medical practitioner must have reasonable skills, knowledge and competence to carry on the practice of medicine. If they fail in the criteria, they will be liable for medical or professional negligence. In this regard the courts in India have generally followed the decisions and practices of English Law.

[19] AIR 2010 SC 1162.

Guidelines and criteria for ascertaining the medical negligence laid down in Bolam's case[20] was followed by the Courts in India. Supreme Court of India has in case after case discussed and adopted this test as guidelines for the courts to adjudicate the medical negligence. In short the test is as under : "where you get a situation which involves the use of some special skill or competence then the test as to whether there has been negligence, not the test of the man on the top of a calpham omnibus.... The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill.... It is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."[21]

In another case[22] the duty of a medical man was elaborated : "If a person holds himself out as possessing special skill and knowledge and he is consulted by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment, he owes a duty to the patient to use diligence care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that service be rendered for reward." Importance of existence of 'duty to care' was illustrated by Lord Wright as follows : "to establish the tort of actionable negligence, it is necessary to define the precise relationship from which the duty to take care is to be deduced. If an act involves lack of care, no case of actionable negligence will arise unless duty to be careful exists."[23]

The aforesaid principles have been adopted by the Supreme Court of India in *Dr. Laxman Balkrishna Joshi* v. *Dr. Trimbak Bapu Godbole*,[24] Court held that except in certain circumstances there is no obligation on a doctor to accept each and every patient that happens to go to him but once he accepts the responsibility for treatment of patient law enjoins following duties on him.[25]

[20] *Bolam* v. *Friern Hospital Management Committee* (1957) 2 All ER 118.
[21] Charles Worth & Percy, Para 8.02.
[22] R. v. Bateman (1925) 94 LJKB 791.
[23] *Grant* v. *Australian Knitting Mills Ltd.*, (1936) A.C. 85.
[24] AIR 1969 S.C. 128.
[25] *Id*, at 134-135.

1. a duty of care in deciding whether to undertake the case.
2. a duty of care in deciding what treatment to give.
3. a duty of care in administration of treatment.

A breach of any of these duties gives right of action for negligence. In this way Supreme Court of India has affirmed the English law on the subject viz. that the breach of duty of care is the basis of liability for negligence and secondly it lays down the standard of care i.e. reasonable degree of care. To establish liability on that basis it must be shown i. that there is a usual practice, ii. that defendant has not adopted it, iii. the course adopted is one which no professional man of ordinary skill would have adopted.

The above stated principles were adopted by Bombay High Court in *Philips India* v. *Kunju Punnu*,[26] and absolved the doctor from the liability of medical negligence for the wrong diagnosis of the doctor. The Court quoted that : "a mistaken diagnosis is not necessarily a negligent diagnosis... A practitioner can only be held liable in this respect if his diagnosis is so palpably wrong as to prove negligence."[27]

Further in *J. N. Srivastava* v. *Rambiharilal*,[28] Malik J. relied upon the observations of Lord Denning regarding the hazards a surgeon faces in operating his patients and held that doctor followed the recognized practice and had shown reasonable care and skill in performing the operation and hence not liable in damages for negligence. However in special appeal before division bench the learned judges reversed the findings and held the doctor guilty of negligence.

The meagre case law provided scant guidelines for resolving cases related to medical negligence. Despite the increase in cases of medical negligence, the affected public hardly litigated for vindicating their rights. Many complaints were not reported or referred to the authorities because victims did not know their rights and remedies available to them. Even the few that pursued the legal remedy against

26 AIR (1975) Bomb. 306.
27 Nathan Medical Negligence 1957, at 43.
28 AIR 1985 M.P. 150.

the doctors found the judicial process extremely torturous and recompense awarded was also shamefully insufficient.

Liability under Consumer Protection Act

This is also civil remedy but in contrast to remedy of civil courts, this remedy is cheap and easy. A new era of consumer justice appears to have finally dawned in India with the enactment of Consumer Protection Act 1986. After this Act the burning issue of consumerism was the controversy whether medical professional are within the ambit of consumerism or not? The dispute has mainly centred around 2 points–

1. whether it is in public interest to bring medical profession within the scope of Act?
2. whether medical profession comes within scope of the Act?

On the point nucleus is term 'negligence' defined in the law of torts and definition of term 'service'[29] and 'consumer'[30] under the Act. These questions have been earlier considered by various High Courts as well as by National Commission. There were conflicting judgments on the issue. In *Dr. A. S. Chandra* v. *Union of India*,[31] a division bench of Andhra Pradesh High Court had held that service rendered for consideration by private medical practitioners must be construed as 'service' for the purpose of Sec. 2(1)(0) of the Act and the persons availing such services are 'consumers' within the meaning of Section 2(1)(d) of the Act. While division bench of Madras High Court had taken different view in the case of *Dr. C. S. Subramaniam* v. *Kumarasamy*,[32] and held that the services rendered by a medical practitioner by way of diagnosis and treatment both medicinal and surgical would not come within the definition of service under Section 2(1)(0) of the Act and a patient can not be considered to be a 'consumer' within the meaning of Section 2(1)(d) of the Act.

On the same line there was controversy regarding the applicability of the Act to medical practitioners due to conflicting

29 Sec. 2(1)(0) of the C.P. Act 1986.
30 Sec. 2(1)(d) of the C.P. Act 1986.
31 (1992) 1 Andh L.T. 713.
32 (1994) 1 Mad. L.J. 438.

decisions of the State Commissions. National Commission[33] resolved the controversy on this point in the case of *Cosmopolitan Hospital* v. *Vasantha Nair*.[34] National Commission held that medical service cannot be characterized as 'personal service' excluded from the definition of service given in the Act. Services rendered by medical practitioners will fall within the scope of expression 'service' as defined in the Act and a patient would be a consumer entitled to invoke the remedy provided under the Act. In its earlier decision[35] Commission had already made clear that the persons who avail the facility of medical treatment in government hospital are not consumers and the said facility of government hospital can not be regarded as service rendered for consideration. The matter was still being agitated before Supreme Court. It was argued that the dichotomy of private and government hospitals was not justified.

Ultimately Apex Court of India in its landmark and historical judgment in *Indian Medical Association* v. *V. P. Shantha*,[36] removed the controversies and settled the law that Consumer Protection Act 1986 is applicable on medical practitioners. The Supreme Court removed all doubts that were entertained in respect of inclusion and exclusion of medical services within the ambit of the Consumer Protection Act. The Court refused to grant special status to medical services and treated them at par with other services of consumer nature. Some notable points of the judgment are : i – Services rendered by medical practitioner would fall within the ambit of services defined in 2(1)(0) of the Act. Except where doctor renders the services 'free of charge' or 'under contract of personal service. ii – Contract of personal service is different from contract for personal service. Since there is no master- servant relationship between doctor and patient their services are not covered under contract of personal service. iii – Services rendered 'free of charge' are outside the purview of expression service defined under the Act. Payment of token amount for registration would not alter the position. iv – Services rendered even in government hospitals on payment of charge and also free of

[33] National Consumer Dispute Redressal Agency.
[34] (1992) I CPJ 302 (N.C.)
[35] CUTS, *Jaipur* v. *State of Rajasthan* (1991) CPR 241.
[36] AIR 1996 SC 550.

charge to others (who can not afford to pay) would fall within the ambit of expression service under the Act. v – Service rendered by the doctors or hospitals can not be regarded as 'free of charge' if charges are borne by Insurance company or by employer (in case of employee). vi – Patient availing the services by payment of charges are consumers under the definition of Sec. 2(1)(d) of the Act. vii – Consumer forums are competent to decide the medical negligence cases in case of complicated issue complainant can be asked to approach the civil court for remedy. viii – No change is brought in substantive law and same test as applied in tort of negligence would equally apply under the Act. ix – Court said trend is towards narrowing professional immunity and doctors also do not enjoy such immunity and can be sued if fail to exercise reasonable care and skill.

Since the above judgment of Supreme Court we see a great change in the area of medical negligence. A medical practitioner is liable under the Act if he falls short of the standard of reasonably skillful medical person in his field.[37] Further in a case[38] Supreme Court declared failure on the part of government hospital to provide timely medical treatment to a person in need of treatment is violation of right to life guaranteed under Article 21 of Constitution. Thus Court had tried to make government answerable to the patients. Again Supreme Court said in another case[39] that not only the patient but also guardian of the patient who hire the services of doctors and hospital are consumers under the purview of the Act.

Supreme Court in it's judgments[40] reasoned that in every mishap or death during medical treatment, the medical man cannot be made criminally liable for punishment. In the absence of adequate medical opinion putting guilt on the medical man would be doing great harm or dis-service to the medical community at large. Every mishap or misforture of a doctor is not a gross act of negligence to try him for an

[37] *Poonam Verma* v. *Ashwin Patel*, AIR 1996 SC 2111.
[38] *Paschim Banga Khet Mazdoor Samiti* v. *State of West Bengal*, AIR 1996 SC 2426.
[39] *Spring Meadow Hospital* v. *Harjol Singh Ahluwalia & Ors.*, (1998) 11 CPJ I S.C.
[40] *Dr. Suresh Gupta* v. *Govt. of NCT of Delhi*, AIR 2004, SC 4091, *Dr. Jacob Mathew* v. *State of Punjab & Ors.*, 2005 (SCC) 1369.

offence of culpable negligence. Going one step further the Court said simply because a patient has not favourably responded to a treatment given by the doctor or a surgery has failed, the doctor can not be held straightway liable for medical negligence by applying the doctrine of *res ipsa loquitur*.[41] Thus the Court has tried to tilt a balance between autonomy of doctor and rights of patients. Autonomy implies the ability to govern oneself in the best possible way. In the case of *Nizam's Institute of Medical Sciences* v. *Prasanth S. Dhanka and Ors.*,[42] Supreme Court set a new bench mark for damages in a case of medical negligence and asked the government hospital to pay Rs.1 crore compensation to the victim. From the point of view of compensation Court did not make difference between government and private hospital. Court held 'Forum should award' adequate compensation by striking a balance between inflated and unreasonable demands of the victim and equally untenable denial of the opposite party.

After 15 years from the first judgment of Supreme Court now the attitude of judiciary towards medical negligence has been completely changed and again the Court is trying to make a balance between two opposite poles and redefined the law of medical negligence in India. Although Court absolved the doctors from the liability under Section 304-A of IPC for rash negligence and consequent death of the patient but laid down the stringent guidelines for doctors liability in civil law for medical negligence. In the case of *Malay Kumar Ganguly* v. *Sukumar Mukherjee & Ors.*[43] Supreme Court over ruled the judgments of National Commission and Calcutta High Court and held the doctors guilty of medical negligence for the death of the wife of Dr. Kunal Saha. Court laid certain guide lines redefining the concept of medical negligence.

(i) Law on the medical negligence also has to keep up with advances in medical science as to treatment as also diagnostics.

(ii) Standard of care will involve the duty to disclose to patients about the risks of serious side effects or about alternative treatments and get informed consent.

(iii) Once the allegation is established, burden of proof lies on doctors what care was taken and satisfy that there was no lack of care or diligence.

(iv) If hospital knowingly fails to provide some amenities that are fundamental for the patients, it certainly amounts to medical negligence.

(v) Doctrine of cumulative effect is not available in criminal law. Finding of medical negligence u/s 304-A of IPC can not be objectively determined.

(vi) Court made a little expansion of doctrine of legitimate expectation under Art. 14 of constitution and said aggrieved expected the best services from best hospital.

(vii) If a doctor represents to be a specialist and it turns out that he is not, deficiency in medical service would be presumed.

(viii) Test of Bolam's case is weakened in recent years and defendant doctor can not escape liability for negligence just on the evidence of medical experts. Before accepting such opinions court will satisfy that in forming their opinion experts have directed their mind to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.

(ix) Standard of care involves the duty to disclose to patients about the risks of serious side effects or about alternative treatments.

(x) In a complicated case the Court would be slow in contributing negligence on the part of the doctor, if he is performing his duties to the best of his ability.

Conclusion

Thus it is clear that approach of judiciary is to tilt a balance between two opposite interests of patients and doctors. Under civil liability court has expanded the dimensions of law by awarding liberal compensation to victims of medical negligence.[44] This trend will help in motivating the doctors to take malpractice insurance and this will make easy to recompense the patients by enforcing 'no fault

[41] *Martin F. D'Souza* v. Mohd. Ishfaq 2009 Ind. Law S.C. 174.
[42] (2009) 6 S.C.C. 1.
[43] AIR 2010, S.C. 1162.

[44] *Supra* note 41.

compensation scheme' on the line of Motor Vehicles Act. Court emphasized the importance of 'informed consent' and warned that in the times to come litigation may be based on the theory of lack of 'informed consent'.[45] In the light of recommendations of working group Consumer Protection Act may be amended to bring mandatory services like health service in government hospital within purview of the Act because government doctors are positioned to meet the state obligation of preserving the life of people. Extending the state obligation court has opined that failure on the part of government doctors to provide medical treatment is violation of right to life guaranteed under Article 21 of constitution[46] and it may also be violative of Art. 14 of the constitution if against legitimate expectation of the patients.[47]

On the other hand court wants to protect the interest of doctors from criminal liability because they do not cause intentional harm to patients and it will be great disservice to society. Court has suggested the Central and State governments to make law in consultation with Medical Council of India to prevent frivolous complaints against doctors. Otherwise experienced doctors will refuse to treat patient due to fear of being accused and young men will be deterred from entering the profession because of risks involved.[48] To conclude Lord Denning may be quoted :

> "It is so easy to be wise after the event and condemn as negligence that which was only misadventure. Medical science has conferred great benefits on mankind but these benefits are attended by unavoidable risks. We can not take the benefits without taking the risks. Doctors like rest of us have to learn by experience and experience often teaches in a hard way."[49]

●

[45] *Supra* note 42.
[46] *Supra* note 37.
[47] *Supra* note 42.
[48] *White House* v. *Jordan* (1980) All ER 650.
[49] *Roe* v. *Ministry of Health* (1954) 2 QB 66.

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 133-154

Gender Discrimination in Land Rights under the U. P. Zamindari Abolition and Land Reforms Act, 1950

Manoj Kumar Padhy*

Abstract : *Property laws, since time immemorial have been framed exclusively for the benefit of man, and woman has been treated as subservient and dependent on male support. Right to property, especially land right is important for freedom and development of human being in general and woman in particular. When women own property and control assets, they are better positioned to improve the lives of their families and themselves. In India out of the total 329 million hectares of land, 124.58 million hectares are devoted to raising food crops to provide food security for the country. This area is owned by a total of 119 lakh farm land holders out of which, only 9.21% are women. This data highlights the gender discrimination in land rights in India and Uttar Pradesh is not an exception. Apart from customary norms, religious beliefs and social practices, the faulty and gender discriminating land legislation of a State is also responsible for gender discrimination in land right. The agricultural land rights of women in Uttar Pradesh are dealt under the UP Zamindari Abolition and Land Reforms Act, 1950. Therefore, an attempt has been made in this article to study the land rights of women under the UP Zamindari Abolition and Land Reforms Act, 1950, so as to ascertain whether, the Act is gender neutral or gender discriminatory in nature. This article also highlights the Constitutional and Human Rights perspectives of land rights of women. Government Policies promoting the land rights of women are also discussed.*

Key Words *: Land Rights; Gender Discrimination; Succession; Land Allotment.*

* Reader in Law, Law School, BHU, Varanasi.

Contents:

I. Introduction
II. Constitutional Mandates
III. Government Policies
IV. Land Rights of Women as Human Rights
V. Land Rights of Women under the UPZA & LR Act, 1950
1. In Succession matters
2. In Allotment Matters
VI. Conclusion

I. Introduction

Property laws, since time immemorial have been framed exclusively for the benefit of man, and woman has been treated as subservient and dependent on male support. Right to property, especially land right is important for freedom and development of human being in general and woman in particular[1]. When women own property and control assets, they are better positioned to improve the lives of their families and themselves. Land rights confer direct economic benefits as a source of income, status, nutrition and collateral benefits. Women may not fully participate in these benefits as member of a household if they do not share formal rights to land[2]. Land is a critical resource for a woman when the household breaks down[3]. The UN Special Rapporteur on Adequate Housing confirms

1 For gender related land right issues see generally, Agarwal, B., *A field of one's own: Gender and land rights in South Asia*, (Cambridge: Cambridge University Press, 1994); Agarwal, B., "Gender and land rights revisited", *Journal of Agrarian Change*, 2003, 3(1), 184-224; Agarwal, B., "Women's inheritance: Next steps", *The Indian Express*, 2005, October 17; Agarwal, B., & Panda, P., "Towards freedom from domestic violence: The neglected obvious", *Journal of Human Development*, 2007, 8(3), 359-388; Alaka and Chetna, "When Women Get Land - A Report from Bodhgaya," *Manushi*, 1987, 40: 25-26; Quisumbing, A., "Male-Female Differences in Agricultural Productivity: Methodological Issues and Empirical Evidence," *World Development*, 1996, 24 (10): 1579-1595.

2 "Women's Land Right", Rural Development Institute, source: *http://www.rdiland.org/OURWORK/OurWork_WomenLand.html*, accessed on 04/30/2010.

3 "Women and Land", source: *http://www.landcoalition.org/pdf/08_RDI_Women_Land_FactSheet.pdf*, accessed on 04/30/2010.

the dire situation of millions of women across the world in these words: "In all most all countries whether developed or developing legal security of tenure for women is almost entirely dependent on the men they are associated with. Women headed households and women in general are far less secure than men. Very few women own land. A separated or divorced woman with no land and family to care for often ends up in an urban slum, where her security of tenure is at best questionable"[4]. The low proportion of land ownership among women assumes significance in light of the close link established between landlessness and rural poverty. In 1997, a World Bank country study showed that landlessness is by far the greatest predictor of poverty in India - even more so, than caste or illiteracy[5].

Women constitute of half of world's population and do 2/3rd of world's work, in return, women get 1/10th of world's income and own 1/100th of world's wealth[6]. In most parts of the world, including India, women are way behind men in ownership of farm land[7]. The factors which influence this gender differentiated land rights are customary norms, religious beliefs and social practices[8]. The widespread inequalities between men and women in their access to land are one of the major stumbling blocks to rural development and food security in most part of the world[9]. The total agricultural land area on earth is

4 UN Special Rapporteur on Adequate Housing, *Study on Women and Adequate Housing*, April 2002, E/CN.4/2003/55, p. 9, as cited in Marjolein Benschop, "Women's right to Land and Property" , Commission on Sustainable Development,, women in human settlement development- challenges and opportunities, Thursday, 22 April 2004. at 2.

5 Nagarajan, Rema., "No Country for Landed Women", TNN, March 8, 2010, source *http://timesofindia.indiatimes.com/india/No-country-for-landed-women/articleshow /5656066.cms*, accessed on 04/30/2010

6 "State of the World's Women", United Nations (1979), Voluntary Fund for the UN Decade for Women, New York, source *http://www.unesco.org/education/tlsf/TLSF/theme_c/mod12/uncom12t01.htm*, accessed on 04/30/2010

7 "Only 9.21% women own farm land in Country: FAO", *DNA Read the World*, 21-feb-2010, source: *http://www.dnaindia.com/india/report_only-9-21pct-women- own-farm-land-in-country-fao_1350710* accessed on 04/30/2010.

8 *Ibid.*

9 *Ibid.* The new FAO database highlights up-to-date information on how men and women in as many as 78 countries differ in their legal rights and access to land. For instance, women account for just 9.21% of the total 119 lakh farm land

estimated to be about 5.0 billion hectares. This is 37.3% of the total land on earth (13.0 billion hectares). Of this total agricultural area, 1.5 billion hectares (11% of total land) is currently arable land under permanent crops[10]. In India out of the total 329 million hectares, 124.58 million hectares are devoted to raise food crops to provide food security for the country[11]. This area is owned by a total of 119 lakh farm land holders out of which, only 9.21% are women[12]. Women constitute almost a third of the agricultural labour force and about 72% of employed women are in the agricultural sector[13].

Uttar Pradesh, where 72% of the population is involved in agricultural activities, is one of the largest contributors of food production towards the nation's granaries[14]. Though, women constitute 48.5% total population of the State and responsible for more than 75% of agricultural activities, their share in agricultural productivity was

holders in the country. Women comprised 32% of the agricultural labour force in 2008, it said, adding a similar situation prevails in most countries. The report points out only 12.98 lakh women have land rights in the country due to legal constraints and socio-cultural factors such as the practice of female seclusion or purdah, prevent women's access to land. Barring Indonesia, the data of majority of 17 Asian countries show fewer women having land rights. According to the new FAO online data, as many as 17 lakh women own farm land in Indonesia out of the total 20 lakh holders. Whereas in Bangladesh, 7.9 lakh women own land out of total 28 lakh landholders, while in Nepal only 2.71 lakh women have land rights out of 33 lakh land holders. Out of the total 57 lakh land holders in Thailand, women are 15.85 lakh, while in Malaysia, 65,328 females have land rights out of 5 lakh land holders, the FAO said. An official with the UN body Zoraida Garcia noted that in many cases, national constitutions acknowledge men and women have equal rights to land, but the day-to-day reality is very different.

10 "World Agricultural Land", source : *http://www.thehumanspirit.net/New_Essays_10/World%20Agricultural%20Land.doc*, accessed on 04/30/2010

11 "New Agriculturist: country Profile- India", source: *http://www.new ag.info/country/profile.php?a=883*, accessed on 04/30/2010

12 Only 9.21% women own farm land in Country: FAO", *DNA Read the World*, 21-feb-2010, source: *http://www.dnaindia.com/india/report_only-9-21pct-women-own -farm-land-in-country-fao_1350710* accessed on 04/30/2010.

13 Nagarajan, Rema., " No Country for Landed Women", *TNN*, March 8, 2010, source *http://timesofindia.indiatimes.com/india/No-country-for-landed-women/articleshow/5656066.cms*, accessed on 04/30/2010

14 Source: *http://www.dishain.org./aaroh/aaroh home.html* accessed on 10/08/2010.

shown only 12.9%[15]. The numbers of total workers in UP, according to census 2001, is 54, 180, 232, of which men are 76% and women are merely 23%. Amongst these women, only 34% are classified as cultivators and 41% as labourers, whereas amongst men, 42 % are cultivators and 20% as labourers[16]. This clearly explains the discrimination in land rights and women are mostly working as labourers. Apart from customary norms, religious beliefs and social practices, the faulty and gender discriminating land legislation of a State is also responsible for gender discrimination in land right. The agricultural land rights of Hindu women in Uttar Pradesh are dealt under the Hindu Succession Act, 1956 and non-Hindu women under the UP Zamindari Abolition and Land Reforms Act, 1950[17]. In 2005, an attempt was made to make the Hindu Succession Act, 1956 gender neutral by passing the Hindu Succession (Amendment) Act, 2005. Inspired by the above amendment the UPZA & LR Act, 1950 was amended in 2008 to make it free from gender discriminatory provisions. Against this background an attempt has been made in this article to study the land rights of women under the UP Zamindari Abolition and Land Reforms Act, 1950[18], to ascertain whether, the Act is gender neutral or gender discriminatory in nature. This article also highlights the Constitutional and Human Rights perspectives of land rights of women. Government Policies promoting the land rights of women are also discussed.

II. Constitutional Mandates

It is now customary to begin any analysis on the principle of

15 *Ibid.*

16 *Ibid.*

17 It extends to the whole of the Uttar Pradesh except the areas which, on the 7th day of July, 1949, were included in a Municipality or Notified area under the provisions of the United Provinces Municipalities Act, 1916 or a cantonment, under the provisions of the United Provinces Town Areas Act, 1914.

18 For Books on UPZA &LR Act, 1950 see generally, Raja, S.H.A.,*The Uttar Pradesh Zamindari Abolition and Reforms Act,1950*,(Modern Publisher, 2004); Singh, C.P., *Uttar Pradesh Bhumi Bidhiyan*,(Allahabad: Allahabad Law agency, 2006); Maurya, R.R., *Uttar Pradesh Land Laws*,(Allahabad: Central Law Publication, 2010).

gender equality and equity and protection of women's right with reference to the Constitution mandate. The framers of the Indian Constitution after taking note of the adverse and discriminatory position of women in society took several steps to ensure that the State would take positive steps to give her actual status. Article 14[19], 15(1)[20], and 15(3)[21] of the Constitution of India, thus not only inhibit discrimination against women but in appropriate circumstances provide a free hand to State to provide protective discrimination in favour of women. Apart from these Fundamental Rights, Part IV of the Constitution which carries the Directive Principles of the State Policy also provides that the State shall endeavour to ensure equality between man and woman. Article 38(1) says that the state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Similarly, Article 38(2) provides that the State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only among individuals but also amongst groups of people residing in different areas or engaged in different vocations. Article 39(a) provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means to livelihood. Article 39(b) intends that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Article 39(c) expects, the portion of the economic system does not result in the concentration of wealth and means of production to the common detriment. Whereas, Article 39(d) provides for equal pay for equal work for man and women, Article 39(e) provides that the health and strength of women are not abused. Flowing from the Constitution

[19] Article 14 - The state shall not deny to any person equality before law or the equal protection of the laws within the territory of India.

[20] Article 15(1) - The state shall not discriminate against any citizen on the grounds only of religion, sex, place of birth or any of them.

[21] Article 15(3) - Nothing in this Article shall prevent the State from making any special provision for women and children.

there are several legislative measures. Despite these efforts there persists a wide gap between the *de jure* Constitutional provisions and *de facto* situation of women's social and economic status with persistence of inequalities, indignities and violence against women. These directions were given more than fifty years ago, but a woman is still neglected in her own natal family as well as in the families she marries into because of blatant disregard and unjustified violation of these provisions by the personal laws and State land laws such as UPZA &LR Act, 1950.

III. Government Policies

In 1st to 5th five years plan (1951-1979) justice and equality of rights of women was mainly welfare oriented and clubbed with the welfare of other disadvantaged groups. However, in the 6th five years plan (1980-85) emphasise was laid on health, education and employment. The 7th and 8th five years plan (1985-97) continued this development strategy but from the angle of employment, including self-employment and human development. The 9th plan (1997-2002) made a significant departure from development to empowerment of women with a focus on creating an enabling environment where women could freely exercise their right both within and outside home. Besides celebrating 2001 as 'women's empowerment year', the 9th five year plan witnessed certain concerted efforts to mainstream women's right as a part of the national policies like National Health Policy, 2001, National Population Policy, 2000, National Policy for Empowerment of Women, 2001 and most important National Agricultural Policy, 2000.

The National Agricultural Policy, 2000 highlights gender concerns in agriculture[22]. It promises to initiate appropriate structural, functional and institutional measures to empower women, build their capabilities and improve their access to inputs, technology and other farming resources. The policy concerns on the data that 75% of all

[22] For detail see generally Chand, Ramesh., "India's National Agricultural Policy: a Critique", source: *http://www.iegindia.org/dis_rc_85.pdf*, accessed on 04/30/2010

women workers and 85 % of rural women workers are employed in agriculture. The policy advocates that with 30-40% of total agricultural workers are being women, women need to be recognised as independent farmers and producers in their own right. The Policy believes that recognising the land rights of women would enable them to access credit and other resources better and contribute to agricultural growth through increased productivity. However, the Hindu Succession Act, 1956(before 2005 Amendment) and Muslim Personal (Shariat) Application Act, 1937, which denied both Hindu and Muslim Women right to inherit landed property, exited gave a stumbling block to this initiative. This hurdle was subsequently removed after concerted effort by the National Commission on Women[23] and Planning Commissions Task Force on Women and children[24]. Consequently, the Hindu Succession Act, 1956 was amended after a recommendation by 174th Law Commission Report[25], which is a landmark correcting in gender inequality in property right over land.

The Hindu Succession (Amendment) Act, 2005[26] removed inequality in many fronts that are agricultural land, Mitakshara joint

[23] The National Commission on Women reviewed 41 legislative measures relating to women and recommended 32 Acts, including HSA 1956, for appropriate amendment or modification.

[24] Planning Commission's Task Force on Women and Children (2000) recommended 22 Acts for review.

[25] Law Commission of India, 174th Report on " Property Rights of Women: Proposed Reforms under the Hindu Law", May 2000

[26] The HS (Amendment) Bill as it was introduced in Rajya Sabha on 20 December 2004 retained gender discriminatory clauses relating to agricultural land and Mitakshra joint family property. But civil society initiatives largely by the women activists, intellectuals and women's organizations with the grassroots support of women worked towards withdrawal of the discriminatory clauses and enable women to achieve equal rights over agricultural land and joint family property including dwelling house. Concerted efforts made by individuals and groups committed to women's rights, land rights, and human rights, through memorandums, depositions, and lobbying' the openness of the Standing Committee on Law and Justice to civil society inputs; the support of some lawyers and MPs, all contributed to the shift from the limited 2004 Bill to the wide-ranging 2005 Act. In fact, there was specific demand by women for independent ownership of land and not joint ownership, be it with husband, father, brother or son.

family property, parental dwelling house and certain widow's right. Under the un-amended Hindu Succession Act, 1956, in the Mitakshara Joint Family property son has additional independent birth right in joint family property as coparcener; daughter could not be coparceners. However, the Hindu Succession (Amendment) Act, 2005 has made the son and daughter having independent birth rights as coparceners in joint family property and as such these shares cannot be willed away by the father. Similarly, under the un-amended Act the inheritance of agricultural land was subject to state level tenure laws, which were highly gender discriminatory in inheritance matters, and not to Hindu Succession Act, 1956. Now under the amended Act, inheritance rights in all agricultural lands are subject to the Hindu Succession (Amendment) Act, 2005. Similarly, in the matters of dwelling house, under the un-amended Act, no female heir can claim partition until the male heir choose to divide their respective shares, daughters had only right to residence, only if unmarried , or deserted or separated or widowed. Now daughter whether married or unmarried has the same right as son to reside in and to claim partition of the parental dwelling house.

IV. Land Rights of Women as Human Rights

Women's right to land has been recognised as a human right as it is closely related to the right to an adequate standard of living and freedom from forced eviction. These rights are recognised by several human rights instruments[27]. The Universal Declaration of Human Rights guarantees everyone, the right to own property alone as well as in association with others[28]. At the same time, it also protects from the

[27] For an overview of international human rights instruments related to women's equal rights to land, housing and property, see Chapter One of UN-HABITAT, *Rights and Reality: Are women's equal rights to land, housing and property implemented in East Africa?*, 2002, *available on: http://www.unhabitat.org/tenure under "publications"*, as cited in Marjolein Benschop, " *Women's right to Land and Property*" , Commission on Sustainable Development, women in human settlement development- challenges and opportunities, Thursday, 22 April 2004. at 2.

[28] Universal Declaration of Human Rights, Article 17(1)

arbitrary deprivation of property[29]. It also confers everyone the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[30] Similarly, Article17 (1) of the International Covenant on Civil and Political Rights, 1966, says: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Article 11 of the International Covenant on Economic, Social and Cultural Rights guarantees everyone the right to an adequate standard of living for himself and his family, including adequate food, clothing and housing as well as a right to be free from hunger. The UN Convention on the Elimination of all Forms of Discrimination against Women, 1979 is an important document in this aspect. Article 13 of the document requires from the State parties to take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to family benefits[31] and (b) The right to bank loans, mortgages and other forms of financial credit[32]. Article 14(1) of the same Document mandates that the State Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas. Similarly, Article 14(2) requires from the State parties to take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality

29 Id., 17(2)
30 Id., 25(1)
31 The UN Convention on the Elimination of all Forms of Discrimination against Women, 1979 Art.13(a)
32 Id., Art.13(b)

of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: *firstly*, to participate in the elaboration and implementation of development planning at all levels[33]; *secondly*, to benefit directly from social security programmes to organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment[34]. Article 15 mandates: *firstly*, the States Parties shall accord to women equality with men before the law[35]; and *secondly*, the States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals[36]. Article 16(1) says that the States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women so that both shall have, *firstly*, the same right to enter into marriage[37]; *secondly*, the same right freely to choose a spouse and to enter into marriage only with their free and full consent[38]; *thirdly*, the same rights and responsibilities during marriage and at its dissolution[39]; *fourthly*, the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount[40]; and *finally*, the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration[41].

33 Id., 14(2)(a)
34 Id., 14(2)(e)
35 Id., 15(1)
36 Id., 15(2)
37 Id., 16(1)(a)
38 Id., 16(1)(b)
39 Id., 16(1)(c)
40 Id., 16(1)(d)
41 Id., 16(1)(h)

V. Land Rights of Women under the UPZA & LR Act, 1950

The earliest tenancy legislations in Uttar Pradesh(the Rent recovery Act, 1859, North-Western Provinces Rent Act, 1873, Agra Tenancy Act, 1901,Agra Tenancy Act, 1926, Abadh Rent Act and UP Tenancy Act, 1939) mostly dealt with classification of tenure holders, recovery of rent, immunity from ejectment, acquisition of occupancy rights and unification of tenancy laws etc. These legislations were never being examined in the light of gender discrimination either due to the reason that the tenure system was under the grab of the evil Zamindars or the highest degree of patriarchy or the governance of the inheritance under the personal laws. However, there was a significant development under the Agra Tenancy Act, 1926 when the widowed mother was included as a successor.

The Uttar Pradesh Zamindari Abilition and Land Reforms Act, 1950 was passed mainly to abolish the evil Zamindari system, which involved as an intermediary between the tiller of the soil and the State of Uttar Pradesh and for the acquisition of their rights, titles, and interest and to reform the law relating to land tenure consequent upon such abolition and acquisition. One of the aims of this Act is to remove religion, sex, caste and tenure holder difference from inheritance laws. Though, the legislation succeeded in removing the religion, caste and tenure holder difference from the sphere of land law but, it failed to remove the sex from land law. Still it contains an array of gender discriminatory provisions. The Hindu Succession (Amendment) Act, 2005 brings all agricultural land at par with other property and makes Hindu women's inheritance rights in land legally equal to men's in Uttar Pradesh, notwithstanding anything contained in UPZA & LR Act, 1950. However, although the majority of women in the State of Uttar Pradesh, the Hindu women stand to gain from the Hindu Succession (Amendment) Act, 2005 in the matters of succession, this still leaves Non-Hindu women's right to agricultural land in an unequal state. The UPZA & LR Act, 1950 also provides for the allotment of agricultural land to landless persons. The allotment provisions under this Act need to be examined in the light of gender

discrimination. Therefore, an attempt has been made below to examine the nature of the provisions of this Act relating to succession and allotment in the light of gender discrimination.

(1) In Succession Matters

Before the passing of the UPZA & LR Act, 1950, there were two legal systems governing the succession of agricultural land in UP. One was personal laws[42] and other was the succession law as contained in the UP Tenancy Act, 1939. The UPZA & LR Act, 1950 repealed UP Tenancy Act, 1939 and abolished religion from the sphere of land law. The Hindu Succession Act, 1956 also authorised the UPZA & LR Act, 1950 to deal with the succession matters for Hindus relating to agricultural land. Section 4(2) of the Hindu Succession Act, 1956 runs thus: "For removal of doubts it is hereby declared that **nothing contained in this Act shall be deemed to affect the provisions of any law** for the time being in force **providing for** the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for **the devolution of tenancy rights in respect of such holdings**". As a result the succession to agricultural land in UP was governed in accordance with the law contained in sections 169-175 of the UPZA & LR Act and the personal laws of the tenure holder stood superseded by the statutory law of succession. However, the Hindu Succession (Amendment) Act, 2005 omitted Section 4(2) and brought all agricultural land at par with other property, overriding any inconsistent State laws. Meaning there by, the Hindu Women's right to agricultural land now will be governed under the gender neutral Hindu Succession (Amendment)Act, 2005 and not under the UPZA & LR Act, 1950. This development still leaves thousands of Non-Hindu women who are still subjected to the gender discriminatory UPZA & LR Act, 1950. Inspired by the Hindu Succession (Amendment) Act, 2005, the UPZA & LR Act, 1950 has been amended in 2008. The aim was to

---

42 If the tenant was a Hindu, the tenancy developed in accordance with Hindu law; if he was a Muslim, the Muslim law applied; and if he was neither Hindu nor Muslim, the succession developed in accordance with the law contained in the Indian succession Act, 1925

make the legislation free from gender discriminatory provisions but, has it really been done? The next part of the paper examines this.

If the deceased tenure holder is a male, the devolution shall be in accordance the principle contained under section 171. On the other hand, if the deceased is a female, the succession shall be governed under sections 172-174. When a male tenure holder dies intestate, the class I heirs includes widow[43], unmarried daughter[44] and the male lineal descendent per strips[45]; provided that the widow and son[46] of a predeceased son how lowsoover per strips shall inherit the share which would have devolved upon the predeceased son had he been alive. It has to be noted here that the widow under class I heir, who would have been a heir, if alive, shall inherit only if she has not remarried. Undoubtly, this gives a set back to the widow remarriage programmes[47]. It also advances the idea that widow in order to inherit must not be remarried, though she may maintain an illicit relation as it happened in *Rameshwar v. Ram Kumar*[48], where it was held that if after death of her husband, the widow has some confidential relations

43 Section 171(1) (iii) - If the widows are more than one, they will jointly get one share. A widow leading an immoral and unchaste life is not entitled to succeed to former husband's property under this section, *Ram Charan v. Smt. Paraga*, 1970 RD 513.

44 Unmarried daughter is one who has never been married, or who is not in the state of married life. In *Gauria v. Kadhora*, 1966 ALJ 909, the Allahabad High court held that the expression "unmarried daughter" includes a "widowed daughter". But, in *Smt. Tanto v. Revenue Board*, 1983 R.D. 32 the Allahabad High Court held that the expression "unmarried daughter" does not include a "widowed daughter". In *Smt. Rajban v. Rahim Bux and Others*, 1969 ALJ 16, it was held that a married but divorced daughter can not be said to be "unmarried". Now, the UPZA & LR (Amendment) Act, 2008 has elevated the position of the unmarried daughter from class III heir to Class I heir, w.e.f. 01-09-2008.

45 Means all heirs who are in the direct line of descent without the intervention of female, i.e., related to the deceased through male only, such heirs are son, son's son, son's son's son and so on.

46 Son means legitimate son which includes both natural and adopted, but excludes illegitimate son and step son. In *Ram Dayal v. Bhimsen*, 1966 RD 25, the Allahabad High Court held that a posthumous son has been included in the expression "son".

47 For detail see Law Commission of India, 81st Report, Hindu Widow Remarriage Act, 1856.

48 2000 RJ 183

with another man and there is no evidence of her remarriage, then, it cannot be said that such a widow lost her rights on account of alleged re-marriage. So, it is suggested here that widow's right should be recognised u/s 171 of the Act, though she is remarried.

Before the UPZA & LR (Amendment) Act, 2008, the unmarried daughter was placed in class III heir below mother and father of the deceased tenure holder[49] and married daughter was placed in IVth class. Now, as a result of 2008 Amendment unmarried daughter has been elevated to the class I heir and placed along with widow and male lineal descendant, and married daughter[50] has been elevated to the III class heir. So, at present there are discrimination between an unmarried and a married daughter and between son and married daughter. In the presence of a son or an unmarried daughter, the married daughter cannot inherit. The exclusion of married daughter to inherit in the presence of a son and unmarried daughter is not in consonance with Hindu law. Now if a tenure holder leaves behind him a separated son and a married poor daughter who is living with him, the son will exclude the married daughter from succession. So it is submitted that the married daughter should be placed along with the son under Class I.

The UPZA & LR (Amendment) Act, 2008 unlike the Hindu Succession (Amendment) Act, 2005 discriminates between unmarried daughter and married daughter. As the presence of unmarried daughter excludes the married daughter, therefore, where an unmarried daughter succeeds to her deceased father, she would lose her right to hold the property, when she marries, and the property shall revert to the last male tenure holder from whom, she succeeded, and, than shall devolve upon his nearest surviving heirs. So, a question arises here whether the marriage by an unmarried daughter, a sin or a crime. This is

49 Mother and father are placed in Class II heir. Prior to the implementation of 2004 Land Laws Amendment mother and father were placed in different order of preference i.e. 2nd and 3rd respectively, but as a result of the above Amendment, the distinction between father and mother has been removed.

50 Before UP Land Laws (Amendment) Act, 1954, the married daughter was completely excluded from the inheritance.

peculiar to the UPZA & LR Act, 1950 that the marriage of an unmarried daughter results her to be deprived of her property which she succeed to her father. This can otherwise be said that, if an unmarred daughter wants to lead a respectful life and marries a man, she shall lose her right in the property of which she has become owner. In all religions the marriage has been considered as an essential ceremony and sacred. The divesting of daughter on marriage may compel her to lead a single life and to do any act of unchastely or immoral except to marry a man. So, this kind of provision not only against the sacredness marriage institution but also against the public policy. Hence it is submitted that the discrimination between married and unmarried should be abolished and married daughter should be placed under class I heir along with the son and unmarried daughter. Similarly, brother and unmarried sister are placed under the class IV heir and married sister is placed under the class VIII heir. So, it is again submitted that married sister should be elevated to the class IV heir and should placed along with brother and unmarried sister.

The concept of coparcenary property and son's and daughter's right by birth in the coparcenary property have not been recognised by the provisions of the UPZA & LR Act, 1950. The powers of Karta under the Hindu law would not be available to tenure holders under this Act[51]. Therefore, a tenure holder during his lifetime can execute a will[52] of his whole estate under section 169 of this Act in favour of his son, depriving unmarried daughter. It has to be noted that in presence of a valid will, the rule of succession does not apply. Therefore, the intention of the legislature in placing the unmarried daughter along with the son in class I heir will vitiate. So, the birth right of the daughter should be recognised in the landed property of the father.

Under section 171 of the UPZA & LR Act, 1950 when a male

[51] *Mahendra Pal Singh v. Dy. Director of Consolidation*, Nirnaya Patrika 1982 All. 178; *Bhawani Pd. v. Ram Deo*, A.I.R. 1975 All. 87; *Chhote Lal v. Jhanda Lal*, AIR 1972 All. 424

[52] Section 169(3): Every Will made under provisions of sub section 1 shall, not withstanding anything contained in any law, custom or usage be in writing, attested by two persons and registered.

tenure holder dies intestate, his interest shall devolve amongst the twenty categories of heirs, of which females heirs are ten in number, viz. widow, widow of a predeceased son, unmarried daughter, mother, married daughter, unmarried sister, son's daughter, father's mother, married sister and half sister. Section 171 does not speak the nature of female interest inherited from a male. However, section 172(1) expressly provides that women's estate as inherited from male is limited one. Women's estate is limited in the sense that on her death, remarriage, abandonment and surrender, the holding shall devolve not upon her heirs, but upon the heirs of the last male tenure holder to whom, the female had herself succeeded. The situation can be better understood in *Abdul Rahman Khan v. Deputy Director of Consolidation*[53], where one Smt.Bashiran, a Muslim widow inherited certain land from her husband and latter on she remarried in 1955. The Allahabad High Court held that the widow Smt. Bashrin lost her right on remarriage, and the estate developed upon the reversoiner Abdul Rahman Khan. So, female inheriting estate from the male under section 171 has not been considered as a fresh stock of descent for the purposes of devolution of holding. However, in *Gajodhari Devi v. Gokul*[54] the Supreme Court of India did not recognise the limited interest of female inherited from male. The Court observed that "...there is no law which takes away the appellant's right which vested in her when succession opened and it is not the case of the respondents that on re-marriage there has to be divesting..." It seems as if the honourable court has not considered Section 172 of the UPZA & LR Act, 1950, which clearly speaks of divesting on remarriage. Hence, this case can not be an authority on section 172 of the Act[55]. Moreover, the State Government has already declared that the divesting under section 172 of the UPZA & LR Act, 1950 shall be

[53] 1980 A.L.J 591. See also, *Gajodhari Devi v. Gokul*, AIR 1990 SC 45; *Shiva Nandan Singh v. Bhagwati Singh*, 1988 RD 27; *Ram Bilas v. Ram Rati*, 1972 RD 429; *Munna Singh V. DDC*, 1969 RD 341; *Jaganath v. BOR*, 1981 RD 329; *Balbir Singh V. Vijay Singh*, 1994 RD 121; *Moti Chand v. Kedar*, 200 RD 157.

[54] AIR 1968 SC 1058.

[55] Maurya, R.R., *Uttar Pradesh Land Laws*, (Allahabad: Central Law Publication, 2010) at 234-236.

continued to be in force[56].

Another question arises, whether female interest inherited from a male is subject to transfer including sale and gift. The Supreme Court in *Ramji Dixit v. Bhrigunath*[57], held that the transfer made by a female bhumidhar inherited from a male is valid and cannot be challenged even after the death of the female. The Allahabad High Court in *Tribeni Prasad V. Dy. Director Consolidation*[58], went one step forward and held that the right of a female bhumidhar inheriting from male cannot be controlled by a compromise enter into after the commencement of the Act or the before the abolition of Zamindari. From the above court verdicts it is clear that except the provisions of section 172(1) the Act does not restrict a female to deal with her property. However, a question arises as to what would have the situation where a female acquiring interest from a male transfer her interest in favour her would be husband?

Under old orthodox Hindu Law female could not inherit from the male, and if they inherited in absence of male heirs they could not be the full and the absolute owner of the property succeeded. This principle was also applied to land laws. However, the concept of limited interest was unknown in Muslim law. The UPZA & LR Act, 1950 placed the Muslim female in the same category as that of the Hindu female, and there by the Muslim female right was reduced. When The Hindu Succession Act , 1956 was passed the concept of limited interest was abolished in relation to property other than agricultural land and now, when the Hindu Succession (Amendment) Act, 2005 omitted Section 4(2) and brought all agricultural land at par with other property, overriding any inconsistent State laws, the Hindu women's limited interest in relation to agricultural land also ceased, leaving the Non-Hindu women's to be the victim of gender discriminatory provisions of 172(1). So, it is humbly submitted that

56 "*Dainak Jagaran*", A wide circulated daily Hindi news paper in Uttar Pradesh, Dated: 27-08-2008

57 1968 RD 293 (FB)

58 1981 R.D. 319; see also *Smt.Barki v.Swami Dayal*, 1988 R.D. 141.

section 172(1) is gender discriminatory which provides that the interest of all the males inherited from male is absolute and there is no divesting on any ground whatsoever, whereas the interest of all females acquiring interest from male is limited and there will be divesting on the ground death, remarriage abandonment and surrender. So, it is suggested that the Act should be amended to remove this gender discriminatory provision and the interest of female acquiring from male should be as absolute as male in the line of the Hindu Succession Act, 1956.

(2) In Land Allotment Matters

The UPZA & LR Act, 1950 provides for the allotment of agricultural land to landless persons under sections 195[59] and 197[60] as per the preference list mentioned in section 198. The objective of these provisions is to achieve the directives given under Part IV of the Indian Constitution especially under Articles 38, 39(b), 39(c) etc. A person may be admitted as a bhumidhar with non transferable rights[61] or an asami[62] by the Land Management Committee[63] in the lands which are either vacant land or land vested in the Gaon Sabha under Section 117[64] of the UPZA & LR Act, 1950 or the land that has come

59 The Land Management Committee with the previous approval of the Asst. Collector in charge of the subdivision shall have the right to admit any person as Bhumidhar with non transferable right to any land other than land falling in any of the classes mentioned in S.132(deals with land on which no permanent right can accrue) of the Act.

60 The Land Management Committee with the previous approval of the Asst. Collector in charge of the subdivision shall have the right to admit any person as Asami to any land falling any of the classes mentioned in S.132 of the Act.

61 A tenure holder under the UPZA & LR Act, 1950 whose interests in relation to the land are permanent, heritable but not transferable.

62 Asami under the UPZA & LR Act, 1950 is a minor form of land tenure. The lessee of the bhumidhar or Gram Sabha is called Asami. Right of an asami is only heritable. It is neither transferable nor permanent.

63 Land Management Committee is the Executive Committee of the Gram Panchayat which is charged with the general superintendence, management, preservation and control of all land entrusted or deemed to be entrusted to Gram Sabha.

64 Deals with lands which vests in Gram Sabha and other Local Authorities, such as forests, fisheries, hat, bazaars and melas, tanks, ponds, private ferries, water channels, path ways and abadi etc.

into the possession of the Land Management Committee after the extinction of the interest of a tenure holder[65] or the land that has come into the possession of the Land Management Committee under any provisions of the Act. While allotting land, the Land Management Committee shall observe the order of preference mentioned under section 198 of the Act.

The list is headed by landless widow, sons, unmarried daughter or parents residing in the circle of person who has lost his life by enemy action while active service in the Armed forces of the Union[66]. It is quite clear that all sons are preferred but the married daughter is not preferred despite the fact that the Hindu Succession (Amendment) Act, 2005 does not make any difference between unmarried and married daughter in succession matters. So, it is submitted that the married daughter should also be entitled to equal share under the section as that of unmarried daughter. Again, looking the aforesaid provision from another angle (landless widow....his life....), it is quite clear that the benefit of the section goes to survivors of the man Armed forces but not to the woman Armed forces , which is quite discriminatory in nature. Now a days the government is inspiring young and energetic women to join in the Armed forces of the Union[67] and, this type of gender discriminatory provision in land allotment matters no doubt gives a set back to such movement. So, it is humbly

[65] Sections 189, 190 & 191 of the UPZA & LR Act, 1950.

[66] Id., Section 198(1): In the admission of persons to land as bhumidhar with non-transferable rights or asami under section 195 or section 197(hereinafter in this section referred to as allotment of land), the land Management Committee shall, subject to any order made by the court under section 178, observe the following order of preference: (a) landless widow, sons, unmarried daughters or parents residing in the circle of person who has lost his life by enemy action while active service in the armed forces of the union.

[67] In a recent development Delhi High Court directed the Centre to grant Permanent Commission to women officers in all three wings of the Armed Forces. Currently, women are inducted in the Army as officers under the Short Service Commission for a maximum period of 14 years whereas their male counterparts are eligible to receive permanent commission after five years. Source: the *Times of India*, net edition, available on *http://timesofindia.indiatimes.com/india/Women-get-permanent-commission-in-armed-forces/articleshow/5675778.cms*, accessed on 05/01/2010.

submitted that this section should be amended to include woman armed personals also.

VI. Conclusion

Women's land needs must be understood from the point of view of women's right to dignified life. They should not face any discrimination in exercising their right to land but, women as always, has been a victim of gender discrimination in land rights. This condition prevails through out India including Uttar Pradesh. Though, the Hindu Succession (Amendment) Act, 2005 equated women's land right as that of men in succession matters through out the country but in Uttar Pradesh this benefit only restricted to Hindu women. The Non-Hindu women are still subjected to gender discriminatory State land laws. Though, the UPZA & LR Act, 1950, amended in 2008 inspired by the Hindu Succession (Amendment) Act, 2005, yet the gender discriminatory provisions could not be removed completely. Though, the unmarried daughter has been elevated to the class I heir and placed along with son, but there is nothing in this Act which would restrict the will of the father in favour of his son and thereby depriving the unmarried daughter from her right. This can be possible as this Act does not recognise the birth right of the daughter in father's agricultural land. So, it is suggested that the birth right of the daughter should be recognised under this Act. This Act discriminates between the son and married daughter. So, in the presence of a wealthy son, the poor married daughter would inherit nothing. So, married daughter should also be elevated to class I heir and should be placed along with son and unmarried daughter. This suggestion can also be justified from other angle i.e. to mitigate the discrimination between married and unmarried daughter. Discrimination between unmarried and married daughter as has already been discussed may advance immoral and unchaste relation and as such it also scandalises the sacred marriage institution. So, it is humbly submitted that married daughter should be placed under class I heir along with the unmarried daughter. Limited interest of woman though recognised in the orthodox Hindu law, the present Hindu law as well as Muslim law does not recognises the

concept of limited interest of women. However, it is still there in the UPZA & LR Act, 1950. So, it is suggested that the concept of limited interest of the women inherited from men should be abolished and the interest of the women estate inherited from men should be absolute like that of men. In allotment matters also the married daughter should be preferred equal that of son and unmarried daughter. There should be provisions for allotment of land under section 198 in favour of the dependent of women armed forces. The local self government should reserve 10% of all land allotments for women. In general, a more holistic and inclusive approach should be needed in the reform of laws and policies on gender issues relating to agricultural land. The implementation of such laws and policies may present a huge challenge and will require concerted efforts from all levels in order for women's rights to land to become reality.

●

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 155-174

Online Jurisdiction: Perception and Reality

Golak Prasad Sahoo[1]

Abstract : *The invention and innovation in the fields of information technology has posed a serious concern to the administration of justice as the chief foci of information revolution not only defeat the terrestrial and legal boundary but also the jurisdictional boundary of a sovereign nation. As a result, jurisdictional jurisprudence laid down in the 19th Century has been diluted and do not answer to the emerging issues posed by the online environment. In the light of the above delineations, this paper outlines various tests laid down by the Federal courts, regulations set out by the Council of Europe, theories of international law and also operation of anti-suit injunction in Indian Perspective to resolve the disputes in borderless world.*

Keywords *: Jurisdiction, Online jurisdiction, Pennoyer theory, Minimum contact theory, Effects theory, Purposeful availment, Active and passive theory, Cause of action, Anti-suit injunction.*

Contents:

(i) Introduction
(ii) Federal Approach
  (a) Pennoyer test
  (b) Minimum Contact test
  (c) Effect test
  (d) Purposeful availment Test
  (e) Active and Passive test
(iii) The European Approach
(iv) Jurisdiction in International Law
  (a) Territorial Principle
  (b) Nationality Principle
  (c) Protective Principle
  (d) Passive Personality Principle

[1] Golak Prasad Sahoo, Asst. Professor, Law School, Banaras Hindu University, Varanasi, U.P. 221005.

(e) The effect Doctrine
(f) Universality Principle
(v) Indian Approach
(a) Criminal Dimension
(b) Civil Dimension
(c) Basis of accepting foreign judgement
(vi) Concluding observations

"Man should not draw lines on the land. The winds will dim them, the snow will cover them, and the rains will wash them"[2]

I. INTRODUCTION

There is a novel saying that "*Ubi jus ibi remedium*" where there is a right and there is a remedy. During the last two decades, the invention and innovation of Information Revolution being a trans-national in character poses a serious threat to the administration of justice. The chief foci of Information Technology not only defeat the geographical and legal boundary but also jurisdictional boundary of a sovereign nation, and it is said 'netizens and web-sites are nowhere and all over the place'.[3] Therefore, the burgeoning world of Information Revolution has created for itself one of the most pressing issues of jurisdiction which is the '*sine qua non*' of administration of justice. A judgment or order or decree is passed by the court without having the jurisdiction, such judgment, or order or decree can be said as "*coram non-judice*"[4] and its invalidity can be set up whenever it is sought to be enforced as a foundation for a right even at the stage of execution proceeding. With the emergence of techno-friendly world, the most debated questions crop up in the minds of the legal community i.e. which court would have jurisdiction to adjudicate disputes between parties transacting on the Internet? The laws relating to jurisdictional jurisprudence characterised in the terms of the subject

2 Burk Dan, "Jurisdiction in a World without Boarders", *Virginia Journal of Law and Technology Spring*. (1997) at 1522-687.

3 Vivek Sood, *Cyber Law Simplified*, (Tata McGraw-Hill Publishing Company Ltd. 2001), at 187.

4 R.C. Khera *"Legal Glossary with the Legal Maxims"* – before a court which has no jurisdiction p. 225: *Sushil Kumar* v. *Gobind Ram*, (1990) 1SCC 193 (205) : *Issabela* v. *Susai*, (1991) 4 SCC 494 (498) : AIR 1991 SC 993 (995): *Patel Roadways* v. *Prasad Trading Co.* (1991) 4 SCC 270: AIR 1992 SC 1514.

matter, territorial aspects, pecuniary and prescriptive matters have been diluted, and do not answer to the emerging issues posed by the cyberspace referring to the standard tests laid down in the nineteenth Century. The prime questions are whether a particular cause of action in cyber space is controlled by the laws of the country (a) where the website is located or (b) by laws of the country where the Internet Service Provider is located or (c) by the laws of the country where the user is placed or and (d) by the laws of the country where cause of action arises or defendant (victim) resides. To meet the ends of justice, a new strand of jurisdictional jurisprudence has been emerged with startling result where there is little domestic legislative recognition for internet jurisdiction. In this paper considerable attention has been devoted to address various regulatory mechanisms to resolve the disputes in the boundary less world.

Before appreciating the provisions of the United States, Europe and India, the quintessential question remains: what is the meaning and the connotations of the word "jurisdiction"?

The term jurisdiction is derived from *Juris*- law and *dicere*- to speak[5], and it is the practical authority granted to a formally constituted legal body or to a political leader to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility[6].

"Jurisdiction", according to *The Encyclopaedia Americana*[7] "is power or authority. It is usually applied to courts and quasi-judicial bodies describing the scope of their right to act."

Encyclopaedia Britannica[8] defines, "jurisdiction in general, the exercise of lawful authority, especially by a court or a judge and so that extent or limits with which such authority is exercisable."

Halsbury's Laws of England[9] acknowledges jurisdiction as, "where, by reason of any limitation imposed by a statute, charter or commission, a court without jurisdiction to entertain any particular

5 Available at *http://en.wikipedia.org/wiki/jurisdiction* accessed on 05.01.2010.

6 *Ibid.*

7 Volume, 16 (1960) at 257.

8 Volume 13 (1959) at 196.

9 *Halsbury's Laws of England* (4th Edn) Reissue. Vol. at 317.

claim or matter, neither the acquiescence nor the express consent of parties can confer jurisdiction upon the court, nor can consent give a court jurisdictsion if condition which goes to the root of the jurisdiction has not been performed or fulfilled".

In the case of *Kiran Singh v. Chaman Paswan*[10] the apex court of India observed, "a defect of jurisdiction strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties" and the principles of *estoppels*, waive and acquiescence or even *res judicata* which are procedural in nature would have no application in a case where an order has been passed by the tribunal/court which has no authority in that behalf."[11] However, a distinction must be made between a decree passed by a court which has not territorial or pecuniary jurisdiction, and a decree passed by a court having no jurisdiction in regard to the subject of the suit. Whereas in the former case, the appellate court may not interfere with the decree unless prejudice is shown ordinarily the second category of the cases would be interfered with.[12] However, the Hon'ble High Court, Bombay held that 'the jurisdiction of the court would be ousted, if there was a bar to the maintainability of the suit'.[13]

II. FEDERAL APPROACH

According to the U.S. constitution, the lawsuits can be brought either in a State or of Federal court provided that the State in which the court is located must have a Long-Arm Statute which allows the court to assert jurisdiction over non-resident defendants. Although these statutes will differ from State to State, Fifth and Fourteenth Amendments of the U.S. Constitution[14] lay down the outer limits for the courts while asserting jurisdiction over the non-resident defendant and complying due process clause.[15]

---

10 AIR 1954 SC 340: (1955) 1 SCR 117.

11 *Hasham Abbas Sayyad* v. *Usman Abbas Sayyad* A.I.R. 2007 (5)SC 1077 (1080).

12 *Hasham Abbas Sayyad* v. *Usman Sayyad*, A.I.R. 2002 (5) S.C. 1077 (1081).

13 *Smith Klin Beecham Consumer Healthcare Gmbhy* v. *Hindustan Lever Ltd.* (2002) 1 Mah. L.J. 453.

14 Choice of law Theory and Background available at *www.hewrn.com./choice co.htm* visited accessed on 20.8.07.

15 *Ibid.*

It is necessary to note that the United States has not codified the law of jurisdiction. Therefore, courts have evolved the various tests to measure the legitimate exercise of judicial power over the parties to the litigation.[16] In United States the law of jurisdiction has been classified as follows: (a) subject matter of jurisdiction (*Subjectam*), (b) personal jurisdiction *(Personam)*, (c) territorial jurisdiction (*Locum)* and prescriptive jurisdiction[17].

In absence of clear rules and regulations, the courts in the United States of America have devised new jurisprudence in order to resolve rivalry grievances of the parties in online world. Prior to the mid-nineties, there were very few decisions in U.S. courts on competence over the Internet disputes. Since 1995, there has been a true explosion of cyber space litigation and American courts have used various tests to determine whether they have jurisdiction over the Internet disputes. Some courts have simply applied traditional rules while other has tried to devise new tests to accommodate the peculiarities of the online environment.

(a) Pennoyer Test

In 1877 *Pennoyer* laid down the fundamental principles that "every State possesses exclusive jurisdiction and Sovereignty over persons and the property within its territory and no State can exercise direct jurisdiction and authority over person and property within its boarder. Due to these laws one State could not infringe the laws of another State because that other State is also a sovereign power"[18]. However, off late during 18th and early 19th centuries, the federalist model of jurisdiction upon which *Pennoyer* test was founded no longer reflected political and commercial reality. After the second world wars, there was an exponential growth of industrialization, modernisation and computerization in the all walks of life. The expansion of the United States and international Commerce after the world wars and the increasing ease of travel across the State lines created problems when

---

16 Law of jurisdiction available at *www.Lex2K.org/index/index/htmal* accessed on 27.07.2008.

17 Prescriptive jurisdiction is the exercise of State authority to regulate local conduct, transactions and activities.

18 *Pennoyer* v. *Neff* 95 U.S.714 (1877).

State could not assert jurisdiction over entities that established connections with the State. The interstate movement of goods and persons compelled the States to provide a way for their citizens to sue non-residents in local court. Unfortunately, *Pennoyer Test* could not stand the test of time, as it has the effect of prohibiting the States from exercising personal jurisdiction over persons and things physically located outside of its territorial limits. To keep a pace with the changing needs of the society, the State started to enact Long Arm Statutes,[19] which permitted the local courts to exercise personal jurisdiction over non residents-defendants. Provided the exercise of jurisdiction did not violate the 14th Amendment of the US Constitution.

(b) Minimum Contact Test

After analysing the perspective of natural person, the court observed that a State may sue a non-resident foreign corporation provided the corporation has "*minimum Contact*" with the forum State and provided that exercise of jurisdiction does not violate the "principle of fair play and justice". This case permits the exercise of jurisdiction in the light of "virtual" presence of defendant within a State. Moreover, in the case of *International Shoe Co. v. Washington, Office of Unemployment Compensation and Placement et al.*[20] the Supreme Court observed that a court's exercise of personal jurisdiction over a non-resident defendant is proper if that defendant has a certain "*minimum contacts*" with the forum State and the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. Later, with the advent of ecommerce this judgment has been used by the courts all over the United States as an established law in identifying "*minimum contacts*" to claim personal jurisdiction over a non-resident.

Notwithstanding the fact, the U.S. Supreme Court in *Worldwide Volkswagen Corp. v. Woodson*[21] cleared the mist between '*rem* jurisdiction and *personam* jurisdiction' putting watertight demarcation that there must be certain relationship between non-residents property and law suit. The fact of this case as; a *New York Volkswagen* dealer

[19] *Hess* v. *Pawl ski* 274 U.S.325 1927.
[20] *326 U.S. 310, 316 (1945).*
[21] *444 U.S. 286, 295 (1980).*

sold a car to New York residents. The New York couple relocated to Oklahoma where they met with an automobile accident that injured the wife and child. The purchaser filled a suit in Okalahoma under its Long-Arm Statute claiming defective automobile design". The Supreme Court held that the defendant corporation did not have minimum contacts with State of Oklahoma because they limited their sales, advertisements and business within the New York only. The sole fact that then product sold was readily movable in commerce did not subject to the defendants jurisdiction of courts outside the area of where they conducted business. The court held that foresee ability has never been a sufficient benchmark for personal jurisdiction under Due Process Clause.

(c) Effects Test

When a defendant targets a particular forum, he may be called to answer his or her actions in that forum. The court asserted its jurisdiction on the principle that when the defendant knew that her action would be injurious to the plaintiff, and then she must reasonably anticipate being sued into the court where the injury occurred. The "effects test" is of particular importance in cyber space because conduct in cyber space often has effects in various jurisdictions. A case centred on that an allegation that New Mexico published allegedly defamatory business statement about an Arizona company. The defendant, which has no Arizona presence, sent e-mail to some customers and other known distributors, and posted information relating to the termination of the supplier/distributor relationship which the plaintiff contended as defamatory on its Web site in the New Mexico. While endorsing the "effects principle", the court held that, the e-mail, Web page, and forum message were both directed at Arizona and allegedly caused foreseeable harm to EDIAS.[22] In *United States v. Thomas*[23] the defendant operated a computer Bulletin board system from their home California. They loaded on their bulletin board images depicting bestiality, oral sex, incest etc. Access to these files

[22] *Noel Cox, 'The Regulation of Cyberspace and the Loss of National Sovereignty' A paper presented in the 2002 Annual Conference of Socio-Legal Studies Association, University of Wales Aberystwyth, available at http://www. geocities.com/noelcox/regulation of cyberspace,htm accessed on 09.12.2007.*
[23] *74F3d 1996.*

was limited to the members who were given password after they paid a membership. Subsequently, an undercover agent was accepted as an agent. When the agent downloaded explicit material pertaining to oral sex, incest, bestiality etc. at Memphis in Tennessee, it violated moral standard laid down in Tennessee District. The defendant belonging to the resident of California vehemently objected that that act did not occur in the territorial jurisdiction Tennessee rather California. The Sixth Circuit relying on the "effects test" delivered a judgment that Tennessee court is enough competent to entertain the matter.

(d) Purposeful availment Test

The concept of *"purposeful availment"* is that person by conducting activities within a State enjoys certain benefits and privileges of that State and with these privileges certain obligation arises which bears nexus with the activities within the State which require them to answer litigations in that State. Parties who reach out beyond one State and "creates continuing relationships and obligations with the citizens of another State are subjected to relations and sanctions in the other States for consequences of their activities. In the case of *Compuserve Inc. v. Patterson*[24], the United Courts held that the doctrine of minimum contacts would apply to contracts of electronic nature. The factual matrix of the instant case as: *Richard Patterson*, located in Texas, entered into an electronic shareware registration agreement with *CompuServe* that permitted the use by Richard Patterson of the services of CompuServe for the marketing and sale of his Internet navigation product. When CompuServe later marketed and sold its Internet Navigation Software, an Intellectual Property dispute arose between Patterson and CompuServe, and CompuServe filled a declaratory suit to clear its name in Ohio. In the first Instance, this suit was dismissed on the ground that CompuServe did not have personal jurisdiction to bring this suit. On appeal, this decision was reversed on the following grounds:

a. Patterson had entered into a written albeit electronic contract with CompuServe that expressly provided that it was entered into and governed by Ohio Law.

b. Patterson exclusively used CompuServe to advertise market and distribute his product.

[24] 1996 U.S. Appeal Lexis 17837s.

c. Patterson derived benefits from the marketing relationship with CompuServe, which income flowed through CompuServe in Ohio to Patterson.

Thus, the court in Ohio therefore, assumed jurisdiction over the dispute because of the repeated contact (telephone calls and sending mails) that Patterson had with CompuServe, within the territory of Ohio, evidenced by Patterson's repeated efforts at sending mail and software products to CompuServe for distribution. Moreover, the Ohio Long Arm Statute allows and Ohio Court to exercise jurisdiction over a non-resident "transacting business" in the State to the full extent allowed by the due process clause of the fourteenth Amendment to the U.S. constitution.

(e) Active and Passive Tests

For jurisdiction purpose, websites are split into two groups; 'Passive' and Active. Passive sites as name suggests provide information in a 'read' only format. Active sites encourage the browser to enter information identifying the bowers or providing background on the browsers interest or buying habits[25]. Subsequently, this principle was sharpened in *Webber v. Jolly*[26] wherein local court is not competent to assert the jurisdiction over the foreign national. The factual matrix of this case runs as : "the plaintiff, Eileen Weber, was resident in New Jersey, USA and made inquiries of the local travel agent about hotel accommodation in Italy. The defendant (Jolly) ran a hotel Chain in Italy (Europe), and had its principal place of business in Valdagno, Italy. Jolly did not conduct any business in New Jersey. However, it did provide photographs of hotel rooms, descriptions of hotel facilities, in formation about number of rooms and telephone numbers on the internet. Ms. Weber booked a stay at one of Jolly hotels through the travel agent and was injured during her stay at the hotel. On her return to USA, she sought to sue the hotel Chain in a USA court for failure to keep promises. A threshold question was whether the courts had jurisdiction over jolly based on the facts that they advertised on the Internet and that this advertising could be viewed in New Jersey.

[25] Vakul Sharma, *Information Technology Law and practice* (Universal Publishing Co. 2010) at 263.

[26] 997 F. Supp. 327 (September 1997) .

From the above deliberation, three solidified cornerstones principles are emerged to assert the jurisdiction in the Internet on the ground of active and passive transactions.

(a) The first category includes cases where defendants actively do business on the internet:

(b) The second category deals with the situation where a user can exchange information with the host computer and

(c) The third category involves passive web sites that merely provide information or advertisement to users.

III. THE EUROPEAN APPROACH

The European approach to exercise personal jurisdiction in online environment is rather different from the American approach. The rules determining which courts have jurisdiction over a defendant are set out in a regulation issued by the Council of the European Unions, known as the Brussels Regulation[27]. This new regulation is a modification of 1968 treaty among European countries governing jurisdiction and the enforcement of judgment in civil and commercial matters.

Article 2 of Brussels regime sets the rules that a person may only be sued in the Member State in which he/she is domiciled[28]. Furthermore, a person domiciled in a contracting State may, in another contracting State, be sued in matters relating to contract, in the courts for the place of performance of the obligation in question[29]. Article 60[30] provides that the domicile of a company or other association is where it has it's a statutory seat and its central administration or its principal place of business.

Article 15 of the Convention says that the consumer may bring proceedings in his own court against a trader if "in the State of the consumer's domicile the conclusion of the contract was proceeded by a specific saying that the consumer may sue at home if the trader pursues commercial activities in the Member State of the consumer's

[27] Council Regulation (EC) No. 44/2001 of 22 December 2000.

[28] *Ibid.*

[29] *Ibid.* Article 5.

[30] *Ibid.*

domicile or by any means direct such activities to that Member State. Article 15 has broadened the scope of trader's liability, as they can now be sued in foreign courts, i.e. for an on line trader defending lawsuits at multiple locations could be both expensive and frustrating.

A website is accessible from anywhere and it would be for the European court to decide what constituted "directed activities". A website may be seen directed to other States "if it offers a choice of the languages or currencies of those States, or gives product specifications or deliver times or prices for them. It amounts to a marketing exercise whereby a website is promoting its products or services to consumers in specific EU States[31].

IV. JURISDICTION IN INTERNATIONAL LAW

International law governs relations between independent sovereign States and they legally bind on States in their intercourse with each other. Under international law, there are six generally accepted bases of jurisdiction or theories[32] under which a state may claim to have jurisdiction to prescribe a rule of law over an activity: (1) Territorial principle (2) Nationality principle (3) Protective principle (4) Passive personality principle (5) The 'Effects Doctrine" and (6) Universality principle.

(a) Territorial Principle : It has two component: (a) objective territorial principle where a State exercise its jurisdiction over all activities that are completed within its territory, even though some element constituting the crime or civil wrong took place elsewhere; and (b) 'subjective' territorial principle, where a State asserts its jurisdiction over matters commencing in its territory, even though the final even may have occurred elsewhere. In *SS Lotus Case*[33], it was observed by the Permanent Court of International Justice that 'the first and foremost restriction

[31] The UK Department of Trade and Industry had proposed a way out, that if the website is directed at a particular foreign territory, then the consumer can bring proceedings against the trader in their home state, but if the website is a general l site, and not especially directed at the consumer's territory, then trader's own local law would be applicable.

[32] Darrel Menthe, "*Jurisdiction in Cyberspace; A Theory of International Spaces*" available at <*http//www.mttlr.org/volfour/menthe.html*> accessed on 29.09.2006

[33] *France* v. *Turkey PCIJ* Ser A (1927), NO. 9.

imposed by international law upon a State is that –failing the existence of a permissive rule to the contrary- it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention'. The chances are that in view of components of acts involving territories of two or more States, the only way out to resolve the issue is through mutual negotiation, extradition to the most affected State or simply by an exercise of jurisdiction by the State having custody of the accused.

(b) Nationality Principle : It is for each State to determine under its own law who are its nationals. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State. Nationality serves above all to determine that the person, upon whom it is conferred, enjoys the rights and is bound by the obligations, which the law of the State in question grants to or imposes upon its national. Under the garb of nationality principle, a State may exercise jurisdiction over its own nationals irrespective of the place where the relevant acts occurred.

(c) Protective Principle : A State relies upon this principle when its national security or a matter of public interest is in issue. A State has a right to protect itself from acts of international conspiracies and terrorism, drug trafficking, etc. In *Attorney-General of the Government of Israel v. Eichmann,*[34] the district Court of Jerusalem held, "The State of Israel's right to punish' the accused derives, in our view, from two cumulative sources; a universal source (pertaining to the whole of mankind), which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source, which gives the victims nation the right to try any who assault its existences."

(d) Passive Personality principle : It extends the nationality principle to apply to any crime committed against a national of a State,

[34] 36 ILR(1961) 5.

wherever that national may be. It in a way provides that the citizen of one country, when he visits another country, takes with him for his 'protection' the law of his own country and subject those, with whom he comes into contact, to the operation of the law. The jurisdictional aspect of 'passive personality' has been elaborated further in the case of *United States vs. Yunis*[35] where the US District Court, (Columbia) held 'this passive personality principle authorizes States to assert jurisdiction over offences committed against their citizens abroad. It recognizes that each State has a legitimate interest protecting the safety of its citizens when they journey outside national boundaries. Because American nationals were on board the Jordanian aircraft, the government contends that the Court may exercise jurisdiction over *Yunis* under this principle".Though the principle may be referred to as a controversial one, it extends the 'arm of national law further even in the foreign territories". Nevertheless, the principle has been adopted as a basis for asserting jurisdiction over hostage makers[36].

(e) The Effect Doctrine : It is an extra-territorial application of National laws where an action by a person with no territorial or national connection with a State have an effect on that State. The situation is compounded if the act is legal in the place where it was performed. The effect doctrine is primarily a doctrine to protect American business interests and is applicable where there are restrictive trades or anti-competitive agreements between corporations. In *Hartfor Fire Insurance Co. vs. California,*[37] the question was whether the London insurance companies refusing to grant reinsurance to certain US antitrust laws and tried in the United States. The US Supreme Court held that the US court did have jurisdiction and that there exists no conflict between domestic and foreign law and 'where a person subject to regulation by two States can comply with the law of both.'

(f) Universality Principle : The scope and scale of the universality principle is quite vast. A State has jurisdiction to define and

[35] 681 F Supp 896 (1988).
[36] International Convention Against The Taking of Hostage, 1979.
[37] 113 S. Ct. 2891 (1993).

prescribe punishment for certain offences recognized by the community of nations as of universal concern. It includes acts of terrorism, attacks on or hijacking an aircraft, genocide, war crimes etc. A State may assert its universal jurisdiction irrespective of who committed the act and where it occurred. The ambit is broader as it was deemed necessary to uphold international legal order by enabling any State to exercise jurisdiction in respect of offences, which are destructive in nature. The principles of jurisdiction of international law take cognizance of both State and international laws. The objective of the State law is not only to ascertain the supremacy of its judicial sovereignty but also general prohibition against the extra-territorial application of domestic laws.

V. INDIAN APPROACH

(a) Criminal Dimension:

Procedurally, the jurisdictional provisions to inquiries or trial of offences are contained in sections 177 to 189 in Chapter XIII of the Code of Criminal Procedure 1973. Section 177 reads as follows: Every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed. If a court other than the one which has territorial jurisdiction tries the offence then it is only an irregularity and such trial is not vitiated unless that irregularity has occasioned a failure of justice[38]. In the case of *Purushottamdas Dalmia v. West Bengal*[39] the Supreme Court observed, 'Jurisdiction of courts is of two kinds. One type of jurisdiction deals with respect to the power of the courts to try particular kinds of offences. That is a jurisdiction which goes to the root of the matter, and if court not empowered to try a particular offence does try it, the entire trial is void. The other jurisdiction is what may be called territorial jurisdiction. This is clear from the provisions of sections 178, 188, 197(2) and 531 Code of Criminal Procedure, 1973. Territorial jurisdiction is provided just as matter of convenience. Keeping in mind the administrative

[38] Section 462 Code of Criminal Procedure, 1973

[39] AIR 1961 SC 1589: 1961 (2) Cr. L.J. 728: (1962) 2 SCR 101: *Nasirddin Khan* v. *Bihar*, AIR 1973 SC 186: 1973 Cr. LJ 241 *and Smt. Raj Kumar Vijh*, v. *Dev Raj Vijh*, AIR 1977 SC 1101: 1977 Cr. LJ 940.

point of view with respect to the work of a particular court, the convenience of the accused who will have to meet the charge levelled against him and the convenience of the witnesses who have to appear before the court. It is therefore provided in section 177 that an offence would ordinarily be tried by a court within the local limits of whose jurisdiction it committed".

The general rule of jurisdiction laid down in Section 177 is subsequently sharpened by Section 178 which deals with situations where there is uncertainly as to the local area within which the crime was committed. Section 178 says every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed : (a) when it is uncertain in which of several local area an offence was committed, or (b) where an offence is committed partly in one local area and partly another, or (c) where an offence is a continuing one, and continues to be committed in more local areas than one, or (d) where it consists of several acts done in different local areas it may be inquired into or tried by a court having jurisdiction over any of such local areas.

The provisions of section 177 are further expanded with section 179. Thus, Section 179 reads: "when an act is an offence by reason of anything which has been done into of a consequence which has ensured, the offence may be inquired into or tried by a court within whose local jurisdiction such thing has been done or such consequence has ensured", and in addition, special mention has been made of offences that are committed by letters or telecommunication message, be inquired into or tried by any court within whose local jurisdiction such letters or messages were sent or were received and any offence of cheating and dishonestly inducing delivery of property may be inquired into or tried by a court within whose local jurisdiction the property of the person deceived was delivered or was received by the accused person[40]. It is pertinent to note that the term 'letters' has been expanded to mean telecommunication messages, which had a special significance in this age of e-mail communication. In the event such as offence is committed over the Internet by using e-mail this is the section which the prosecution will resort to.

[40] Section 182 Code of Criminal Procedure Code, 1973

Section 188 provides for the necessary procedural counterpart to Section 4 of Indian Penal Code 1860 and to exercise extra-territorial jurisdiction. It says, when an offence is committed outside India: (a) by a citizen of India, whether on the high seas or elsewhere: or (b) by a person, not being such citizen, on any ship or aircraft registered in India, he may be dealt with in respect of such of such offence as if it had been committed at any place within India at which he may be found: provided that, notwithstanding anything in any of the preceding sections of this chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the central government. The prime object underlines that the central government may refuse to extradite the offender if he is wanted for being tried in a foreign country subsequent to his trial in Indian Court or by refusing to sanction a prosecution against him if he has already tried in foreign country in respect of the same offence[41].To a large extent, these issues would be resolved through the specific contexts of individual extradition treaties between India and the country seeking extradition.

However, the jurisdictional principle of Indian Penal Code 1860 based on territoriality, and nationality has been widened by the Information Technology Act, 2000. Section 1(2) states that the Act[42] shall extend to the whole of India and, save as otherwise provided in this Act; it applies also to any offence or contravention there under committed outside India by any person.

Further section 75[43] says: (1) subject to the provisions of sub-section (2), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality. (2) For the purposes of such-section (1), this Acts shall apply to offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

---

41 R.V. Kelkar, *Criminal Procedure*, Fourth Edition. (Lucknow : Eastern Book Company, 2001) at 201.

42 The Information Technology Act, 2000.

43 *Ibid.*

For the offences or contraventions contained within the Information Technology Act, 2000 any person whether or not he is a citizen of India can be made liable for his act whether committed within or outside India provided the effect of the same is felt on any computer, computer system, or computer network, located in India. Therefore, even if a foreigner outside the territorial limits of India commits an offence or contravention under the Information Technology Act, 2000 the courts in India would have the jurisdiction over him. The extra territorial operation of the Information Technology Act, 2000 has been put in place considering the ease with which anybody actually presents any where in the world can commit a cyber crime having an impact in India. In this way the legislature in India has been influenced by the *effect test* as provided in section 182 of Code of Criminal Procedure 1973. Therefore, any offence which is committed by means of telecommunication message can be inquired into or tried by any court within whose local jurisdiction such messages were received.

(b) Civil Dimension

In civil matters whether the jurisdiction of the courts is exclusive or non exclusive in the online setting, one should view (a) subject matter having regard to the location of immoveable property: (b) place of residence or work of a defendant or place where cause of action has arisen as highlighted in the Code of Civil Procedures 1908.

Sections 16 to 18 deal with suits relating to immovable property. Clauses (a) to (e) of Section 16 deal with the following five kinds of suits, viz; (a) suits for recovery of immovable property; (b) suits for partition of immovable property; (c) suits for foreclosure, sale or redemption in case of mortgage of or charge upon immovable property: (d) suits for determination of any other right to or interest in immovable property: and (e) suits for torts to immovable property.

What will happen if the property is situate within the jurisdiction of more than one court? Section 17 of the Code of Civil Procedure, 1908 provides for this contingency. It says that where a suit is to obtain a relief respecting, or damage for torts to immovable property situate within the jurisdiction of different courts, the suit can be filed in the court within the local limits of whose jurisdiction any portion of the property is situate provided that the suit is within the pecuniary jurisdiction of such court. This provision is intended for the benefit of suitors and to prevent multiplicity of suits.

A case may, however, arise where it is not possible to say with certainty that the property is situating within the jurisdiction of the one or the other of several courts. In such a case, one of these courts, if it is satisfied that there is such uncertainty, may after recording a statement to that effect proceed to entertain and dispose of the suit.[44]

Section 19 of Code of Civil Procedure states "where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendants resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the said courts."

Further, Section 20 states "every suit shall be instituted in a court within the local limits of whose jurisdiction: (a) the defendant, or each of the defendants where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, as aforesaid acquiesce in such institution; or (c) the cause of action[45], wholly or in part arise.

(c) Basis of Accepting Foreign Judgment

A foreign judgment[46] is not conclusive in certain circumstances in India. Section 13[47] of the Code of Civil Procedure speaks as: a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except:

(a) where it has not been pronounced by a court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

[44] Section 18 of the Code of Civil Procedure, 1908.

[45] *Oil and Natural Gas Commission* v. *Utpal Kumar Basu and other* (1994) 4 SCC 711.

[46] Section 2(6), Code of Civil Procedure, 1908 Judgment means the judgment of a foreign court.

[47] Section 44A : Execution of decrees passed by Courts in reciprocating territory.

(c) where it appears on the face of the proceedings to be founded on an incorrect view of the international law or a refusal to recognize the law of India in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in India.

In India, recently, justice *Sanjaya Kishan Kaul*, *India TV (Independent News Service Ltd) v. India Broadcast Live LIC & Ors*[48] related to the domain name *Indiatvlive.com* registered and used by the defendants as a domain name for video streaming of Indian television channels has exercised the jurisdiction over non-resident defendants. On this issue the Court followed the principles laid down in *Modi Entertainment Network and another*[49]. In the said case the Hon'ble Supreme Court of India observed as, 'the courts in India like the courts in England are courts of both law and equity. The Principles governing grant of injunction-an equitable relief- by a court will also govern grant of anti-suit injunction which is but a species of injunction. When a court restrains a party to a suit/proceeding before it from instituting or prosecuting a case in another court including a foreign court, it is called anti-suit injunction. It is a common ground that the courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction in an appropriate case.

CONCLUDING OBSERVATIONS

The Internet operates in an environment which allows infringements to take place with no clear and convenient jurisdiction. The challenge to the legal community posed by such an environment is currently being dealt with at the national and international levels. There has been an ongoing effort to form new rules that would apply to the online environment. Some very interesting beginnings have been made in the area of adjudication through the Uniform Domain Name Disputes Resolution policy adopted on August 26, 1999 by the

[48] Judgment dated 10.7.07 in CS (OS) No. 102 of 2007;MANU/DE/1703/2007.

[49] *Modi Entertainment Network* v. *WSC Cricket Pvt. Ltd* 2003 (4) SCC 341; MANU/SC/0039/2003.

Internet Corporation for Assigned Names and Numbers.[50] In Indian perspective In.Registrar. com[51] and Computer Emergency Response Team [52] etc. are the successful initiaves adopted by the Indian Parliamentarian.

The Internet is a place where the infringer is neither domiciled nor has his place of business or property within national territory, the right holder has no choice but to enforce judgment obtained within national territory in a foreign country. At regional level, there are proceedings for recognition of foreign judgment, but they are sometimes rather tedious and time consuming. Consequently steps should be taken towards creating an international convention for the recognition of foreign judgments, applicable throughout the world.

To conclude, technology reconstructs societies and alters its concern: and law is an instrument through which these altered concerns need to be regulated, managed and facilitated. To protect the rights of the netizens in the online world, the courts around the world are struggling to come up with a coherent, consistent and concurrent doctrine of personal jurisdiction. Though, the application of real world norms in the virtual society is well established, the virtual world should be subjected to a greater degree of control than the real world and it should be based necessarily different from the principles of real world regulation.

●

---

50 In 1999, the Internet Corporation for Assigned Names and Number, a non-profit, Private Sector Corporation based in Marina de Rey, California, and USA assumed management of the domain name system from NSI (Network Solutions Inc.). The main functions of ICAN are: sets rules for giving the numbered IP addresses/protocol parameters (b) adding new suffixed for the directory and (c) sets rules for arbitrating disputes over domain ownership.

51 The IN Registry *(http://www.registry.in)* has been created by NIXI (National Internet Exchange of India) (http://www.nixi.in/index.htm), a Not-for-profit company registered under section 25 of the Companies Act 1956. It implements the various of the new policy set out by the Government of India and its Ministry of Communications and Information Technology, Department of Information Technology.

52 Section 70B, Ins. By the Information Technology (Amendment) Act, 2008.

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 175-190

Enforcement of Foreign Arbitral Awards: Is the Public Policy Exception in Indian Law Consistent with the Global Trends?

Rajnish Kumar Singh*

Abstract : *Certainty and predictability are the most important values of an arbitral process. To achieve the goal, international instruments in the form of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1985 United Nations Commission for International Trade Law (UNCITRAL) Model Law on arbitration in particular have made attempts to secure finality and enforceability of international arbitral awards across the world in a uniform manner. Indian legislature responded to the above international framework and enacted the Arbitration and Conciliation Act, 1996. The Act in its Preamble states that it is based on the Model Law and thus conveys the impression that Indian law is consistent with the global trend. Present article examines the Indian law on enforcement of foreign awards in the context of public policy exception to test the correctness of the above conclusion.*

Key Words: *Foreign awards, enforcement, public policy, New York Convention, UNCITRAL, arbitration, error of law, international commercial arbitration, international public policy.*

Contents:

I. Introduction
II. Public Policy Exception in Indian Law
III. Application of Part I of the Act to Foreign Awards
IV. Effect of Application of Part I of the Act to Foreign Awards in the Context of Public Policy Exception
V. Conclusion: Evolving International Public Policy

---

* Assistant Professor, Faculty of Law, Banaras Hindu University, Varanasi, U.P., India. Author may be contacted at *rajnishsinghlaw@gmail.com.*

I. INTRODUCTION

The growth of law of arbitration at international level indicates that all the Conventions on international arbitration emphasize on certainty and predictability in the process of arbitration, and in particular, their attempt is to secure finality and enforceability of international arbitral awards across the world in a uniform manner. Thus a coordinated effort of the world community can be seen in the last few decades. The policy of harmonization of laws on the subject of international commercial arbitration gets reflected in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1985 United Nations Commission for International Trade Law (UNCITRAL) Model Law on arbitration.[1] The UNCITRAL Model law aims mainly at restricting and limiting the legal regulation of arbitration and increasing the freedom of parties to order the arbitral process as they choose. Its principle concern is the extent of control over, and freedom granted to, domestic arbitral proceedings. Thus it expressly confers on arbitral tribunal a broad range of powers and jurisdiction, which they can exercise without much judicial interference.[2]

Indian legislature responded to the above international framework and enacted the Arbitration and Conciliation Act, 1996. The Act is based on the UNCITRAL Model Law. The Act in its Preamble states that: "it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law…". The Act of 1996 covers both international and domestic arbitration, *i.e.*, where at least one party is not an Indian national and also arbitrations where both parties are Indian nationals respectively. Part I of the Act entitled 'Arbitration' is general and contains chapters I to X while Part II deals with 'Enforcement of Certain Foreign Awards'. Chapter I of part II deals with New York Convention Awards and Chapter II deals with Geneva Convention Awards. A plain reading of the 1996 Act shows that speedy arbitration and least court intervention are its main

1 Homayoon Arfazadeh, "In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception", *Am. Rev. Int'l Arb*, 13 (2002) at 43.

2 TT Arvind, "The Transplant Effect, in Harmonization", ICLQ vol. 59, January 2010 at 70.

objectives. Section 5 of the Act provides for judicial minimalism.[3] This basic provision is found in the laws of all the countries which have adopted the UNCITRAL Model.

In the light of the above one can arrive at a conclusion that the process of harmonization and adoption of a model law leaves no doubt as regards the consistency of Indian law with the global trend. Present article examines the Indian law on enforcement of foreign awards in the context of public policy exception to test the correctness of the above conclusion. In part I instances of public policy exceptions in Indian law have been identified and discussed. Part II and part III bring to discussion the issue of applicability of Part I of the Act to the foreign awards which lays the foundation to examine the need to evolve the concept of international public policy.

II. PUBLIC POLICY EXCEPTION IN INDIAN LAW

Pursuant to the policy of judicial minimalism contained in section 5, section 34 imposes certain restrictions on the right of the court to set aside an arbitral award. It provides seven grounds for setting aside an award. The first five grounds have been set forth in section 34(2)(a). In order to invoke these grounds the party challenging the award will have to plead and prove the existence of any one of these grounds. The rest two grounds are contained in section 34(2)(b) which provides that an arbitral award may be set aside by the court on its own initiative on the grounds that the subject matter of dispute is not arbitrable and that the impugned award is in conflict with the public policy of India.[4]

3 Arbitration and Conciliation Act, 1996, Section 5: Notwithstanding anything contained in any other law for the time being in force, in matters covered by this Part (Part I), no judicial authority shall intervene except where so provided in this Part.

4 Arbitration and Conciliation Act, 1996, Section 34: Application for setting aside arbitral award.- (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3). An arbitral award may be set aside by the Court only if: (a) the party making the application furnishes proof that: (i) a party was under some incapacity, or (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of

In relation to enforcement of foreign awards, the grounds on which the enforcement may be refused are contained in section 48 of the Act. It legislates the language of article 36 of the Model law which implements article V of the New York Convention in identical language.[5] It also contains seven grounds including the public policy exception.

It is said that the fact that international instruments provide judicial review on the merits of an award on the ground of incompatibility with the forum's public policy is an apparent paradox. For many practitioners and legal commentators, the choice of public policy as a ground for vacating an international arbitral award is rather puzzling, since it could potentially thwart efforts aimed at achieving uniformity of standards and predictability of outcome in the field of international arbitration.[6] In the Indian context while defining the meaning of the phrase 'public policy of India' the Supreme Court in the case of *Oil & Natural Gas Corporation Ltd.* v. *SAW Pipes Ltd.*[7] observed that:

the arbitral proceedings or was otherwise unable to present his case; or (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matter beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Past; or (b) the Court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or (ii) the arbitral award is in conflict with the public policy of India. Explanation- Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced of affected by fraud or corruption or was in violation of section 75 or section 81.

5 OP Malhotra, *The Law and Practice of Arbitration and Conciliation*, Ist Edition, (New Delhi : Lexis Nexis Butterworths, 2002) at 30.

6 According to UNCITRAL's Commission Report, U.N. Documents, A/40/17 dated August 21, 1985, at No. VII, it was even proposed during the preparation of the UNCITRAL Model Law that "the provision 34(2) (b) should be deleted since the term public policy was too vague." *Supra* note 1.

7 AIR 2003 SC 2629

> "The phrase 'Public Policy of India' is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression 'public policy' does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept 'public policy' is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent the Court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and Constitutional provisions."

On an earlier occasion in the case of *Central Inland Water Transport Corporation Limited and Anr.* v. *Brojo Nath Ganguly and Anr,*[8] the Court observed that "From the very nature of things, the expressions 'public policy', 'opposed to public policy', or 'contrary to public policy' are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognized head of public policy, the courts have not shirked from extending it to the new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. ***There are two schools of though – "the narrow view" school and "the broad view" school.*** According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law making in this area.

In *Renusagar Power Co. Ltd.* v. *General Electric Co*[9]., Supreme Court considered Section 7(1) of the Arbitration (Protocol and Convention) Act, 1937 which provided that a foreign award may not

8 AIR 1986 SC 1571.

9 (1994) I SCC 644.

be enforced under the said Act, if the Court dealing with the case is satisfied that the enforcement of the award will be contrary to the Public Policy. The Court arrived at the conclusion that Public Policy comprehended in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 is the 'Public Policy of India' and does not cover the public policy of any other country. For giving meaning to the term 'Public Policy', the Court observed: "Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to **(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality**."

The first two grounds which the court set forth are reasonable enough, but the third confers a very wide discretion upon the courts, giving as it does the power to refuse to enforce any award that they believe produces an 'unjust' result.[10] Since neither the Geneva

[10] *Supra* note 2, at 73.

Convention nor the New York Convention recognized justice or morality as a ground for refusing to recognize a foreign award, it is apparent that the above definition given by the court can not be considered to be a narrow definition.

In *ONGC* case[11], court went a step forward by adding 'patent illegality' to the above list of what constitutes violation of public policy. It was decided in the context of section 34(2)(b) of the Arbitration and Conciliation Act 1996. The court justified the expansion by holding that the narrow meaning given to the term 'public policy' in *Renusagar's* case[12] is in context of the fact that the question involved in the said matter was with regard to the execution of the award which had attained finality. It was not a case where validity of the Award is challenged before a forum prescribed under the Act. The scheme of Section 34 which deals with setting aside the domestic arbitral award and Section 48 which deals with enforcement of foreign award are not identical. A foreign award by definition is subject to double exequatur. This is recognized *inter alia* by Section 48(1) and there is no parallel provision to this clause in Section 34. The court relied on the opinion of eminent Jurist & Senior Advocate Late Mr. Nani Palkhivala who, while giving his opinion to *'Law of Arbitration and Conciliation' by Justice Dr. B.P. Saraf and Justice S.M. Jhunjhunuwala*, noted thus:

> ".... The new arbitration law has been brought in parity with statutes in other countries, though I wish that the Indian law had a provision similar to Section 68 of the English Arbitration Act, 1996 which gives power to the Court to correct errors of law in the award. I welcome your view on the need for giving the doctrine of "public policy" its full amplitude. I particularly endorse your comment that Courts of law may intervene to permit challenge to an arbitral award which is based on an irregularity of a kind which has caused substantial injustice. If the arbitral tribunal does not dispense justice, it cannot truly be reflective of an alternate dispute resolution mechanism. Hence, if the award has resulted in an injustice, a Court would be

[11] *Supra* note 7

[12] *Supra* note 9

well within its right in upholding the challenge to the award on the ground that it is in conflict with the public policy of India."

The Law Commission of India in its report[13] has also recommended inclusion of patent illegality as a ground to set aside an award. The report reads: "So far as 'error of law' apparent on the face of the award in respect of purely domestic awards between Indian nationals, the Commission is inclined to include this ground provided the error relates to a 'substantial question of law'. This view is based to a large extent on section 28 of the Act and considerations for upholding the rule of law and public interest but at the same time restricting the time of appeal to substantial question of law."

It is not out of context to mention that English courts have always maintained the distinction between the policy that an English court would adopt in respect of an arbitration conducted in England and an arbitration conducted abroad.[14] In the case of *deursche Schachtbau-und-Tiefbohrgesellschaft mbH* v. *R'as AL-Khimah National Oil Company,*[15] the Court of Appeal interpreted the term 'public policy' as 'international public policy'. In England the general pro-enforcement bias informing the Convention and explaining its super session of the Geneva Convention points towards a narrow reading of the public policy defence. An expansive construction of this defence would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement. Enforcement of foreign awards may be denied on the basis only where enforcement would violate the forum state's most basic notions of morality and justice.[16]

In USA also the public policy exception is construed narrowly and such challenges are rarely successful.[17] This can be seen in the US Supreme Court judgment in the case of *Eastern Associated Coal Corp.*

[13] Law Commission of India, 176th Report on "The Arbitration and Conciliation (Amendment) Bill, 2001 at 141.

[14] *Supra* note 5, at 800.

[15] [1987] 2 All ER 769.

[16] *Parsons & Whittemore Overseas Co. Inc.* v. *Societe Generale De L'Industrie Due Papier (Rakta) and Bank of America,* (1824-34) All ER 258.

[17] *Town of South Windsor* v. *South Windsor Police Union Local* 1480, 255 Conn. 800, 770 A.2d 14, 169 L.R.R.M. (BNA) 2551 (2001).

v. *United Mine Workers of America*[18] which involved an arbitral award reinstating a truck driver, who twice failed drug tests required by federal regulation for those working in safety sensitive tasks, to his former position. The employer challenged the award claiming that the reinstatement violated the public policy of prohibiting workers who test positive for drugs from operating dangerous machinery. The Court upheld the award reinstating the employee. It stated that the award must be viewed as a contractual agreement between the parties that could only be overturned if such an agreed reinstatement requirement was contrary to public policy. The Court declared that the issue was not whether drug use violated public policy but, rather, whether a reinstatement agreement violated public policy. Since one of the goals of the federal testing policy was rehabilitation, the Court held that the reinstatement award, which punished the employee, required substance abuse treatment, and made it clear that another violation would result in termination, did not violate public policy.

Thus one can conclude from the above discussion that the law relating to public policy defence in India admits more that one interpretation. The justification is provided on the basis of the distinction between sections 34 and 48, but the fact remains that even the narrow definition of public policy given in the context of foreign awards is much wider than the UNCITRAL Model Law as well as the English and American practices.

III. Application of Part I of the Act to Foreign Awards

In the case of *Jindal Drugs Ltd.* v. *Noy Vallesina Engg. SpA.*[19] Court in India held that in so far as challenge to foreign award is concerned the scheme of the Act is clear that the remedy that is available to a person against whom that award has been made is to wait till the person in whose favour the award is made moves for enforcement of the award and it is then that such a person can challenge then validity of the award on the ground mentioned in section 48.

[18] Dist. 17, 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed. 2d 354, 16 I.E.R. Cas. (BNA) 1633, 165 L.R.R.M. (BNA) 2865, 142 Lab. Cas. (CCH) ¶10842 (2000). Cited from 1 Domke on Com. Arb. § 38:10.

[19] 2002 (2) Arb LR 322.

The relationship between part I and part II of the Act in relation to foreign award was explained in the case of *Force Shipping Ltd.* v. *Ashapura Minechem Ltd.*[20] where it was held that where there are special provisions for enforcement of foreign awards then the general provisions including provisions for challenge to the award would be excluded. Once that be so, the matter falls under part II of the act and provisions of part I would not apply. Under part I a decree can be executed only if the challenge under section 48 fails, if made. Under section 48, a foreign award becomes enforceable and is to be executed as a decree under section 36[21]. Again in *Bulk Trading S.A.* v.*Dalmia Cement (Bharat) Ltd.*[22], it was held that challenge to a foreign award cannot be made under section 34, which deals with challenge to domestic awards. A perusal of section 49[23] shows that it makes no reference to any application under section 34. An application under section 34 is not at all contemplated in so far as foreign awards are concerned.

Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement, two practical differences must be noted. Firstly, the ground relating to public policy may be different in substance, depending on the state in question (*i.e* state of setting aside or state of enforcement). Secondly, and more importantly, the ground for refusal of recognition or enforcement are valid and effective only in the state (or states) where the winning party seeks recognition and enforcement, while the grounds for setting aside have a different impact: the setting aside of an award at a place of origin prevents enforcement of that award in all other countries by virtue of article V(1)(e) of the 1958 New York Convention and article 36(1)(a)(v) of the UNCITRAL Model Law.[24]

The certainty of law relating to enforcement of foreign awards

[20] (2003) 3 Arb LR 432 (Bom)

[21] Arbitration and Conciliation Act, 1996, Section 36: Enforcement: Where the time for making an application to set aside the arbitral award under award shall be endorsed under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

[22] (2006) 1 RAJ 54 (Del).

[23] Arbitration and Conciliation Act, 1996, Section 49, Enforcement of foreign awards: Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

[24] G.K. Kwatra, *Arbitration and Conciliation Law of India*, 7th Edition (New Delhi : Universal Law Publishing Co., 2008) at.346.

suffered a setback by the decision of the Supreme Court in the case of *Bhatia International* v. *Bulk Trading S.A. and Anr.*[25] where it was held that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply. The judgment was based on the premise that if part I is not applied to arbitrations held out of India following consequences may emerge:

(a) There would be a lacuna as neither Part I or II would apply to arbitrations held in a country which is not a signatory to the New York Convention or the Geneva Convention (hereinafter called "a non-convention country"). It would mean that there is no law, in India, governing such arbitrations.

(b) It may lead to an anomalous situation, inasmuch as Part I would apply to Jammu and Kashmir in all international commercial arbitrations but Part I would not apply to the rest of India if the arbitration takes place out of India.[26]

(c) Lead to a conflict between Sub-section (2) of Section 2 on one hand and Sub-sections (4) and (5) of Section 2 on the other. Further, Sub-section (2) of Section 2 would also be in conflict with Section 1 which provides that the Act extends to the whole of India.

(d) Leave a party remediless inasmuch as in international

[25] (2002) 2 SCR 411.

[26] Arbitration and Conciliation Act, 1996, Section 1: Short title, extent and commencement: (1) This Act may be called the Arbitration and Conciliation Act, 1996. (2) *It extends to the whole of India: Provided that Parts I, III and IV shall extend to the State of Jammu and Kashmir only insofar as they relate to international commercial arbitration or, as the case may be, international commercial conciliation.*

commercial arbitrations which take place out of India the party would not be able to apply for interim relief in India even though the properties and assets are in India. Thus a party may not be able to get any interim relief at all.

In the above context one can argue that foreign awards which are made in countries not bound by either the Geneva or the New York Convention cannot be enforced in the same manner as foreign awards from countries where those Conventions apply. Such foreign awards are, however, enforceable in India on the same grounds, and in the same circumstances, in which they are enforceable under the general law: justice, equity, and good conscience. Therefore, they can be enforced in an action brought before a court of law. A foreign award will not be enforced by courts if its enforcement would be contrary to public policy or the laws in India.[27] The mechanism of enforcement of non-convention awards can be found and thus the lacuna identified by the court does not stand. It is important to note that the heading of Part II of the Act is "Enforcement of *Certain* Foreign Awards" which itself conveys that this part is not meant for all arbitrations taking place anywhere in the world. The judgment is also criticized on the ground that the wording of the statute in section is clear and unambiguous. There was no need to state the negative, because it clearly states that part I will apply 'where the place of arbitration is in India, which implies that it will not apply where the place of arbitration is not in India'. Likewise, the legislature did not consider it necessary to say that Part I will "only" apply where the place of arbitration is in India because it is implicit in the words 'Part I would apply where the place of arbitration is in India'.[28] It was also observed by the court that 'the said Act does not appear to be a well-drafted legislation'. In this connection, in *Precision Steel & Engineering Works* v. *Premdeva*,[29] the Supreme Court has emphasized, 'where the language is plain and unambiguous and admits of only one meaning, no question of construction of statute arises, for the Act speaks for itself even if the

[27] Nidhi Gupta and Rajnish Kumar Singh, "Law Relating to International Commercial Arbitration in India", *Yearbook of Private International Law*, (2006), 8 Sellier. European Law Publishers & Swiss Institute of Comparative Law, at 246.

[28] *Supra* note 5 at 130.

[29] AIR 1982 SC 1518.

result is strange or surprising, unreasonable, or unjust or oppressive, it is not a matter for the court.' The remedy is with the legislature, not with the court because 'a court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the authority granted to it by its creators'[30]

The decision means that an Indian court can, for instance, entertain challenges to arbitrators or hear an application to set aside the award even if the seat of the arbitration is outside India. Giving the courts of a country power of this type over foreign arbitral proceedings ran counter not just to the UNCITRAL Model Law, but also to the Geneva instruments and the New York Convention.[31] Thus, the result of the judgment was that the Act, rather than narrowing the powers of the judiciary as the UNCITRAL Model Law intended to do, very significantly broadened them.[32] Thus inconsistency between Indian law and the global trend is apparent.

IV. Effect of Application of Part I of the Act to Foreign Awards in the Context of Public Policy Exception

The ratio of two cases described above *viz. Bhatia International* v. *Bulk Trading S.A. and Anr* and *ONGC* v. *Saw Pipes* were put together by the Supreme Court in the case of *Venture Global Engineering* v. *Satyam Computer Service Ltd. and Anr.*[33] where court observed that:

> "in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied. The very fact that the judgment of *Bhatia International* holds that it would be open to the parties to exclude the application of the provisions of Part I by express or implied agreement, would mean that otherwise the whole of Part I would apply. In any event, to apply Section 34 to foreign international awards would not be inconsistent with Section 48 of the Act, or

[30] *Stoll* v. *Gottlieb* (1938) 305 US 171.

[31] *Supra* note 2 at 75.

[32] *Ibid.*

[33] AIR 2008 SC 1061

any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, to set aside the award. The public policy of India includes - (a) the fundamental policy of India; or (b) the interests of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. This extended definition of public policy can be by-passed by taking the award to a foreign country for enforcement."

The effect of the judgment is that now the extended definition of the phrase 'public policy' can be used to review the merits of even foreign awards. The Supreme Court rejected *Satyam's* argument that it did not have the power to set aside Convention awards. Court completely overlooked the proposition of law that foreign courts have virtually no powers, except to enforce arbitral agreements and awards and provide interim measures of support.[34] It is pertinent to note that the justification given by Supreme Court for expanding the meaning of the term 'public policy' in *ONGC* was that the case was in relation to section 34 *i.e.* for setting aside an award passed under part I of the Act and the same narrow meaning of *Renusagar* case will be the law for enforcement of foreign awards. The very basis of the judgment in *ONGC* gets eroded by the verdict of *Venture Global.* Law Commission of India also recommended expansion of definition of public policy only in the context of the domestic awards. It can be argued that the residual power of Indian courts to review and set aside foreign arbitral awards at the enforcement stage is desirable to protect the interests of vulnerable Indian parties who may not have had a fair hearing before a foreign tribunal. But the argument seems to fail as in *Venture Global*,

[34] New York Convention, Article 1(2).

it was a foreign party not an Indian party which benefited from the intervention of Indian courts.

V. Conclusion: Evolving International Public Policy

It is proposed by many that the proper implementation of public policy rules necessitates an elaborate scheme of mutual support and coordination among arbitrators and (foreign) judges in a complex decision-making process on the extraterritorial scope of application of public policy rules. The confusing and potentially dangerous shift of domestic public law concerns to the enforcement stage is destined to act as the shadow of a safeguard rather than a genuine means of protection.[35] According to UNCITRAL's Commission Report,[36] it was even proposed during the preparation of the UNCITRAL Model Law that "the provision 34(2)(b) should be deleted since the term public policy was too vague." International Law Association also supports the view.[37] ILA observed that beyond purely domestic public policy there exists a narrow category of international public policy which is confined to the violation of really fundamental conceptions of the legal order in the country concerned. Narrower still, the ILA identified a further category, namely "truly international" or "transnational" public policy, which it found to be of "universal application- comprising fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as 'civilized nations".[38]

There is nothing new, so far as arbitration is concerned, in differentiating between national and international public policy. It is a consistent theme to be found in the legislation and judicial decisions of many countries. For example Portugal has a similar provision at Article 1096(f) of the Code of Civil Procedure (1986), which refers to

[35] *Supra note* 1, at 54.

[36] U.N. Documents, A/40/17 dated August 21, 1985, at No. VII.

[37] International Law Association, *Final Report on Public Policy* (para.23 at 5-6), presented by Professor Pierre Mayer (Chairman of the Committee) and Audley Sheppard (Rapporteur) at the New Delhi conference, April 2002, *available at* www.ila-hq.org.

[38] Alan Redfren, Martin Hunter, *et al, Law and Practice of International Commercial Arbitration.* South Asia Edition 2006 at 420-421.

the principle of "Portuguese international public policy", the Court of Appeal decision in *deursche Schachtbau-und-Tiefbohrgesellschaft mbH* v. *R'as AL-Khimah National Oil Company,*[39] is another illustration of application of international public policy.

In the Indian context it can be said that the courts not only assert a broad jurisdiction to supervise arbitration, but also read into the statue the powers that had not been conferred on to it. It seems that the present understanding of the term public policy in the context of foreign award in India is in a state of uncertainty. Indian law seems to undermine the global attempt to harmonize the law relating to international commercial arbitration. Thus one can conclude that today a foreign award can be set aside in India if it is found to be patently illegal on the ground that it violates 'public policy' of India and thus there is no differential treatment possible for an arbitration taking place in India from one which takes place out of India. The Inconsistency is apparent.

●

[39] *Supra* note 15

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 191-212

Credible Mechanism for Disciplining the Judges

Rajneesh Kumar Patel*

Abstract : *The problem of corruption and misbehaviour in relation to the honorable bench has remained no more a hidden fact. More than often the incidents of misbehaviour of the Judges are reported in the press and the corruption is rampant. Though, the Constitution of India provides safeguards to ensure, judiciary being managed by men of ability, honesty, experience and competence, but there are credible complaints against the judges of higher judiciary too, who are regarded as God. Actually allegations of misconduct by judges are reported from time to time and tend to shake the confidence in the superior judiciary as a whole. With the change of time and declining values, ethics, integrity, morality and propriety, the judges have also fallen in line with others.*

The high expectation from the Judges that "Judges as trustees must give and account for their conduct" is getting belied. Judicial accountability is not properly enforced. Even some of the Judges themselves have exposed the situation of rampant corruption in Judiciary. The imminent problem with respect to the decline of Bench is to enquire into and make a thorough study with a guideline "when moral sanctions have not worked, the legal sanctions are imperatively required". It also needs to be studied whether along with the amendment of the Judges Inquiry Act, 1968, Article 124 of the Constitution itself needs amendment, because it provides for impeachment which is very difficult. But what is needed is to make the Judges accountable so that in cases of aberrations there should be some solution to remove that aberration. At present we have none. In India as for as the lower judiciary is concerned, there is a lot of disciplinary mechanism provided by the Constitution itself, and also by the special statutes. The High Courts can exercise not only judicial

* Lecturer in law, Banaras Hindu University, Varanasi, UP, rajneeshpatel 2010@gmail.com

power but have also administrative control over the judges of lower judiciary. The laws of contempt of courts are also applicable to the judges of lower judiciary. On the other hand, mechanism provided for the judges of higher courts is cumbersome and ineffective. Therefore question arises who will Judge the Judges?

Keyword: *Judging-judges, corruption, accountability, removal, administration of justice.*

Contents:

1. Introduction.
2. Control Mechanism for Judges in India.
   (A) Contempt Proceedings.
   (B) Impeachment Process.
   (C) In-house Procedure.
3. Recent attempt towards ensuring Judicial Accountability.
4. Concluding Observation

INTRODUCTION

It is undisputed fact that Indian Judiciary has enjoyed the highest degree of independence, and has been held least accountable wing of the Government because it is presumed that they are most honourable, dignified and honest men. A Judge imbibes fairness keeping him an aloof and his life is serene, pure and self disciplined. He should be bold enough to assent the majesty of law like Lord Coke who may not fail to remind the Crown that "*the King is under no man, but under God and the law.*" However, with the change of time and declining values, ethics, integrity, morality and propriety, the judges have also fallen in line with others. That's why at present everyone are bound to say that though, the Constitution of India provides safeguards to ensure, judiciary being manned by men of ability, honesty, experience and competence, but there are credible complaints against the judges of higher judiciary too, who are regarded as God .

Actually it is the conduct of judges and the absence of any adequate disciplinary mechanism, which raises the question of accountability of judges. Karnataka, Punjab & Haryana, Delhi, Calcutta, Tamil Nadu, and recently Ghaziabad scandals are some of

the examples which are proving this uniform unfortunate state of affairs. Therefore, the time has come to enact a credible mechanism to hold judges accountable.

Against this background an attempt is made under this paper to highlight the necessity and reality of the mechanism provided for maintaining judicial accountability in India.

CONTROL MECHANISM FOR JUDGES IN INDIA

The problem of unbecoming behavior in relation to the honorable bench has remained no more hidden fact. More than often the incidents of unbecoming behavior of judges are reported in the press and corruption is rampant. Even some of the judges themselves have exposed the situation of rampant corruption in judiciary.

In 2002 in his address to bar, the then Chief Justice of India Mr. Justice S.P. Bharucha stated that "more than 80% of the judges in country were honest and smaller percentage was bringing the entire judiciary into disrepute."[1]

Recently a senior judge of the Apex court Mr. Justice *Altameh Kabir* has affirmed the above view when he said that only 80 percent judge are noble.[2] Another Chief Justice of the India, Mr. Justice J.S. Verma after his retirement also admitted that "there is no point in saying that there is no corruption in the judiciary. No one is going to say it, much less accept it".

A very alive, correct and informing situation has been depicted by Mr. Justice Verma, when he remarks;

There was a time when judges had sense of propriety, dignity, and self-respect, but time is over such propriety having become rare. Today however, if after making a reasonable inquiry you find that there is something wrong and you tell the judge concerned, he will say "who are you to ask me to resign..... I have taken the oath. That is the attitude.[3]

Likewise, a few days ago Mr. Justice Markandey Katju also

---

1 Das Crus, *Judges and Judicial Accountability*, 2005. at p. 45.
2 See , Hindustan, 11/12/2010 at p.13
3 Shivani, "there's Corruption in Judiciary, it's showing now: J.S. Verma, available at www.expressindia.com, visited on 25/12/2009.

added in the above views of the honorable judges when he said that *something rotten in Allahabad High Court*. He also said that "Do not tell all these things I and my family have more than hundred year of association with Allahabad High Court. People know who is corrupt and who is honest. There are some judges in Allahabad High Court whose nobility is always questionable"[4].

Honestly speaking there is problem of credibility of judges of higher judiciary too and social sanction is not working. The present accountability mechanism for judges is often traced from the sources such as, the traditional oath of office taken by judges which requires them to adhere to the Constitution. Further judges are required to follow the law of the land as well as judicial decisions of the courts. In India, apart from above, there exist following mechanism to deal with the conduct of judges and ensuring accountability for the same.

(A) Contempt Proceedings

In India as for as the lower judiciary is concerned, there is a lot of disciplinary mechanism provided by the Constitution itself,[5] and also by the special statutes.[6] The High Courts can exercise not only judicial power but have also administrative control over the judges of lower judiciary. The laws of contempt of courts are also applicable to the judges of lower judiciary. On the other hand, in a series of judicial pronouncements courts have repeatedly taken the view that the term 'Judge' used under section 16 of the Contempt of Courts Act, 1971 gives statutory recognition in respect of contempt committed only by those judges who presided over subordinate courts.[7]

Actually, the plain, grammatical, literal and natural meaning of the expression 'Judge' goes in the favour of including all judges from bottom to the top. Judiciary has put artificial limitation on the scope of section 16 of Contempt of Courts Act, and thereby arriving at conclusion that the judges of the courts of record could not be held

4 See, Times of India, dated, 10/12/2010 at p. 1.
5 See, Article 227 of the Indian Constitution.
6 See, Indian Penal Code, 1860.
7 *Harishchandra Mishra v. the Honorable Mr. Justice S. Ali Ahmed* AIR 1968 Pat. 65.

liable for the contempt of court. Such restricted interpretation is not very much convincing and conducive to the confidence in administration of justice by reposing unequalled faith in and respect for the superior court judges merely with the help of unwritten norms of English tradition prevailing at the time of the commencement of the Constitution or statutory provision of the Contempt of Courts Act.

It is interesting to note that, the Parliament by enacting the said Act does not make any clear distinction between judges of the inferior courts and the judges of superior courts. Section 16 of the Act uses simply the term 'judges and magistrate', and it may be taken into its literal or simple meaning, as judges means all the judges.

Hence, it is a good case proving tendency towards the need of inclusion of superior court judges too in the definition of 'Judge' under the Act.

It has been interesting to note how the conduct of the honorable Judge of Patna High Court during the proceeding of the court in *Harishchandra Mishra v. the Honorable Mr. Justice S. Ali Ahmed*,[8] could be justified or appreciated, where the learned judge had not only threatened advocate *Mr. Sadanand Jha* to get him arrested but on his expressing a word of sorrow his reaction was against the propriety of judges. In the instant case an incident took place as advocate *Sadanand Jha* insisted upon hearing of revision on admission matter on merits. Thereupon, Mr. Justice S. Ali Ahmad remarked to advocate *Jha* "You are present in court physically but mentally you are elsewhere and therefore, you missed my observation". Advocate *Jha* then replied "My Lord, it is really uncharitable that your Lordship says that I was present, in the court physically but was mentally somewhere else. I was both physically and mentally present in the court".

Learned Judge, became very angry upon this and he stated that it has become your habits to insult the court. He said *Peshkar* call the constable, I will have him arrested. He spoke for about ten minutes in which he used the following terms and expressions towards Advocate *Jha*:

8 A.I.R. 1986 Pat. 65.

> "You are a small fry and I would not even like to harm you because you are such a small fry. You have no knowledge and no understanding. With your habit you are doomed. I will not harm you but you will suffer from within and be doomed. I can tolerate a lot but there is limit to it and once the limit is reached. I am a very hard nut and remember that I tell you that you will suffer internally and be doomed. Now a day it has become the fashion of the Bar to insult the judges. I tell you, you will weep"

Advocate *Jha* said I am sorry.

Then reaction of judge was: "You should be sorry and you would be sorry. You will suffer and you are doomed. Do not think with the attitude you will flourish or prosper".

The honorable majority (N.P. Singh, S.K. Chaudhari, Udai Sinha and P.S. Sahay JJ.) adopted the same view and held that the judges of the Supreme Court and High Court are not subject to contempt of court.

It is humbly submitted that majority's view did not appear to be legally convincing by giving restricted meaning to Sections 9 and 16 of the Contempt of Courts Act by several reasons, **Firstly**, the Supreme Court and High Courts were said to be immune from contempt proceedings under Articles 129 and 215 of the Constitution merely on the ground that courts of record and in England had never been subject to contempt of court. We should think that we have written Constitution and statutory provisions in relation to the contempt of courts and we should not adopt foreign view against our Constitution. **Secondly**, the superior courts judges' immunity from contempt of court was said to be justified only because of absolute freedom and independence of such judges is necessary for the administration of justice. If it is so it is requested with due respect that the absolute freedom and independence of subordinate court also ought to be ensured. **Thirdly**, it is also not very much convincing because of the specific provision using the term 'Judge' and not

expressly granting immunity to superior courts' judges. **Finally**, the reasoning of the majority that such things had happened in the court room in the past as well but they had been buried in the spirit of forget and forgive also does not prove to be of any avail, as *bad precedent could not be treated as good precedent*.

However, Mr. Justice *Birendra Prasad Sinha* did not agree with the majority's proposition. He observed:

> "With greatest of respect to my learned Brethren it is not possible for me to agree with the proposition that the judges of the High Courts and Supreme Court are not immune from contempt of courts proceedings, nor do I agree that an application filed without the consent in writing of the Advocate General is not maintainable".[9]

Though, for the above mentioned minority decision of Mr. Justice Birendra Prasad Sinha, it is true no reason has been given by him, but it is humbly submitted that, the minority view of Justice Sinha is more convincing, accordance with the call of the time and carries more weight than many majority decisions of the Supreme Court.

No doubt, this question has not been authoritatively settled till now, but preponderance of judicial opinions appears to favour the complete exclusion of superior court's judges from liabilities under the Contempt of Courts Act, 1971. There is a series of cases in which courts have repetitively said that superior court's judges are immune from the contempt proceedings. The highest court of the land otherwise did not allow a petition against the former Chief Justice of India, *E. S. Venkataramiah* without expressing any view on the issue whether contempt proceeding could lie against the superior court justices or not. In the instant case issue had arisen out of an interview given by the learned former Chief Justice exposing the reasons for deterioration of standards due to the role of *lavish party and whiskey bottle* in judicial appointments. He had exposed that in every High Court there were at least four to five judges who had practically been

---

[9] *Ibid.* at. p.69.

out every evening, wining and dining either at a lawyers' house or a foreign embassy. The honorable court silenced the issue by reminding Chinese proverb "*as long as you are upright do not care if your shadowed is crooked*".[10]

The Apex Court also avoided contempt proceedings against *Mr. Justice V. Ramaswami* in *Sub-Committee of Judicial Accountability V. Justice V. Ramaswami*[11] for having written a letter to members of the inquiry committee setup under Judges (Inquiry) Act, 1968 making reckless allegation against the judiciary as a whole. The same judicial attitude continued in State of *Rajasthan v. Prakash Chand*[12] where Justice Sethna approved the above decisions by saying that no contempt petition lie against the superior court judges.

The Apex Court again choose to sail on the same boat in *Tarak Singh V. Joyti Basu*[13], which represented unholy nexus between duty and interest of a High Court judge, wherein the judge concerned had stayed allotment in Salt Lake City but had got a corner plot allotted to himself out of Chief Minister's discretionary quota. The Supreme Court noted that, the learned judge had misused his divine judicial duty as liveries to accomplish to his personal ends. He had betrayed the trust reposed in him by the people. But the court did not think it proper to proceed under the Act in spite of false affidavit submitted by the learned judge.

The silence of the court in successive cases is bound to create a background in which the court will break its silence and bring the contemptuous conduct of superior courts' judges within the preview of the Contempt of Courts Act. The court is likely to do it in view of no specific exemption granted either under the Constitution or under the Statutes. The rule of interpretation evolved in *Superintendent and Remembrancer of Legal Affairs, W.B. v. Corporation of Calcutta*[14], wherein while dealing with the issue whether state is bound by its own statute the Supreme Court had said that it is bound unless it is excluded expressly or by necessary implication may serve as torch bearer.

[10] See, Outlook, March, 2009, at 18.

[11] A.I.R. 1992 S.C. 320, see also *Krishaswami v. Union of India* (1999) 4 S.C.C. 605, In the instant case the functioning of the committee was challenged, but Supreme Court held that petitioner had no *locus standi*.

[12] (1998) 1 SCC 1.

[13] (2005) 1 SCC 1.

[14] A.I.R. 1972 SC 505.

Therefore, in view of the requirement of transparency in every walk of life it is not appealing why the honorable judges of the superior courts should enjoy immunity from contempt proceedings. So, there are two options, **firstly** the Supreme Court should give natural meaning to the expression 'Judge' used under the Contempt of Courts Act and include the judges of the superior courts within its preview, or **secondly** the Parliament should amend the Contempt of Courts Act making it clear by using the expression Judges including the Justices of the High Courts and the Supreme Court.

(B) Impeachment Process

With regard to the judges of higher judiciary the Constitution of India provides only for impeachment procedure under Article 124. The procedure prescribed under clause (4) of Article 124 speaks in negative tone and thereby emphasizes the mandatory requirement to be fulfilled. It reads:

> "A judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that house and by a majority of not less than two thirds of the membership of that house present and voting has been presented to the President in the same session for such removal on ground of proved misbehaviour or incapacity".[15]

The above constitutional provisions make it clear that judges of High Courts and the Supreme Court are to be removed only on the ground of proved misbehaviour or proved incapacity. The word "proved" used in the Article 124 makes the procedure so ticklish and

[15] It is equally applicable with respect to the removal of High Courts' judges under Article 217 (1) (b) of Indian Constitution.

"implies that the allegations have crystallized into conclusive proof pointing to the misbehaviour of incapacity. The word 'proved' also indicates that the address can be presented by Parliament only after the alleged charge of misbehaviour or incapacity against the judge has been investigated, substantiated and established by an impartial tribunal.

Likewise, the constitutional provision does not prescribe how this investigation is to be carried on against a particular judge.[16] It leaves it to Parliament to settle and lay down by law the detailed procedure according to which the address may be presented and the charges of misconduct or incapacity against the judge are investigated and proved.[17] It is to be done according to the provisions of Judges (Inquiry) Act, 1968, which is very cumbersome.[18]

We should remember that at present there are some visible signs of decline in judicial prestige which requires renovation of existing law. In March 2003, Mr. Justice Shamit Mukherjee of the Delhi High Court was arrested by the Central Bureau of Investigation under the Anti-Corruption Act, 1988 and Criminal Procedure Code, 1973 for Criminal conspiracy and allegedly involving in serious graft charges including womanizing and involvement in the multi-crore Delhi Development Authority Corruption and ultimately he was suspended in charge of taking money for favorable decision.

Recent incidence of impropriety committed by Mr. Justice Saumitra Sen of Calcutta High Court and consequent communication of Chief Justice of India to Prime Minister of India to initiate impeachment process after his refusal to resign has added fuel to the fire of judicial credibility. In 2009 very acute controversy arose as to the elevation of the Chief Justice *Dinakaran* of the Karnataka High Court to the Supreme Court bench in view of allegation of graving

16 Jain M.P., *Constitutional Law of India*, 5th edirion, (2003) at 283.
17 Article 124 (5), Constitutional of India.
18 The Parliament in pursuance of constitutional mandate enacted the Judges (Inquiry) Act, 1968, which regulates the procedure for investigation and proof of misbehaviour or incapacity of Judge for presenting an address by the Houses of Parliament to the President for his removal.

governments' land in Karnataka. The controversy took a new twist and removal process has been initiated against him on the basis of a motion admitted by the chairman council of the State who has appointed a three member panel headed by Justice *V.S.Sirpurkar* of the Supreme Court of the India. The investigation is in progress. In Chandigarh there was also considerable furor over three judges of the Punjab and Haryana High Court accepting membership from the golf course club, namely, the *Forest Hill Club*.

However, it is interesting to note that since the adoption of Indian Constitution this procedure has been put in motion on only one occasion.[19] Even that was impeded, and it did not reach its logical end. The obvious result is that in nearly six decade functioning of our constitution, not a single judge has been removed under the Article 124 of the Constitution. It does not mean that the judges are extremely honest and capable but it only means that procedure prescribed under Article 124 read with Judges (Inquiry) Act, 1968 is cumbersome, flawed, dilatory and political.[20]

Thus, due to dissatisfactory conditions of control mechanism envisaged under the Constitution and failure of removal process a different procedure was evolved to discipline the errant judges. It necessitated the evaluation of 'in-house' procedure by the court itself.

(C) In-house Procedure

The adoption of in-house procedure has an interesting history. In 1995, the members of the Bar in Bombay High Court resorted to the extra-ordinary steps for disciplining the Chief Justice of the same High Court. The basis of the action of the Bombay Bar Association was financial irregularities alleged to have been reflected in the disproportionate amount of royalty received by Chief Justice Bhattacharjee from a foreign publisher[21]. The Bombay Bar Association resorted to strike and passing a resolution against him to resign.

19 See the matter of Justice Ramaswami.
20 As happened in the matter of Justice Ramaswami.
21 *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee and others*, (1995) 5 SCC 457.

While Justice Bhattacharjee resigned following an uproar, the Supreme Court emphasized the need to evolve a method of self regulation by the judiciary in such cases of alleged misconduct. The Judiciary chose to evolve a via media to satisfy both. It opined that:

It is true that freedom of speech and expression guaranteed by Article 19(1) (a) of the Constitution is one of the most precious liberties in any democracy. But equally important is the maintenance of respect for judicial independence which alone would protect the life, liberty and reputation of the citizen. So the nation's interest requires that criticism of the judiciary must be measured, strictly rational, sober and proceed from the highest motives without being coloured by partisan spirit or pressure tactics or intimidatory attitude. Keeping this object in mind the judiciary has evolved *in-house procedure* to deal with errant judges which is self regulatory mechanism.

In the aforementioned case evolving a domestic mechanism the Supreme Court said that instead of taking matter to press, staging '*bundh*' and boycotting the court, advocate should bring the matter before the Chief Justice of High Court, in the case of complaint against any judge of the High Court and in the case of complaint against Chief Justice of the High Court they should bring the matter before the Chief Justice of India.

Thus, yawning gap between proved misbehaviour and bad conduct inconsistent with the high office on the part of a non-cooperating judges/Chief Justice of a High Court could be disciplined by self-regulation through in-house procedure. This domestic procedure would fill in the constitutional gap and would yield salutary effect.

Under this proceeding, if the Chief Justice of the High Court is of the opinion that the allegation against a judge of the High Court needs a deeper probe, he shall forward to the Chief Justice of India the complaint and the response of the judge concerned along with his comments. The procedure stipulates that after considering these, if the Chief Justice of India thinks that a deeper probe is required, he shall

constitute a three-member inquiry committee of two Chief Justices of High Courts other than the High Court to which the judge facing the allegation belongs and one High Court Judge. The judge concerned would be entitled to appear before the committee and have his say. Under the procedure adopted by the Supreme Court, it would not be a formal judicial inquiry involving the examination and cross-examination of witness and representation by advocates.

Likewise in the case of a complaint against a Supreme Court judge, if the Chief Justice of India, in the light of the response of judge concerned, feels that it need a deeper probe, he would constitute on inquiry committee of three Supreme Court judges. The Chief Justice of India shall take further action based on the findings of the committee.

Under this procedure, the committee may conclude and report to the Chief Justice of India that:

(i) There is no substance in the allegations contained in the complaint, or

(ii) There is sufficient substance in the allegations and the misconduct disclosed is so serious that it calls for initiation of proceedings for removal of the judges, or

(iii) There is substance in the allegations contained in the complaint but the misconduct disclosed is not of such a serious nature as to call for initiation of proceedings for removal of judges.

After receiving the findings of the committee, Chief Justice of India shall advise the judge concerned to resign or seek voluntary retirement. In case the judge refuses to do so, the Chief Justice of India shall advise the Chief Justice of the High Court concerned not to allocate any judicial work to him, and intimate the President and the Prime Minister.

The scheme of in-house procedure was spelt out by the bench in the *Bhattacharjee* case[22] and it has been experimented on four

[22] *C. Ravichandaran Iyer v. Justice A.M. Bhattacharjee and others*, (1995) 5, SCC 457.

occasions, i.e. the Punjab & Haryana, High Court scandal first[23] and second,[24] and Rajasthan High Court scandal[25] Karnataka High Court scandal.[26] However, the ultimate result of the above scandals compels to remark that the in house procedure may not be able to check the deviant behavior of judges.

In public service commission case Chief Justice V.N. Kirpal recommended transfer of one of the tainted judges, Justice Amarbir Singh Gill, to the Guwahati High Court, However, said judge was never transferred because of opposition to the proposal from Guwahati Bar, which felt that the Guwahati High Court was being considered *a dumping ground for tainted judges*. With regard to other two judges, the in-house committee appointed by Chief Justice Pattanaik (who came in office in due time) had concluded that, judges misconduct did not warrant their removal. The committee exonerated Justice M.L. Singhal, while holding Justice Mehtab Singh Gill and Amarbir Singh Gill guilty.

It is noteworthy that, Justice Amarbir Singh Gill wrote to Justice Pattanaik that he would be taking leave, from December 16, 2002, until his retirement in May 2003. As Mehtab Singh Gill did not respond back to Justice Pattanik on what he intended to do, Justice Pattanaik passed an order deprecating his misconduct. In his order he warned Mehtab Singh Gili to be careful in future, though, no further action was taken against all the three judges.

The "in-house procedure" was tried again in the matter of Justice Arun Madan, a judge of the Rajasthan High Court. A three judge Committee setup in the case confirmed the involvement of Justice Madan in a proposition to a woman doctor to have sex with him in exchange for a judicial favour. Though, no disciplinary action was taken against Mr. Justice Arun Madan, but it is worth mentioning that the Justice B.K. Roy committee report resulted into the resignation of Justice Arun Madan.

---

23 Properly known as Public Service Commission case, 2002.
24 See, Justice Nirmal Yadav case.
25 See, Justice Arun Madan case.
26 Sex Scandle case of Karnatka High Court's Judges.

The in-house procedure was tried again in case of a group of judges of the Karnataka High Court, however in that matter a three judge Committee headed by the Chief Justice of the Bombay High Court. Justice C.K. Thakkar was set up to examine the alleged sexual misconduct of the judges. But the in-house procedure failed once again in that case and no damage was done to the judges of Karnataka High Court.

It depicts from the above discussion that in order to maintain accountability of the Higher Court's judges, our judiciary always thought to have a domestic mechanism, as in-house procedure. Although, under this procedure one thing may be appreciable that here alternative were given to the errant judges, either to quietly resign or to face impeachment proceedings, but this approach, however, is time taking, limited reach and same has not been working so well in every cases.

The failure of in-house procedure fourth time in the matter of allegation against Justice Nirmal Yadav of the Punjab & Haryana High Court is clear proof of the ineffectiveness of the procedure even if the in-house inquiry finds the actionable wrong committed by comes judges of the superior courts. To refresh our memory in allegation of 15 lakhs intended to be given to Justice Nirmal Yadav the Central Bureau Investigation investigated the matter and made out a case for precutting Justice Nirmal Yadav under the Prevention of Corruption Act. In meanwhile a three Judge in-house committee headed by justice H.L. Gokhley, Chief Justice of Allahabad High Court had found substance in allegation and recommended initiation of proceedings to remove from office. But due to otherwise advice of Attorney Genral Milon Banerjee, the proceeding was thwarted.

The ultimate result of the cases dealt under in-house procedure reveals that, this procedure may not be able to check the deviant behaviour of judges. Of late there has been a series of transfers of the High Court judges to another High Court.

It is humbly submitted that instead of dealing with the corruption, the judge concerned must not be transferred to another

High Court. Continuing a judge found to be guilty of deviant behaviour by transferring him to another High Court is extremely unethical and highly objectionable, because of merely transfer in extreme cases is no punishment at all. Though, the Supreme Court of India also adapted to Restatement of Values of Judicial Life, 1997, as 'in-house mechanism, but till now there has not been even a single case in which a judges has been removed from his office.

The main reason of failure of *in-house mechanism* is in fact is purely product of the judiciary and it does not have any Constitutional or statutory basis. That is reason why there is an ultimate and urgent need of a statutory based mechanism for disciplining the judges of Higher Courts, as in United State of America, South Africa and other countries. The unsatisfactory results of the impeachment process as well as the non-statutory nature of in-house procedure, the impropriety and misconduct of the judges seem to have ignited a public debate. There is growing acceptance that in India, there is a need to *Judge the Judges*.

However, there exist various schools to though, as to means committed to the similar end of judicial accountability. A very charitable view was shared by former Chief Justice of India, Mr. Justice Venkatachaliah, when he said "my own feeling is that judges do not need a code of conduct in the strict sense. Rather, it is a restatement of those principles of judicial life and conduct which might come in handy for us, whenever we are in dilemma. The need for the code of conduct may imply that there is something wrong with the system and mechanism which dealt with the misbehaviour of judges. That may be well so because a system cannot be higher than the quality of the times in which it functions".

On the other hand, Chief Justice J.S. Verma expressed a quite opposite view. In his opinion "when moral sanction does not work, then legal sanction is required". Fears have been expressed that accusation of misconduct, before they have been established as credible-would affect the independence of the judiciary.[27]

[27] *Supra* note, 3.

In this regard it will be relevant to quote Mr. Justice Katju that "something rotten in Allahabad High Court. He also added that he is from the same High Court and people know who is honest and who is corrupt.[28]

It goes without saying that judiciary like other institutions in a democratic set-up, must be open to receive a critical analysis and should be answerable. A former Chief Justice of Delhi High Court rightly wrote in his article that "the necessity of Council is based on the undisputed fact that the judges do not come from another planet. They come from the same stock as the rest of society and subject to the same frailties. It is no secret that the antics of some of them do bring shame to judiciary. No protection is sought for them"[29].

Therefore, the question arises, **who will judge the judges**? The general dissatisfaction with the available mechanism resulted into a voice of demand to establish a strong efficient and adequate mechanism for maintaining accountability of judges.

RECENT ATTEMPT TOWARDS JUDICIAL ACCOUNTABILITY

Recently, in India, mainly two proposals have come out. Firstly, the formation of a National Judicial Commission, and secondly, a new bill in place of existing, Judges (Inquiry) Act, 1968. Though, the proposal for appointment of a National Judicial Commission was in fact first mooted by Mr. Justice P.N. Bhagwati[30], but authoritively it has been made by the Law Commission of India in its 80th report in the year of 1990. A Constitutional Amendment Bill, 1990 was also formulated in this regard by the Minister of Law and Justice, but the Bill lapsed on the dissolution of the 9th Lok Sabha.[31]

Thereafter, the formation of National Judicial Commission was recommended by the *National Commission to Review the working of*

[28] *Supra* note, 4.

[29] Sachar Rajendra "National Judicial Council", available at www.pucl.org/law/judicialcouncel, visited at 5.3.2008.

[30] Quoted from Venkatesan V., "A disciplinary mechanism on trial, available at www.hindu.com., visited on 26.10.2007.

[31] 67th (Amendment) Bill, 1990.

the Constitution.[32] It was proposed that, the commission will draw up a code of ethics for judges besides ordering transfer, postings and promotion of judges. It will also take disciplinary action against judges indulging in Malpractice. Regarding the removal of judges and remedies for deviant behaviour, the Commission suggested [33]as under:

"A Committee comprising the Chief Justice of India and two senior-most judges of the Supreme Court shall be exclusively empowered to examine complaints of deviant behaviour of all kinds and complaints of misbehaviour and incapacity against judges of the Supreme Court and the High Courts. Their scrutiny at this stage would be confined to ascertain whether:

(a) there is substance at all in the complaint;

(b) there is a *prima facie* case calling for a fuller investigation and inquiry; or

(c) it would be sufficient to administer an appropriate advice/warning to the erring Judge or give other directions to the concerned Chief Justice regarding allotment of work to such judge or to transfer to him to some other court".

If, however, the committee finds that the matter is serious enough to call for a fuller investigation or inquiry, it shall refer the matter for a full inquiry to the committee constituted under the Judges (Inquiry) Act, 1968.

It is important to note that the Commission recommended also, certain changes in the Judges (Inquiry) Act, 1968, to make the system of accountability more effective[34] by saying that the Committee constituted under the judges (Inquiry) Act, 1968 shall be a permanent committee with a fixed tenure with composition indicated in the said Act and not one constituted ad-hoc for a particular case or from case to case, as is the present position under Section 3(2) of the Act. The tenure of the inquiry committee shall be for a period of four years and to be re-constituted every four years.

---

[32] Recommendation dated, March 31, 2002.

[33] *Id.*, para 73.8.

[34] *Id.*, para 77.9.

The inquiry committee shall be constituted by the President in consultation with the Chief Justice of India. The inquiry committee shall inquire into and report on the allegation against the judge in accordance with the procedure prescribed by the said Act and submit their report to the Chief Justice of India, who shall place it before a committee of seven senior-most judges of the Supreme Court. The Committee of seven judges shall take a decision as to whether:

(a) Findings of the inquiry committee are proper, and

(b) any charge or charges are established against the judges and if so, whether the charges held proved are so serious as to call for his removal or whether it should be sufficient to administer a warning to him and/or make other directions with respect to allotment of work to him by the concerned Chief Justice or to transfer him to some other court. If the decision of the said committee of judges recommends the removal of the judge, it shall be a convention that the judge promptly demits office himself. If the fails to do so, the matter will be processed for being placed before Parliament in accordance with article 124(4) and 217(1) proviso (b).

This procedure shall equally apply in case of judges of the Supreme Court and High Courts except that in the case of a Supreme Court Judge against whom complaint is received or inquiry is ordered shall not participate in any proceeding affecting him. The matter of judges' conduct inviting action was again taken up in 2003 and a suggestion to set up a National Judicial Commission came under the Constitution (98th) Amendment Bill, 2003 but could not be passed.

The next step was Judges (Inquiry) Bill, 2006.The perusal of the provisions of this bill reveals that it has made sufficient improvement upon the Judges (Inquiry) Act, 1968 and has also made effort to provide the procedure for dealing the cases requiring action short of removal. The proposed Bill will fill in and remove certain infirmities to be found under 'in-House' procedure. It is to be noted that the Apex Court itself had pointed out the special significance of 'in-House' procedure, when it observed "It would thus, be seen that owing gap

between proved misbehaviour and bad conduct inconsistent with the high office on the part of a non-cooperating Judge/Chief Justice of a High Court could be disciplined by self regulation through 'in-house' procedure. This 'in-house' procedure would fill in the constitutional gap and would yield salutary effect". But the functioning of 'in-house' procedure for a decade exposed its unsatisfactory position due to lack of statutory basis and therefore, non obligatory nature. Complaint procedure given under the proposed bill will remove this infirmity by providing statutory and obligatory basis.

If after inquiry in respect of a complaint the counsel is satisfied that charges against the judge concerned regarding misbehaviour or incapacity are proved but do not warrant removal of the judge it may impose the measures in form of advisories warnings, withdrawal of judicial work for a limited time censure or admonition, public or private. It may also request that judge may voluntarily retire.

The proposed bill also shows improvement upon the earlier Judges (Inquiry) Act, 1968. **Firstly**, on the line of advocates Act, 1961, requiring the disciplinary action purely by the advocates themselves, it provides for the establishment of National Judicial Council consisting of all the members of the judiciary itself. It has dropped the membership of a 'distinguish jurist' and has also increased the number of members in the Council. Now the proposed National a Judicial Council will consist of five members i.e. Chief Justice of India as Chairman, two senior most judges of the Supreme Court and two Chief Justices of the High Court as members. Chief Justice will have the dominant role as he will be Chairman and will nominate the other four members. **Secondly**, it has taken full care of maintaining judicial independence without leaving any chance of prosecution through Media, as, inquiry is to be conducted *in camera* by the Chairperson and the members of the Council seating jointly. **Thirdly**, the proposed bill tries to safeguard the interest of the complainant by keeping identity confidential from all persons in general and also the judge against whom the complaint is made in particular along with such protections as the counsel deems fit. **Fourthly**, the proposed bill also disqualifies, the removed judge from getting any further employment

to any office of profit under the Government of India, or Government of States, any diplomatic assignments or other appointment required to be made by the President, acting as an arbitrator in any Arbitration proceedings and pursuing chamber practice. **Fifthly**, with a view to minimize or avoid complaints false, which are frivolous, vexatious, not in good faith or with an instant to hares the judge against whom such complaint is filed, are made punishable. **Sixthly**, the proposed bill also recognizes right to appeal and provides that an aggrieved judge may prefer an appeal to the Supreme Court against an order of removal by the President, or a final order passed by the council imposing one or other 'minor measure' on the basis of the complaint. **Seventhly**, with a view to keep the stream of justice pure the proposed bill aims at issuing of code of conduct containing guidelines for the conduct and behaviour of judges and **lastly**, the proposal regarding inclusion of the intimation of assets and liabilities by the superior court judges to their respective Chief Justice may have good effect with a view to attract the public confidence in the judges.

CONCLUDING OBSERVATION

No doubt the recent attempts to insuring judicial accountability are able to check the conducts of errant judges but despite the above narrated merits and improvement upon the earlier measures on the point, the proposed bill is not completely free from blemishes. **First**, it is not intended to entertain complaints with respect to any act or conduct constituting misbehaviour which took place before the commencement of the Judges (Inquiry) Act (when it will come into force after becoming an Act of Parliament). Likewise it does not intend to entertain any complaint against a judge constituting misbehaviour which has become more than two year old. Similarly, no complaint is intended to be entertained against a judge who has demitted the office. Thus, in all such cases the errant judges will go unnoticed and unpunished. **Second**, the position regarding impartibility of removal of the superior courts' judges will remains as it has been earlier, because after the Inquiry and its conclusion it will have to follow the same procedure of Article 124(4) of the Constitution of India. It is respectfully submitted that it may justify the

comment ***'putting old wine in new bottle'***.

In addition it will require Constitution of 15 members joint committee to be constituted by the nomination of 10 members by Speaker of Lok Sabha and 5 member by the Chairman of Council of States which is likely to make the procedure further complicated and unworkable. **Third**, the proposed bill is not intended to cover the Chief Justice of India under the complaint procedure and thereby leaves free Chief Justice of India from the clutch of disciplinary action short of removal. It is common knowledge and discussed above that, the conduct of some of Hon'ble Chief Justices has also been called in question.

Anyway Judges (Inquiry) Bill, 2006 should not be allowed to meet the fate of many bills by being allowed to lapse. It should be passed immediately.

To sum up it is respectfully submitted also that in a democracy all institutions including the judiciary must be transparent and accountable and therefore, even the higher judiciary should not be above the law. It is not advisable that judiciary should adopt the attitude of ***'TOUCH ME NOT'*** in all cases. The persons who are more learned and law knowing should be required to be more responsible. That will be a better way to ensure the system of justice pure and clean.

●

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 213-218

Mining in Bauxite Mines on Niyamgiri Hilltop in Orissa: Government's Action in Harmony with the Nature

Ali Mehdi*

Loss of green cover, biodiversity and tribal habitat over a considerable part involving more than seven square kilometres of the Niyamgiri hilltop influenced the decision making authority of the Ministry of Environment and Forests, Government of India not to give clearance for the diversion of forest land to non forest use, though the apex court in India has agreed in principle to go ahead with safeguards. The final decision and approach of the government is laudable as it preferred the conservation of environment along with the protection of cultural, economic, and social life of a considerable and sizable strength up to 20% of a tribe with a total meagre population of 5148 only.

A brief narration of the story of the case must precede the analysis to comprehend the issue in a transparent manner. It originates from a proposal moved by the government of Orissa in Feb, 2005, to the Ministry of Environment and Forests (MoEF) for the diversion of 660.749 hectares of forest land for mining operation of bauxite ores in favour of the Orissa Mining Corporation (OMC) in Kalahandi and Rayagada districts. MoEF through its Forest Advisory Committee (FAC) considered the proposal and after a period of over two and half years recommended approval "in principle" as stage-I examination. Matter was placed for clearance before the Supreme Court. M/s Vedanta Aluminium Ltd (VAL) a multinational corporation also got clearance for setting up alumina refinery, a large integrated aluminium complex with an estimated cost of Rs. 4000 crores, at the same place. Vedanta filed an interlocutory application before the Supreme Court seeking clearance of the proposal for mining of 723.343 ha of land of reserve forest land. The project involves the proposal for diversion of 58.943 ha of forest land. Vedanta Aluminium Ltd was stated to be a

* Professor, Law School, Banaras Hindu University and Member Commission on Environmental Law, IUCN, Switzerland.

joint venture of OMC Ltd. and mining lease should stand in the name of OMC Ltd, a state undertaking. It was shown that VAL was a subsidiary of an Indian company Sterlite Industries India Ltd (SIIL). On record it was, however, not found such. It was also stated that project was to be funded by the Vedanta Resources a UK based company, that operation was banned in Norway having caused environmental damage and contributed to human and labour rights violation on the report of Ethical Council.

The Supreme Court in *T.N. Godavaraman Thirumulpad* v. *Union of India and others*; and in the matter of Vedanta Alumina Ltd[1], issued order laying down certain conditions to be complied by the company, SIIL, before forest clearance could be granted. The court passed order to the effect that the project of VAL did not deserve to be cleared, liberty was, however given to SIIL to move to court, if SIIL and OCM and the state concerned were jointly agreeable to comply with the rehabilitation package as suggested for clearance of the project in question. The court was not against the project in principle. It only seeks safeguard to protect the nature and sub serve the development. Further as a sequel to this order SIIL filed an interlocutory application accepting unconditionally the terms and conditions including rehabilitation package. The apex court finally granted clearance and permission for diversion of 660.749 ha of forestland to undertake mining on Niyamgiri Hills to the SIIL, OMC and State of Orissa. It would be appropriate to mention that the Central Empowered Committee (CEC) of the Supreme Court in its Report dated 21st, 2005 had expressed its view the diversion of forest land as envisaged should not be permitted. The court, however, observed further that the next step would be for the MoEF to grant its approval in accordance with law; [*T.N. Godavarman* v. *Union of India*; and in the matter of SIIL[2].

On August 10th, 2009 the state government applied for final clearance to the MoEF. The MoEF did not grant forest clearance or environmental clearance on basis of the report of a specialist committee (Dr. Saxena Committee) constituted by it. The report of the committee was considered by the Forest Advisory Committee (FAC)

[1] (2008) 2 SCC 222.
[2] (2008) 11 Scale 193.

in accordance with section 3 of Forest Conservation Act, 1980, and its findings were accepted by the FAC. The decision of the Ministry appeared on 25th Aug, 2010. The findings of Saxena Committee revealed serious environmental problems that were relied upon by the FAC in reaching out the conclusions. The FAC has recognised and recorded the following as violations of the law and disregard of the conditions :

1. Violation of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006- the Primitive Tribal Groups were not consulted in the process of seeking clearance of the project.
2. Violation of the Forest (Conservation) Act 1980 – M/S Vedanta Alumina Ltd to whom the bauxite extracted from the Niyamgiri Mines is to be supplied, has illegally enclosed 26.123 ha of a village forest, thereby denying access to the villagers. It has also illegally occupied some more forest land.
3. Violation of the Environment (Protection) Act, 1986- Project proponent has already proceeded with construction activities for enormous expansion of Alumina refinery project without obtaining prior and complete environmental clearance as per the provisions of the Environment Impact Assessment (EIA) Notification, 2006.
4. Violation of conditions of clearance- Certain facts was concealed by the project proponent. The company claimed that no forest land needed and there was no Reserved Forest within 10 km of the proposed refinery. Company submitted a proposal for diversion of forest land which was later on informed to the Ministry that they did not need the land demanded. But the facts revealed that company continued to occupy the forest land. Such enclosure of village forests was in violation of the law. It was further reported that the bulk of the bauxite ore presently being used is being sourced from fourteen mines, eleven of which do not have the requisite environmental clearance.
5. Threat to Biodiversity- Niyamgiri hills is of high ecological and biodiversity value. The area is a home to species such as four-horned antelope[3]. Mining at the place would cause irreversible damage to biodiversity.

[3] Wild Life (Protection) Act, 1972, Schedule I.

6. Source limited- The ore is available to the magnitude of 72 million tonne and it would last only about four years for the increased needs of the expanded refinery.

The present case points out a new turn in the path of development of environmental law in India. The Indian judiciary out of the three wings of the State has taken a lead role in setting and adopting several principles, interpreting the existing principles to cope up with the changing domestic and global scenario, being hard to the incautious person and failure of executive machinery and also suggesting the law makers to respond to the developments around. Focus of the judicial approach since 1985 (Doon valley case)[4] has been for clean and healthy environment because clean environment is the fundamental and basic human right. In 1996, through the case, *Indian Council for Enviro-legal Action*[5] the Supreme Court of India has also recognised the truth of development along with due care ensuring the protection of environment i.e. the principle of sustainable development. This concept of sustainable development was introduced for the first time by Gro Harlem Brundtland, chairperson of the World Commission on Environment and Development in the report "Our Common Future", in the year 1987. The Report defines sustainable development as "development that meets the needs of the present without compromising the ability of future generation to meet their own needs".

The court while giving clearance for mining to the company other than the Vedanta has referred to the principle of sustainable development with the opinion of balancing development vis-à-vis protection of wildlife, ecology and environment. It may be noted that the Central Empowered Committee (CEC) an authority constituted in the year 2002 by the Central government at behest of the Supreme Court has objected to grant of clearance as Niyamgiri being a vital life habitat on several counts viz, loss to elephant corridor, obstruction to wildlife and tribal community, threat to water source and incidence of soil erosion in ecologically sensitive area. The court accepted the objections and denied clearance to Vedanta only. With safeguards as

[4] AIR 1985 SC 652.
[5] AIR 1996 SC 1446.

proposed by the court and the same being duly accepted by the SIIL and others, the clearance was allowed.

But certain questions pertaining to ecology, rights of the Primitive Tribal Groups (PTG) to the forest, their life style and preservation of the culture could not be answered by the suggested measures. The Scheduled Tribes and Other Traditional Forest-Dwellers (Recognition of Forest Rights) Act 2006 was enacted and notified very late for implementation after over a year of political interventions, bureaucratic twists and hectic lobbying by activists representing tribal and wildlife interest groups but the dream appeared to be short lived. The forest right including the habitat and habitation given under section 3(1) (e) to the (PTG) is, particularly, applicable to such tribe in Orissa but the existence itself of such community is at stake. The concept of sustainable development is constantly evolving concept and UNESCO, in the year 2005, has widened the scope of sustainable development further by including the cultural diversity within its fold. The meaning of sustainable development as construed in this case is, therefore, not in conformity with the developing trend. Further the Environment Impact Assessment Regulations, 2006, requires for "public consultation" as a mandatory process of the affected persons having plausible stake in the environmental impact of the project but the Environment Impact Assessment Report was not made available at any stage of consideration of the proposal. The local tribes and other concerned persons had therefore also challenged before the National Appellate Authority and the appeal is pending.

It is apposite to look at the institution and jurisdiction of CEC that has assumed a very significant status in the process of forest clearance and environmental clearance to the project proposals. CEC was first constituted by the Supreme Court of India in writ petitions No. 202/95 and 171/96, on the lines of Arunachal Pradesh Forest Council (*T.N. Godavarman* v. *UOI* and *Environmental Awareness Forum* v. *State of J.& K.*), having authority to provide suitable relief, *interalia*, the implementation of the Forest Act, Indian Forest Act, Wildlife Act including the respective Rules, Regulations and guidelines framed by the Supreme Court. The Central government subsequently, on 17th September, 2002, constituted this authority by a notification under the Environment Act in pursuance of the Supreme

Court's orders dated the 9th May, 2002 and 9th September, 2002, to examine pending interlocutory applications and place its recommendations before the Court for orders. It also has the power to hear applications filed by any aggrieved person seeking relief against any action taken by the Government or any other authority purportedly in compliance of the orders passed by the Supreme Court or against any action of any person or body or agency in violation of such orders and to dispose of such applications. It can also examine and deal with any issue referred to the Committee by the Supreme Court or the Central Government. Thus CEC plays a vital role in the process of project clearance keeping the environmental concerns a preferred priority over the profit oriented priority of the proponents. The view of CEC on ecological matter, therefore, can not be just passed over as it is the product of judicial wisdom. On the other hand, it is also interesting to note that in the judgment of the Supreme Court, dated, 23rd November, 2007, it appears that CEC objected the proposal of Vedanta only. Can an inference be drawn that CEC did not foresee threat to the environment by the other's projects in the same region?

The decision of the government is in absolute harmony with the nature. The Government, however, should not feel content as education; medical facility and other fruits of development should also reach out to the people. The safeguards and rehabilitation package agreed by the SIIL, OMC and the State of Orissa can not be an answer to blatant violation of the laws and a substitute for the lost cultural diversity, eco-balance and the fragility of the relation between forest and the dependants there upon.

●

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 219-226

Service Tax : A Profitable Imposition

M.N. Haque*

1. INTRODUCTION

The tax on service was imposed in 1994-95 only on three services. The collection of tax was 407 crores which increases tremendously with the passing of the time. Though the tax was levied by Finance Act and its procedural aspect was tackled by Excise Act. No specific legislation for its imposition but it is constitutional and not ultra vires to the provision of Constitution.

During Financial year 2009-10 our GDP was 44,64,081 crores and contribution of service was 55.9% while contribution of agriculture was only 14.6% and the people who depend for their livelihood on Agriculture is 67.4% but dependency on service is only 19.5%. This shows the tremendous increase and contribution of service sector in Indian economy. Taxes, nowadays is not only a source of raising governments, revenue but is also a tool to remove social and economic disparity from the society. The objects of writing this paper is to make it clear that though the baby is born in 1994-95 but with a span of 15-16 years it has achieved a great height and is one of the most profitable levy in comparison to any other tax imposed by the Central government.

2. REASONS FOR IMPOSITION

In any welfare state it is the prime responsibility of the government to fulfil the increasing developmental need of the state and its people by way of economic expenditure. Our government is a welfare government and as a welfare government, government has to perform a number of activities for the welfare of the people and no activities can be performed without the help of money and one of the

* Associate Professor, Faculty of Law, BHU

major source of governmental revenue is nothing but tax. The following are the fundamental reasons for imposition of service tax in India:

(i) Direct Tax

Taxes imposed by the government may be direct or indirect. In direct taxes collection of tax is less due to tendency of avoidance and evasion, not only this but tax base is also very narrow. Out of more than 100 crores of population of India only few crores are paying Income tax which is one of the main source of direct tax.

(ii) Indirect Tax

As against direct taxes collection of tax in indirect taxes is not only easy but also more but due to pressure from above and outside agency revenue is on decline. So, government was searching for a new sector and service was the most suitable and growing sector in comparison to any other sector.

(iii) Tax Reform Committee, 1990

Tax Reform Committee, popularly known as Chelliah Committee gives its report to the government in 1990, also suggested an imposition of tax on services. The government taking into consideration the recommendation of the committee imposed tax on services in 1994-95 by Finance Act.

(iv) Heterogeneous Spectrum

Services constitutes a heterogeneous spectrum of economic activities. The nature, economic activities, purpose and the people who affected by such imposition belongs to the different sector of the society. There is no similarities between one and other services, likewise there is no resemblance between the persons who affected because of imposition of service tax upon them. They belongs to the different status and group of the society. There is no uniformity either social, economic or sexual status of the peoples who are the affected party. Some services affect only women while some services are for all and sundry. Likewise some services can be taken by the people who

belongs to high economic status while some services like telephone etc. is for the common masses. Therefore, the persons who are affected party, there economic status is not same.

(v) No Opposition

When Value Added Tax was imposed by the State on the recommendation of Chelliah Committee too there was a great opposition by the businessmen particularly in Uttar Pradesh and the then Chief Minister, Mr. Mulayam Singh Yadav was forced to announce that so long businessmen does not agree, the value added tax will not be imposed in U.P., When Ms. Mayawati become the Chief Minister such tax was imposed. But when the service tax was imposed by the then Finance Minister Dr. Manmohan Singh no opposition from any walk of life. Even after the passage of time number of services increases from three to more than hundred but no opposition at all. The only reason seems to me is that it affects not only the same sector of society but different sector of Societal set up.

(vi) G.D.P.

During Financial year 2009-10 our GDP was 44,64,081 crores. Out of this the contribution of service sector was 55.9%. When service tax was imposed for the first time at that time the contribution of service sector was 40% and its contribution increases day by day. It shows the tremendous growth in this sector.

Contribution in G.D.P.

Sector	Yr. 2009-10	2008-09	1997-98	1983-84	1950-51
Agriculture	14.6%	18%	28%	39%	57%
Industry	28.5%	26%	24%	21%	14%
Service	55.9%	56%	48%	40%	29%

The above chart shows the contribution of various sector in GDP. It makes clear that in 1950-51 the contribution of service sector in GDP was only 29% less than agriculture, which contribution was 57% but with the passing of time the contribution of service sector is increases faster than any sector and now it is more than 56% of our national G.D.P.

(vii) Economic growth rate

The economic growth rate in service sector is very fast. It is more or less equal to industry with a growth rate of 8.9% while in agriculture the growth rate is 1.1% only.

(viii) Broader Tax base

The tax is imposed not only on any particular sector of society but imposition is on most of the population of India. In comparison to income tax, the tax base in service tax is very broad.

(ix) More Revenue

One of the basic objective of the tax is to collect more and more revenue and the service tax fulfil this objective very well. When for the first time tax was imposed collection was upto a sum of Rs.407 crore which increases to Rs.64464 crore in present time. This shows the tremendous potential in service tax to collect governmental revenue. The collection of revenue was very healthy and imposition of service tax was seems to be a very profitable imposition.

(x) To achieve equality

Taxes, nowadays is not only a source of governmental revenue but is a tool to remove economic & social disparity in society. Most of the services affects the persons who belongs to the economically well to do section of the society. They pay more service tax in comparison to the common masses of the society. These are the some of the reasons why government of India think proper to impose tax on services.

3. WHAT IS SERVICE

Service tax is tax on services rendered for given thing or purpose. So, basic inquiry is what is service. Service means those services which are specifically mentioned in Finance Act from time to time. Service tax was imposed by Finance Act firstly only on three services i.e. Non Life Insurance, Stock brokers & Telephone with the rate of 5% but with the passage of time it increased year by year and at

present there are more than 100 services on which service tax is imposed. So, service means services on which service tax is imposed by Finance Act 1994-95 till present.

4. HISTORICAL DEVELOPMENT

It is very difficult to find out which is birth place of service tax. Despite of all efforts we fails to find out from where the service tax originate and tax is imposed for the first time by which State and finally we comes to the conclusion that nowhere in the world service tax was imposed, wherever a tax it was is GST. But in India service tax was imposed for the first time on the recommendations of Chelliah Committee by Finance Act 1994 and become effective from 1994-95 on three service only i.e. Non Life Insurance, Stock broker and Telephone. While imposing service tax the then Finance Minister Dr. Manmohan Singh in his budget speech said, "there is no sound reason for exempting services from taxation therefore, I propose a service tax on Telephone, Non Life Insurance and Stock broker." In 1996, the net of service tax has been expanded by including three more services e.g. Advertising, Courier and Pager services. In 1997 the government widened the tax net by including 12 more services including Air travels, Mandap Keeper, steam agent and goods transport etc. Though in 1998 the government dropped three services, goods transport, outdoor catering and Mandop Keeper but at the same time 12 more services including Architect, C.A., Cost Accountancy etc is brought within the tax net. In the years 1999 and 2000, the government did not expand tax net but dropped services of mechanized slaughter house. In 2001 the government added 14 services including Telex, Post services etc. and at the same time appointed a seven members expert group under the chairmanship of Dr. Govind Rao. The committee recommended a separate, self contained enactment of service tax alongwith other recommendations but government paid no attention to the suggestions given by Rao Committee. 11 more services including beauty paralour, cable operator etc. were introduced by the government in the tax net in the year 2002. Likewise, in 2003, 10 new services, in 2003, 13 more services, in 2005, 10 services, in 2006, 14

services, in 2007, 7 services and in 2008, 4 more services were added to the list of service tax. In 2009, services like Doctors, Advocate and two more i.e. total 4 services were added. By the recent Finance Act of 2010, 8 new services were included like health service, flat booking, electricity etc. The journey begin with three services only and with the passing of 15-16 years it increased to 117 services approximately. This shows the tremendous increase in tax net without any opposition from any walk of life and still there is a high hope that in near future the service net will increase.

5. RATE OF TAX

When for the first time in 1994-95 service tax become effective the rate of tax was 5% which increased to 8% in 2003. Again increased in 2008 and imposed at the rate of 10%. In 2006 the government seeing its tremendous potentiality to raise revenue increase the rate from 10% to 12% and again in 2007 though the rate of tax remain the same but government added 3% educational cess on service tax. However, a sense prevail and in 2009 for the first time the government decreases the rate of tax from 12% to 10% and presently the same rate i.e. 10% is in operation.

6. EXEMPTION LIMITS

In 1994-95 the exemption limit was 4 lakh which increased to 8 lakh in 2007 and again increased to 10 lakh in 2008 and remain the same in 2010 too.

7. GROWTH RATE

From 3 services when imposed for the first time now approximately 117 services i.e. a growth of 39% per year in the number of services likewise when imposed collection was 407 crore which increased to 64460 crore i.e. an increase of 14% per year in the collection of government revenue.

8. CONSTITUTIONALITY

To impose any tax the power is vested in the government and the government derived its power from Constitution of India. Article 265

of the Constitution of India says "no tax shall be levied or collected except by authority of law." The term 'Law' means statutory law or an enactment. When service tax was imposed it was imposed not by passing of an specific Act but was imposed by Finance Act. The basic objection raised was whether imposition of service tax by Finance Act is constitutionally valid as per the provision of Article 265 of the Constitution of India? The other objection was since the 'service' is not mentioned in any of the Entry of List-I, how the Central government become empowered to imposed a tax on service? The Chelliah Committee was of the view that because of residuary entry 97 of the Union list, Parliament has a power to levy tax on services. The validity of service tax has been challenged in Addition Advertising V.U.O.I.[1] in which the levy of service tax was declared valid.

The Supreme Court in Laghu Udyog Bharti V.U.O.I.[2] held that imposition of service tax by Finance Act is valid. The Court further held that Parliament is empowered to levy tax on any subject because of Entry 97 of List I.

However, the imposition of Service tax was without any specific legislation i.e. Act and also without any specific mentioned of term service in any of the entry of the central list, the Court unanimously comes to conclusion that imposition of tax on service is constitutionally valid. But the government to avoid the further litigation and make the position clear finally in 2003 by 88th Constitutional amendment includes a new entry 92-C dealing with tax on services to give a full stop to any controversy.

9. CONCLUSION

Service sector is a highly growing sector. Though the people who depend for their livelihood on service their percentage is only 9.5%, much less than the people who depend upon agriculture for their livelihood i.e. 67.4% and on industry where 22% people are depend for their livelihood. But in comparison to Agriculture the economic

---

1 (1998) 98 E.L.T 14 Guj.
2 (1999) 105 Taxman 630 SC.

growth rate of service sector is much higher, that is, 8.9% while the economic growth of agriculture sector is 1.1%. Likewise, the contribution of agriculture and industry in GDP is only 14.6% and 28.5% respectively, while the contribution of service in GDP is 56%. This shows that service sector is the more growing sector and there is every chance of its further growth. At the same time it is more profitable source of governmental revenue. Indian economic growth rate is ranging from 6-8% from the last 30 years. To achieve the economic growth rate 9% the service sector will play a great role. So, the journey which begin in 1994-95 with only three services and 407 crore collection now increased to more than 100 services with a great and healthy contribution to G.D.P. of India.

●

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 227-234

Platonic Concept of Justice *vis-a-vis* Indian Varna Dharma : A Fresh Look

Anshu Mishra* & Dharmedra Kumar Mishra**

I. INTRODUCTION

Of all the living creatures on this planet, man is the only one who has been bestowed with rational power[1]. This rational power compels human being to know himself, and the environment which shapes and moulds his life to a large extent. The world has heterogeneous nature. Earlier, all the human knowledge was considered under one branch of discipline i.e.-Philosophy. In Philosophy, all the aspects of human being such as– religious, political, economic, social and ethical were considered, but within this philosophical study, the state and its institutions constituted an important part.

The State was the subject of human speculation from the dawn of human reflection. The people of every age and country have speculated about the State, its nature, purposes, functions and organizations. The idea of an ideal state has been a core issue of political thinking in the whole ancient world. In the history of Greek political theory, which originated almost three thousand years ago, ample views are available over the above issue. In Indian philosophy, the concept of *Ram-Rajya* is, also, based on the same footing. Greek philosophy took its concrete shape in the thoughts of Socrates who had given the doctrine *"virtue is knowledge"*. What Socrates regarded as knowledge was not something grasped by the intellect alone, it was something with which the whole mind or soul was identified. It was realization. In other words, it can be described as illumination of soul. In Sanskrit, this knowledge is known as enlightenment (ज्ञान). The

* Deptt. Of Political Science, Shree Baldeo P G College, Baragaon, Varanasi-4
** Associate Professor, Faculty of Law, BHU, Varanasi-5, authors can be approached at ansu_dkm20@yahoo. co.in

1 आहार निद्रा भयमैथुनं च सामान्यमेतदपशूभिःनराणाम्।
धर्मोहितेषामधिको विशेषः धर्मेणहीनाः पशूभिः समाना।।

implication of Socrates' above doctrine can be seen in the writings of his disciple Plato.

Plato (429-348 BC) was convinced that the gulf between things as they were and as they should be bridged only when wisdom and power combined in the same person or when philosophers became kings or kings with cultivated the spirit of philosophy. Thus, according to him, good state is that where wisdom rules. It is believed that on the execution of Socrates in 399 B.C., Plato left Athens and traveled in Greece, Egypt and Italy. James Urwick holds the view that he visited India also and learnt Vedanta of which there are many traces in his philosophy[2]. The political instability which he saw all around him, impressed him very much and influenced the course of his thinking. It led him to make a search for those eternal principles of human conduct which, alone, can bring happiness to the individual and stability to the State[3]. Plato's this search resulted in the form of dialogue in his famous writing-'*Republic*'. The present study is an overlook in similarities between the Platonic Concept of Justice and the Indian Varna Dharma with regard to societal structure and the law within a State.

II. PLATONIC CONCEPT OF JUSTICE

The '*Republic*' is universally regarded as the greatest work of Plato which has double title named "*concerning justice*". It deals with some fundamental questions like-

i) what does constitute a State?

ii) what are the principles upon which society should be organized? and

iii) how can a state gain stability?

Plato was of the view that state arises out of the needs of mankind. Every individual has several needs – the more fundamental of which are food, clothing and shelter, but he can not satisfy them by his unaided efforts. No individual is sufficient into himself. This is the reason that the principle of reciprocity lies at the basis of society. Society is organized on the reciprocal exchange of services which is

[2] E. J. Urwick, *The Message of Plato*: A Re-Interpretation of the Republic (1921), at 14.

[3] Plato- *Republic*, Book IV, cornford translation (1988) at 428.

based on the division of labour. Plato explained that there are three classes in the social organism-*philosopher class* or the ruling class, which stands at the summit of social and political pyramid, *auxiliaries* - a class of warriors and defenders of the country, comes at the middle of the ladder and at bottom are *productive class* like farmers and artisans[4].

Plato was very much influenced by Pythagoras[5], he, therefore, tried to make a link between social organism and human organism. He held that the human soul consists of three elements,- reason, spirit and appetite. He compared these three elements with three different metals such as reason with gold, spirit with silver and appetite with bronze. He was of the view that the elements of the human beings' body have their place according to their importance in the life of human being. Reason resides in the head, spirit in the arms and then after comes appetite in the belly.

Thus, weaving a web between human organism and the social organism, Plato asserted that functional specialization demands from every social class to specialize itself in the station of life allotted to it. The ruling class should acquire more and more knowledge to guide the ship of the State. The auxiliaries, who are concerned with the defence of the State, should always be prepared to assist the ruling class in the discharge of their duties. Likewise, the appetitive section of the community, who are meant to provide essential mercantile goods to the community should wholeheartedly devote themselves to the task of production.

III. INDIAN VARNA DHARMA

In ancient India, Dharma was the Law and Indian Varnadharma was its part, known as duties and rights of Varnas. The aforesaid mentioned Greek Philosophy finds place in the Indian Dharmashastras as *Varna-System*. The earliest manuscript on *Varna- System* is found in the *Manusmriti*, a law text dating to roughly between 200 B.C. to 200 A. D. Manu where said that :

"the Brahaman, the Kshatriya and the Vaisya varna are ---------, the Sudra----------, there is no fifth. [6]"

[4] *Ibid.*

[5] *Id.* at 600a.

[6] X, Manu 4, ब्राह्मणः क्षत्रियो–वैश्यम् त्रयोवर्ण द्विजातयः।

Varna is a sanskrit term which meant "to cover or to envelop". *Purusasukta* of **Rgveda**(1000 BC) has also mentioned of *Varna system* :

'Brahaman, Kshatriya, Vaishya and Shudra classes made of the mouth, arms, thighs and feet of the primordial giant- Purusa.'[7]

It may be conceded that at the time when the hymn of *Purusasukta* was composed, the community was divided into four groups. Dr. Kane has commented that the Brahmanas were thinkers, learned men and priests; Kshatriyas were worriers; Vaisyas were common people following agriculture and craft and Sudras were those that did menial work.[8] The system of four Varnas is also mentioned in the *Bhagavad-gita*[9]. Lord Krishna pointedly declared that :

> *"the four orders of society were created by me (Krishna), classifying them according to the mode of Prakriti, predominant in each and apportioning corresponding duties to them, though the author of this creation know me, the immortal lord, to be a non-doer."*

He, further, said that not by birth or hereditary reasons but according to each person's inherent nature and capability, the class of an individual is determined[10]. Thus, the *Varna system* illustrates the spirit of comprehensive synthesis characteristic of the ancient Indian mind with its faith in the collaboration of races and the co-operation of cultures. Paradoxical, as it may seem, the system of *Varna* was the outcome of tolerance and trust. It insisted that the law of social life should not be on cold and curl competition, but on harmony and co-operation. Society should not be a field of rivalry among individuals. The *Varnas* were not allowed to compete with one another. *Varna* divisions were based on individual temperament, which were not immutable.

चतुर्थ एक जातिस् तु शूद्रो न अस्ति तु पंचमः।।

7 Rgveda, 10.90.12, ब्राह्मणोऽस्य मुखमासीत्, बाहुः राजन्यः कृतः।
उरू तदस्य यद्वैश्य, पद्भ्याम् शूद्रोऽजायत्।।

8 P.V. Kane, *History of Dharmasastra*, Vol. V, Part II, (1977), at 1632.

9 Bhagavad-gita, 4.13, चातुर्वर्ण्यं मया सृष्टं गुणकर्मविभागशः।
तस्य कर्तारमपि मां विद्धयकर्तारमव्ययम्।।

10 *Ibid.*

The basic idea of this *Varna system* was division of labour in the society. Dr. Kane explained that :

> *"the original scheme of Varna was natural and based on the work that men put in for the community as a whole. It was not birth. The ideas underlying the original Varna system made the nearest approach towards a society in which there was no attempt to secure a competitive equality but in which the interest of all groups were regarded as identical."*[11]

Thus, Brahaman was defined as "*Brahman Nayati iti Brahmin*"[12] - the people, who preached spiritual teachings to the society and lived spiritual life were called Brahamans, thereby led the society towards spirituality. Kshatriya was defined as "*Ksheeyate trayate iti Kshatriya*"[13] - these were the people who protected the society against external attacks and maintained internal order. Vaishya was defined as "*Visati iti Vaishya*"[14] - who were performing business, trade, commerce and farming, fall under this category. The category of Sudras people (carpenters, blacksmiths, goldsmiths, cobblers etc.) were engaged in the services. This system ensured that in ancient Indian society, religious, political, financial and physical powers, were separated into four different social classes. In the *Shantiparva* of *Mahabharat*, Yudhisthir defined a Brahmin as one who is truthful, forgiving and kind. He clearly pointed out that a Brahmin is not a brahaman just because he is born in a brahaman family, nor a sudra is a sudra because his parents are sudras. An another scripture the *Apastambha Dharmasutra* states that by birth every human being is a sudra. It is by education and upbringing that one becomes "twice born" that is "dvija"[15].

Thus, all the above references point out that the *Varnas* were designated to a person based on one's aptitude, quality, mental status etc. Later on, *Varnas* was determined by birth or parentage. A number

---

11 *supra* note 8, at 1635.

12 ब्रह्मन् नयति इति ब्राहमणः

13 क्षीयते त्रायते इति क्षत्रियः

14 विसति इति वैश्य

15 *supra* note 6.

of examples are traced from the mythology which demonstrate the flexibility and mobility among the *Varnas*. Vedavyasa, a brahmin sage, the most revered author of many vedic scriptures, was the son of Satyavati, a sudra woman and his father Parashar, was also a son of Chandala woman. Vyasa's profound knowledge based on vedic wisdom established him as a brahaman and yet was considered as Brahmin, even when he was born of Sudra family. Another sage Valmiki was initially a hunter. He came to be known as brahaman sage on the basis of his knowledge and authorship of the *Ramayana*. Likewise, Vishwamitra born in a Kshatriya family became a sage and hence a Brahmarshi, based on his asceticism.

IV. PLATONIC JUSTICE vis-a-vis INDIAN *VARNA SYSTEM*

E. J. Urwick in his book "*The Message of Plato*"[16] explained again that in order to understand Plato's *Republic*, we should first grasp the fundamentals of Hindu thought. He wrote that just as Manu of ancient India, instituted the caste system upon the basis of three principles in the individual soul, so Plato also divided his ideal State into three classes representing the three physical element. Platonic State comprised of three distinct classes. They are –

1) the producing-class comparable to Indian Varna the *Vaishya* class,
2) the warrior class-corresponding to the *Kshatriya* class, and
3) the ruling class-corresponding to the *Brahamana* class

[Manu spoke of the fourth class also, namely the Sudras. In Platonic state, there exists the class of slaves, though Plato made no special mention of it]. The attributes of the Platonic classes are greatly similar to the attributes of the four main Indian Varnas. The men of gold correspond to the Brahmins in whom the *Sattavic* element predominates; those of silver correspond to the Kshatriyas in whom the *Rajasic* quality predominates and the men of iron are those in whom the *tamasic* quality predominates. According to the *Bhagwat Gita*, '' the *varna* is conferred on the basis of the intrinsic nature of an individual which is combination of three gunas – *sattava, rajas* and *tamas*.[17] Just as Indian texts forbade the Brahamans to acquire and

[16] *supra* note 2, at 24.

[17] Bhagwat Gita : 14:5, सत्तवं रजस्तम इति गुणाः प्रकृति समभवाः
निबध्नन्ति महाबाहो देहे देहिनमव्ययम्।।

accumulate wealth and restricted their function to the acquisition of knowledge and service of the people, so Plato laid down that the rulers are to be knower of the idea of good and to serve the people but not to *amass* money.

V. CLASSLESS MODERN COSMOPOLITAN SOCIETY

Now, the aforesaid narration made it clear that to maintain law and order, peace and harmony in the society, division of work has been a pre-requisite of human beings since time immemorial. This occupational division of labour in society, developed in India as well as Europe, later on. In England, even today there are many people with the surnames- taylor, smith, goldsmith, baker, butcher, potter, barber, mason, carpenter, turner, watermen, shepherd and gardner which indicate that their ancestors had followed those profession. Indian caste system was also based on the same footing. Every vocation became a caste such as – badhai (carpenter), sonar (goldsmith), kumbhar (potter), dhobi (washerman), nai (barber), darzi (tailor), kasai (butcher), mallah (fisherman), kewat (boatman), teli (oil presser), kahar (water carrier) and gadadia (sheep herder). In a feudal society, apart from agriculture, the handicraft industry also developed. This happened in India too; and the caste system became the Indian variation of the feudal occupational division of labour in the society, somewhat like the medieval European guild system. As Adam Smith wrote in the wealth of Nations, division of labour results in great progress[18]. The caste system in India resulted in great development of the productive forces. Hence in the feudal age it was progressive institution.

Before the coming of Britishers, India was one of the world's most prosperous country of that time. Apart from agricultural products such as spices and indigo to the Middle East and even Europe, India was exporting muslin of Dacca, silk of Murshidabad, shawls and carpets, ornaments of Kashmir and so on. The discovery of Roman coins in several parts of South India point to a great volume of trade with India, which shows the considerable development of productive forces in feudal India. In fact, India was once a superpower with a 31.5 per cent share in global production, which came down to 3 per cent by 1991. India was a relatively prosperous country before the coming of the British because a high percentage of the people were

[18] Adam Smith, *Wealth of Nations*, Bk One, Ch. I, (1776)

engaged in handicraft industry at that time. This was the reason that Lord Clive around 1757 (the year of battle of Plassey) described Murshidabad, the then capital of Bengal, as a city more prosperous than London[19].

The British rule ended handicraft industry of India. At the end of British rule, only 10 per cent people were engaged in handicraft industry and rest who were engaged in that industry were rendered unemployed. The level of economic development of a country relates to the percentage of the population engaged in industry and agriculture respectively. The greater percentage in industry and lesser in agriculture show that the country will be more prosperous. Thus, the United States, the most prosperous country in the world, today, has only about 2 to 3 per cent of its population in agriculture, while the rest in industry or services. The British rule ended handicraft industry of India.

VI CONCLUSION

In the post independent India, the traditional division of work in the society has been banished. Ancient system was time and money saving as well. The vocational training was inculcated in a child since his or her childhood. State was free from such type of liability. In the present age of unemployment, recession and economic colonialism, there is need to retrace the division of work theory, which was rooted in India and Europe.

[19] J.L. Nehru, *Glimpses of World History*, at 416.

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 235-242

Justice and Truth: An Analysis with Special Reference to Criminal Justice System in India

Arun Kumar Singh*

I. INTRODUCTION

Justice is the central theme of social life which has been equated with the human hunger or thirst.[1] The term has been explained in many contexts. For a common man truth and justice are synonyms and when truth fails justice also fails, but it is not very true under the Criminal Justice System in India. The Legal meaning of justice may be fairness. The quality of justice to the Court is largely guaranteed by integrity, impartiality and independence of the Judges.[2] But it is not very true to say that all the citizens have equal rights and access to justice. Whenever a matter is brought to the Court the object of the parties is always victory not abstract truth. Our Criminal Justice System is based on proved evidences because India follows the Adversarial System where judges do not play a very active role at the time of trial. The most striking feature of common law system is that it puts justice before truth. The issue in criminal prosecution is not basically guilt or innocence, but can the prosecution prove its case according to the rules? These rules are designed to ensure fair play not to emphasize searching the truth. As Swami Vivekananda has said, "There does not pay homage to any society ancient or modern, but society has to pay homage to truth or perish."[3] India is a country where truth has been given highly importance. *Satyamev Jayate* the National Emblem which has been taken from the pillar of Emperor Asoka is the example of it. Apart from this, Gandhiji has also held as "truth as the righteous means to achieve independence by launching the movement of *Satyagrah*.[4]

* Assistant Professor, Department of Law, North Eastern Hill University, Shillong, 793022

[1] Russel Fox, *Justice in the 21st Century. (Under,* Cavendish Publishing Co. Limited ,2000), at 1

[2] Ibid

[3] Report of the Committee on Criminal Justice System, (2003), at 28

[4] Ibid

The paper aims to discuss the provisions of Criminal Justice System of India and its drawbacks. It is also tried to highlight the views of Indian Judiciary. Apart from this some suggestions are mentioned which can be incorporated to maintain the efficacy of the system.

II. CONCEPT OF INQUISITORIAL SYSTEM AND ADVERSARIAL SYSTEM

Justice system is a method of legal practice in which the judge endeavors to discover facts while simultaneously representing the interests of the State in a trial. The countries in the world are following either Adversarial System or Inquisitorial System in their criminal justice system. Most of the Civil law countries like Germany, France, Italy etc. have adopted Inquisitorial System where as Common law countries like India, United States of America, United Kingdom, Australia etc have adopted Adversarial System. Inquisitorial System is a model to find out truth in the case. In the inquisitorial system, the presiding judge is not a passive recipient of information. Rather, the presiding judge is primarily responsible for supervising the gathering of the evidence necessary to resolve the case. They are part of investigating machinery charged with responsibility of ascertaining truth. The investigation process is done by Judicial Police Officer (Police/Judicator).[5] They actively steer the search for evidence and question the witnesses, including the respondent or defendant. They investigate and draw the documents on the basis of their investigation. The Judicial Police are required to gather evidence for and against the accused in neutral and objective manner as it is their duty to assist the investigation and prosecution to discover the truth. Nevertheless, since a case would not be brought against a defendant unless there is evidence indicating guilt, the system does not require the presumption of innocence that is fundamental to the Adversarial System.

So far as Adversarial System is concerned Judges play passive role. They play the role like an umpire they do not actively involve in the investigating proceedings to ascertain truth. In adversarial system presumption of innocence of the accused unless guilt is proved against him is the basic principle of the criminal justice system. Two or more

[5] Ibid at 24

opposing parties gather evidence and present the evidence and their arguments to a judge or jury. The judge or jury knows nothing of the litigation until the parties present their cases to the decision maker. Apart from this one more principle is applicable in Adversarial System that nine guilty persons can be acquitted but one innocent should not be convicted. The goal of both the Adversarial System and the Inquisitorial System is to find the truth. But the Adversarial System seeks the truth by pitting the parties against each other in the hope that competition will reveal it, whereas the inquisitorial system seeks the truth by questioning those most familiar with the events in dispute. The Adversarial System places a premium on the individual rights of the accused, whereas the Inquisitorial System places the rights of the accused secondary to the search for truth. A criminal defendant in an Inquisitorial System is the first to testify. The defendant is allowed to see the government's case before testifying, and is usually eager to give her or his side of the story. In an Adversarial System, the defendant is not required to testify and is not entitled to a complete examination of the government's case. In most Inquisitorial Systems, a criminal defendant does not have to answer questions about the crime itself but may be required to answer all other questions at trial. Many of these other questions concern the defendant's history and would be considered irrelevant and inadmissible in an adversarial system.

III. TRUTH AND INDIAN CRIMINAL JUSTICE SYSTEM

Huge pendency of criminal cases, inordinate delay in disposal of cases and low rate of conviction are the main problem of Indian Criminal Justice System. These causes motivate the accused to involve in crime. India follows the adversarial system in its Criminal Justice System. This system is based on the proved evidence. The standard of proof in Indian Criminal Justice System is that the prosecution has to prove beyond reasonable doubt. If prosecution fails to prove the case beyond reasonable doubt or accused creates reasonable doubt then the benefit of doubt is given to the accused. In criminal cases, burden of proof lies on prosecution.[6] It is based on a Latin maxim '*actiori incumbit onus probandi.*'[7] Even if the judge trying the case himself is aware that such particular person has committed the offence but there

[6] Indian Evidence Act, 1872 : Sec. 101

[7] Burden of proof lies on prosecution or pleader of the case.

is no evidence given against him may be because of any reason or evidence given is not sufficient to prove his guilt beyond reasonable doubt he is acquitted. According to Indian Criminal Justice System the justice has been done because procedure has been properly followed but whether truth has been discovered or not, the system is not concerned to the same.

Our Criminal Justice System always talks about the justice towards criminals as it is very clear from its nomenclature (criminal justice means justice towards criminals). Hardly provisions are available for the protection of victims as well as witnesses. Victims not being the party of the case have no active role in trial except giving evidence whenever is called as witnesses. The victims may have information about the evidence in regard to commission of the crime. He may also be the vindication of the justice by securing conviction of the person who has committed the offence. And also, if he is permitted to assist the Court, it would be helpful for discovering the truth and finding real offender. Because of not playing very active role by the judges and maintain their position neutral in the adversarial system the active role of victims become very crucial in investigation as well as trial. But in place of giving importance to the victims sections 53 and 54 of the Indian Evidence Act, 1872 favors the accused.[8] Because the previous good character of the accused can influence the mind of the judges in favor of accused up to some extent. Not only this, section 54 gives extra safeguards providing that if the previous record of the accused is not good and he is a man of bad character, it cannot be disclosed before the Court because it is irrelevant. However, the section provides to disclose the bad character of the accused in response to the good character of the accused. In other word it can be said that the bad character of the accused can be produced before the Court only to rebut the good character which has been produced on behalf of the accused. So we can say that in criminal proceedings the good character of the accused can be used as sword whereas the bad character of the accused can be used as shield only. Not only the above protection but section 315 of the Criminal Procedure Code, 1973 says

[8] Indian Evidence Act: Sec. 53, "In criminal proceeding the fact that the person accused of good character is relevant". Section 54 , "In criminal proceeding the fact that the accused person is of bad character is irrelevant unless evidence has been given that he has a good character, in which case it become relevant".

that accused are competent witness but he can be called as witness on his own request and if he does not give evidence under this section his failure does not rise any presumption against him.[9]

Apart from the forgoing, witnesses in criminal trial have also not been provided any safeguard. They can be asked any question which is related with the fact in issue or of relevant facts.[10] Whenever they are called to give evidence and the Court is adjourned no one is bothered that where from they have come and what is their status, whether they are economically sound to bear travelling and other expenditures or not. Not only is this even if they present in the Court room to give evidence no proper regard is paid to them. From the above discussion it is clear that Indian Criminal Justice is heavily loaded in favor of the accused and is insensitive of the victims and the witnesses plights and rights. Section 165 of the Indian Evidence Act, 1872 empowers the Judge to ask any question in any form at any time to any witness. But the judge must exercise this power only to obtain proper proof of relevant facts. This section however does not empower the court to summon witness to give evidence but to produce any document or thing.[11] However the Supreme Court has said that this section has

[9] Sec. 315 Criminal Procedure Code: Any person accused of any offence before a criminal Court shall be competent witness for the defense and may give evidence on oath in disproof of the charge made against or any person charged together with him at the same trial:
Provided that-
(a) he shall not be called as witness except on his own request in writing;
(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or Court or give rise any presumption against himself for any person charged together with him at the same trial.

[10] Indian Evidence Act, 1872 provides that evidence may be given in any suit or proceeding of the existence or non existence every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

[11] Indian Evidence Act Sec. 165 "The Judge may in order to discover or obtain proper proof of relevant fact ask any question he pleases in any form, at any time of any witness or of the parties about any facts relevant or irrelevant; and may order the production of any document or thing and neither the parties nor their agents shall be entitled to make any such question or order nor without the leave of the Court cross examine any witness upon any answer given reply to any such question:
Provided, that the judgment must be based upon the facts declared by this Act to be relevant and dully proved.

given very wide power to judge to put any question and there is nothing which inhibits the power of judge to put question to the witness to elicit truth. It is very useful exercise of judges to minimize the errors.[12]

Apart from the above, the Court has been conferred wide power to summon and examine the witnesses under section 311 of the Indian Evidence Act, 1872.[13] The first part of the section is discretion of the Court to summon witness whereas second part of the section imposes obligation to examine the witness if it is essential for the just decision of the case. The provisions of the section do not cast a positive duty on the Court to exercise the power to summon witness 'in order to seek truth' but only 'the proof of relevant facts' or for 'just decision in case'. But the 'Just decision of the case' as provided in the section is not synonymous with the duty to discover truth.[14] Therefore the section requires to be amended and duty should be imposed to every Court to *suo motu* cause production of evidence for the purpose of discovering truth.

IV. JUDICIAL APPROACH

In adversarial system Judges are least bothered of truth. They are concerned about the proof that the case has been proved beyond reasonable doubt or not. If it is not proved beyond reasonable doubt, the accused will be acquitted. Therefore, the people who are aware that the acquitted accused is real offender lose faith in the system. Judiciary has also given importance to discover truth by the judges. The Supreme Court in *Ram Chandra's* case[15] has said that there is unfortunate tendency for the judge presiding over a trial to assume the role of umpire and allow the contest between prosecution and defense. This condition is evident from other cases too.

---

12 *State of Rajasthan v. Ani*, AIR 1997 SC 1023.

13 Indian Evidence Act: Sec. 311 provides "Any Court may at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examin any person in attendance, though not summoned as witness or recall or reexamine any person already examined; and the Court shall summon and examine or recall and reexamine any such person if his evidence to it to be essential to the just decision of the case.

14 Supra note 3 at 31.

15 *Ram Chandra v. State of Haryana*, AIR 1981 S.C. 1036.

Considering section 311 of Criminal Procedure Code,1973 Supreme Court in *Jamraj's case*[16] said that the requirement of just decision of the case does not limit the action something in the interest of the accused only , but action may equally be taken to the benefit of prosecution also. So that balance is maintained.

Again in *Rama Paswan's* case [17]the Court held that the determinate factor of section 311 of the Criminal Procedure Code is, whether it is essential to 'just decision of the case' to recall the witness for evidence. It was also held by the Court that the section is not limited only for the benefit of the accused but for the prosecution also.

In case of Kashmir *Devi,*[18] few policemen were alleged for the torture and murdering of the deceased. Appellant in this case had demanded to get the investigation done by the independent authority. But no one paid heed on his voice and investigation was done by the police officers. The Session Judge in the case observed that it was prima facie case of deliberate murder of an innocent person in police custody. The Supreme Court held that police in this case had acted in partisan manner to shield the real culprit and the investigation of the case has not been done in proper and objective manner. The Court opined that in the interest of justice it was necessary to get a fresh investigation made through an independent authority so that truth may be known.

In *Mohanlal's* case[19] it was observed by the Supreme Court that, if the best available evidence has not been brought before the Court, should the judge simply sit as an umpire and declare the judgment on the basis of the argument done between the prosecution and defense or he should play an active role to ensure justice and finding truth. The Court held that the Court must discharge its function according to law in dispensing justice because it is the duty of the Court not only to do Justice but also to ensure that justice has been done. The Court also said that while considering the scope and ambit of section 311 of the Criminal Procedure Code the object of section is to enable the Court to arrive the truth irrespective of the fact that prosecution or defense has failed to produce some evidence which is necessary for just and proper

---

16 *Jamraj v. State of Maharashtra* AIR 1968 SC 178

17 2007 Cri. L J. 2750 (SC)

18 *Kashmiri Devi v. Delhi Administration and Others*, AIR 1988 SC 1323

19 *Mohanlal Shamilal Soni v. Union of India Another* (1991) Supp.(1) SCC271

disposal of the case. The power under the section is exercised and the evidence is examined neither to help the prosecution nor the defense but only to sub serve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

V. CONCLUSION AND SUGGESTIONS

From the above discussion it appears that the existing Criminal Justice System exalts criminal's rights over the victims and procedural supremacy is getting more importance rather than quest for truth and justice. Judges are acting like an umpire not as discoverer of truth. Undue delay in disposition of cases defeats its objectives. The Adversarial System rates truth too low among the values that institutions are meant to serve. The most striking feature of our Criminal Justice System (Adversarial System) is that it puts justice before truth. The issue is not basically guilty or not guilty but can prosecution prove its case according to the rules, may be at the expense of truth.[20] The Adversarial System is against our ancient ethos where truth was given priority over other things. So the time has come to think over the existing system to make it more effective. Following are some of the suggestions which can be incorporated.

(1) Standard of proof in the Adversarial System should be changed. In place of proved 'beyond reasonable doubt' it should be 'up to the satisfaction of the Court'.
(2) Procedure of investigation in Adversarial System is not very satisfactory. To make it more efficient we should follow the process of Inquisitorial System.
(3) At present police are overburdened. So the law and order making wings are required to be separated from the investigating wings.
(4) Witnesses are prime factors of justice delivery system. But they are not given any protection or safeguards by the system. They should be given proper facilities, protections and safeguards. So that truth of the case is discovered.
(5) Apart from the above, victims of the case should be allowed to actively participate in such case rather than use him only as witness. This is because they are the only sourcewho can help the case in better way.

[20] Fox, Supra note 1 at 9.

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 243-257

Concept of Plea Bargaining in India

Adesh Kumar*

1. INTRODUCTION

The primary responsibility of the state is to maintain law and order so that the citizens can enjoy the peace and security. Life and personal liberty being vary precious rights, their protection is guaranteed to the citizens as fundamental right under Article 21 of the Constitution. The state discharges the obligation to protect life and personal liberty and property of the citizens by taking suitable preventive and punitive measures. Substantive penal laws are enacted prescribing punishment for the invasion of the rights. When there is invasion of these rights of the citizens it becomes the duty of the state to apprehend the person guilty for such invasion, subject him for fair trial and if found guilty punish him. Substantive penal laws can be effective only when the procedural laws for enforcing them are efficient. This essence is the function of criminal justice system[1]. Hence the administration of criminal justice is one of the most important affairs of the state. The state is bound to provide fair justice to all. But most of the time the justice is delayed and justice delayed is justice denied. Hence the state as a guardian of fundamental rights of its citizens is duty-bound to ensure speedy trial and avoid excessively long delays in trial of criminal cases that could result in grave miscarriage of justice. It is in the interest of all concerned that the guilt or innocence of the accused should be determined as quickly as possible. But over the years the situation became very grim. Long delays continue to occur in the disposal of trials and appeals. In the state of affairs as now existing it is extremely difficult to expedite the

* Lecturer, Law School, Banaras Hindu University, Varanasi, U.P. 221005. email- adesh@bhu.ac.in

[1] Suman Rai," *Law Relating to Plea Bargaining in India*", (Allahabad : Orient Publishing House, 2007).

process of criminal trials in the subordinate courts and the disposal of the appeals in the appellate courts. An appeal is generally carried against the order of the trial court, especially in the Sessions cases. Experience has shown that in the High Courts, it would take at least five to eight years for a criminal appeal to be decided. In High Court like Allahabad and Bombay, the Law Commission gathered the period of waiting for the disposal of the appeal is as long as ten years. If the matter should be carried on further appeal to the Supreme Court, it would be another ten years by the time the Supreme Court decides the matter. In the case of Hussainara Khatoon v. State of Bihar[2] taking, the above mentioned, facts into consideration, the Court observed that :

> *"the offences with which some of them are charged are trivial, which, even if proved, would not warrant punishment for more than a few months, perhaps for a year or two and yet these unfortunate forgotten specimen of humanity are in jail, deprived of their freedom for periods ranging from three to ten years without even as their trial having commenced"*

To reduce delay in disposing off criminal cases the concept of "plea bargaining" was introduced as an alternative method to deal with huge arrears of criminal cases[3]. In its 15th report the Law Commission recommended that plea-bargaining must be incorporated as a separate chapter in the Indian criminal jurisprudence[4]. The main objective[5] behind the incorporation of the concept was to reduce the delays in the disposal of criminal trials and appeals and also to alleviate the sufferings of under trial prisoners awaiting the commencement of their trials.

2. DEFINITION OF PLEA BARGAINING

Plea Bargaining is the central feature of modern criminal justice system[6]. In its most traditional and general sense, "Plea bargaining"

[2] AIR 1979 SC 1360.
[3] The Code of Criminal Procedure (Amendment) Bill, 2005.
[4] 154th Law Commission Report 1996 on Code of Criminal Procedure, 1973, Vol I
[5] 12th Law Commission of India.1991, 142nd report on concessional Treatment for Offenders who on their own initiative plead guilty without any bargaining.
[6] M.N. Bhavani, *"Plea Bargaining and Penology: An Appraisal"*, Ist Edition (2008)

refers to pre-trial negotiations between defendant and prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecutor.

According Black's Law Dictionary Plea Bargaining is :

> *"a process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offence of to only one of some as the counts of a multi-count indictment in return of a lighter sentence that that possible for eh graver charge".*

Albert W. Alschuler[7] defines Plea Bargaining as follows

> *"Plea bargaining consists of exchange of official concessions for a defendant's act of self conviction. Those concessions may relate to the sentence imposed by the court or recommended by the prosecutor, the offence charged, or a variety of other circumstances.*

The Canadian Law Commission[8] initially defined as follows

> *"any agreement by the accused to plead guilty in return for the promise of some benefit."*

In a subsequent working paper that commission[9] used the more neutral expression of "plea negotiations" or "plea discussions" since it was considered that the purpose of the process was to reach a satisfactory agreement and not to enable to accused to obtain a bargain. They, therefore, substituted the expression "plea agreement" for "plea bargain", and the following definition was then given to the process:

> *"...any agreement by the accused to plea guilty in return for the prosecutor's agreeing to take or refrain*

[7] "Plea Bargain and its history", Columbia Law Review, (1979) at 1.
[8] Law Reform Commission of Canada: Criminal Procedure : Control of Process, Working Paper 15 (1975) at 45.
[9] Law Reform Commission of Canada: Criminal Law : Plea Discussions and Agreement, Working Paper 60 (1989) at 174-175.

from taking a particular course of action."

3. CONCEPT OF PLEA BARGAINING

Originally it is an Anglo-American system of by-passing juries to reduce work load. The concept of plea bargaining arose between 1830 and 1840 as a part of a processes of political stabilization. There vast majority of criminal cases are settled by plea bargain rather that by a jury trial subject to the approval of the court. America's very well endorsed and established criminal jurisprudence inspired India to experiment the concept of plea bargaining in our country.

The term plea bargaining can be defined as the process whereby the accused and the prosecutor in a criminal case workout a mutually acceptable disposition of the case. That disposition is subject to court approval. However the court is not involved in any negotiations leading to agreement and in United States, is prohibited from such involvement. Properly negotiated and structured plea agreements in general benefit accused, the government and the judiciary also.

Plea bargaining basically involves three areas of negotiation i.e. Charge Bargaining (occurs when prosecutor allows defendant to plead guilty to a lesser charge), Sentence Bargaining (occurs when defendant is told in advance that to what extent his sentence will be reduced if he pleads guilty) and Fact Bargaining (involves an admission to certain facts in return for an agreement not to introduce certain other facts into Evidence).

It would be appropriate to refer to a leading case of the American Supreme Court sustaining the constitutional validity and also the important role, which the concept of plea bargaining plays in the disposition of the criminal cases. In the case of Santobello vs New York[10], Chief Justice Burger, who delivered the judgment, observed:

> *"disposition of charges after plea discussions is not only an essential part of the process, but a highly desirable part for many reasons. It leads to prompt and largely final dispositions of most criminal cases...it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned."*

[10] 404 US 257(1971)

The Law Commission considered the above beneficial aspect of plea bargaining and in its 15th report it said plea-bargaining should be incorporated in the Indian criminal justice system.

4. INDIAN LAW ON PLEA BARGAINING

In India, the system was introduced as a result of criminal law reforms introduced in the Criminal Law (Amendment) Act, 2005 (Act 2 of 2006). Section 4 of the Amendment Act introduced Chapter XXIA to the Code containing sections 265 A to 265 L. Though the Act was passed in 11th January 2006; the provisions were notified and came into effect from 5th July 2006 only.

A. Applicability of Chapter XXIA

S. 265 A deals with applicability of the Chapter XXIA. Benefit of Plea bargaining can be extended in two circumstances. One is, if a report is forwarded by an Officer in Charge of a police Station after the completion of investigation to the Magistrate[11]. The other is, if the Magistrate has taken cognizance of an offence on a complaint[12] followed by examination of a complainant and witness[13] and issuance of process[14]. Thus, it means, that the accused is entitled to avail the benefit of the plea bargaining both in the cases instituted on the police report and as well after commencement of proceedings upon a private complaint[15].

B. When are Plea Bargains Made?

A plea-bargain may be made by an accused when the challan has been presented by the police in the court alleging that an offence, punishable with seven years or less imprisonment, appears to have

[11] Under section 173 of Cr. P.C. 1973.
[12] Under S. 190(a) of Cr. P.C. 1973.
[13] Under S. 202 of Cr. P.C. 1973.
[14] Under Section 204 of Cr. P.C. 1973.
[15] Under Section 200 of Cr. P.C. 1973.

been committed by an accused or on a private complaint the accused has been summoned by the court in respect of the offences punishable with seven years or less imprisonment[16].

The accused person above the age of 18 years can file such an application for plea-bargaining provided the offence should not have been committed against a women or a child below the age of 14 years[17]. The offence should not affect the socio-economic conditions of the country and the accused should not have earlier been convicted for the same offence[18].

C. The Process of Plea Bargaining

The accused may file an application shall which contain brief description of the case including the offence to which the case relates and shall contain brief description of the case including the offence to which the case relates and shall be accompanied by an affidavit sworn by the accused stating that he knows the extent of punishment of the offence or offences he is indicated for and that he is willing to plead guilty to the charge of the particular offence or offences and that he has not been previously convicted of the same offence.

The court will then issue notice to the public prosecutor concerned, investigation officer of the case, the victim of the case and the accused for the date fixed for the purpose. When the parties appear, the court shall examine the accused in Camera where the other parties in the case shall not be present, to satisfy itself that the accused has filed the application voluntarily. The court shall then give time, if satisfied, to the above parties to work out mutually satisfactory disposition[19] of the case and the parties are then to sit together and workout mutually satisfactory disposition of the case. The court will ensure that the process is completed voluntarily and the accused can also seek the help of an advocate in the process.

16 Sec 265 A (1) a of Cr. P.C. 1973.
17 Sec. 265 L of Cr. P.C. 1973.
18 Sec. 265 A (2) and Sec. 265 B of Cr.P.C. 1973.
19 Sec. 265 B of Cr. P.C. 1973.

When the parties work out the disposition, a report shall be prepared which shall be signed by all the parties. This shall be followed by judgment[20] imposing lighter sentence on the accused and providing compensation to the victims. The provisions also mandate the court to give accused the benefit of Probation of Offenders Act, 1958 wherever it is permissible[21]. If the court finds that the benefit of probation is not available to the accused, then the court may sentence the accused to 1/4th of the punishment provided for such an offence. In cases, where the minimum punishment has been provided under the law for offence committed by the accused, the court may sentence the accused to half of the punishment to such minimum punishment. The judgment of the court will be final and an appeal shall lie against such judgment.

It may also be mentioned here that the period of sentence already undergone by the accused during investigation and trial of the case shall be set off against the sentence imposed by the court under this Chapter[22].

The accused is entitled to the benefits of Probation of Offenders Act, benefit of set off under section 428 of Cr.P.C. 1973 and the benefit of the bail under provisions of Cr.P.C. 1973. The accused convicted in the system of plea bargaining has no right of appeal but the remedy of writ jurisdiction under Articles 226 and 227 and special leave petition under Article 136 of the Constitution of India is not barred[23].

It has also been made amply clear in this chapter that notwithstanding anything contained in any other law for the time being in force, the statement of facts stated by the accused in the application for plea-bargaining shall not be used for any other purpose except for the purpose of this chapter of plea-bargaining shall not be used for any other propose except for the purpose of this chapter of plea-bargaining.

20 Sec. 265 F of Cr. P.C. 1973.
21 Sec. 360 of Cr. P.C. 1973.
22 Sec. 265 E of Cr.P.C. 1973.
23 Sec. 265 G of Cr.P.C. 1973.

Where mutually satisfactory disposition of the case could not be arrived at, the case shall proceed further in accordance with the provision of the code from the stage of such application has been filed without prejudice to the contents of the application and affidavit or any other disposition made by the accused in this behalf.

Thus provisions of Chapter XXIA extends the scheme of pea-bargaining in the Indian Criminal Jurisprudence, to a limited extent only, by giving discretion to the court, restricting excess power to the prosecution, as seen form International Jurisprudence, by giving sufficient measures to prevent the abuse of process.

5. PROS AND CONS OF THE CONCEPT OF PLEA BARGAINING

Significant feature of the method of plea bargaining is that it helps the courts and state to manage the case loads. It reduces the work load of the prosecutors enabling them to prepare for gravest case by leaving the effortless and petty offences to settle through plea bargaining. It is also a factor in reforming the offender by accepting the responsibility for their actions and by submitting them voluntarily before the law, without having an expensive and time consuming trial. In cases wherein the prosecution is weak, if trial is concluded, for want of proper witnesses or evidences and the ultimate result may be an acquittal, the prosecution will have a chance to find the accused as guilty, by cooperation with the accused for a plea bargaining.

From the angle of victim also, plea bargaining is a better substitute for his ultimate relief, as he can avoid a lengthy court process to see the accused, be convicted. The system gives a greater relief to a large number of under trials lodged in various jails of the country and helps reduce the long pendency in the courts.

There are certain flaws and disadvantages of this concept as well.

It is provided that chapter XXIA shall not be applicable in respect of the accused if the offence committed by the accused affects the socio economic condition of the country but the term "socio

economic offence affecting the society" is not defined under the Cr.P.C. It would lead unnecessary long drawn legal debate and confusion until the Apex Court finally interprets the scope of the above expression.

When there are several accused, some admit guilt under "plea bargaining" and other who defended the case are acquitted on merits, the persons convicted on plea bargaining seem to be discriminated in law in public perception.

The precautionary steps set down in law for the court to make in-camera enquiry, notice to prosecutor and victim consultations for final disposition spread over in different hearing dates invariably result in delayed disposal. The very object of expeditious disposal to cut short the proceedings gets defeated. On other hand, the quick summary enquiry of the accused and the victim in the open court and immediate decision would be a desirable and ideal procedure.

Conceptually, the plea-bargaining process reduces the administration of criminal justice to a barter system, where the haggling is between legal punishment and gains to the wrongdoer. Secondly, even the innocent accused would capitulate to wrong compromises and wrong convictions in order to escape from the ordeal of a prolonged and expensive trial. Such accused can develop a scornful attitude to the justice dispensing system. Plea-bargaining also undercuts the requirement of proof beyond reasonable doubt and that plea negotiation is substantially more likely than trial to result in the conviction of innocent. Plea-bargaining results in unjust sentencing. Finally, plea-bargaining can be construed as violating the principles enshrined in Article 21 of the constitution that no person shall be deprived of his liberty except according to the procedure established by law. The main criticism in the U.S. has emanated from human rights activities on the ground that plea-bargaining impairs the human rights of the accused. Moreover by inviting the police investigators in plea-bargaining process it would invite coercion and corruption. If the plea guilty application of the accused is rejected then the accused will face great hardship to prove himself innocent before the same trial court.

No doubt the plea-bargaining concept undermines the public confidence in the criminal justice system and result of this, it may lead to the conviction of innocent, inconsistent penalties from similar crimes and lighter punishment for the rich, still the advantages would out way the demerits.

6. INDIAN JUDICIARY TOWARDS PLEA BARGAINING

In India, a crime is essentially a wrong against a society and the state. Indian judiciary has adopted a very strict approach towards plea-bargaining. According to it any negotiation between the accused person and individual victim of the crime, should not pardon the accused from criminal liability. The Supreme Court of India has examined the concept of plea-bargaining in various cases like in *State of U.P. v. Chandrika*[24], the court reiterated the law relating to plea-bargaining, "it is a settled law that on the basis of plea-bargaining the court may not dispose of the criminal cases. The court has to decide it on merits. If accused confesses his guilt, appropriate sentence is required to be imposed... Mere acceptance or admission of the guilt must not be a ground for reduction of sentence."

The case of *Madanlal Ram Chandra v. State of Maharashtra*[25], is one of the landmark cases. In this case, the Supreme Court observed,

> *"In our opinion, it is very wrong for a court to enter into a bargain of this character. Offender should be tried and punished according to the guilt of the accused. If the court thinks that leniency can be shown on the basis of the case it may impose a lighter sentence. But the court should never be party to the bargain by which money is recovered by the complainant through their agency."*

The Supreme Court was of the view that, "in our jurisprudence, especially in areas of dangerous economic crimes and food offences; this practice intrudes on society's interests by opposing society's

[24] AIR2004 SC 164.
[25] AIR1968 SC 1267.

decision."[26] Thus, Indian jurisprudence recognizes plea bargaining as unconstitutional[27], illegal and immoral.

But insurmountable number of pending cases has forced judiciary, legislature and the concerned citizen to reconsider their opinion on the plea-bargaining, as it could be a beneficial provision to dispose of the backlog.

Speedy trial is the essence of criminal justice system and delay in trial itself constitutes denial of justice. In many instances the victim's soul rests in peace before the judgment is passed. The Supreme Court in *Kadra Pehadiya v. State of Bihar*[28] held, *"it is a crying shame upon our adjudicatory system which keeps men in jails for years on end without a trial."*

In *State of Gujarat v. Natwar Harchandji Thakor*[29], a Division Bench of the Gujarat High Court dealing with the concept of plea-bargaining observed:

> *"The very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable."*

In the case of *Shri Agulab Kareem Shekh v. State of Maharashtra*[30] the defendant was driving the bus after consuming alcohol and was arrested by police officer. When he was produced before the Magistrate he pleaded guilty to the charge against him. Accordingly, his plea of guilt was recorded and the learned Magistrate accepted the said plea and convicted him under S. 85 of the Motor Vehicles Act and sentenced him to pay a fine of Rs. 750, in default, to suffer simple imprisonment for two weeks.

[26] *Ganeshmal Jashraj v. Govt. of Gujarat*, AIR 1980 SC 264.
[27] *Kachhia Patel Shantilal Kodertal v. State of Gujarat*, MANU/SC/0141/1980.
[28] AIR 1981 SC 939.
[29] 2005 Cr. L. J. 2957.
[30] 2001(5) Bom Cr 57.

In *R. K. Saxena & Others Vs. State of Maharashtra*[31] the Applicant was caught under S.33 EEC(c) of the Drugs and Cosmetics Act, 1940. He was told that if he pleaded guilty to the offence, he would be let off with simple sentence. So he pleaded and was punished of under simple imprisonment for six months and to pay a fine of Rs. 2000 each and in default, to suffer simple imprisonment for tree months.

Also in the case of *In Re: 122 prisoner v. Respondent*,[32] the court highlighted the importance of plea-bargaining wherein a petition filed by 122 under trial prisoners voicing several grievances, it was appointed out as Amicus Curiae, brought to the notice of this Court that there are huge number of undrtrials prisoners languishing in different jails in the State, undergoing detention for more that even the maximum period of sentence prescribed for the offence or offences alleged against them. It was also submitted that this was mainly due to not-production of such prisoners in court for want of sufficient police escort.

After considering the facts, court also convinced about the importance of the plea bargaining and observer that:

> *"It is also to be mentioned here that admittedly, there are no sufficient Magistrate Courts in the State and the working conditions and infrastructure provided in the Criminal Courts are deplorable and in bad shape. The number of cases pending before most of the Magistrate Courts is quite huge... There can be no doubt that the State must be alert to this state of affairs, as well."*

7. NATURE OF PLEA BARGAINING IN INDIA : A CRITICAL ANALYSIS

Plea-bargaining has been derived from the principle of "Nolo Contendre" which literally means, "I do not wish to contend". The

[31] 2006 MLJ 242.
[32] 2007 Cr. L. J. 3241.

apex court has interpreted this doctrine as an implied confession, a promise between the Government and the accused that the charge of the accused must be considered as true for the purpose of a particular case only[33].

In India the legislature has endeavored to make plea-bargaining a tripartite process. It is pertinent to note that under the scheme available in USA, the settlement is out of court whereas in India it is proposed to involve the court as adjudicator between the parties, ensuring voluntary conduct. This was done since the court is charged by the constitution to act as a sentinel on the qui vive guarding the fundamental rights guaranteed by the constitution and public still reposes faith on judiciary.

Unlike the common jurisdictions such as England and Wales, Victoria, Australia, where plea-bargaining is permitted for the purpose of bargaining on charges, there is no express mention of any discussion on charges in India. Thus the situation is bleak with regard to multiple charges.

8. APPROACH OF THE LEGISLATURE

It is stated in S. 265C, that while the mutually satisfactory disposition is worked out, the compensation and other expenses payable to the victim is included. Therefore the accused cannot contest the quantum of the compensation which is quoted or voluntarily acquiesced to. In the absence of a guideline to work out the compensation the prosecutors have no restrictions or bars in deciding the quantum of compensation such an arbitrary provision leads to discrimination between people. The lacuna in plea bargaining has given scope of exploitation and "The law grinding the poor, the rich riding on them" and adequate measures have not been taken to evade it.

S. 265 D envisages commencement of de nova trial in case of failure to arrive at the mutually satisfactory disposition. This provision

[33] *State of Gujarat v. N H Thakor*, 2005 1 GLR 709

has generated the highest amount of controversy due to the unforeseen discrimination. It creates by creating two distinct classes of people based on their ability to work out a satisfactory disposition which stems from their financial inability and ability to negotiate. But this does not mean that all laws must be uniform and reasonable classification for the purpose of legislation is justified.

It may be emphasized that the outcome of the meeting is dependant on the parties involved in the negotiations and the legislature does not even create there classes and merely recognizes outcomes of the consensus for the purpose of giving appropriate remedies, without which it is impossible to obtain a verdict. Thus it is clearly inferred from above that the classification is real and substantial and bears a just and reasonable relation to the object of the legislation.

S. 265(G) has generated some unrest in the masses since it involves the waiver of the fight of the accused to appeal while entering into plea-bargaining, as the verdict of the court is conclusive. Any process based on negotiations and consensus leave no scope for appeals. An appeal is a creature of statute and only exists when expressly given. It is neither and absolute right nor an ingredient of natural justice. The legislature has envisioned speedier multiplicity of proceedings, pendency of criminal cases and inordinate delay in disposal of cases.

It is pertinent to note that remedies as provided for under Articles 226, 227 and 136 are available to the aggrieved party for redressing any legitimate grievance[34].

9. CONCLUSION

Certain lacunas are there in the statute as it does not specify the sentencing procedure for multiple charges and there is scope for ambiguity as the statute does not envisage whether the "Plea of guilt" extends to every single offence of mention the consequence of a

[34] *Workmen, Meenakshi Mills v. Meenakshi Mills Ltd.* AIR 1994 SC 2724

"partial plea of guilt", i.e. when the accused person plead guilty to a certain offence and not to the others. Secondly, the hearing must take place in court and involving the police should not invite coercion.

The concept no doubt undermines public confidence in justice. However, the advantages outweigh the disadvantages and will help in cleaning cases of smaller offences. This is reflected in the US criminal justice system, which has embraced plea-bargaining along with its minor defects and is making attempts to remove those defects out.

At this stage it can be said that "Law is not a Panacea. It cannot solve all problems but it can reduce the severity". Plea-bargaining in India endeavors to address the same, which despite its shortcomings can go a long way in speeding the caseload disposition and attributing efficiency and credibility to Indian Criminal Justice.

●

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 258-264

BOOK-REVIEW

Forensic Science (Hindi) Dr. Basantilal Babel 2006, Fourth Edition, Eastern Book Company, Lucknow pp. XXIII + 200 Rs. 125/-

While the use and progress in modern technology has influenced the society in general, forensic science has shaped the world of justice. Forensic science is the application of science to law. The broad spectrum of science is used to answer the questions of interest in the legal system. It may be in relation to crime or civil action. However, the traditional belief that forensic science is all about the cop and the crime has undergone a vital change. Now-a-days, forensic science is being used to verify and monitor compliance with such international agreements as Nuclear Non-Proliferation Treaty and the Chemical Weapon Convention in order to ascertain whether a country is developing a clandestine nuclear programme.

The term 'forensic' comes from Latin word '*forensis*' meaning forum. During the times of Romans, the criminal charge meant presenting the case before the group of public individuals. Both the persons – the accused and the accuser, would give speeches based on the side of their story. The individual with the best argumentation and delivery would determine the outcome of the case, that is, the person with best forensic skill would win. The "Eureka" legend of Archimedes (287 -212 B.C.), perhaps, can be considered an earliest account of the use of forensic science to find out the truth. By applying the principle of density, Archimedes was able to prove that a crown, as it was claimed was not made of gold.[1] Similarly, Sir Arthur Conan Doyle, in his writings produced from 1887-1915, created a fictional

[1] The Hamlyn Illustrated Encyclopedia (1988) at 30.

character Sherlock Homes who used forensic methods in investigations.[2]

Forensic science has many sub-branches. Criminalistics is the application of various sciences to answer the question relating to examination and comparison of biological evidence, trace evidence, impression evidence, controlled substance, ballistics and other criminal investigations. Forensic Anthropology is the application of physical anthropology in a legal setting usually for the recovery and identification of skeletonise human and animal remains. Forensic archeology is the application of a combination of archeological techniques and forensic science. Forensic Art involves drawing and artistic reconstruction of suspects, victims and criminals. It plays a major role in solving civil and criminal cases. Forensic biology deals with serological and D.N.A. analysis of physiological fluids for the purpose of identification and individualization. Forensic entomology deals with the examination of insects in, on and around the animal and human remains to assist the determination of time and location of death. Forensic geology deals with trace evidence in the form of soil, mineral and petroleum. Forensic meteorology is a site specific analysis of past weather conditions. Forensic pathology is a field in which the principles of medicine and pathology are applied to determine the cause of death or injury in the context of legal inquiry. Forensic odontology is the study of uniqueness of dentition. Forensic toxicology is the study of drugs and poisons on animals and human. Forensic psychology is the application of psychological principles and knowledge to various legal activities. Typical forensic psychology issues include child custody disputes, child abuse or neglect, assessing personal capacity to manage one's affairs, matters of competency to stand trial, criminal responsibility, personal injury, and advising judges in matters relating to sentencing regarding various mitigating and the

[2] Arthur Conan Doyle, Sherlock Holmes : The Complete Novel and Stories (2003) I and II, Bantam Classics Reissue, New York.

actuarial assessment of future risk.[3]

The book under review[4] is concise in space but exhaustive in its ambit. The author has presented the subject is such a way that it is easy for the reader to appreciate the subject. The book is divided into thirty chapters. In chapter I, the author has outlined the meaning and objective of preliminary investigation. The desirable qualification of investigating officer has also been succinctly highlighted in this chapter. The author has devoted to the importance and utility of forensic science and forensic psychology in the chapter II. The investigating officer should visit the place of occurrence as soon as possible. The author has explained the Locard's principle of mutual exchange. The accused leaves some of his traces at the place of incident and similarly takes some traces with him from that place. This issue has been taken up by the author in III chapter of the book. Application of forensic photography gives vital information which human eye may not. The author in chapter IV has described the importance of photo-picture.

The Bartilon system suggests that every one is unique in his body construction and it does not usually undergo any change after attaining 21 years of age. The accused, victim or any other person may be identified by his voice. To identify such a person a sophisticated digital voice analysis system is used. Moreover, one may be identified by his mode of operation. All these have been taken up by the author in chapter V. Chapter VI deals with importance, types, search, collection, analysis and comparison of physical evidences obtained during investigation.

---

3 One of the earliest examples of a psychologist acting as an expert witness in a court of law was in 1896 when Albert von Schrenck-Notzing testified at the trial of a man accused of murdering three women. Drawing on research into memory and suggestibility he argued that pre-trial publicity meant that witnesses could not distinguish between what they actually saw and what had been reported in the press. Forensic hypnosis is a techniques adopted to find out the truth.

4 Basantilal Babel, *Forensic Science*, Fourth Edition (2006).

Body fluids like blood and semen found on the place of occurrence may be vital for the investigating agencies to reach the culprit. The importance of such fluids, the method of their collection and packaging and comparison has been dealt at length in two chapters, namely, Chapter VII and VIII respectively. Everyone has distinct hair structure. Hair is important physical evidence. The techniques of search, collection and analysis of hair and the distinction between human and animal hair has been discussed in Chapter IX. Tattooing and scars, in identifying a person, have proved to be useful and is well illustrated by Sidney Shark case.[5] Branding, mutilation and moles play vital roles. This aspect has been taken up in chapter X and XI.

While chapter XII deals with finger prints, pore-scopy and D.N.A, chapter XIII deals with foot prints. The author has traced the historical background of finger print since Tutankhamen[6]. Galton's system in classifying the types of finger prints finds place in chapter XII. The importance of finger print in finding out the truth has been highlighted in a well known Bhowal Saint Case[7]. Similarly, the use of DNA test in establishing the offence of adultery has also been accepted by the Delhi High Court.[8] The author has also elaborated the techniques of taking finger prints[9], foot prints[10] and their packaging. Chapter XIV and XV respectively deal with counterfeit coins and currencies. The method of minting and the different stages involved in this process has been lucidly discussed. The identification of counterfeit coins and the law prohibiting the making of such coins are discussed in chapter XV. The methods of currency making, identification of fake currency and fake money detector – an

---

5 Id at 68.

6 One of the last kings of the XVIII dynasty of Egypt.

7 *Supra note* 3 at 81.

8 Id at 88.

9 Id at 84.

10 Id at 93-98.

instrument used for identifying fake currency have also been discussed in this chapter.

Chapter XVI is devoted to questioned documents. The documents play important role in establishing a case. The problem, however, arise when the truth of this document is challenged. There are certain documents like letter, money order, question papers and wills where tampering is very common. The author has described various methods of making a false document and the methods of identification such false documents. The opinion of expert has been mentioned in this chapter.

Different instruments like microscope,[11] lie detector,[12] polygraph, automatic finger print recognition (A.F.R.) and facial analysis comparison and elimination system (FACES)[13] are used in forensic study. The author has given space for such instruments as well.

For speedier communications use of wire is very common and theft of such wire is equally rampant. In chapter XX different types of wires, their specificities along with the instruments usually used in wire cutting have been described. The author has also suggested certain precautions to be taken by the investigating officers while dealing with wire cutting cases.

Light wave is a combination of visible and invisible rays. Visible rays consist of seven colours while there are two invisible rays called infra rays and ultra rays. The importance of infra and ultra rays in investigation has been elaborated in Chapter XXI of the book under review.

Chapter XXII deals with computer. It is a unique instrument used in detecting the crime and in committing the crime. Different types of fire arms and explosives, used cartridges and their importance in identification of accused has been elaborated in chapter XXIII of the book. In this chapter the author has given guidelines to the

[11] Chapter 17.
[12] Chapter 18.
[13] Chapter 19.

investigating officer while dealing with fire arms beside the method and technique of packaging of such arms.

In the age of fast life, road accidents are very common leading to death and / or injuries. The aetiology of road accident, the technical inspection of the vehicle and the direction to the investigating officer dealing with road accident has been pointed out in chapter XXIV. The identification of physical objects like soil, glass, paints, petroleum substance, misbranded packets etc. on the basis of shape, size and chemical examination have been dealt in chapter XXV. The importance, functioning and types of metal detector finds place in Chapter XXVI. Though the author has devoted a separate chapter to metal detector, this aspect could have been taken up very well in subsequent chapter XXVII on crime prevention instruments. Various instruments like fake money detector, fire proof wall paper, electronic locks etc. which may be used in preventing the crime have been described in chapter XXVII Forensic hypnosis is an emerging branch of psychology. This technique is being used in detection and prevention of crime. This is dealt in chapter XXVIII and also in chapter XXX.[14] In chapter XXIX the evidentiary value of physical evidence has been discussed. The identification of person by iris of eye also finds a place in this chapter. It may be suggested that iris identification part of this chapter would have been appropriate placed in chapter eleven of the book. The last chapter of the book deals with the use of new technologies in crime investigation.

The title of the book at the cover page is appropriate. It may, however, be suggested that the English explanatory-title of the book 'Being a study of scientific aid to investigation'[15] at inner page be modified as 'A Study of Scientific Aid to Investigation.' The book

[14] Id at 196
[15] Id at (iii)

could be improved further by adding one chapter on toxicology. The author has, however, done a commendable work not only for the lucid presentation of a technical subject in Hindi but also by consuming lesser space. The book shall be of immense use to investigating officers, judicial officers and students along with any common reader having interest in the subject. The publisher should also be appreciated for providing a good gait up to this book at moderate price.

Akhilendra K. Pandey*

●

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 265-266

BOOK-REVIEW

Private International Law in India : Adequacy of Principles in comparison with Common Law and Civil Law System By Dr FE Noronha LLM, PhD, Advocate, Universal Law Publishing Co, Pvt Ltd, Delhi 110 033, 2010, ISBN 978-81-7534-779-3

Private international law (also known as "conflict of laws") is that body of laws applied to a situation where some foreign elements are involved. It tries to resolve a dispute relating to jurisdiction, choice of laws, issuance of a process to a foreign defendant, recognition and enforcement of foreign judgment. The subject is of growing importance and fascinating in view of the fact that interstate commercial transactions and interactions are very frequent today which also justifies the renewed interest in the subject in recent years.

Literature on private international law in this country is scanty so a good book like of which is under review is always welcome. The author has taken pain in bringing home to the readers the nature of the subject and almost all the important aspects concerning it mainly through the case law . Exposition as well as the texture of the work is simple and the readers may find it easy to grasp a subject as difficult and complex as the private international law .

The book is divided into ten Chapters. The author begins by taking a stock of the situation in Chapter I "Private International law and its Unsatisfactory State In India" where he emphasized the need to codify the rules of private international law . Reliance shown by the Indian courts on the English and other countries' precedents has been documented and is useful to the readers. In Chapter II the author traces the origin of the rules of private international law with a brief account of the genesis of private international law in India. Chapter III " General Questions of Private International Law" concerns itself with some general aspects in the context of private international law. It deals with even those topics having remote relationship with the

subject.

Chapter IV "Choice of Jurisdiction "deals with jurisdictional issues where subject matter has some foreign connexion. The author has also dealt with some peripheral matters such as Jurisdictions *in rem* and *in personam*, State immunity. The author has recommended that jurisdictional rules should be adopted in this country. "Choice of Law "is the next Chapter. The choice of law is an important aspect of the subject which is about the rules determining the law to be applicable in a given case. A discussion by the author of Proper law in International Contracts, extra- territorial operation of Indian law and decisions of the Supreme Court on choice of law recently delivered are particularly useful.

Domicile is a key aspect of every discussion on private international law which is discussed in Chapter VI of the book. To my mind a discussion on "domicile "should have found place in the beginning of the book itself. Chapter VII " Personal and Property law and Miscellaneous topics" throws light on some aspects of personal and property laws as well as extradition .Needless to say these are not strictly the subject matter of private international law but useful in having a complete idea of the subject . Final Chapters of the book include the topics – international arbitration, recognition and enforcement of foreign decrees. In the concluding Chapter X the author has given a model Indian Code of Private International law which has increased the value of the book much. The book also contains three appendices. Appendix I collects the relevant provisions of the some countries which is illustrative. Appendix II contains the relevant case law and Appendix 3 contains the key international conventions touching on the subject which is very useful.

Ajendra Srivastava*

●

* Associate Professor, Law School, BHU, Varanasi

Vol. 39 Ban. L.J. (Jan. 2010 – Dec. 2010) 267-272

BOOK-REVIEW

Law of Evidence by M. Monir (Chief Justice), (Eighth Edition-2010) Universal Law Publishing Co., New Delhi, India, ISBN No. 978-81-7534-968-1 Pp. 502.

Being a procedural law, the law of evidence plays a very important role in determining the rights and liabilities of the litigants. The object of judicial proceedings is also the enforcement of the rights or liabilities which invariably depends upon certain facts. A sound decision is not possible without the knowledge of the true facts related to the dispute. Law of Evidence defines a system of rules for ascertaining controverted questions of fact in judicial inquiries. The facts alleged by one party and denied by other party require the court to ascertain whose contentions are true and for that purpose, the judge has to weigh the evidence available in support of or contradiction to those contentions. This task is preformed in accordance with the rules of evidence. The time of the court is also very precious. Bringing of irrelevant and frivolous facts on record wastes the time of the courts which results in delay of the proceedings unnecessarily and also it may influence the mind of the court. In the absence of the Law of Evidence, substantive law would be almost worthless. Because without the enforcement mechanism, the threat of punishment to the law breakers by the substantive law, would remain empty in practice and we know that empty threats do not deter. Consequently there should be some rules of law to control the leading of evidence in a judicial proceeding. The law of evidence is essentially, procedural law with overtones of substantive law i.e. sec 115- doctrine of estoppel.

Our Law of evidence is contained in the Indian Evidence Act 1872 which was drafted by the renowned authority Mr. James Stephen. It came into force from 1st September 1872. The whole Act is divided

into three main parts i.e. relevancy of facts, proof and production and effect of evidence. The Act mainly based on Taylor's Evidence. Sir James Fitzjames Stephen defined that

"it is an attempt to reduce the English law of Evidence in the form of express propositions arranged in their natural order with some modifications rendered necessary by the peculiar circumstances of India".

The book under review titled "Text Book in the Law of Evidence" is authored by Chief Justice M. Monir who is the authority of Law of Evidence. The book is revised by the Dr. Manjula Batra, Dean, Faculty of Law, Jamia Millia University, New Delhi who has also written the preface to the eighth edition of the book in which she rightly observed that "*the book is rich in case law and the commentary given on each section speaks volume about the writing skill of the author*". The book makes an original as well as unique contribution to the law of Evidence. It seems to be an honest and sincere attempt to give readers as much as possible of the judicial exposition of the law on the basis of the decisions under law of evidence. The skeleton of Indian Evidence Act 1872 titled as "Charts at a Glance" and the brief introduction is the marrow of this book. The book is divided in three parts and eleven chapters having thirty six pages of contents.

The introduction part of this book discusses the function of the law of evidence. The author enlivened the words of Sir James Fitzjames Stephen, in answering the question that why should there be any legal rules of evidence as distinguished from the ordinary rules of reasoning?, " *My Evidence Bill would be a very short one. It would consist of one rule to this effect: "All rules of evidence are hereby abolished."* It also deals with the scheme of the Evidence Act chapter-wise briefly. Discussing about the preamble, the author explains that though the act is a consolidating statute, yet it is not exhaustive. In addition to the general rules of evidence provided in the Act, there are some other rules of evidence relating to special subjects contained in

other enactments. But it is not open to the courts to apply principles of equity, justice and good conscience in the matters of evidence nor they can admit irregular evidence to throw light upon the issue. The author reveals that it is a *Lex Fori.*

The first chapter narrates the extent and scope of the Evidence Act with the interpretation clause. The term 'Evidence' is defined with a comparative study of Indian and English law. In English law, the real evidence is also included with oral and documentary evidence. In India law of evidence recognizes only two categories i.e. oral evidence and documentary evidence. Thus the author finds that the definition of 'Evidence' under section 3 of Indian Evidence Act is incomplete and narrow. The author emphasised on the guidelines of the Supreme Court by which the circumstantial evidences can be a sole basis for conviction. The author continues the complete discussion to the term "Proved, Disproved, Not Proved" and "May Presume, Shall Presume and Conclusive Proof" with related sections of the Act.

The most credit worthy aspect of the Indian Evidence Act "Relevancy of Facts" summarised in chapter two. It explains the Principle of Res Gestate, Plea of alibi, Admission, Confession thoroughly. The chapter also evaluates the dying declaration and analyzes the difference between Indian and English law with the evidentiary value and admissibility of dying declaration. Relevancy of judgement of courts is traced by the author. In this chapter the author has done an indepth analysis of the relevancy of expert opinion. Who is expert, the difference between expert and non expert witness, the competency and credit of an expert. Regarding D.N.A. test the Apex Court observed that *"the D.N.A. test is not to be regarded as matter of routine and only in deserving cases such a direction can be given".* Relevancy of character in civil and criminal cases is also given place in this chapter.

Facts which need not to be proved are taken into consideration in chapter three which includes that fact judicially noticeable need not to

be proved, facts which court must take judicial notice and facts admitted need not to be proved. Oral evidence, its meaning, evidentiary value and appreciation of oral evidence is covered under chapter four. It also makes it clear that what is hearsay evidence and reason for exclusion of it with the exceptions.

Documentary Evidence is defined under Sec- 3 of the Indian Evidence Act and the chapter five deals with the mode of proof of documentary evidence i.e. the mode of proof contents of documents either by primary or secondary evidence. It also deals with the types of documents viz. Public and Private documents of the presumptions as to the documents. Admissibility of electronic records, proof of signature, handwriting, electronic signature, verification of digital signature and Official Gazettes are the strength of this chapter with the detailed study of presumptions with reference to various documents.

The sixth chapter concentrates the exclusion of oral by documentary evidence. This chapter forbids proving the contents of a writing otherwise then by writing. Reliance of oral evidence, cases where oral evidence is excluded by documentary evidence as well as oral evidence of a dying declaration and statements to the police are taken into consideration for the study under this chapter.

The part III of the book in accordance with Indian Evidence Act is the last part entitled "Production and Effect of Evidence" which starts with chapter seventh 'burden of proof'. It affirms the maxim "*incumbit probatio qui dicit, non qui negat i.e.* the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. Lord Maughan observed that "*it is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons*". The chapter adverts burden of proof to particular facts, relationship and ownership. The presumptions relating to various offences, paternity of child and conclusive proof of legitimacy is the base of this chapter with the detailed study of presumptions as to dowry death which is discussed in

relation with provisions of Constitution of India. The chapter also summarised the presumptions which court may presume.

Best wrote that principle of Estoppel belongs rather to substantive law than to adjective law. Taking it into consideration estoppel, nature of estoppel as a rule of evidence or substantive law, general conditions of estoppel and kinds of estoppel are the crux matter of this chapter. The present chapter also deals with the rule of exclusion of certain evidence under certain circumstances e.g. between tenant and landlord, bailor and bailee and licensor and licensee etc. at length.

The chapter ninth speaks about the most important aspect of the evidence i.e. witnesses. The witnesses in various aspects such as their competency, compellability, privileges, admissibility and number are narrated in this chapter. The present chapter outlines the testimony, competency and credit of child witness and conviction on the basis of child witness including dumb witness, communication between husband and wife, official communication and professional communication.

The chapter ten expresses propositions of law, well settled principles in English law, regarding the examination of witness. Three kinds of examination i.e. examination-in-chief, cross examination and re-examination, leading questions and when they must be asked and may be asked are the main contents of this chapter. Special attention is given to Sec- 165 dealing with the powers of the judge to put question or to order production of the document. Improper admission and rejection of evidence is the subject matter of the last chapter which traces scope, application of Sec 167 and effect of improper rejection of evidence.

On the whole the work is highly informative, thought provoking and full of new insights. By and large the subject has been treated in a candid and analytical way. The author has done a Yeoman Service in

writing the book. The book is well documented and every subject has been discussed at proper place which reflects the inventive spirit of the author and also the depth of knowledge on the subject. The greatest strength of this book is its precision, coherence, comprehensive treatment and simplicity of the language. The table of content, statutes referred and systematic subject index increases the research value of the book. The author makes an original as well as unique contribution to the law of evidence. Needless to say it is a must and compulsory reading for the experts, students, teachers as well as research scholars.

Adesh Kumar*

* Lecturer, Law School, Banaras Hindu University, Varanasi, U.P. email-adesh@bhu.ac.in

SHORT ARTICLES

Ali Mehdi	Mining in Bauxite Mines on Niyamgiri Hilltop in Orissa : Government's Action in Harmony with the Nature
M.N. Haque	Service Tax : A Profitable Imposition
Anshu Mishra and	Platonic Concept of Justice vis-a-vis Indian
Dharmedra Kumar Mishra	Varna Dharma : A Fresh Look
Arun Kumar Singh	Justice and Truth: An Analysis with Special Reference to Criminal Justice System in India
Adesh Kumar	Concept of Plea Bargaining in India

BOOK REVIEWS

Akhilendra K. Pandey	Basantilal Babel Forensic Science (Hindi)
Ajendra Srivastava	FE Noronha Private International Law in India : Adequacy of Principles in comparison with Common Law and Civil Law System
Adesh Kumar	M. Monir, Law of Evidence