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Basic Structure of the Indian Constitution - An Analysis*

Hon'ble Mr. Justice V. Dhanapalan #

Introduction :

Constitution of India is the creation of a constituent act and is an extra-ordinary legislation derived directly from the people acting in their sovereign capacity for setting up the structure of the Government.

Constitution is a set of laws and rules. It sets up the machinery of the Government of a State. It defines and determines the relation between the different institutions and areas of Government, the executive, legislature and the judiciary, the Central, the State and the local government. A Constitution is a source of jurisprudential fountain head from which other laws must flow and it must grow with the growth of the nation with the philosophical and cultural advancement of the people who gave birth to it. The Constitution of India is one such document which is the longest of its kind representing the political, economic and social ideals and aspirations of the vast majority of the Indian people. The ideals intended to be achieved by the provisions of the Constitution were preceded by immense sacrifices and the Constitution could not be a source for the destruction of these ideals. It is a constituted document keeping with modern constitutional practice, and fundamental to the governance of the country. The people of India have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the

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Constitution. All powers belong to the people. They are entrusted by them to specified institutions and functionaries. This is enshrined in our Preamble of the Constitution.

Except the Indian Constitution, no other Constitution in the world combines under its wings such diverse people with different notions, religions, culture and in different stages of economic development into one nation and no other nation is faced with such vast socio-economic problems. It is a noble and grand vision carried out in part by conferring fundamental rights on the people. Legislature, Executive and Judiciary have been created and constituted to serve the people.

Indian society not only requires the development of individual citizens but also requires this development to be such that it leads to the upliftment of the society as a whole. The approach to socialistic ideas are derived from Indian social considerations. The public and private sectors are harmoniously working. The preamble to our Constitution emphasises removal of the economic inequalities, to provide equality and opportunities for all and to protect the economic interests of several sections of the society. The commitment of the Constitution to the social revolution through rule of law lies in the effectuation of the fundamental rights and directive principles as supplementary and complimentary to each other. We can say that the preamble, fundamental rights and directive principles of the State policy – the Trinity – are the conscience of the Constitution. Socio-economic democracy with political democracy must take strong roots and should become a root of human life. Social and economic democracy is the foundation on which political democracy would be a way of life. Law, as a social engineering, is to create a fair social order removing the inequalities in social and economic life.

Preamble - the foundation of Basic Structure Doctrine :

The Constitution of India, solemn principle and concepts underlined in the Preamble[1].

The Preamble to the Constitution forms an important part

1. "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens :
JUSTICE – social, economic and political ;LIBERTY – of thought, expression, belief, faith and worship ;EQUALITY – of status and of opportunity ;and to promote among them all,FRATERNITY – assuring the dignity of the individual and the unity and integrity of the Nation ;IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November,1949, do HEREBY, ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

with the hopes and aspirations of the people of India made on the day when this nation has become Republic. The solemn promise is not only to themselves, but also to the coming generations and posterity. The Indian Republic envisaged in the Preamble is a form of Government of the people, for the people and by the people through their freely elected representatives and thereby found necessary to qualify the sovereignty of the Republic by using the word 'Democratic', which was made explicit by emphasising "liberty of thought, expression, belief, faith and worship and equality of status and of opportunity", which means, an independent sovereign State may well become a people's Government. Similarly, the dignity of the individual in the Preamble to the Constitution emphasises the positive aspect, which signifies the word of moral and spiritual import. It implied an obligation on the part of the Union to respect the personality of the citizen and to create conditions in which every citizen would be left free to find individual self-fulfillment.

Sovereignty, in a democratic country like India, theoretically vests in the people. In fact, it is exercised by the dominant group of leading politicians, who can successfully use the collective forces as a ruling party under the Constitutional mandate. Thus, the concept of sovereignty in our Constitution moves like a rigmarole amongst the pillars; though in the ultimate sense it vests in the people of India, in its exercise and practice, it revolves amongst Parliament and the Legislature, the Judiciary and the Executive. Shortly to say, in theory, it vests in the people; in practice, it vests in the three pillars of the Constitution and by experience, it is exercised by the political groups, who dominate the governance of the country.

While dealing with the concept of justice, the Preamble has enshrined that justice has three facets viz., social, economic and political. The order of the words social, economic and political are of much significance. Without social justice, the Constitution would not be able to secure economic justice to the people. It is only such citizenry which has been able to secure social justice and economic justice for all its citizens, which would deserve, claim and assert political justice. Only a voter, who is socially and economically strengthened, can hope to earn political justice. Similarly, there can be no expression without thinking. Liberty of thought enables liberty of expression. Belief occupies a place higher than thought and expression. Belief of people rests on the liberty of thought and expression. Placed as the three angles of a triangle, thought and

expression would occupy two corner angles on the base line while belief shall have to be placed at the upper angle.

No reading of any Constitution can be complete without reading it from the beginning to the end. While the end may expand, or alter, the point of commencement can never change. It is the Preamble where from the Constitution commences. Hence, the significance of the Preamble.

It is no exaggeration to say that the Preamble to the Constitution of India is its spirit and backbone. The Preamble pervades through and inspires all the provisions of the Constitution. It is also the quintessence of the Constitution. Ever since the day it was adopted by the Constituent Assembly, it has enabled the Constitution to stand erect – neither bending nor breaking. Hundreds of judicial pronouncements made by stalwarts testify that the Constitution of India has stood like a rock facing the splash and floods of stormy waters. However the waters have flown by, but the Constitution and its Preamble have not been swayed away.

The Preamble to the Constitution has played a predominant role in shaping the destiny of the country. Wherever the limbs of democracy have moved on the path laid down by the Preamble, the movement has been in the right direction. Any deviation from the path has resulted in aberrations.

The significance of the Preamble is that it contains the fundamentals of our Constitution. The people of India resolved to constitute their country into a sovereign democratic republic. No one can suggest that the words and expressions in the Preamble are ambiguous in any manner. By their true import and connotation, it is well known that no question of any ambiguity is involved.

Jurists and judicial opinion hold unanimously, except for variation in choosing the words of expression, that the Preamble to the Constitution of India is not just a formal piece of draft. It is, in itself, a historic document and yet a part of the Constitution. It is a source of interpretation and the basis of rule of law. It has guided the destiny of this nation at least through the Judiciary – a pillar of constitutional democracy. It will continue to play its role, as thought of by the framers of the Constitution, in the times to come.

The Constitution-makers gave to the Preamble the place of pride. It embodied in a solemn form all the ideals and aspirations for which the country had struggled during the British regime. The Constitution was sought to be enacted in accordance with the genius of the Indian people. It certainly represented an amalgam of schemes and ideas adopted from the Constitutions of other countries. But, the constant strain which runs throughout each and every article of the Constitution is reflected in the Preamble which could and can be made sacrosanct. It is not without significance that the Preamble was passed only after draft articles of the Constitution had been adopted with such modifications as were approved by the Constituent Assembly. The Preamble, was, therefore, meant to embody in a very few and well-defined words, the key to the understanding of the Constitution. To achieve the goal set out in the Preamble, the Directive Principles and Fundamental Rights, the Constitution envisaged a planned economy.

The objectives specified in the Preamble contain the basic structure of our Constitution, which cannot be amended in exercise of the power under Article 368 of the Constitution. The concept relating to "separation of powers among the legislature, the executive and the judiciary" and the fundamental concept of an independent judiciary are now elevated to the level of basic structure of the Constitution and are the very heart of the constitutional scheme.

The Constitution intend to remove social and economic inequality to make equal opportunities available [2]. In reality, the right to social and economic justice envisaged in the Preamble and elongated in the Fundamental Rights and Directive Principles of the Constitution, is to make the life of the poor, disadvantaged and disabled citizens of the society, meaningful [3].

Basic Structure of the Constitution of India consists of the following features:

(1) Supremacy of the Constitution;

(2) Republic and Democratic form of Government.

(3) Secular character of the Constitution;

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2. Articles 14 (4) and 16 (4) of the Indian Constitution.
3. Articles 14,15,16,21,38,39 and 46 of the Indian Constitution

(4) Separation of powers between the legislature, the executive and the judiciary;

(5) Federal character of the Constitution.

1. Supremacy of the Constitution :

Supremacy of the Constitution is a doctrine whereby the Constitution is the supreme law of the land and all the State organs including Parliament and State legislatures are bound by it. They must act within the limits laid down by the Constitution. They owe their existence and powers to the Constitution and, therefore, their every action must have the support of the Constitution.

The question whether fundamental rights can be amended under Article 368 came up for consideration before the Supreme Court in *Sankari Prasad Singh Deo v. Union of India*[4] , . In this case, the validity of Constitution (1st Amendment) Act,1951 which inserted inter alia Articles 31-A and 31-B of the Constitution was challenged. The amendment was challenged on the ground that it abridges the rights conferred by part III and hence was void. The Supreme Court however rejected the above argument and held that the power to amend including the fundamental rights is contained in Article 368 and the same was taken by Court in *Sajjan Singh v. State of Rajasthan*[5] . In *Golak Nath v. State of Punjab*[6] , the validity of 17th Amendment, which inserted certain Acts in Ninth Schedule, was again challenged. The Supreme Court ruled that the Parliament had no power to amend Part III of the Constitution and overruled its earlier decisions in *Shankari Prasad* [7]and *Sajjan Singh* [8] cases. In order to remove difficulties created by the decision of the Supreme Court in *Golak Nath* [9] case, Parliament enacted the 24th Amendment Act. The Supreme Court recognised Basic Structure concept for the first time in the historic *Kesavananda Bharati*[10]case. Since then, the Supreme Court has been the interpreter of the Constitution and the arbiter of all amendments made by Parliament. In this case, the validity of the 25th Amendment Act was challenged along with the Twenty Fourth and Twenty Ninth Amendments. The Court, by

4. AIR 1951 SC 458
5. AIR 1965 SC 845.
6. 1967 (2) SCR 762
7. Supra 5
8. Supra 6
9. Supra 7
10. 1980 (3) SCC 625

majority, overruled the Golak Nath's case, which denied Parliament the power to amend fundamental rights of the citizens. The majority held that Article 368, even before the 24th Amendment, contained the power as well as the procedure of amendment. The Supreme Court declared that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution and Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change', or 'alter' the basic structure or frame work of the Constitution. This decision is not just a landmark in the evolution of constitutional law, but a turning point in constitutional history.

In *Indira Gandhi v. Raj Narayan*[11], the Supreme Court applied the theory of basic structure and struck down clause (4) of Article 329-A, which was inserted by the 39th Amendment in 1975 on the ground that it was beyond the amending power of the Parliament as it destroyed the 'basic structure' of the Constitution. The amendment was made to the jurisdiction of all courts including Supreme Court, over disputes relating to elections involving the Prime Minister of India. In this case, again, each Judge expressed views about what amounts to the basic structure of the Constitution.

In *Minerva Mills Ltd. v. Union of India*[12], the Supreme Court, by 4 to 1 majority, struck down clauses (4) and (5) of the Article 368 inserted by 42nd Amendment, on the ground that these clauses destroyed the essential feature of the basic feature of the Constitution. It was ruled by the Court that a limited amending power itself is a basic feature of the Constitution.

In *Kesavananda Bharati v. State of Kerala*[13], the Supreme Court held that every provision of the Constitution can be amended provided the basic foundation and structure of the Constitution remains the same.

In the said judgment, the question of validity of Article 31-C was examined mainly from two points of view; the first was its impact on the various freedoms guaranteed by Article 19, the abrogation of the right of equality guaranteed by Article 14 and the right to property contained in Article 31. The second was whether the amending body, under Article 368, could delegate its amending power to the Legislatures of the Union and the States. Alternatively, whether the Parliament and the State Legislatures can, under Article

11. AIR 1975 SCC 2299,
12. AIR 1980 SC
13. (1973) 4 SCC 225

31-C, amend the Constitution without complying with the form and manner laid down in Article 368.

In *Indira Nehru Gandhi v. Raj Narain* [14], there was a controversy during the course of arguments on the point as to whether the Supreme Court laid down in its judgment in *Kesavananda Bharati case* [15] that fundamental rights are not a part of the basic structure of the Constitution. What has been laid down in that judgment is that no Article of the Constitution is immune from the amendatory process because of the fact that it relates to a fundamental right and is contained in Part III of the Constitution. It was also held that a constitutional amendment under Article 368 does not constitute "law" as mentioned in Article 13. The Supreme Court also did not agree with the view taken in the case of Golak Nath that there was a limitation on the power of Parliament to amend the provisions of Part III of the Constitution so as to abridge or take away the fundamental rights. The Supreme Court (Khanna,J.), thereafter, dealt with the scope of the power of amendment[16] and the connotation of the word "amendment" as,

> The words 'amendment of the Constitution' with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic Government into dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the State according to which the State shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. Provision regarding the amendment of the Constitution does not furnish a pretence for subverting the structure of the Constitution nor can Article 368 be so construed as to embody the death-wish of the Constitution or provides sanction for what may perhaps be called its lawful harakiri. Such subversion or destruction cannot be described to be amendment of the Constitution as contemplated by Article 368."

14. 1975 Supp SCC 1
15. Supra 14
16. Article 368

It was further observed by Khanna, J.:

> "The word 'amendment' in Article 368 must carry the same meaning whether the amendment relates to taking away or abridging fundamental rights in Part III of the Constitution or whether it pertains to some other provision outside Part III of the Constitution. No serious objection is taken to repeal, addition or alteration of provisions of the Constitution other than those in Part III under the power of amendment conferred by Article 368. The same approach, in my opinion, should hold good when we deal with amendment relating to fundamental rights contained in Part III of the Constitution. It would be impermissible to differentiate between scope and width of power of amendment when it deals with fundamental rights and the scope and width of that power when it deals with provisions not concerned with fundamental rights."

It would appear from the above that no distinction was made by Khanna,J. so far as the ambit and scope of the power of amendment is concerned between a provision relating to fundamental rights and provisions dealing with matters other than fundamental rights. The limitation inherent in the word "amendment" according to which it is not permissible by amendment of the Constitution to change the basic structure of the Constitution was to operate equally on Articles pertaining to fundamental rights as on other Articles not pertaining to those rights. Proposition (vii) of the summary of conclusions of Khanna,J. of the judgment also bears it out and the same reads as under:

> "(vii) The power of amendment under Article 368 does not include power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence or core of that right. The power

of amendment would also include within itself the power to add, alter or repeal the various articles."

It has been stated by Khanna,J., that the secular character of the State, according to which the State shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. The above observations show that the secular character of the Constitution and the rights guaranteed by Article 15 pertain to the basic structure of the Constitution.

In the same judgment, Chandrachud, J. considered it beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of the Constitution, they are that: (i) Indian sovereign democratic republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion and that (iv) the nation of all be governed by a Government of laws, not of men. These, in the opinion of Chandrachud, J. are the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution.

It has been pointed out, in the Kesavananda Bharati case, that the preamble of our Constitution did not like that of the American Constitution, "walk before the Constitution", but was adopted after the rest of the Constitution was passed, so that it is really a part of the Constitution itself. It means that the Constitution is a document recording an Act of entrustment and conveyance by the people of India, the political sovereign, of legal authority to act on its behalf to a "Sovereign Democratic Republic". "This Constitution" has a basic structure comprising the three organs of the Republic: the Executive, the Legislature, and the Judiciary. It is through each of these organs that the Sovereign Will of the People has to operate and manifest itself and not through only one of them. Neither of these three separate organs of the Republic can take over the function assigned to the other. This is the basic structure or scheme of the system of Government of the Republic laid down in this Constitution whose identity cannot, according to the majority view in Kesavananda Bharati case, be changed even by resorting to Article 368.

2. Democracy

Democracy is a political government either carried out directly by the people or by means of elected representatives of the people. The term is derived from the Greek word dçmokratía, which means, "the power to the people" which was coined from dêmos "people" and krátos "power", in the middle of the fifth-fourth century BC to denote the political systems then existing in some Greek city-states, notably Athens following a popular uprising in 508 BC. Even though there is no specific, universally accepted definition of 'democracy', there are two principles that any definition of democracy includes, equality and freedom. These principles are reflected by all citizens being equal before the law, and having equal access to power, and freedom is secured by legitimized rights and liberties, which are generally protected by a constitution.

India is a democratic country and has emerged as the world's largest democracy. Democracy has been conceived as a political status, an ethical concept, and a social condition. Democracy is a system of living on the basis of certain social values. The peculiar values of democracy are Freedom, Equality, Fraternity, Fundamental rights, Social justice and Independence of Judiciary. Certain circumstances that put these values into practice are : All get opportunities; Share responsibilities ; Opinions are expressed freely ; Respect the opinion of others ; Accept the opinion of the majority ; Ensure peoples' participation ; Every one waits for his/her turn etc.

Democracy cannot exist without freedom to dissent, without the right and opportunity to express a view different from the opposite to the view of those in power and thus make people aware of the pros and cons of vital issues affecting their welfare. Free trade in ideas and the absence of suppression of dissent which are so vital for the functioning of democracy, constitute basic traits of liberty. Democracy and liberty are thus considered to be inseparable. Liberty postulates absence of fear. When fear stalks the land, its attendants are servile sycophancy, rank opportunism and nauseating charlatanism and the casualties are the noble impulses of the mind. Where fear is, freedom cannot be.

Democracy ensures the most favourable conditions for the supremacy of the rule of law. It contains essential safeguards against arbitrariness and provides effective machinery for redress of grievances. The likelihood of injustice under a democracy is

much less than under systems where civil liberties are suppressed and there is absence of democratic norms. Man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary.

It would thus appear that there is a close nexus between democracy, liberty and rule of law. They are indeed the three faces of the trinity which presides over the destiny of all liberal societies. Each one of them is vital for the survival of the other. The demise of one would prove fatal for the other two.

Successful working of the democratic system is possible with the following essential elements, viz., Equality of opportunity ; Literacy ; Tolerance and fraternity; People with a civic sense ; Social justice; Free and fair election system ; Purposeful and principled leadership; Strong and responsible opposition ; and Independent and impartial judicial system.

The Constitution of India provides for governance of the country by its three essential pillars, the legislature, the executive and the judiciary and it promises governance through "Rule of Law". Maintenance of "Rule of Law", therefore, is a sine qua non under our constitutional scheme and, in fact, is essential to sustain any democracy. We must consider ourselves to be fortunate enough that notwithstanding the vastness and size of our population and the complexity and problems we have, on account of diverse philosophy, democracy has taken deep roots in this country and democratic institutions have flourished to such an extent that it will be difficult for any of our neighbours to destabilise the same. It is the sacred duty of the judiciary to see that the "Rule of Law" is maintained and it shall be construed as a constitutional obligation for the judiciary to do all that is possible in maintaining the "Rule of Law" not merely in interpreting the provisions of law but also in issuing directions and orders to the authorities concerned for maintenance of the "Rule of Law".

3. Secular character of the Constitution :

Secularism is the basic feature of the Constitution as a guiding principle of State policy and action. Secularism in the positive sense is the cornerstone of an egalitarian and forward-looking society which our Constitution endeavours to establish. It is the only possible basis of a uniform and durable national identity in a multi-religious and socially disintegrated society. It is a fruitful means for conflict-resolution and harmonious and peaceful living. It provides a sense of security to the followers of all religions and ensures full civil liberties, constitutional rights and equal opportunities.

By 42nd Constitution (Amendment) Act, secularism and socialism were brought in the Preamble of the Constitution to realise that in a democracy unless all sections of society are provided facilities and opportunities to participate in political democracy irrespective of caste, religion and sex, political democracy would not last long.

The Constitution of India stands for a secular State. State has no official religion. Secularism pervades its provisions which give full opportunity to all persons to profess, practise and propagate religion of their choice. The Constitution not only guarantees a person's freedom of religion and conscience, but also ensures freedom for one who has no religion, and is scrupulously restrains the State from making any discrimination on grounds of religion. A single citizenship is assured to all persons irrespective of their religion.

The meaning, context, scope and parameters of Secularism have been authoritatively laid down by the Supreme Court in a number of decisions of which Bommai's is the leading one, which has been reiterated in *M.Ismail Farooqui v. Union of India*[17], also known as the Ayodhya Acquisition case. Basically, it delineates the role of the State vis-a-vis religion and is in the nature of injunctions against the State in this respect. Religion cannot be mixed with any particular activity of the State. The religion of the citizen has nothing to do in matters of socio-economic problems and that public revenues cannot be spent to promote any religion.

In M.R.Balaji v. State of Mysore[18], the Supreme Court spoke of "the noble ideal of a secular welfare State set up by the Constitution". In Kesavananda Bharati, the Court declared that the secular character of the Constitution was part of the basic structure. By the 42nd Amendment to the Constitution, the words "socialist" and "secular" were inserted in the preamble qualifying the words "democratic republic". *In S.R. Bommai v. Union of India*[19] , a Bench of nine Judges expounded the basic feature of secularism at great length. It was pointed out that the concept of secularism was very much embedded in our constitutional philosophy. By the 42nd Amendment what was implicit was made explicit.

17. AIR 1995 SC 605
18. AIR 1963 SC 649,
19. 1994 (3) SCC 1 = AIR 1994 SC 1918

It is now generally accepted that Secularism is one of the basic features of our Constitution. A basic feature cannot be removed even by Constitutional amendment. So, Secularism is a permanent and unalterable trait of the Indian Constitution.

4. Separation of Powers :

The Constitution of India provides for governance of the country by its three essential pillars viz., Legislature, Executive and Judiciary. The principle 'Separation of Powers' deals with the mutual relations among the said three organs of the Government. The doctrine of separation of powers has no place in strict sense in Indian Constitution, but the functions of different organs of the Government have been sufficiently differentiated, so that one organ of the Government could not usurp the functions of another.

In Indian Constitution, there is express provision that "Executive power of the Union shall be vested in the President and the executive power of the State shall be vested in the Governor..." (Article 154(1) of the Indian Constitution). But, there is no express provision that legislative and judicial powers shall be vested in any person or organ.

President, being the executive head, is also empowered to exercise legislative powers. In his legislative capacity, he may promulgate Ordinances in order to meet the situation, as Article 123 (1) says – "If, at any time, except when both Houses of Parliament are in Session, President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require." When proclamation of emergency has been declared by the President due to failure of Constitutional machinery, the President has been given legislative power under Article 357 of our Constitution to make any law in order to meet the situations. A power has also been conferred on the President of India under Articles 372 and 372-A to adopt any law in the country by making such adaptations and modifications whether by way of repeal or amendment as may be necessary or expedient and to provide that the law so adapted or modified shall have effect subject to adaptation and modifications so made and the adaptation and modifications shall not be questioned.

The President of India also exercises judicial function, as Article 103 of the Constitution empowers the President to decide cases of disqualification of membership of the Houses of Parliament. According to this Article, if any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102, the question shall be referred for the decision of the President and his decision shall be final. Article 50 lays emphasis to separate judiciary from executive. But, in practice, we find that the executive also exercises the powers of judicial function as in appointment of Judges (Articles 124, 126 and 127). The legislature (either House of Parliament) also exercises judicial function in removal of President (Article 56) in the prescribed manner. Judiciary also exercises legislative power. High Court and Supreme Court are empowered to make certain rules, legislative in character. Whenever High Court or the Supreme Court finds a certain provision of law against the Constitution or public policy, it declares the same null and void and then amendments may be incorporated in the legal system. Sometimes, High Court and Supreme Court formulate the principles on the point where law is silent. This power is also legislative in character.

Apart from this, when Judges establish a new principle by means of a judicial decision, they may be said to exercise legislative and not merely judicial power. The High Courts, in certain spheres, perform functions which are administrative rather than judicial. Their power of supervision over subordinate courts is more of administrative nature rather than judicial (Article 227). Under Article 228, they have power to effect transfer of cases.

History has proved the fact that if there is a complete separation of powers, the Government cannot run smoothly and effectively. Smooth running of Government is possible only by co-operation and mutual adjustment of all the three organs of the Government. The aim behind the principle is to protect the people against capricious, tyrannical and whimsical powers of the State.

Virtually, absolute separation of powers is not possible in any form of Government. In view of the variety of situations, the legislature cannot foresee or anticipate all the circumstances to which a legislative measure should be extended and applied. Therefore, legislature is empowered to delegate some of its functions to administrative authority (executive). But, one thing is notable that legislature cannot delegate its essential legislative power.

With the widening of the horizons of 'Judicial Activism', criticism emanated from a few percent of the people that the judiciary is overstepping its bounds and taking over the Government functions, but, this is not a justifiable thought. The Supreme Court and the High Courts act as watchman to keep Executive and Legislature within the bounds of law. Today, millions of people are suffering in the country because of the failures or inactions of the executive. It is the Judiciary, which is holding out hope for them.

5. Federal Character of the Constitution :

The Constitution of India is not an end but a means to an end, not mere democracy as a political approach but a social judicial process. The Indian federalism is unique in nature and is tailored according to the specific needs of the country. Federalism is a basic feature of the Constitution of India in which the Union of India is permanent and indestructible. Both the Centre and the States are cooperating and coordinating institutions having independence and ought to exercise their respective powers with mutual adjustment, respect, understanding and accommodation.

Federalism constitutes a complex governmental mechanism for the governance of a country. It seeks to draw a balance between the forces working in favour of concentration of power in the centre and those urging a dispersal of it in a number of units. A federal Constitution envisages a demarcation of governmental functions and powers between the centre and the regions by the sanction of the Constitution, which is a written document.

The Indian Constitution is not regarded as federal or unitary in the strict sense of the terms. It is often defined to be quasi-federal in nature. Throughout the Constitution, emphasis is laid on the fact that India is a single united nation. India is described as a union of States and is constituted into a sovereign, socialist, secular and democratic republic.

It has been argued that the Indian Constitution does not satisfy certain essential tests of federalism namely the right of the units to make their own Constitution and provision of double citizenship. Further, in the three-fold distribution of powers, the most important subjects have been included in the Union list, which is the longest of the three lists containing 97 items. Even regarding the Concurrent list, Parliament enjoys an overriding authority over the State legislatures. Article 253 empowers the Parliament

to make laws implementing any treaty, agreement or convention with another country or any decision made at any international conference, association, or other body.

Some of the other Constitutional provisions, which are often quoted in favour of the Unitary status of the Indian Constitution are – emergency powers of the President to declare national emergency or declaring emergency in a State in the event of failure of Constitutional machinery, the appointment of governors, unification of judiciary and the dependence of the States on the Centre for finance. The power of the Union to alter the names and territory of the States, to carry out Constitutional amendments and to affect co-ordination among the States and settle their mutual disputes is also regarded as an indicator of the unitary character of the Indian Constitution.

It should be remembered that the aforesaid provisions in the Constitution are aimed at establishing a working balance between the requirements of national unity and autonomy of the States. The father of the Indian Constitution Dr. B.R. Ambedkar has said that the Indian Constitution would be both unitary as well as federal according to the requirements of time and circumstance.

The Constitution makes a distribution of powers between the Union and the States, the jurisdiction of each being demarcated by the Union, State and Concurrent lists. In case of a conflict between the two legislatures over a matter in the Concurrent list, the will of the Parliament prevails. The supremacy of the Constitution – the hallmark of a federation – is an important feature of the Indian polity. Neither the Central government nor the State governments can override or contravene the provisions of the Constitution. Another pre-requisite of a federation, namely, an independent judiciary – an interpreter and guardian of the Constitution – is also present in the Indian federation. The Supreme Court can declare any law passed by the Union Parliament or a State legislature ultra vires if it contravenes any of the provisions of the Constitution.

It is time to undertake a study of Indian Federalism with a view to evaluate the trends, frictions and difficulties which have developed in the area of inter-governmental relations and to seek to evolve ways and means to meet the challenging task of making the Indian federation a more robust, strong and workable system so that the country may meet the tasks of self-improvement and

development. The responsibility lies on not only the jurists and policy framers, but also the citizens of the country to work in a harmonious manner for the development of the country.

Epilogue :

The doctrine of basic structure of the Constitution as evolved by the Supreme Court of India is unique in constitutional jurisprudence. The seeds of the theory are to be found in the Preamble to the Constitution. Landmark pronouncements of the Supreme Court in *Kesavananda Bharati* [20], , *Indira Nehru Gandhi v. Raj Narain* [21] , and *Minerva Mills* [22] , bear testimony to this truism. Any amendment of the Constitution is open to judicial review and liable to be interfered with by the Court on the ground that it affects one or the other of the basic features of the Constitution.

The Preamble of the Constitution of India, the Fundamental Rights and the Directive Principles, constituting a trinity, assure to every person in a welfare State social and economic democracy with equality of status and dignity of persons. Political democracy without social and economic democracy would always remain unstable. Social democracy must become a way of life in an egalitarian social order. Economic democracy aids consolidation of social stability and smooth working of political democracy. The Preamble emphatically declares that we have given to ourselves the Constitution with a firm resolve to constitute a sovereign, socialist, secular, democratic, republic, with equality of status and of opportunity to all its citizens. "Rule of Law" being our constitutional faith, it is imperative that every governmental institution must observe it, irrespective of any obstacles or odds on its path.

Indian Constitution is not to be construed as a mere law, but as the machinery by which laws are made. It is a living and organic instrument, which, of all documents, has the greatest claim to be construed broadly and liberally.

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20. AIR 1973 SC 1461
21. 1975 Supp SCC 1
22. 1980 (3) SCC 625

New Vistas of Alternative Dispute Resolution System *

Hon'ble Mr. Justicer R. Mahadevan #

I am greatly honored and delighted to be part of this occasion, and to be here in this campus. As an alumnus, I have nostalgic memories of the student days I spent in this campus. My felicitations to the organizers of this special lecture series here which will enlighten the students and everyone the salient features of Alternative Dispute Resolution, in short ADR.

The ability to defend and vindicate private rights is a cornerstone of a civilized society. It is central both to the promotion of the welfare of citizens as well as to the economic development of the State. While the courts will always retain a central place in the civil justice system, it is increasingly recognized throughout the world that, in many instances, there may be alternative and perhaps more appropriate methods of resolving civil disputes in a manner which may be more cost and time efficient for parties. Merely because a dispute is defined as justifiable, does not necessarily mean that the courts are the only option to seek redress.

It is the need of the hour for much more than an effective court system with an integrated civil justice system wherein the courts are a forum of last resort, supported by other, closely related techniques for ensuring the law is open to all. That is Alternative Dispute Resolution (ADR) the general name given to a variety of procedures i.e Arbitration, Conciliation and Mediation available to parties in civil cases to resolve their disputes before a formal trial.

Many countries and their Courts of Justice have recognized the right to valid remedies as a general principle of law and this has been reinforced with that of the Fundamental Rights. In promoting

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Judge, High Court of Madras

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access to justice, a modern civil justice system should offer a variety of approaches and options to dispute resolution. Citizens should be empowered to find a satisfactory solution to their problem which includes the option of a court-based litigation but as part of a wider menu of choices.

The word - alternative refers to looking outside the courtroom setting to resolve some disputes. It is the long-standing approach of the legal profession and of the courts that, where it is appropriate, parties involved in civil disputes should be encouraged to explore whether their dispute can be resolved by agreement, whether directly or with the help of a third party mediator or conciliator, rather than by proceeding to a formal - winner v loser decision by a court. This happens every day in the courts, in family litigation, in large and small commercial claims and in boundary and other property disputes. In that respect there are strong reasons to support and encourage parties to reach a solution through agreement, especially in disputes where emotional issues combine with legal issues, provided that this alternative process meets fundamental principles of justice.

In addition to the recognition by the legal profession and the courts that some disputes can be better resolved by agreement rather than court decision, the emergence of alternative dispute resolution processes internationally has also been associated with real problems of delays in the court system. An undoubted advantage of mediation and conciliation is the ability to get speedy access to a process that may produce a satisfactory outcome for the parties in a short span of time. Long delays in the court process involve clear barriers to justice: justice delayed is, indeed, justice denied. While some ADR processes may have emerged in response to delays.

In mediation, a neutral third party helps the parties come to an agreement about how to resolve the case. The mediator has no authority to impose a solution on the parties. Instead, he goes back and forth between sides to help them come to an understanding about how the case could be resolved to their mutual satisfaction. A mediator can be helpful in helping parties evaluate their case realistically, as the mediator can point out which facts or arguments he believes or rejects. When courts order parties to try ADR, they most often order mediation.

In arbitration, the parties authorize a neutral third party (or panel) to decide the outcome of their dispute. The process is similar to a trial in the sense that each side presents facts and arguments to the decision maker(s), but it is different because the rules of evidence do not apply and the arbitrator(s) need not adhere exactly to the law.

The primary motivations for ADR are to save money and control risk. Preparing for trial is extremely expensive, and parties can save money if they can resolve the case without having to incur the expense of trial preparation. Also, when parties settle cases, they have some control over the outcome of the case in that they can negotiate for terms of the settlement. If a suit goes to trial, the outcome of the case is left entirely in the hands of the judge. Parties cannot control the risk of losing at trial. ADR gives parties a chance to control that risk. In some cases, privacy or confidentiality may be a factor. Most litigants think of ADR as private, and thus, if they seek secrecy, they may be motivated to try ADR.

It should also be noted that, in the last decade or so, courts have developed rules that require parties to try ADR, usually mediation, before trial. Mandatory ADR has become popular because it helps unclog the court system and because most cases can settle once the parties have undertaken discovery and understand what evidence exists. Most experienced litigation lawyers can fairly assess whether they can win a case and how much the case is worth, although they know that anything could happen at trial, and they would prefer to settle for a fair amount than risk a terrible verdict. When we talk about public resolution, we are talking about trial and courts are constrained in the way they can resolve disputes. They are constrained by rules of procedure, rules of evidence and rules of law. One of the benefits of ADR is that it lets the parties work out the dispute in the way that best satisfies their needs, and it may be in a way that the court wouldn't have jurisdiction or authority to do.

The main objectives and principles of mediation and conciliation include: the voluntary nature of ADR, the principle of confidentiality, principles of self-determination and party empowerment, the objective of ensuring efficiency, flexibility, neutrality and impartiality of the mediator or conciliator and the quality of the process for the parties. The potential benefits of mediation and conciliation, including the cost and time effectiveness of the processes, must be balanced against the reality that mediation

and conciliation can also be seen as an additional layer on civil litigation where it does not lead to a settlement and that every step along the way drives up the costs of litigation. ADR may not be appropriate in some cases where power imbalances may exist which put the parties on an unequal footing, allowing one party to place undue pressure on the other.

The result may be that one party may impose their solution on the other side. In other cases there may be uncertainties in the law which needs to be clarified, either because there is a lot at stake in a particular case, or because its outcome could affect a number of other cases. Sometimes legal precedents need to be relied on, or to be established for future cases. There are cases in which public interest dictates that a public hearing should take place and a public decision be made. Furthermore, any case in which a party is motivated to engage in an ADR process, but only for improper tactical reasons, is not one appropriate for resolution through ADR.

ADR should not be seen as a separate entity from the court-based arrangements for civil justice but rather should be seen as an integral part of the entire system. ADR and the formal justice systems are not homogenous, separate and opposed entities. Their relationship is complex and evolving. Some jurisdictions have already legislated for mediation and provide statutory definitions for the process. Mediation is an activity voluntarily entered into by the Parties, whereby a professionally trained neutral Mediator using recognized methods systematically encourages communication between the Parties, with the aim of enabling the Parties to themselves reach a resolution of their dispute.

Many disputants may not be aware of the full spectrum of dispute resolution processes which are available to them and, when assessing a client case, Advocates should also assess whether ADR is appropriate because: - An effective justice system must be accessible in all its parts. Without this, the system risks losing its relevance to, and the respect of, the community it serves. Accessibility is about more than ease of access to sandstone buildings or getting legal advice. It involves an appreciation and understanding of the needs of those who require the assistance of the legal system.

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Influence of American Judicial Decisions on Indian Judicial Process – A Critical Study

Hon'ble Prof. Dr. P. Vanangamudi *

This paper attempts to assess the influence of American legal system on the Indian judicial process from the drafting stage till date. It is a doctrinal analysis. Analytical, critical and comparative methods have been used. The judgments delivered by the Supreme Court of India and American Supreme Court, besides the Constituent Assembly debates are the sources for the analysis. This paper confines its analysis more particularly to the doctrine of due process of law and Article 21 of the Indian Constitution.

Indian judiciary though influenced by American judiciary, the remnants of the British legacy continues. In all the three judicial systems, English is the common official language. The influence of the House of Lords is still felt in the law of Torts and Administrative law. The influence of the American judiciary is in the areas of separation of powers, due process of law, personal liberty and federal principles among others. The 'due process clause' and the 'personal liberty' clause have been construed under Article 21 of the Constitution and analyzed thread bare in various judgments.

Judicial system of Countries that follow the common law system is bound to adjudicate cases based on three sources of law namely, legislative enactments, judicial precedents and valid customs. Indian Constitution follows the common law system. The Supreme Court, the highest judiciary in India, is structured by the Indian Constitution. Chapter IV of Part V from Articles 124 to 147 of Constitution deal with the structure, powers and functions of the

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Supreme Court. This part elaborately deals with the jurisdiction, powers and functions of the Supreme Court. However, for the purpose of the present paper Articles 141and 142 are relevant

Article 141 prescribes that, "[t]he law declared by the Supreme Court shall be binding on all courts within the territory of India." However, in Article 142, it has been provided that "the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree passed or order so made shall be enforceable throughout the territory of India." These provisions make it obvious that the Supreme Court of India in its judicial process may derive its sources from the Constitution, or from legislative enactments or from its own judicial precedents. Likewise, it is clear that the law laid down by the Supreme Court shall be enforceable in all courts in India.

Viewed from the traditional Wednesbury approach, the Supreme Court of India cannot take any other source from any other judicial system in the world including the American judicial system. But the Indian judicial system, more precisely the Supreme Court has reached a stage wherein it is said to be the most powerful court in the world, with the power to question even the constitutionality of the constitutional amendments. In this backdrop, this article attempts to explore and formulate the influence of a very powerful organ, the American judicial system, on the Indian judiciary especially on the Supreme Court. Explorative and formulative methods have been applied in this paper. For that purpose, cases in which American judicial precedents have been cited either as obiter dicta or as a ratio decidendi are taken up.

In the past 60 years of its existence, the Supreme Court has delivered a large number of judgments. Identifying cases which refer to American cases is a major task. Therefore cases listed in Manupatra, a leading Online database of the Supreme Court, have been used for the study. Cases relating to environment protection bearing the American judicial impression have been culled out. From those cases, cases relating to Article 21 of the Indian Constitution have been fished out. In this database, 83 cases are listed out under the heading 'American Judiciary' and they are used for analysis. These cases form the source of data for this paper.

Influence of the US Judiciary at the drafting stage

The influence of the American judiciary was explicit even at the time of drafting the Constitution. It manifested more explicitly

in Article 21. It was a widely debated Article. It runs as follows. "No person shall be deprived of his life or personal liberty except according to procedure established by law". In the draft Constitution, this article was numbered as 15. This article came up for discussion on 6th and 13th December 1948. Three important concepts in this article i.e. (i) 'personal liberty', (ii) 'except according to procedure established' and (iii) 'law' were intensely debated. In the course of that debate, the concept 'due process of law' as it is practiced and interpreted by the American Courts emerged as the predominant area of debate and discussion.

Speaking on 'personal liberty' Mahboob Ali Baig Sahib Bahadur, a member of the Constituent Assembly, pointed out that the word 'personal' that has been inserted before the word 'liberty'. Justifying that he says, "unless this word 'personal' finds a place there, the clause may be construed very widely so as to include even the freedoms already dealt with in article 13."[1]

The word 'law' also elicited good discussion. Pandit Thakur Das Bhargava explained the meaning of the word 'law' as used in this article thus: "[a]ccording to the general connotation of the word, so widely accepted and the connotation which has been given to this word by Austin, law means an Act enacted by the legislatures whereas I submit that when Dicey used his words 'law of the land', he meant law in another meaning."

Similarly, when the Japanese Constitution and other constitutions used this word in the broad sense, they meant to convey by the word 'law', universal principles of justice, etc. According to the present section, procedure is held sacrosanct whereas the word 'law' really connotes both procedural law as well as substantive law."[2]

Likewise, words, 'except according to procedure established by law' were seriously debated. In the original draft Constitution, "without due process of law" was there. After prolonged discussion, it was substituted by the words, 'except according to procedure established by law'.[3]

Krishna Chandra Sharma was for retention of the words 'without due process of law'. In support of his argument, he cited the American case of 1875, *Loan Association v. Topeka*. But, Alladi Krishnaswami Iyer vociferously argued against the retention

1. Government of India, Constituent Assembly Debates, Vol.VII, (New Delhi: Lok Sabha Secratatiat,1999), p.844
2. Ibid, p.846
3. Ibid, p.845

of these words. He pointed out how this concept was used and interpreted by the Supreme Court of America in these words: " [i]n the development of the doctrine of 'due process', the United States Supreme Court has not adopted a consistent view at all and the decisions are conflicting. One decision very often reversed another decision. I would challenge any member of the Bar with a deep knowledge of the cases in the United States Supreme Court to say that there is anything like uniformity in regard to the interpretation of 'due process'. One has only to take the index in the "Law Reports Annotated Edition" for fifteen years and compare the decisions of one year with the decisions of another year and he will come to the conclusion that it has no definite import. It all depended upon the particular judges that presided on the occasion. Justice Holmes took a view favorable to social control. There were other judges of a Tory complexion who took a strong view in favour of individual liberty and private property. There is no sort of uniformity at all in the decisions of the United States Supreme Court."[4]

Z.H. Lari on the other hand argued in favour of retaining the doctrine 'without due process of law'. He referred to the American practice as well as the Constitution of Japan in his speech in the following words: "[i]n America, this clause is accepted and is reproduced in the Japanese Constitution. You know the Americans have been responsible for framing the Japanese Constitution, a Constitution for a fascist country, a country where individuals are prone to violence – they wanted to overthrow the peace of the world – when they were drafting a Constitution for such a country, composed of such citizens, they laid down… that nobody shall be denied access to courts, nobody shall be arrested unless causes are shown against him, and nobody shall be denied the privilege of the assistance of the council…. No doubt, every clause can be criticized in one way or other. But we have to be guided by experience of other countries, and this has shown that the words 'due process of law' can exist without jeopardizing the existence of the state…. We should profit by the experience of other countries…. My submission is that it is only making a bogey out of nothing. We should not be led away by this bogey into accepting this clause. If this clause is accepted, then the whole constitution becomes lifeless. The article, as it stands, is lifeless and it makes also the whole constitution lifeless. Unless you accept the amendment, you would not earn the gratitude of future generations."[5]

4. Ibid, p.853
5. Ibid, pp.856-857

Responding to these arguments, Dr.B.R.Ambedkar said, "I am somewhat in a difficult position with regard to Article 15 and the amendment moved… for the deletion of the words 'procedure according to law' and the substitution of the implications of these words". He viewed that "The 'due process clause' in my judgment, would give the judiciary the power to question the law made in the legislature on another ground. That ground would be whether the law is in keeping with certain fundamental principles relating to the rights of the individual."[6] He further added, "[t]he question now raised by the introduction of the phrase 'due process' is whether the judiciary should be given the additional power to question the laws made by the state on the ground that they violate certain fundamental principles."[7]

On this tricky question, there are two views. According to Ambedkar, "One is to give the judiciary the authority to sit in judgment over the will of the legislature and to question the law made by the legislature on the ground that is not good law, inconsonance with fundamental principles…. The second position is that the legislature ought to be trusted not to make bed laws. It is very difficult to come to any definite conclusion. There are dangers on both sides. For myself, I cannot altogether omit the possibility of a legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the legislature and by dint of their own individual conscience or their bias or their prejudice is trusted to determine which law is good and which law is bad."[8] Finally he left it to the discretion of the house to decide the issue. Ultimately the Constituent Assembly negatived all the amendments and thus the words 'due process of law' were substituted by the words, 'except according to procedure established by law'. Thus 'due process' as found in the American Constitution was ejected out from the final document after deliberations.

The Judicial Process of Supreme Court of India

Since 1950 the Supreme Court interpreted this concept on many an occasion, when the concepts 'life' and 'personal liberty' were analyzed. The former is related to a person's right to a decent life, which was predominantly discussed under environmental

6. Ibid, p.1000
7. Ibid.
8. Ibid, pp.1000-1001

rights. 'Personal liberty' is interpreted to incorporate human rights. The set of words, 'except according to the procedure established by law', originally dealt with the procedural law, but now it includes even the substantive law. Similarly, the term law originally referred to the enacted law, but now it includes even the natural law.

Article 21 is analyzed in two dimensions in this context. The concept 'life' manifests in the form of environmental rights and the concept 'personal liberty' under human rights. Environmental rights, till 1976 was only a statutory right. The 42nd Constitutional amendment introduced Articles 48A and 51A (g). Article 48A, part of directive principles, directs the state that it "shall endeavour to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures." These are enabling provisions and the Indian Parliament has enacted various environmental laws like "The Environment Protection Act, 1986", "The Prevention of Water Pollution Act, 1974", "The Prevention of Air Pollution Act, 1981", etc. A careful reading of the Constitution and the enactments would enable one to infer that the rights related to environment are only statutory rights. To the credit of the Supreme Court, it can be said that, it elevated these environmental rights to the level of fundamental right through its interpretation of Article 21. Thus it was made enforceable under Articles 32 and 226 of the Constitution through writs. In this process, Supreme Court freely applied the American judicial decisions along with the principles and concepts that have been evolved by environmental summits. Now, a few Supreme Court judgments wherein the American judiciary's influence is found manifested are analyzed.

In *Tharun Bharat Sangh's* case[9], the Supreme Court declared that, "[t]he issue of environment must and shall receive the highest attention from this Court." The deep American judiciary's influence comes out in this case. In the words of the Court a "great American judge emphasizing the imperative issue of environment said that he placed Government above big business, individual liberty above Government and environment above all."

In *Sachidhananda Pandey's* case[10] the Supreme Court was so taken in by the wisdom of a Red Indian Chief that it decided to incorporate verbatim the entire long discussion between a Red India Chief at Seattle in 1854 with an Englishman, so that its essence is not diluted. The conversation came about when the white man

9. Tharun Bharat Sangh v. Union of India, AIR 1992 SC 514
10. Sachidahananda Pandey v. State of West Bengal, AIR 1987 SC 1109.

asks the Red Indian Chief to sell the land. The reply by the Chief reveals the profundity of age old wisdom and how old civilizations cared and protected the environment. He said that the whole world is a web and the existence of so many creatures along with man makes leading life worthwhile. If environment is affected due to extinction of one species, the other lives in the web are affected. He places man on par with other creatures, big and small. Co-existence is the only way life has to be lived. The Indian Supreme Court truly amazed by the deep wisdom felt that each and every word of that Chief was pregnant with great ideas that it was pleased to quote the entire speech. This case immensely influenced the judiciary in all its later environmental cases. The resulting Supreme Court's judgment was a landmark judgment.

The concept 'Public Trust Doctrine' was introduced by the Supreme Court in *Kamal Nath's* case[11]. In delivering this judgment, a well-known American Supreme Court judgment in the *Mono Lake's* case was cited and its influence resulted in adoption of Public Trust Doctrine', which doctrine was liberally applied in many environmental cases.

In 1978, by the 44th Constitutional Amendment, right to property was taken out from fundamental right and it was introduced in Article 300 A as a mere Constitutional right. But in consequence of the American Supreme Court decision on the *Mono Lake's* case, the Indian Supreme Court restored it back under fundamental right i.e., by applying the public trust doctrine and making it enforceable under Article 32. Several such environmental doctrines have been brought under fundamental rights through the interpretation of Article 21 due to the influence of American judiciary. Through writs, under Articles 32 and 226, they become enforceable.

There are a number of cases delivered by the American Courts which have been cited in Indian cases. They are analysed below. In *University of Kerala v. Council, Principal, College, Kerala*[12], the American cases referred are *Trop v. Dulles, Osburn v. Bank of U.S., Duport Steels Ltd v. Sirs etc. Subash Chandra v. Delhi Subordinate Services Selection Board*[13] is another case where American judgments like *Johnson v. California, De Freitas v. Benny,* etc., have been cited. In *Ajay Goswami*[14] *v. Union of India,* the following leading American cases have been referred, *E. Butle v. State of Michigan, Brown v. Board*

11. M.C.Mehta v. Kamalnath, AIR 2000 SC 1997.
12. University of Kerala v. Council, Principal, College, Kerala, SCC, 2009
13. Subhas Chandra v. Delhi Subordinate Services Selection Board, AIR 2009 SC 5590.
14. Ajay Goswami v.Union of India,AIR2007SC493.

of Education, Frager v. Ewans, Janet Reno v. American Civil Liberation Union and United States v. Play boy Entertainment Group.

In *People's Union for Civil Liberty v. Union of India,* the American case *Giltow v. New York* was referred. The Constitutional Bench in *State Bank of West Bengal v. Kesoram Industries Ltd.* referred Frankfurter's judgment in *Morey v. Doud. In Ashok Kumar Thakur v. Union of India,* another Constitutional bench referred the landmark American cases like *Brown v. Board of Education, Dred Scott v. Saunders, Abley v. Dale and United States v. Lopez.* In this case, various American doctrines like 'suspected legislation', 'narrow tailoring', 'strict scrutiny' and 'compelling state necessity' have been referred.

From the analysis of some of the great judgments delivered by the Indian Supreme Court, it is understood that the judgments of the Supreme Court of the United States do have great 'persuasive value'. This analysis makes it clear that the Indian Supreme Court frequently admitted and incorporated several judgments of the American Supreme Court. It is also evident that in matters related to environment, such judgments have greater influence than in other matters.

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Maintaining the Standards in Judiciary

Mr. A. Thiyagarajan *

INTRODUCTION:

The dawn of the 21st century has witnessed various developments in the judicial arena. Liberty, Equality and Fraternity, being the cannon of democracy are indeed the bedrock of judiciary. It is the judiciary which safeguards democracy and its institutions. So maintaining the standards of such an institution is a *sine-quo-non* of any civilized society. Whenever the democracy is threatened, it is the judiciary which has to protect and safeguard it. This threat can emanate from any institution or individual.

At times the various organs of the state go beyond the legal limits of the powers conferred upon them by the Constitution of India and the other ancillary laws thereby shaking the very democratic structure. The judiciary should vigilantly curb the misuse or abuse of power by the State. The Judiciary through its actions must ensure fair, just and free governance from the State. The judiciary is conferred with the power of 'judicial review' mainly to regulate the executive's power. An efficient judiciary stands as a bulwark between the citizen and the State, effectively checking the abuse of power. The democratic principles can even be threatened by the actions of people for whose welfare it is intended. The consumer of justice wants unpolluted, expeditious and inexpensive justice. In the absence of it instead of taking re-course to law, he may be tempted to take the law in his own hands. This is what the judicial system shall have to guard against, so that people do not take re-course to extra-judicial methods to settle scores and seek redress of their grievance. If this tendency proliferates it would be a sad day

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for the constitutional democracy to which we are all wedded. The lack of speedy dispute resolution mechanism has a direct impact on the level of lawlessness in our society. A peaceful society is a necessary pre-condition for the development of a country.

A bold and independent judiciary alone can maintain the rule of law, which in turn sustains democracy. So we need impartial and independent judges, who follow high standards of conduct. Only if the highest possible standards are adhered to, the faith of the common man in the judiciary can be maintained. The judiciary must follow the standards of the morality and behaviour which it sets for others, and as a matter of fact before laying down the standards of behaviour for others, the judiciary must first do it and set an exemplary example for others to follow.

The aim of this article is to throw light on the various ways and means by which the standards in judiciary may be improved and maintained.

To maintain standards in judiciary

1. ROLE OF THE JUDGES
2. ROLE OF THE LAWYERS
3. ROLE OF THE STATE
4. ROLE OF THE SOCIETY

are to be analyzed in a comprehensive manner.

ROLE OF THE JUDGES:

"When a judge puts on his judicial robes, he puts off his relationship to everyone and becomes a person without a relation, friend, an acquaintance, in short, a man who is impartial."

- Thomas Fuller.

To be an ethical judge one has to be an ethical person not only in the court room but also outside. Only then it would be easier for him to follow the judicial ethics, which has a variety of parameters. Experience will teach the boundaries of judicial ethics beyond which he is not supposed to go. Observance of canons of the judicial ethics enables the judiciary to struggle with confidence, to chasten oneself, be wise and to learn by themselves the true values of judicial life. The discharge of judicial function is an act of divinity. According to Mr. Justice Thomas of the Supreme Court of Queensland, there are two key issues that must be addressed.

i. Identification of standards which the members of the judiciary must follow.

ii. A formal and informal mechanism to ensure that these standards are adhered to.

In simple words we can say that judicial ethics are the basic principles which should guide the action of the judges.

The following principles are intended to establish the standards relating to the ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating the judicial conduct. They are also intended to assist the members of the executive, legislature, lawyers and also the public in general to understand and support the judiciary in a better way. These principles pre-suppose that the judges are accountable for their conduct. Appropriate institutions are to be established to maintain judicial standards, which are themselves independent and impartial and are intended to supplement and not to derogate from the existing rule of law and conduct which binds the judge.

There are six qualities which a judge should possess. They are

i. INDEPENDENCE
ii. IMPARTIALITY
iii. INTEGRITY
iv. PROPRIETY
v. EQUALITY
vi. COMPETENCE AND DILIGENCE

PUBLIC CONFIDENCE:

First and foremost thing in judiciary is, as an institution it needs to preserve its independence. To do this it must strive to maintain the confidence of the public in the established courts. Though we can say that the source of the judicial power is law, in reality it emanates from two factors.

i. Externally by the public acceptance of the authority of the judiciary.
ii. Internally it is by the integrity of the judiciary.

Independence of the judges is best safeguarded by the judges themselves through institutions and organizations. The law empowers to set up and preserve the image of an incorruptible higher judiciary that would command the respect of all right thinking people. The very existence of the justice delivery system depends on the judges who for the time being constitute the system. The judges have to honour the judicial office, which they hold as a public trust. Their every action and every word spoken or written –

must show and reflect correctly that they hold the office as a public trust and that they are determined to strive continuously to enhance and maintain the people's confidence in the judicial system. The greatest strength of the judiciary is the faith of the people in it. Faith, confidence and acceptability cannot be commanded, they have to be earned in the hard way.

CODIFICATION OF JUDICIAL ETHICS:

Canons of judicial ethics have been attempted, time and again, to be drafted as a Code. Several documents of authority and authenticity are available as drafted or crafted by several luminaries at the national and also international level. The fact is that such a code is difficult to be framed and certainly cannot be consigned to a strait jacket. Some of the important attempts at codification are:

i. Restatement of Values of Judicial Life adopted by the Chief Justices Conference of India, 1999;

ii. The Bangalore Principles of Judicial Conduct, 2002;

iii. The oath of a judge as contained in the third schedule of the Indian Constitution.

RESTATEMENT OF VALUES OF JUDICIAL LIFE (1999):

On May 7, 1997, the Supreme Court of India in its Full Court unanimously adopted a Charter called the "Restatement of Values of Judicial Life" to serve as a guide to be observed by Judges, essential for independent, strong and respected judiciary, indispensable in the impartial administration of justice. It is a complete code of the canons of judicial ethics. It reads as under:

1. Justice must not merely be done but it must also be seen to be done. The behaviour and conduct of members of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary. Accordingly, any act of a Judge of the Supreme Court or a High Court, whether in official or personal capacity, which erodes the credibility of this perception, has to be avoided.

2. A Judge should not contest the election to any office of a Club, society or other association; further he shall not hold such elective office except in a society or association connected with the law.

3. Close association with individual members of the Bar, particularly those who practice in the same court, shall be eschewed.
4. A Judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or daughter-in-law or any other close relative, if a member of the Bar, to appear before him or even be associated in any manner with a cause to be dealt with by him.
5. No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the Judge actually resides or other facilities for professional work.
6. A Judge should practice a degree of aloofness consistent with the dignity of his office.
7. A Judge shall not hear and decide a matter in which member of his family, a close relation or a friend is concerned.
8. A Judge shall not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination.
9. A Judge is expected to let his judgments speak for themselves. He shall not give interviews to the media.
10. A Judge shall not accept gifts or hospitality except from his family, close relations and friends.
11. A Judge shall not hear and decide a matter in which a company in which he holds shares, is concerned unless he has disclosed his interest and no objection to his hearing and deciding the matter is raised.
12. A Judge shall not speculate in shares, stocks or the like.
13. A Judge should not engage directly or indirectly in trade or business, either by himself or in association with any other person. (Publication of a legal treatise or any activity in the nature of a hobby shall not be construed as trade or business.)
14. A Judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund for any purpose.
15. A Judge should not seek any financial benefit in the form of a perquisite or privilege attached to his office unless it is clearly available. Any doubt in this behalf must be resolved and clarified through the Chief Justice.

16. Every Judge must at all times, be conscious that he is under the public gaze and there should be no act or omission by him, which is unbecoming of the high office he occupies and the public esteem in which that office is held.

These are only the "Restatement of the Values of Judicial Life" and are not meant to be exhaustive but illustrative of what is expected of a Judge".

The above "restatement" was ratified and adopted by Indian Judiciary in the Chief Justices' Conference 1999. All the High Courts in the country have also adopted the same in their respective Full Court Meetings.

THE BANGALORE DRAFT PRINCIPLES:

The values of judicial ethics which the Bangalore Principles crystallizes are:

i. Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial.A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

ii. Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

iii. Integrity is essential to the proper discharge of the judicial office.

iv. Propriety, and the appearance of propriety, is essential to the performance of all the activities of a judge.

v. Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

vi. Competence and diligence are prerequisites to the due performance of judicial office.

vii. Implementation – By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles, if such mechanisms are not already in existence in their jurisdictions.

THE OATH OR AFFIRMATION BY JUDGE:

The Constitution of India obligates the Indian Judiciary to reach the goal of securing to all its citizens- Justice, Liberty, Equality and Fraternity. How this goal is to be achieved is beautifully summed up in the form of oath or affirmation to be made by the

Judges of the Supreme Court and High Courts while entering upon the office.

Swearing in the name of God or making a solemn affirmation a Judge ordains himself:-

i. That I will bear true faith and allegiance to the Constitution of India as by law established;

ii. That I will uphold the sovereignty and integrity of India;

iii. That I will truly and faithfully and to be, the best of my ability, knowledge and judgement perform the duties of office without fear or favour, affecting or ill-will; and

iv. That I will uphold the Constitution and the laws.

In my humble opinion, the oath of a Judge is a complete Code of Conduct and incorporates therein all the canons of judicial ethics.

SET STANDARDS:

Judicial governance means that the Judges who are constitutionally entrusted with the responsibility of protecting the rights of the citizens must also be seen as persons of rectitude. They must make annual financial disclosure statements, not privately to their Chief Justices, but publicly. This is done in U.S.A

So judges must set an example for Ministers, Parliamentarians and Higher Officials of the government to follow as"What so ever great men doeth that other men also do; the standard they set up, by that people go".

VARIOUS ASPECTS TO BE VIEWED IN DECIDING A CASE:

While deciding a case a Judge should follow certain principles

1. Objects and reasons of the Act
2. Relevant provisions involved in the case
3. Factual matrix of the case
4. Circumstances of the case
5. Probabilities
6. Reasoned judgements

SUPREME COURT RULING IN MAINTAINING ITS STANDARDS:

The Supreme Court of India in

PremSurana v. Additional Munsif and Judicial Magistrate and another[1] ;

1. 2002 (5) Supreme Court 419

In this case an Advocate slapped a Judicial Magistrate in the open court and abused him. The Supreme Court held that slap on the face of a Judge by an Advocate is a slap on the face of the Judicial Justice delivery system in the country. It is a case of gross criminal contempt and as such question of acceptance of an apology or an undertaking for a future good behaviour does not and cannot arise, neither there can be any leniency in sentence of 6 months imprisonment.

The Supreme Court in

Shambu Ram Yadhav v. Hanuman Das Khathri [2]

In this case an Advocate had been disbarred permanently for the misconduct of suggesting in a letter to his client that a client should sent him Rs.10,000/- for illegal gratification of a Judge.

Ramon Services Pvt. Ltd. v. Subhash Kapoor [3]

The Supreme Court held striking lawyers failed in their contractual and professional duty which they had been paid to perform. Held affects not just the members of the legal profession but obstructs the process of court which intended to secure justice.

Thus the Supreme Court through judges on various occasions stood for the cause of maintaining the standards of the judiciary.

ROLE OF LAWYERS:

Lawyers see law in action as perhaps no one else does and without their assistance it is impossible to make law as an instrument of justice. According to Jeremy Bentham, *"Law is not made by Judges alone, but by Judge and Company"*. Lawyers are the most important shareholders of the company. A vigilant Bar is a great asset of the Judiciary. The lawyers should prepare themselves to meet the new challenges post before them in the latest global arena. The Advocates owes their duties to the court, client and to the society. The dignity of the institution should be shared with the Bar and the Bench, so when the Bar resorts to such activities as strikes, road-rokos, the image of the institution will not cherish. The judicial hours should not be used for such activities. The Supreme Court of India through various judgements made it clear that Advocates should not indulge in such activities which delays or defies the Judicial Process. When a client looses his hope with the judicial institution then it will directly affect the society. When an Advocate wears his robes he should maintain and protect his dignity to the Court, Bar, Client and to the society as a whole. His behaviour in the court

2. 2001 (6) SCC 1
3. 2001 (1) SCC 188

will reflect the society's opinion towards judiciary. The standard of judiciary will not be attained unless there is an active role played by the Advocates. Advocates should not indulge in scandalizing the court practices and thereby vandalizing the system.

To succeed in this endeavour the lawyers must ensure that the professional standards are maintained and legal ethics do not take a back seat.

SUPREME COURT CASES ON PROFESSIONAL MISCONDUCT:

Bar Council of A.P. v. Kurapati Sathya Narayana[4]

Held that Advocate receiving money in a proceeding for execution of a decree on behalf of the decree holder, but not accounting him and using it for his own need of medical treatment amounts to professional misconduct.

P.D.Gupta v. Ramamurthy and another [5]

The Advocate buying the disputed property under litigation at a throw away price from his client whose title to the property was in dispute and selling the same to the third party for profit was held to be professional misconduct and the Advocate was debarred from service for one year.

N.G.Dastane v. Srikanth Shivde and another[6]

In this case Advocate sought for repeated adjournments for postponing of witnesses who were present in court without making alternative arrangement for their examination falls within the expression of professional misconduct.

Thus an Advocate owes his duty to the client, court and profession and society as a whole.

ROLE OF THE STATE:

India's independent judicial system occupies a pivotal position in the Constitution. The appointment of the Judges to the higher Judiciary is made by the President in consultation with a collegium headed by the Chief Justice and the senior colleagues whose recommendations are virtually binding on the executive. Various provisions of the Constitution ensures the independence of the judiciary from the bottom to the highest level. Article 50 of the Indian Constitution states that executive must be separated from the Judiciary. The independence of the judiciary is absolutely essential for impartial administration of justice.

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4. 2002 (8) Supreme Court 198
5. 1997 (7) SCC 147
6. 2001 (6) SCC 135

Fiscal autonomy of the Judiciary:

Administration of the justice must not be affected by lack of funds. Financial security and fiscal independence of the judiciary will have a direct bearing on its independence. Unless adequate remuneration is guaranteed the Judge cannot feel independent of the executive. If the members of the judiciary were to plead for an increase in salary and other allowances to the executive, then it would surely undermine the dignity of the judiciary since the executive have the control over the funds. Such fiscal restrictions would seriously affect the introduction of the modern technologies and the genuine need for spending more for the larger interest of the society. Dr. A.S. Anand expressed his view in this regard, "I believe that some of the ills with which our administration of justice is presently afflicted are capable of being cured if financial and administrative autonomy is granted to the judiciary." In this context every High Court and the judicial system in the country are starved of funds, the expenditure in the judiciary in this country is only 0.2% of the GNP as compared to 4.3% in U.K. More than half of the expenditure on the judiciary is generated by court fees, fines etc;

Salaries of the Judges:

Mr. Justice. S.P. Bharucha has pointed out the importance of the financial adequacy for the judges for their fearless discharge of their duties. He has pointed out that a Law Lord in England and also a Supreme Court Judge in Canada gets Rs.75 lakhs as salary in a year whereas an Indian situation needs a vast improvement. The State earns a large sum from litigation by way of court fees, and the administration of justice being the responsibility of the State; it has to spend from the exchequer for providing better services to the public. The State has to make necessary steps to make the judiciary independent and thereby maintaining standards in the judiciary.

ROLE OF SOCIETY:

Role of Press:

Being the fourth estate of the democracy, Press and the Media which cherishes their independence must recognize that this freedom is essential for the judiciary to deliver justice as it is for the media to observe it impartially. Any running commentary on cases pending before the court is likely to prejudice the outcome of the trial. The victims in such an event sometimes could be the very

same persons in media or trying to defend or prosecute. The editors are familiar with the pressures from the public relations and the advertising industry to smuggle viewpoints into the media. They must see that the judiciary is free from such pressures. Similarly, the public and society as a whole by resorting faith to the institutions must enable the judiciary to fulfill its hopes in an efficient manner.

CONCLUSION:

The reforms in the judiciary are not merely about the cases and the speed with which they are decided. The judiciary of the 21st century needs to set an example in exemplary self discipline: Discipline in its approach to legal problem that fall in its lap. There is also need for greater transparency in the life style of the judges, and an abiding tolerance of public criticism. Litigants no longer accept judge's decision as they used to in the past. The mystique of the judiciary – the awesome majesty of the law as it used to be called – is no longer a sufficient protection. The job has become harder. The judges are seen less as the impersonal agents of a system and regarded more as human beings responsible for the failure of the losing party. Hence, the need for ethics – and some guidelines from the top, which "the top" too must scrupulously observe.

In a country like ours, and in times like these it is not enough for the judiciary to be independent of the executive and of all other external influences. The judges, because of the high offices they hold and the plenitude of powers they exercise, must be seen to have qualities of excellence of mind and heart and above all they must have courage and nobility. Greater the power greater is the need for restraint. Therefore judges at all levels, are expected to be circumspect and self-disciplined in discharge of their duties.

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Indian Federal System and Its Fragile Internal Security Dimension

Dr. C. Chockalingam*

"Though the country and the people may be divided into different States for the convenience of administration, the country is one integral whole, its people are single people living under a single imperium derived from a single source"

– Dr.B.R.Ambedkar.

The concept of Federalism is fairly modern. Its theory and practice, in modern times, are not older than the American Federation, which came into existence in 1787. The Federal idea- the plan of government of a number of contiguous territories in association and neither separated nor combined in one-is very old and had been practiced in ancient Greece, but it has been employed on a larger scale only during the last two centuries.

Federalism is an historical product, the result of historical evolution. It springs from the necessity for the union of a number of independent States which are not strong enough individually to protect themselves from outside danger and whose union is requisite for their safety and also for the promotion of their economic interests, but which are not prepared to surrender their independence completely.

The impulses, which leads, to the formation of a federation are usually the idea of national unity, the desire to promote common economic interests and the amicable resolution of common

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problems and considerations of defence and international prestige[1]. The federal form of government is not deduced from a theory or a prior reasoning, but is a historical product or a necessity arising under certain political conditions. Its fundamental principles have been fully worked out in the highly developed federation in the world, that of the United States of America.

Indian Federalism: It's Nature

A good number of scholars of Constitutional law, Indian and foreign, describe India as a quasi-federal State, and some even regard it as more unitary than federal. Joshi holds that "the union is not strictly a federal polity but a quasi-federal polity with some vital and important elements of unitariness ... It is designed to work as a federal government in normal times, but as a unitary Government in times of emergency[2].

It must be remembered, that though India is a federation, her constitution departs from the ideal of a true federation in several vital and significant ways. It is not a genuine federation, but a quasi-federation having several features of a unitary State. Prof. K.C. Wheare, a well-known British authority on federalism, classified India as "a unitary State with subsidiary unitary principles[3].

However India is a true federation - although, like all other federations, it has distinctive characteristics - and that it is misleading to refer to India as a quasi-federation.

"P.B.Gajendragadkar, former Chief Justice of India, opined that though the constitution "partakes of some of the characteristics of federal structure, it cannot be said to be federal in the true sense of the term[4].

Hence, a large number of scholars, reflecting on the vast powers left with the government of India and the subordinate role of the States and also the crucial powers of the Union to practically annihilate an existing State, doubt whether India is a Federation at all. Some have called it a 'Pseudo-federation'. Others have said that it will be more appropriate to call it a quasi-federation, but a good number of political thinkers have suggested that there is no such thing as a quasi federation and that India should be grouped along the federations by virtue of its Constitution, India is a federation.

1. Bowie and Friedrich – Studies in Federalism.
2. G.N. Joshi, The constitution of India, London 1954,p.32
3. K.C. Wheare,federal Government London 1963 p.27
4. P.B. Gajendragadkar, The Constitution of India; it Philosophy and Basic Postulates, Bombay 1969.p.69

In a Federation, there should be a Central Government and State Governments. Secondly, the powers and functions of both the Central and State Governments should be defined by a written constitution. The third test is that there should exist an exclusive field for the Centre and another exclusive field for the States before it can be called federation. The fourth test is that both the Centre and any of the States should have the power and ability to function in its exclusive field through its own agencies[5] . The essential difference between a federation and a confederation is that a confederation is a sort of a State which usually has no central agency or Government to implement its policies. It has to depend upon its units for the implementation of its policies.

In the case of a Federation, the Central Government will have its own agencies for its functions and the units will have their own agencies for their own functions. The last test is that it should be possible for any citizen or for a State to have disputes relating to the powers and functions of the Central Government and the units decided by the courts, that is to say, the relations must be justifiable. Now, if these tests are applied to Indian Constitution it satisfies each off them fully and therefore, there can be no doubts that India is a Federation. Moving for consideration of the Draft Constitution in the Constituent Assembly Dr. Ambedkar said that the form of the constitution was federal. "It established a dual polity with the union at the centre and the States at the periphery, each endowed with sovereign powers to be exercised in the field assigned to them respectively, of one is co-ordinate with that of the other [6]."

The basic principle of federalism is that the legislative and executive authority is partitioned between the Centre and the States not by any law to be made by the Centre, but by the constitution itself. This is what the constitution does. The States are in no way dependent upon the Centre for their- legislative or executive authority. The States and the Centre are co-equal in this matter." "It is difficult to see how such a constitution can be called centralism. It may be that the constitution assigns to the centre a larger field for the operation of its legislative and executive authority than is to be found in any other federal constitution [7].

The horrible conditions of war and economic depression demand unitary control for the effective protection of national

5. A.V. Dicey – The Law of the Constitution- p.157
6. Constituent Assembly Debates Vol.4, p.133
7. V.N. Shukla, Constitution of India, p.40 (1969)

interests. Similarly, the ideal of social welfare State has enjoined upon the National Government to increase its scope of activity more and more to eradicate gigantic evils of poverty, unemployment, disease, starvation, ignorance etc.

The regional Governments life is in a perpetual condition of financial difficulties. They have 'meager resources', more than that, they are forced to collect money that they cannot spend and also forced to spend, in a particular way, money that they have to beg at the door of the Centre. Though a formal federal system in all respects, the very system is reduced to a Unitarian model when political parties run the machinery of general and regional governments without federalising their own character.

Federal system not only stands for the distribution of powers between national and regional governments, it also desires sincere cooperation between the two sets of political organizations in order to ensure that the ideal of coordination and complete administration of the divided spheres is attained as effectively as possible[8] . It is needed for the obvious reason that there is the area of inter-regional relationships disallowing any component unit to keep itself completely off from others in the interest of administrative efficiency and nationalist sentiments.

Indian Federal System: The Tension Areas

Union-State relations, in India, have taken a new turn after the fourth general elections with coming into power of non-congress coalition Governments in several States and with Congress Government at the Centre being reduced to a thin majority. The Union-State tensions, before this, were more often than not, an intra-party affair which took the shape of a family quarrel and as such, it was comparatively easy to resolve it, particularly on account of the presence of Nehru and the prestige that he commanded at the national and State levels. But conflict resolution could take place with the help of 'consultation-consensus technique' and that also within the Congress system itself.

It appeared that the federal system was operating in a unitary party framework. After fourth general elections, the federal system has to operate within a multi-party framework, which perhaps is more akin to the plural social background of Indian federalism. The post-fourth general election tensions in the Union-State relations arc characteristic of the transition from the stage of one-party dominant

8. M.P. Jain – Indian Constitutional Law. P.347(1978)

politics to the present day situation of multi-party competitive politics.

The main conflict areas between the Union and the States can be broadly classified into three categories of issues, though no rigid Compartmentalization is possible. 'These categories are:

I. Political dimensions,

II. Administrative dimensions, and

III. Economic and Financial dimensions

In India there is a tendency to view politics through the constitutional legal mechanism and to suggest constitutional amendments for resolving political problems. No doubt, many facets of political life including the Centre-State relations, have a legal basis, but it should be appreciated that these relations are essentially political and it is important to evolve political solution rather to look in the political context. Even the operation of the Constitution is dependent on the dynamics of the political dimension, such as the party alliances, the ideological movements and people's demands. In fact as long as the Congress Party was in power at the Centre as well as in all the States, there was little need to use whatever constitutional provisions were available or managing the Centre-State or inter-State conflicts. These were more like family disputes which could be handled by the high command and it was discourteous even to mention these matters in public, It was only when the non-Congress parties formed Governments in different States that the party machinery could not be utilized for the Inter- Governmenta1 disputes. Moreover, inter-party differences also tended to be magnified as inter-Governmental conflicts

Law and Order

In the functional sphere the law and order issue has been the most fertile ground of disputes. The constitution makes the State Government responsible for maintenance of public order as well as protection of the Central Government property located in the State[9] . The properties of the Centre and its undertakings are spread all over the country. The most conspicuous instance is that of the railways. Any disruption in the effective functioning of the central undertakings will cause inconvenience to the public. To avoid such a situation, constitution authorizes the Centre to give directives[10] to

9. D.D. Basu, Introduction to the Constitution of India, p.263
10. T.K. Tope, Constitutional Law of India – p.523(1982)

various State Governments. In case of non-compliance by any State Government to the Centre's directives , the Centre may resort to the extent of' taking over the administration of such State under Article 356.

The Indian constitution is federal in form but unitary in spirit. The party in power at the Centre is content within the existing constitutional framework. While the regional parties and the States led by the non-Congress parties demand for a thorough revision and change. They stand for a thorough re-examination of the Constitution so that the Centre-State relations could be re-arranged and the States can acquire more power

Under the constitutional scheme national security in not a subject specifically listed in any of the three Lists i.e., the Union, the State and the Concurrent List. The subject of security under Art.352 and under the emergency provisions in part XVIII of the constitution has been assigned to the Union government[11]. Though it is an overriding executive power of the Union, in constitutional practice, however security is a subject in which the Sates and the Union have a common interest and are expected to act in a coordinated manner. Under the cooperative relationship the duties and obligations of the Union and the States are covered primarily in Art. 256, 355,356 and 365 and also under relevant provisions. Entries pertaining to Defence of India, and control and deployment of the armed forces of the Union are covered in List I of the Seventh Schedule. Public order and Police feature as Entries 1 & 2 in the List II. Criminal law, Criminal procedure and Administration of Justice are covered in List III as entries 1,2, & 11A. Thus the need for a close cooperation between the Centre and the States on this vital subject with multiple challenges cannot be over emphasized.

Security Dimensions

There has been a conceptual shift in the definition and functional understanding of the term 'Security', delineating the areas falling within the purview of National and Internal Security. National Security was earlier viewed to encompass, among other elements, economic strength, maintenance of internal cohesion that enabled the exercise of national will on directing the economic and technological progress and maintaining communal and religious harmony. Under the new techno-economic concept, 'Security' enlarged its ambit to include food security, energy including

11. The Constitution of India, Seventh Schedule, Union List Entry – 1,

nuclear security, clean environment, and equality before law and good governance. The concept of 'globalization' of Economies, further transformed the dimensions of security to involve ethnic identity considerations and mitigation of cultural conflicts in social terms. The interplay of the economic and technological concerns in the process of globalization, and the proliferation of low cost wars, through terror groups and also religious and ethnic conflicts, in and around the borders further enlarged the scope of what are called 'the global security concerns' which qualitatively affected the conventional national security ethos. To that extent, where India is concerned, with many a problem emanating from its neighborhood and affecting the States, both via its land and coastal borders, the National and Internal Security issues have to be addressed jointly from a common platform.

Internal Security, on the other hand, can be defined as 'security against threats faced by a country within its national borders, either caused by inner political turmoil or provoked, prompted or proxied by an enemy country, perpetrated even by such groups that use a failed, failing or weak state, causing insurgency, terrorism or any other subversive acts that target innocent citizens, cause animosity between and amongst groups of citizens and communities intended to cause or causing violence, destroy or attempt to destroy public and private establishment. In addition, socio-economic factors also play their role in causing Internal Security problems such as naxalism. While such security concerns cannot be defined as falling either within the traditional law and order realm or military threats from across the border, they cause both kinds of threats simultaneously, aimed at causing detriment to societal peace and national security. Naturally, they cause a peculiar dilemma for an affected State and its agencies.

It is to be noted that Article 355 casts a duty on the Union 'to protect every State against external aggression and internal disturbance' and it has been held through various pronouncements by the Supreme Court that the Union Government's obligation under Article 355 clearly supersedes the argument that 'this duty' rests with the State Governments since 'police' and 'public order' are subjects falling in the domain of the States, by virtue of their placement in the List II (State List) of the Seventh Schedule of the Constitution.

It is well recognized that the dimensions of internal security in India's geographical and geo – political context, besides the militancy within the country has serious external connections particularly with some neighboring countries. Given the long land and coastal borders measuring a total of over 22000kms (appro.15100kms of land border and approx 7500kms of coastline)[12] involving many states, a build up of synergic relationship between the Centre and the States would be necessary to counter any such security threats. The over all objective of the relationship has to be

(i) to try to pre-empt and prevent any possible threats

(ii) to contain the damage to human life and property in case of such incidents taking place and

(iii)to strengthen the law enforcement system to make it deterrent for such crimes

The law and order machinery in the States should be fully assisted by the Centre with equipment, technology, and training programmes as only then can the State governments become as much responsible as the Centre in combating terrorism.

Crimes such as terrorism, production and distribution of fake currency notes, espionage arms smuggling, organized crime, hijacking and assassination / assignation attempts on the life of iconic figures/ political leadership, cyber crimes, crime related to acquisition of radio – active and poisonous substance, bio terrorism, norco terrorism i.e., drug trafficking money used for organizing terrorist operations should be classified as crimes threatening national or internal security.

The Supreme Court in its various pronouncements maintained that the Union Government's obligation under Article 355 clearly supersedes the argument that 'this duty' rests with the State Governments since 'police' and 'public order" are subjects falling in the domain of the States by virtue of their placement in the List II (State List) of the Seventh Schedule of the Constitution. This has been amply clarified by the Supreme Court repeatedly, in its verdicts in

(1) Ram ManoharLohia v. State of Bihar [13]

(2) Kartar Singh v. State of Punjab and [14]

(3) People's Union for Civil Liberties v. Union of India[15]

12. Commission on Centre-State Relations-Report on Internal security-March 2010
13. AIR (1966 SC 74)
14. (1994 3SCC 569)
15. (2004 9 SCC 580)

The judgments of the Supreme Court in all these cases leave no doubt that any criminal act which is aimed at, or which clearly has the potential of, causing detriment to the country's security, integrity, stability or sovereignty, or destabilizing its economy, is to be deemed as a threat to national security and defence of India adding that such perilous activities cannot obviously be left to be routinely dealt with by the concerned State police force as an ordinary crime or law and order problem. The Centre should have a clear cut role in dealing with such acts, albeit in active collaboration with the State Government concerned. The Country needs an over-arching structure at the National level for the maintenance of Internal Security. This structure should be capable of handling all matters relating to serious internal disturbances caused by terrorist attacks and/or militancy including insurgency within the country. The structure has to be so designed that it can take care of all stages of serious crimes committed against the security and integrity of the country, such as pre-emption, prevention, control, investigation and prosecution. A similar structure in the form of Department of Home Land Security was created in the USA after the terrorist attack of September 11, 2001 on the World Trade Centre in New York and the Pentagon. Barring the Federal Bureau of Investigation (FBI), which continues to be under the Department of Justice but fully co-operates with the Department of Home Land Security, most other concerned departments including the revenue intelligence, customs, transportation security etc., departments have been directly placed under the Department of Home Land Security and report on all matters pertaining to Internal Security of USA to this Department. Indeed, the Department of Home Land Security of USA is provided with huge financial, technical and human resources. It is often claimed that with the creation of this Department, in spite of continuing threats, USA has been able to avert any serious terrorist attack since September 2001.

India can consider the US model. However, given the Internal Security situation in the country there would be no harm if the best practices from the existing models are picked up to safeguard our National interests. The existing NIA Act, 2008 though useful for the limited purpose for which it was enacted, the Agency created under this Act will not be able to serve the overall purpose of tackling all issues pertaining to Internal Security. 'A New Architecture for India's Security' is the need of the hour. Indeed, for such a structure to function and operate successfully in a federal system that the

country has, co-operation of the States will have to be fully in-built right from the start, apart from the enormous amount of fund allotment for it.

Internal Security Issues

There are four problem areas relating to the Internal Security of the country, which have been a cause of great concern for the last few decades. These are Terrorism, Naxal-related violence, insurgency movement in the North-East and militancy in Jammu and Kashmir (J &K).In fact some positive results have also been achieved in certain areas such as the return of total peace in Mizoram, neutralization of ULFA to a certain extent, overall containment of violence in the North-East, reduction in incident levels in J & K and so on. These successes have come about, both on account of the political initiatives and as a result of requisite administrative action. One of the notable features, however, has been the success of the electoral process and the successful functioning of the democratically elected Governments in the States of North-East and Jammu and Kashmir, all this while even when militancy was on. In the last elections also large turn out of voters was witnessed, both for the Assembly and Lok Sabha contests, with all political parties with different ideologies fully and vigorously participating. Barring a couple of occasions since Independence, such as in 1983 Assembly elections in Assam and in 2002 Assembly elections in Jammu & Kashmir when the voter turn out was somewhat lower, people have generally chosen to ignore the calls and threats issued by the militants and separatist outfits and have fully participated in the electoral process. Even on the calls and threats issued by Naxal leaders in some constituencies little or no effect has been noticed on the public and the voting has been vigorous. Another plus has been that the elections have, by and large, been peaceful. The high and increasing voter turnout in the last several elections gives a clear indication that democracy is well entrenched both in the North-East and in J & K and a very large percentage of citizenry wants peaceful resolution of the issues at hand.

Terrorism poses the biggest challenge because terrorists are opposed to the very idea of United India and they want to destroy the country politically, economically and culturally. The country must have a clear anti-terror policy backed by a stringent anti-terror law like the Unlawful Activities (Prevention) Act.

The Naxal related violence i.e. Maoist insurgency has shown geographically shrinkage but it retains the capacity to strike at will.

The insurgency could be contained if there is a strong political will and the government follows a well defined policy. To start with the Maoists have to be neutralized through sustained counter insurgency operations and that will have to be followed by socio economic development of the area reclaimed from the Maoists. Lands alienated from tribals will need to be restored to them and the Forest Rights Act[16] has to be implemented in its real spirit. Of all the above there will have to a genuine attempt to win the heart of the people in the affected areas.

So far as the North East is concerned it will have to be made clear that the insurgent groups genuine political aspirations would be met within the constitutional frame work, there would be no tolerance of violent activities on any pretext. The term of suspension of operation agreements, negotiated with the insurgent groups must be enforced in letter and spirit. Peace talks with the various faction in the North-East must concluded successfully within a time frame.

Jammu & Kashmir:

Jammu and Kashmir is the only State which has its own Constitution. Although the accession of the State to the Indian Union took place in October 1947, making an integral part of India, the State's Constitution was adopted in November 1956. Article 370 of the Constitution of India makes some special provisions pertaining to the legislative relations between the Union of India and the State of Jammu & Kashmir. Jammu & Kashmir has also been included in the list of special category States since 1990, which gives the State the benefit of 90:10 funding pattern in terms of Central assistance for plan schemes.

It is well known that issues relating to Jammu and Kashmir have both external and internal dimensions. The external dimension is warped in geopolitical strategy-the dimensions involving a matrix of linkages with China, Afghanistan, and above all Pakistan - and needs to be addressed as such. Both dimensions, indeed are inter-related. For the purpose of this section, we will cover only the internal dimension and particularly on the areas where the Centre and the State can work together to put an end to the ongoing militancy

16. The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2007. It came into force on 1st January, 2008

The trends of militancy in the State in the current decade bring out clearly that there has been a massive decline in the number of incidents and the casualties in successive years.

This has largely been achieved because the Union and the State Government together adopted a multi-pronged approach to contain the cross border infiltration, which inter-alia, included strengthening of border management and multi-tiered and multi-model deployment of forces along the line of control and on the identified infiltration routes, construction of border fencing, provision of weaponry and equipment with improved technology for the security and police forces, improved intelligence and operational co¬ordination and synergizing intelligence flow to check infiltration and for taking pro-active action against terrorists within the State. When the terrorist violence and militancy in the State aided by the neighbouring country assumed serious proportions in 1989, the Centre extended the Armed Forces Special Powers Act, 1958 to J&K in 1990

One of the key indicators on the improvement of the situation besides the reduction in the militancy is the success of the electoral process. In recent times, barring the Assembly elections of 2002, when the voter turnout was somewhat lower as a result of the threats and calls issued by the militants and the separatists, the State has always witnessed a very high turn out of voters who have invariably not responded to the threats and calls of boycott issued by the militants/separatists. This is a clear indication that a large majority of the people of the State, do not any more support or subscribe to the philosophy of militancy, and they want to get on with their lives and achieve higher standards of living.

Similar to the situation in meeting the Naxal Problem and the militancy in the North East even in J&K the policy has to have those two important elements of

(i) rapid socio-economic development with equal effort in confidence building and

(ii) Continuation of strong administrative action to put an end to the militancy as quickly as possible while relentless campaign and action against militancy including sealing of borders to stop infiltration, Recovery of arms and ammunition and swift action against terrorist should continue .There is also need now to increase the efforts towards confidence building measures. These measures may include reduction in the deployment of the Central Para Military Forces and

simultaneous augmentation and training of the State police for taking full charge of the law and order situation in the State over a period of time, quicker rehabilitation of the deprived persons who have suffered on account of war or militancy.

In India the internal security problems may appear formidable, but our country has the resources and political and economic strength to get over them[17] . The only magical wand that is needed in today's context is a strong political will, as the famous saying goes "where there is a will there is a way".

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17. Prakash Singh, The New Indian Express, dt. 04-05-2014

Global Administrative Detention – Challenge to Fairness

Prof. Dr. N. Ebenezer Joseph *

Introduction

When the whole world is shrinking like a village, global problems have also come into existence. Terrorism has become a global issue. The migration of people from one state is at the increase. Terrorists, smugglers and traffickers of one state taking shelter in another state are the order of the day. States are resorting detention of such individuals as a preventive measure to curb terrorism and other activities. United States of America after declaring global war on terrorism detained in Guantanama Bay of Cuba many individuals as enemy combatant. Such type of detention is called as Global Administrative detention.[1] Moreover almost all the nations are detaining many persons under secret detention. These detainees suffer without any proper remedies. Detentions of such persons are gaining global importance. Almost all the nations are practicing detention of migrants and asylum seekers [2]. Interpol practices detention of individuals on the requests of the nations. While exercising these functions, control of the misuse of authority is essential.[3]

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1. Terrorism and Human Rights: Discussing Politically Motivated Violence, The International Council on Human Rights Policy, Lahore, 20-22 May 2005, at p.10.
2. United Nations High Commissioner for Human Rights Statement by 13 UN experts on global detention initiative, 6 October 2008 at p.1.
3. Global detention system, http://www.sourcewatch.org/index php?title=Globaldetentionsystem visited on 18.12.2010

Global administrative law is emerging as a new concept. Global Administrative Law is hereinafter called as GAL. Globalization denotes considering the whole world as a unit.[4] This arises due to many common identities in the global level. They are like environment, security, health etc. In order to realize these purposes many global bodies like World Bank, International Monetary fund etc, U.N Security Council etc. comes into existence. Moreover these bodies make regulations and take decisions to achieve these common identities.

These activities bring a global governance or global administration.[5] Such activities of the global bodies penetrate the sovereignty of the states and rights of the individuals[6]. While regulations and the functions of the state authorities infringe the interests of the individual, administrative law comes to the rescue of those individuals. In the similar manner when the regulations and functions of the global bodies infringes the interests of the nations and individuals GAL is necessary to protect those interests from the uncontrolled exercise of power by the global bodies. Whether under the domestic level or the global level, every body is supposed to act according to law. Moreover so many global problems are existing for which, at present, sufficient regulatory bodies are not available. One of such areas is detention that takes place in the global level. This chapter analyses the necessity of the GAL in relation to such global administrative detentions. Human rights of the detainees in Global detention can be protected by applying the principles of Administrative law.

Global Administrative Law

Administrative law governing the exercise of power by public officials is the body or rules and principles to ensure that when public officials act, they act in accordance with the rule of law. GAL is also in the same way such rules and principles which ensure that the Global Administrative authority, when they act must act in accordance with the rule of law. In this aspect the GAL may be described as a branch of public law that examining the legal phenomena, which together constitute international administration, seeks to discover and specify the norms that govern this administration. In this way,

4. Emerging concept of Global Administrative Law An Overview, at p.1 http://www.allindia reporter.in/articles/index.php?article=980visited on-12-12-2010
5. Ibid.
6. Nicokrisch, The Pluralism of Global Administrative, European Journal of International Law Vol.17.No.1(2006) at p .254

GAL covers the entire rule and procedures that help to ensure the accountability of global administration.[7]

Essentials of Global Administrative Law

Global administrative bodies, Global purposes, Global Regulations, Global Subjects, GAL principles are considered essential in GAL.

Global Administrative Bodies like World Bank, IMF, U.N Security Council, and Interpol are essential for GAL.[8] According to Daphne Richemond – Barak, there are four types of global administrative bodies[9] .

1. Formal International Organs[10]

Example U.N Security Council, World Health Organization, International Labour Organisation etc.,

2. Transnational networks and co-ordination arrangements.[11]

It is characterized by the absence of binding formal decision making structures and the dominance of information co-operation among state regulators. One such organ is Basel Committee, in the area of banking regulations.

3. Distributed domestic Administration.[12]

This highlights the role of domestic regulatory agencies within the global administrative space in particular it includes state's attempt to regulate activities outside its territory. One such example is the extension of US Jurisdiction over extra-territorial detention of suspected terrorist in the Gunatanamo Bay at Cuba.

4. Hybrid Intergovernmental arrangements[13]

Bodies that combine private and government actors example Internet Corporations for Assigned Name and Number (ICANN)

5. Private Institution with regulatory function

E.g.: International Standard Organization (ISO)[14]

Global purposes are like forest preservation, control of fishing, water regulation, environmental protection, arms control, standardization and food safety, financial and accounting standards,

7. Supra note 4 at p.5.
8. Benedict Kings Bury, Nickorish, Richard B. Stewarts, The Emergence of Global Administrative law, Law and Contemporary Problems, Vol 68;15(Summer/Autumn at p.17)
9. Daphne Richemond – Barak, " Regulating War: A Taxonomy in Global Administrative Law," The European Journal International Law, Vol. 22, No.4(2011) at p. 1038
10. ibid at p. 1038
11. ibid at p. 1040
12. ibid at p.1040
13. ibid at p.1041
14. ibid at p. 1041

Internet governance, intellectual property protection, refugee protection, labour standards and security.[15] States, individuals, corporations, NGOs and other collectivities are the subjects of GAL. As in the case of domestic administrative law where authorities are to apply the administrative law principles, Global administrative bodies must also apply the important principles like legality, fairness, rationality, proportionality, accountability, etc.[16]

Global administrative space means a regulatory space that transcends international law and domestic administrative law, distinct from the inter-State relations which is dealt in International Law. While global bodies control the states or individuals, they cannot act arbitrarily. They have to follow certain regulations or certain principles. These areas without regulation or principles are called as the global administrative space.[17]

Global Administrative Detention

Activities endangerous to human security and global security takes place in the global level. In the age of easy international travel and advance communications, terrorist networks have increased. In many instances, attacks are planned by individuals located in different countries who use modern technology to collaborate for the terrorism. It is an international problem and requires effective multilateral engagement between various nations.[18] One of the methods evolved to ensure global security is detention of the individual in the global level.[19] USA detained individuals from different parts of the World outside its territory without extradition in Guantanamo Bay under its enemy combatant policy.[20] Such type of detention is called as global administrative detention by International Council on Human Rights Policy[21] Detention has gained global concern in these areas. Secret detention is discussed hereunder.

15. Sabino Cassese, Global Administrative Law, Cases and Materials, University of Rome, Law Sapienza Public Law institute,(May 2006) at p.27
16. Benedict Kingsbury, Publicness and Representation in the "Law of Global Governance" NYU Law School November, 2008 at p.7
17. Nico Krisch, Global Administrative Law and the Constitutional Ambition at p.12. http://ssrn.com/abstract=1344788
18. Supra note 2 at p.57
19. Detention of persons from various parts of the world by USA at Guantanamo Bay was named as Global detention system by source watch, Global Detention System; http;//66.39./28.35/under.php?title=global detention system stopping the torture visited on 18.12.2011
20. Ryan Goodman, " The Detention of Civilians in Armed Conflict", Editorial Comment, The American Journal of International Law, Vol. 103:48, (2009) at p.61
21. Supra note 1

Secret Detention and Global Administrative Detention

Secret detention is defined by United Nations Human Rights Council as follows:

"One is kept in secret detention if State authorities acting in their official capacity, or persons acting under the orders thereof, with the authorization, consent, support or acquiescence of the State, or in any other situation where the action or omission of the detaining person is attributable to the State, deprive persons of their liberty; where the person is not permitted any contact with the outside world ("incommunicado detention"); and when the detaining or otherwise competent authority denies, refuses to confirm or deny or actively conceals the fact that the person is deprived of his/her liberty hidden from the outside world, including, for example family, independent lawyers or non-governmental organizations, or refuses to provide or actively conceals information about the fate or whereabouts of the detainee. Secret detention does not require deprivation of liberty in a secret place of detention; in other words, secret detention within the scope of the present report may take place not only in a place that is not an officially recognized place of detention, or at an officially recognized place of detention, but in a hidden section or wing, which is itself not officially recognized; but also in an officially recognized site. Whether or not detention is secret is determined by its incommunicado character and by the fact that State authorities, as described do not disclose the place of detention or information about the fate of the detainee."

Where the detainees may only have contact with their captors, guards or co-inmates, would also amount to secret detention. If the International Committee of the Red Cross (ICRC) is granted access by the authorities, but is not permitted to register the case, or not to notify others of the persons' whereabouts, would also amount to secret detention.[22] The detainee is left without any remedy either under the International law or under the domestic laws. Even if remedies are available, the detainee cannot avail them due to constraints. It goes against the theory of A.V. Dicey since the act is not done within law.

U.S.A was having its secret detention centers in Jordon, Egypt, The Syrian Arab Republic, Monaco, Pakistan, Ethiopia, Dyi bounty, Uzbekistan.[23] It detained several persons as "high value detainees" from different nations. They were detained by it without extradition.

22. Joint study on Global Practices in Relation to Secret Detention ,A/HRC/13/42 at p.7
23. Ibid at p.130

Moreover, U.S.A has its detention centre in Guantanamo where it detained persons from various nations in this detention centre without extradition under the enemy combatant policy. While most of the states practice secret detention, there are possibilities that an individual outside the territory of a nation may be detained in such secret detention centers without extradition. Then it amounts to global administrative detention. This gave the development of Global Administrative Detention.

The following are a few persons detained in such a manner by USA under Global Administrative Detention.

- Abd al-Rahim al-Nashiri (Saudi), captured in the United Arab Emirates in October or November 2002.
- Khalid Sheikh Mohammed (Pakistani), captured in Rawalpindi, Pakistan, on 1 March 2003.
- Mohammed Farik bin Amin (Malaysian), also known as Zubair, captured in Bangkok on 8 June 2003.
- Riduan Isamuddin (Indonesian), also known as Hambali, also known as Encep Nuraman, captured in Ayutthaya, Thailand, on 11 August 2003.
- Mohammed Nazir bin Lep (Malaysian), also known as Lillie, captured in Bangkok on 11 August 2003.
- Abu Faraj al-Libi (Libyan), also known as Mustafa Faraj al-Azibi, captured in Mardan, Pakistan, on 2 May 2005.[24]

This list shows that the detainees may be belonging to any nation and such type of detentions has got global dimensions. While detaining them due process of law has been neglected. One who is in secret detention cannot file the habeas Corpus. Though the Supreme Court of the USA has held in *Boumedine vs. Bush (2008)*[25] that a detainee can file *habeas corpus* but the possibility of filing such petitions from the secret detention is remote.

Other nations are also having secret detention centers for their internal problems. China, India, Islamic Republic of Iran, Nepal, Pakistan, the Philippines and Sri Lanka are having secret detentions. These nations justify secret detentions to contain terrorism.[26] Most

24. "President Discusses Creation of Military Commissions to Try Suspected Terrorists", 6 September 2006, http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html.

25. 128 S.Ct. 2229 (2008)

26. Ibid at p.107

of the countries resorted to secret detention during the past forty years. Latin American countries like Peru and Argentina, African countries like Ethiopia, European countries like Romania, Italy and Asian countries like India, Sri lanka, Iran all practice preventive detention.[27]

Indian magazine "The week" reported that there are at least 15, and perhaps as many as 40 secret detention sites in India, which are used to detain, interrogate and torture suspected terrorists. The Week claimed that they were not run directly by the ministry of Home Affairs, but by security agencies including the Research and Analysis wing (RAW, India's Foreign Intelligence Agency) and the Intelligence Bureau (IB).[28]

It is reportedly admitted that torture techniques were used, based loosely as those used on Guantanamo and elsewhere in the "war on terror" of the Government of U.S.A, including the use of loud and incessant music, sleep deprivation, keeping naked to degrade and humiliate them, and forcibly administering always through the rectories to further break down their dignity.[29]

As secret detainees are held outside the reach of the law, no procedure established by law is being applied to them as required by Article 9 of the International Covenant on Civil and Political Rights (ICCPR)[30] and would Secret detention without contact with the outside world entails de facto that the detainees do not enjoy the possibility to institute habeas corpus, amparo, or similar proceedings, personally or on their behalf, challenging the lawfulness of detention before a court of law that is competent to order their release in the event that the detention is found to be unlawful.[31] No proper records of the detainees are maintained.

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27. Ibid at PP 60,71,75 and 79
28. Ibid at p.110
29. Ibid
30. 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
    2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
    3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
    4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
    5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
31. Ibid at p.12

They are held in places of detention which are not officially recognised.[32] Such type secret detentions give scope for the growth of Global Administrative Detention. There are possibilities that so many innocent can be detained under such secret detentions. This can be seen from the classification of detainees by Ryan Goodman. He classifies four groups of individuals who can be detained.[33]

A) Regular Armed Forces and irregular armed forces that meet the criteria of the Third Geneva Convention or Additional Protocol I

B) Direct Participant in hostilities

C) Civilians who are indirect participants in hostilities and

D) Civilians who non participants in hostilities.

Participant entitles a sufficient causal relationship between the act of participation and its immediate consequences.[34]

Fundamental Principle of International Humanitarian Law (IHL) forbids the detention of civilians solely because they are indirect participants or non-participants unless there is a specific determination that such civilians pose a threat to the security of the state.[35] While determining the enemy combatants, only those armed forces (Group – A) and those who directly participated in the conflicts (Group – B) are to be included. But the U.S Department of Defense included indirect participant as enemy combatant.

Order establishing Combatant Status Review Tribunals issued by the Defence Department defines 'enemy combatants' to include an individual who was part of or supporting Taliban or Al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners. Thus, an individual who merely supports the Taliban or Al Qaeda may be defined as a combatant. US Congress also essentially ratified the Defense Department's New Definition in the Military Commissions Act of

32. Supra note 2 at p.1,
33. supra at 20 p.60
34. ibid at p.52
35. Article 5 of Fourth Jeneva Convention provides for the suspension of persons' rights under the Convention for the duration of time that this is "prejudicial to the security of such State", although "such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention."

Article 42 of Fourth Jeneva Convention The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.

2006. Thus non-participants who is not a threat to the security of the state can be kept under secret detention. These non-participants may be from the territory of the nation other than the detaining nation.[36] The possibility of following US model is brighter with other nations also.

Application of the Principles of Administrative law in Global Administrative Detention

The above said circumstances substantiates that detention becomes a global concern. There is every possibility that in the upcoming generations, the terrorist's activities may multiply which naturally encourage global level detention.

The possibility of the detention of the innocents in many occasions cannot be neglected. To err is human. After the London Bombings, one innocent Brazilian was shot dead by the London police by mistaking him as suicide bomber.[37] An Indian doctor was detained by the Australian police as terrorist.[38] U.S.A found later many Guantanamo detainees as innocents.[39] There is prime responsibility not to deprive the human rights of these detainees.
In the case of secret detention, even though International Human Rights Law and International Humanitarian Law deal about detention, states do not adhere to these principles International Humanitarian Law prevents the preventive detention of those who do not directly participate in the hostilities unless there is security threat[40] .

The most unacceptable situation is that the states are not accountable to any body in secret detention. None of the principles of Administrative Law is followed in global detention which leads a helpless situation to the detainees.

The primary purpose of Administrative Law is to ensure fairness and legality in the functions of the authorities. As it is known, administrative bodies need not be sovereign states under GAL. Even a private body can be a part of GAL. Hence, not only a sovereign state but also any other independent organ may be empowered to determine the fairness of detention.

36. See page 4
37. http://www.mytimes.com/2005/08/23/international/europe/23Condon html.
38. http://www.southerentimes.com/au/new/subsequent-compensation-for-dr-haneef-public-apology-coming
39. Benjamin witts, Public Law Studies, Detention Retention: Are Guantanamo Detainees all innocents?
    http://www.brookings.edu/opinion/2007/1207-courts-witts-aspx
40. Supra note 20 – This Article explains how USA fails to follow the International Humanitarian Law

The detainee never gets a fair opportunity to explain his situation. As it is seen in the domestic laws unless a fair opportunity and fair application of law is available to the detainee in global detentions, there may not be any body to care these detainees. Such sort of detentions will go unnoticed. Doing an act arbitrarily or without law will go against the basic object of a democratic society that every act is to be done according to law. The problem primarily lies with the secret detention where even the ICRC is not permitted under certain circumstances. If the states are not accountable for secret detention and if the detainee is not given proper opportunity for hearing, then it leads to lawlessness.

USA has established Military Tribunal to determine the legality of the detention of such civilians in Guantanamo Bay under the Military Commission Act 2006[41] . But this is a prosecutor-judge combination as military is the same authority to detain and here the fairness.

Conclusion

While in the interest of Global security the detention of an individual is essential, equally measures for the protection of the innocents are also essential. Efforts are to be taken that such types of detention would come within the purview of Global Administrative law. Under such circumstances either a bottom up or top down approach is essential. Under the bottom up approach ordinary courts under the domestic laws will have the jurisdiction to review the correctness of the decision. In Boumidine vs. Bush[42] the U.S Supreme Court held that those who were in the secret detention could approach the judiciary for relief. Even though such relief is extended, the situation of these detainees is beyond their reach as practically it may not be possible for the detainee to approach court without any assistance. The assistance may be provided through International organisation like International Red Cross Society, International Human Rights Commission.

Under the top down approach an institution like International Tribunal is to be available. This requires a body which is powerful enough to control the state or any organ like UN Security Council while they exercise detention without fairness. The European Court of Justice could hold in Kadi's case that the decision of the Security Council to freeze the accounts of Kadi without hearing him is against

41. See page 8
42. Supra note 25

the principles of fairness[43] . An organization like European court of Justice is necessary to control the states by giving fair opportunity to the state as well as the detainee. Or else it may lead to global despotism.

The functions of the institution like International Human Rights Commission or Amnesty International may, at present, bring only a reputational accountability against the detaining nations. But to review the correctness of the decisions, so far no such body is available. Moreover the NGOS like IRCS and other Human Rights Organizations which are Global Administrative Bodies may be empowered to enquire the fairness of the detentions and to take effective measures to identify the innocents among the detainees. They may be empowered to see that while exercising global detention the principles of Administrative law is applied by the authorities.[44] Even though the functions of a sovereign body cannot strictly be brought within the definition of Global Administrative law (GAL),it is highly necessary to bring them within Global Administrative Law especially in the area of Secret detention without extradition.

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43. Yasin Abdullah kadi and Al Barakat, International foundations vs council and commissions-Sep 2008
44. Nico Krisch Supra note 6 at p.248

Enabling the Disabled: Human Rights Approach to Disability

Prof. Dr. A. David Ambrose *

A "disability" is a condition or function judged to be significantly impaired relative to the standard of an individual or the group and is often used to refer to the individual functioning including physical impairment, sensory impairment, cognitive, intellectual impairment and mental health issues. The World Health Organization estimates that there are as many as six hundred million persons with disabilities. The UN estimate is 650 million. According to 2001 census, there are 21.9 million persons with disabilities in India[1].

A "Person with Disability" or a "Disabled"[2] faces many challenges due to his/her impairment and made to suffer due to the casual approach of the society. Disability has been seen as an individual problem or as a societal problem[3] . Accordingly, four models have been developed to address the problem of disability and they are: (i) charity model, which considers the disabled as helpless victim (ii) the bio-centric model – focuses on the biological origin of the disability conditions and concerns with the issues like disease, disorder, physical or mental characteristic. (iii) the functional model – where in the difficulties faced by a person are seen as arising from a mismatch of the individuals biological conditions and functional capacity on one hand and environmental

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1. 2001 census of India projected an average of 2.13 % of total population are with disabilities. See National Human Rights Commission Disability Manual New Delhi 2005 at p 9.
2. This general term, unlike the other terms like 'handicapped', 'physically challenged', 'differently abled', 'retarded', 'lame', or 'a cripple' conveys, in addition to the individual's impairment, the sufferings faced by them not only due to impairment but also due to the apathy of the society with regard to such impairment. Hence here in this paper the word disabled is preferred and has been used as an all-inclusive term.
3. Disability is considered to be society imposed state of execution or constraint that physically impaired individuals may be forced to endure; see M. Oliver, **The Politics of Disablement** (Mac Millan, London, 1990) Cf. Brendan, Glesson, **Geographies of Disability**, (Routledge, London, 1999) at p 25.

and situational factors; (iv) the human rights model – which considers disability as an important part of human culture and it affirms that all human beings irrespective of their disability have certain inalienable rights[4] . Since, the social dimension of disability has of late gained momentum, the last two models have become important. Among the two, as it is true that the person hood in all the disabled is the foundation faith of the rule of law[5] and human rights model encompasses all the rights of the disabled, it is preferred more. The glaring truth is that the concept of disability from the legal point of view always encompasses the disabled rights that the disabled stand denied. The causes and consequences of disability vary through out the world due to the socio-economic, cultural, political and other perspectives. Accordingly, the rights of the disabled also vary according to the various perspectives. Due to this, there has been no consensus regarding the rights of the disabled. In addition, the disabled rights were not given their due recognition and suffered from poor implementation.

Human rights have aroused greater significance in the post World War II period. Today, there is hardly any branch of law in which human rights do not get involved in some degree or the other. Human rights has got it self entangled in both law and politics. Every problem has now a human rights dimension and disability problems/disabled rights are not an exception to this. The need for human rights approach to the disabled and their rights has been felt by all. The prospects of human rights approach to the disabled that provided the much-needed recognition and a linkage to augment the rights of the disabled across the globe are discussed here under in this paper.

I. Ethics and Human Rights

It is not surprising that human rights itself was considered to be an ethical imperative[6] that compels the state to be just and accountable and human rights emerged as a moral ethical discourse furnishing standards of critically moving for the evolution of state action. The ethic of human rights is what communities and individuals outfits to desire. At the same time it should be conceded that ethical approach to human rights will strengthen and reinforce human rights implementation. As the ethical values in the society undergo changes[7] , it results in a better understanding, and

4. http://nhrc.nic.in/publication/ Disability chapter 2. html.
5. Justice V.R.Krishan Iyer, Law Justice and the Disabled (Deep & Deep, 1982) at p 19
6. Upendra Baxi, **The Future of Human Rights**, 3rd edn. (Oxford, 2003) p.7
7. ibid at 7-8

expansion due to broader interpretation, in the wide application and effective implementation of human rights. It will not be an exaggeration to say that the ethical wind turned the rising tide of human rights into a human rights tidal wave that can swallow any challenges or barriers. At least, three core ethical values with their new understanding and new human sensibility have revolutionized the human right thinking and understanding. They are human dignity, equality and development (human well being).

Dignity:

It can be boldly said that human dignity as an ethic has been the mother of many human rights that have come into existence due to new developments. In fact 'dignity" has become a core ethical; value read into human right protection thereby expanding the scope of many known established human rights. Decency and dignity are non-negotiable facets of human rights opined Justice V.R. Krishna Iyer way back in 1990 itself [8] .

The Indian Supreme Court, starting from *Maneka Gandhi's*[9] case, on numerous occasions has held that the right to life guaranteed under Art. 21 of the Constitution includes the right to live with human dignity. In fact, this proposition laid down by the Supreme Court has opened the floodgates and allowed the flow of many unremunerated human rights from Art. 21. It includes promotion of health and strength of workers of men and women, tender age of children against abuse, opportunities, facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities just and humane conditions of work and maternity relief. These are the minimum requirements, which must exist in order to enable a person to live with human dignity[10].

Equality;

Equality is another core ethical concept known for a long time. "Respect towards the other as a coequal humans", observes Baxi, "is the ground work of an ethic of human rights, furnishing universally valid norms for human conduct and the basic structure of the society"[11] . The Christianity also supports this. "Though shall love thy neighbor as thy self," said Jesus Christ in Bible[12] . In fact while condensing the whole ten commandments in to just two equal commands Jesus put it as the second one[13]. "Therefore all things

8. *Rathinam Municipal Council Vs Vardhi Chand* AIR 1980 SC1622.
9. *Maneka Gandhi Vs Union of India* AIR 1978 SC 597.
10. *Bandu Mukthi Morcha Vs Union of India* AIR 1984 SC 802
11. Baxi,supra note 6 at p7
12. Gospel according to St.Mathew-Chapter.19-Ver:19(Kings James Version)
13. Ibid.Chapter.23 Ver:39;see also St.Mark-Chap.12-Ver:31,Romans-Chap.13-Ver:9,Galaitians - Chap.5-Ver:14, James-Chap.2-Ver:8

what so ever ye want to that men should do to you do, ye even so to them; this is the law of prophets" also said Jesus. Love and concern for our fellow human beings is the basic tenet of just society. From this emerges the equality principle and nondiscrimination principle. It is heartening to note that this non-discrimination principle has brought many human rights to the fore.

Development:

Guaranteeing of human rights is for facilitating or increasing development. Many of the human rights are discussed and interpreted using the development concept. However, it should be noted that the concept of development has unlike yester years has underwent changes. Earlier during 1970s and1980s.when the third world countries supported the New International Economic Order (NIEO) development meant simply economic development. However, today due to holistic approach, development means not only economic but also, social, cultural, intellectual, spiritual, political development in short over all development. Accordingly, if the very essence of human rights is development then it should not be development in the context of a particular development alone. In other words, the ethic of development i.e. overall development warrants a fresh look at the human rights and more specifically the relationship among various human rights. The mutual inter relationship and interdependence between civil and political rights and economic and social rights has been strengthened by the holistic approach to development. Moreover, the development ethics has also helped in solving the conflict, if any, between and among various human rights.

Any right/concept when read in the light of human rights along with its core ethical values, will undoubtedly lead to broader interpretations, better understanding and wider effective implementation of such right/concept. Disabled rights are also not an exception to this general rule.

II. The Concept of Disability

The disability could be with reference to body functions and body structures. Thus the WHO's International Classification of Functioning (ICF) Disability and Health[14] distinguishes between

14. See WHO 1999. The earlier WHO's International Classification of Impairments Disabilities and Handicaps (ICIDH) made a three fold definitions of disability i.e. (i) impairment – any laws or abnormality of physiological or anatomical structure or function….(ii) Disability- any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being ..(iii) Handicap a disadvantage or disability that limits or prevents the fulfillment of a role for that individual. WHO 1980:29

body functions (physiological or psychological) and body structures (anatomical parts). The impairment in bodily structure organization is defined as involving anomaly, defect, loss or other significant deviation from certain generally accepted population standards, which may fluctuate over time. The ICF lists 9 broad domains of functions, which can be affected:

- learning and applying knowledge
- general tasks and demands
- communications
- mobility
- self care
- domestic life
- interpersonal interactions and relationships
- major life areas
- community, social and civic life

Thus, disability means many things to many people for many purposes. However, disability has to be legally defined. The UK Disability Discrimination Act 1995 for its purpose says that 'a person has disability, if he has a physical or mental impairment which as a substantial and long term a diverse effect on his ability to carry a substantial and long term adverse effect on his ability to carry out normal day to day activities. Under the US American's with Disability ACT (ADA) 1999, disability with respect to individuals means (a) A physical or mental that substantially limit or more of the major life activities of such individual (b) a record of such an impairment or (c) being regarded as having such impairment.

In India, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995[15] defines "person with disability as a person suffers from not less than forty percent of any disability as certified by a medical authority[16] and "disability"[17] means,

(i) blindness[18]

(ii) low vision [19]

15. Received the assent of the President on 1st January 1996.Here in after PWD Act
16. See sec 2 (t) of PWD Act
17. See sec 2 (i) of PWD Act
18. See Sec.2(b) Blindness refers to a condition where a person suffers from any of the following conditions namely (i)total absence of sight or (ii) visual acuity not exceeding 6160 or 201200 (Snellen) in the better eye with correcting lenses; or (iii) limitation of the field of vision subtending an angle of 20 degree or worse.
19. See sec 2(u) where in it has been stated that "a person with low vision" means a person with impairment of visual functioning even after treatment or standard refractive correction but who uses or is potentially capable of using vision for the planning or execution a task with appropriate assistive device;

(iii) leprosy cured[20]
(iv) hearing impairment[21]
(v) locomotor disability [22]
(vi) mental retardation [23]
(vii) mental illness [24]

One of the recent and authoritative international definitions is given in the UN Convention, which is as follows: 'persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which is interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'[25].

III. Human Rights and the Disabled

International Position:

The United Nations General Assembly established the foundation for promotion and protection of human rights in 1948 when it adopted unanimously the Universal Declaration of Human Rights. Article 25 of the Declaration states that each person has, "the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in the circumstances beyond his control". Following the Universal Declaration of Human Rights (UDHR), two covenants namely, the International Covenant as Civil and Political Rights (ICCPR) and the International Covent on Economical, Social and Cultural Rights (ICESCR) were adopted in 1966. It is of interest that both the covenants contained certain rights that are applicable to disabled persons also.

20. According to sec 2(n) of the PWD Act "Leprosy cured person" means any person who has been cured of leprosy but is suffering from (i) loss of sensation in hands or feet as well as loss of sensation and paresis in the eye and eye-lid but with no manifest deformity (ii) manifest deformity and paresis; but having sufficient mobility in their hands and feet to enable them to engage in normal economic activity;(iii) extreme physical deformity as well as advanced age which prevents him from undertaking any gainful occupation, and the expression "leprosy cured" shall be construed accordingly;
21. See section 2(l) "hearing impairment" means loss of sixty decibels or more in the better ear in the conversational range of frequencies;
22. The PWD Act provides that "locomotor disability" mean disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy. See sec 2(o)
23. See sec 2(r) "mental retardation" means a condition of arrested or incomplete development of mind of a person which is specially characterized by sub normality of intelligences
24. See sec 2(q) "mental illness" means any mental disorder other than mental retardation.
25. See Article 1 of the UN Convention on Rights of Persons with Disabilities.; UN GA A/Res/61/106 13 December 2006 UN Convention on Rights of Persons with Disabilities; herein after PWD Convention. So far, 115 countries have signed the convention, which was adopted unanimously by the General Assembly on 13 December 2006 and opened for signature on 30 March 2007. The Convention entered into force on 3 May 2008. India ratified this Convention on 1 October 2007. This Convention is intended as a human rights instrument with an explicit, social development dimension. A broad categorization of persons with disabilities is adopted and it reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms.

For example, the ICCPR provided the following rights that are also necessary for the disabled:

* Right to life (Art 2 and 6);
* Right to liberty and security of the person (Art 9);
* Equal recognition as a person before the law and full legal capacity (Art 2(1), 3, 14, 23(4), 24(1), 25,26,27, Art 16 & art 6 & 14;
* Freedom from the torture or cruelty in-human degrading treatment (Art 7); and
* Right to participate in political and public life (Art 25).

Similarly, the ICESCR also provided for certain rights[26] that are applicable especially for the disabled.

The International Convention on Elimination of all forms of Discrimination Against Women, 1979[27] , (CEDAW) provides for the basic rights of all women including that of disabled women[28]. Further the International Convention on the Rights of the Child (Child Rights Convention) 1989[29], also to some extent aims at protecting the children including the disabled child, not satisfied with above provision that occasionally touch directly the disabled, the UN adopted the Declaration on the Rights of the Mentally Retarded Persons in 1971[30] that which guaranteed certain rights of the mentally retarded persons irrespective of race, sex, religion. Not stopping there the UN adopted a Declaration on the Rights of the Disabled in 1975[31] making the people with disabilities entitled to inherit rights to respect for their human dignity.

The 1975 UN Declaration declared the year 1981 as the International Year of the Disabled, in order to draw the global attention of the member states to show more concern and care for the disabled and their rights[32] . Being encouraged by the success of this, the UN adopted another resolution on World Programme of Action Concerning the Rights of the Disabled in 1982[33] that declared the period between 1983-92 as the UN Decade of the Disabled

26. Right to food water (Art 11), health (Art 12(1): right to education (Art 13), right to work with just and reasonable conditions (Arts 6 & 7) and right to social security (Art 9).
27. UNGA Res No 34/180 of December 18, 1978.
28. See Art 14 (right to food, water); Art 12(1) (right to health); Art 10(right to education; Art 16(1) right to marry and found family.
29. UNGA Res No 44/45 of 20 December 1989.
30. UNGA Res 2886(XXV) of 20 December 1971.
31. UNGA Res No 31/123 of 6 December 1975.
32. See UNGA Res No 31/123 of December 16, 1975. This Resolution declared 1981 as International year of the Disabled persons and the main objective is to make states to realize their responsibility in the enforcement of the rights of the disabled persons as human beings.
33. See UNGA Res No. 37/52 of December 3, 1981.

Persons as providing equality in opportunities is the one of the essential core concept of disabled rights. The UN in 1991 adopted certain principles for the protection of mental illness and for the mental Health care[34] and in 1993 adopted the Standard Rules on Equalization of Opportunities for Persons with Disabilities[35].

The Vienna Declaration after reaffirming that all human rights and fundamental freedoms are universal and thus universally include persons with; disabilities envisages that special attention should be paid to ensure non-discrimination and equal enjoyment of all human rights and fundamental freedoms by disabled persons, including their active participation in all aspects of society[36].

These efforts of UN in one way helped in the shaping of the rights of the disabled and paved the way for the consensus both at national and international levels regarding the enforcement of these rights. More over, these efforts culminated in the adoption of a comprehensive convention on the Rights of Persons with Disabilities recently in the year 2006[37] .

The PWD Convention reaffirms the universality, individuality, interdependence and inter-relatedness of all human beings and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination[38] . It emphasized the importance of main streaming disability issue as an integral part of relevant strategies of sustainable development[39]. It further recognises that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person[40] .

`The purpose of the convention according to Art 1 is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity. The principles of the Convention are enunciated in Art 3 of the PWD convention. They are (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons (b) Non-discrimination (c) Full and effective participation

34. See UNGARes 46/119 of December 17, 1991.
35. UNGARes No A/res/48/9885 of search 20, 1993.
36. See Vienna Declaration Adopted on 25th June 1993 in the World conference on Human Rights at Vienna Part I Para 22 and Part II Paras 63&64 The Declaration further provided that the persons with disabilities should be given equal opportunity through the elimination of all society determined barriers that excluded or restricted their full participation in society.
37. See supra note 25.
38. See Para (c) of PWD Convention's Preamble.
39. Para (g) ibid.
40. Para (h) ibid.

and inclusion in society (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity (e) Equality of opportunity (f) Accessibility (g) Equality between men and women (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

The States Parties to the PWD Convention undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability[41] . The PWD convention provides for equality and non-discrimination for the disabled persons[42] . It has provisions for women with disabilities[43] for full enjoyment of human rights and fundamental freedom. The PWD Convention aims at guarantying many rights within the municipal limits of the contracting parties and some of the major rights recognized by the PWD Convention are as follows:

- right to live independently and participate in all aspects of life(Art 9)
- right to life (Art 10)
- right to recognition everywhere as persons before the law (Art 12)
- right to effective access to justice (Art13)
- right to liberty and security of the persons (Art14): privacy (Art 22); personal mobility (Art20)
- freedom from torture or cruel, inhuman or degrading treatment or punishment (Art 15); freedom from exploitation (Art 16); freedom of expression and opinion (Art 21)
- right to live in the community (Art 19)
- respect for home and family (Art 23)
- right to education (Art 24); health (Art 25)
- right to attain maximum independence and full physical, mental, social, and vocational ability (Art 26)
- right to work and employment (Art 27) and adequate standard of living and social protection (Art 28)
- right to participate in political and public life (Art 29); in cultural life, recreation, leisure and sports (Art 30)

41. See Art 4 (1) of the PWD Convention ibid.
42. Art 5 ibid.
43. In Art 6 the state parties after recognizing that women and girls with disabilities are subject to multiple discrimination have agreed to take measures to ensure the full and equal enjoyment by them all human rights and fundamental freedoms .

The Convention also provides for international co-operation and implementation of these rights within the municipal sphere and for monitoring for such implementation[44] . The Convention also envisages under Art 34 a committee on the rights of the persons with disabilities.

On the whole the PWD Convention with 50 Articles not only comprehensively covers many of the rights of the persons with disability including women and children but also elevates them to the status of human rights and insists upon their effective implementation. For the effective implementation of human rights related to people with disability and to address the issue more directly there is an Optional Protocol to the Convention on the Rights of the Persons with Disabilities. The Protocol gives teeth to the Committee on the Rights of the Persons with Disabilities and outlines the Committee's powers and functions in detail. In this fashion implementation of PWD Convention has been made effective. The earlier UN efforts regarding the disabled were focused on specifying and recognizing the rights of the disabled. Latter, realizing the importance of the disabled rights and the need for their effective implementation, the disabled rights are elevated and accorded the status of human rights, compelling the States Parties to take appropriate steps for the effective implementation of disabled (human rights).

The Indian Position:

Constitution and the Disabled:

For the right orientation and sensitive understanding of disability, the Indian Constitution is undoubtedly the single and strongest ally of a person with disabilities[45].

The Preamble of the Indian Constitution aims at securing to "all" its citizens justice, social, economic and political as also equality of status and opportunity and to promote fraternity so as to uphold the dignity of all individuals. Here the all-inclusive word "all" also includes persons suffering from disability whether they are blind, physically disabled or even mentally retarded.

The goals set out in the Preamble are achieved by various provisions of the Constitution like Part III on Fundamental Rights. Art. 14, guarantees equality before law and equal protection of law for "all". Whereas, Arts 15 and16 guarantee equality of opportunity to "all" citizens in matters relating to any public employment or appointment.

44. See Arts 32 & 33 of PWD Convention.
45. National Human Rights Commission, **India Disability Manual**, 2006 at p 6.

Equality could also mean substantive equity and thus the right to equality under its mandate includes also the right of the persons with disabilities against any discrimination, which is on the basis of disability of the persons[46] . Accordingly, in *National Federation of Blind v UPSC*[47] , the Supreme Court gave directions to the effect of permitting the liberty handicapped (blind and partially blind) eligible candidates to complete and write Civil Services examinations concluded by the UPSC that too in Braille script or with the help of a scribe.

In *Veena Sethi Vs State of Bihar*[48] , when it was brought to the notice of the Supreme Court that persons of unsound mind, kept in Bihar jail for no reasons for 30 to 40 years in some cases even after they became sane, the Supreme Court, while ordering the immediate release of such prisoners observed, 'cases of these prisoners disclosed a shocking state of affairs involving total disregard of basic human rights. They constitute an affront to the dignity of man and it is surprising, indeed shocking to the conscience of mankind, that such a situation should prevail in any civilized society. What meaning has the rule of law, if the poor are allowed to languish in jail without the slightest justification as if they are castaways of the society?

In Mandal case, the intervention application filed by the National Federation of Blind and argued by a visually impaired advocate Shri S.K Rungta raised an important issue "while backward class(es) of citizens" could also include persons with disabilities. The Supreme Court examined this as a sub-issue along with the other major issues and held by a majority that even though backward class(es) of citizens as used in clause 4 of Art 15 and 16 did not cover persons with disabilities, the Constitutional scheme and spirit of Art 14 and Art 15(1) and Art 16(1) allowed for reservation and other kinds of affirmative actions in favor of persons with disabilities[49].

In effect the apex court uphold the earlier opinion given in *KC Vasanthakumar v State of Karnataka*[50] that several factors such as physical disability, poverty place of habitation…might each become sole factor, for purpose of Art15(4) or Art16(4)….while relief may be

46. Shruti Pande, et al; **Disability and the Law Human Rights Law Network** (New Delhi, 2006) at p 2
47. AIR 1993 SC 1916.
48. (1982) 2 SCC 283.
49. *Indra Swhney and others Vs Union of India* (1992) supp (3) SCC 217. It is of interest to note that in this case the Supreme Court classified that the reservation in favor of persons with disabilities.
50. 1985 supp SCC 7114.

given in such cases under Article 14, Article 15(1) and Article 16(1) by adopting a rational principle of classification, Article 15(4) and Article 16(4) cannot be applied to them.

Art 21 of our Constitution guarantees the protection of life and personal liberty to "all" persons. On many occasions, the Supreme Court has held that the right to life includes the right to live with human dignity and all that goes along with it namely the basic needs of life like adequate nutrition clothing and shelter, free movement and community with fellow human beings[51]. All the basic rights that are found emanating from Art 21 are also guaranteed to the disabled who have the right to live with human dignity.

Part IV Directive Principles of State Policy also has several references that address the disabled rights. Art 41 specifically provides for effective provision to be made by the state for securing right to work, to education and to public assistance in case of disablement[52] . Art 39A envisages equal justice and free legal aid to all citizens and that opportunities for securing justice are not denied to any citizen by reason of economic or "other disabilities". Art 46[53] and Art 47[54] also have the potential for raising the standards of living , education and development of persons with disabilities.

Legislative Protection:

Entry 9 of List II in the 7th Schedule of the Constitution empowers the states to enact law with regard to relief of the disabled and unemployable and Entry 16 of List III enables both the central and state government to enact legislations relating to "lunacy and mental deficiency, including places for the reception or treatment of health and mental deficient". Accordingly, many disability acts have been enacted in India. There are at least two pre independence legislations like (a) the Lepers Act, 1899 (b) the Lunacy Act, 1912[55]. After independence, the first act dealing with disability

51. See *Francis Coralie Vs Union Territory of Delhi* AIR 1981 SC 746; see also Chameli Singh Vs State of UP (1966) 2 SCC 549.
52. Art 41 runs as follows: "The State shall, within the limits of its economic capacity and development, make effective provision for securing the Right to Work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other case of undeserved want".
53. Article 46 says, "promotion of educational and economic interests of Scheduled Castes, Schedule Tribes and other weaker sections-The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Schedule Castes and Schedule Tribes, and, shall protect them from social injustice and all forms of exploitation".
54. Article 47 says, "duty of the State to raise the level of nutrition and the standard of living and to improve public health. The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the state shall endeavor to bring out prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs, which are injurious to health..
55. D.S..Metha, **Hand Book of Disabled in India** (Allied Publishers, New Delhi 1983) at p 286.

is the Mental Health Act 1987. It is of interest to note that after this Act and since 1990, there is a paradigm shift in the approach to the disabled rights in India. The earlier traditional largesse approach has been abandoned and the functional approach/model has been preferred.

As a result, the following legislations are adopted: The Rehabilitation Council of India Act 1992; the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. Recently Indian Government introduced the Rights of Persons with Disabilities Bill in Rajya Sabha, seeking to increase reservation for disabled persons in public sector jobs from existing 3% to 5% and reserve seat for them in higher educational institutions[56] . Very recently, on March 26, 2014, in *Justice Sunanda Bhandare Foundation Vs Union of India*[57], , the Supreme Court Bench, consisting of Justice R.M. Lodha, Justice Sudhansu Jyoti Mukhopadhaya and Justice Dipak Misra, issued directions to the Central Government, State Governments and Union Territories to implement the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

In addition the Human Rights (Protection) Act 1993, the National Human Rights Commission (NHRC), and the State Human Rights Commissions (SHRCs) created under the said Act have in fact address disability issues directly and more enthusiastically thereby strengthening and reinforcing the disabled rights.

PWD Act:

The PWD Act addresses most of the basic rights of the disabled like Education[58] , Empowerment, Access, House, and Mental Health. The aims and objectives of the Act are: : (i) to spell out the

56. The Bill introduced on February 7, 2013 by the Minister of Social Justice and Empowerment, Mr. Mallikarjun Kharge, seeks to broaden the ambit of disability from seven to 19 sub-categories. See Times of India Feb 7, 2014,available at http://timesofindia.indiatimes.com/india/Government-introduces-Rights-of-Persons-with-Disabilities-Bill-in-Rajya-Sabha/articleshow/30007941.cms.visited on 01-04-2014
57. "We, accordingly, direct the Central Government, State Governments and Union Territories to implement the provisions of the 1995 Act immediately and positively by the end of 2014". See Para 14 of the judgment ; Writ Petition (Civil) No. 116 of 1998.
58. In *Javed Abidi Vs Union of India,* AIR 1999 SC 512), the Supreme Court, keeping in view the objectives of the Act, While agreeing that the economic capacity is a relevant consideration while deciding the question as to whether all persons suffering from disability as defined under section 2(i) of the Act should be granted concession like the blind persons for traveling by air, held that the court cannot ignore the true spirit and object with which the Act was enacted to create barrier free environment for persons with disabilities and to make special provisions for the integration of persons with disabilities into the social mainstream apart from the protection of rights, provision of medical care, education, training, employment and rehabilitation which are some of the prime objectives of the Act.

responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities; (ii) to create barrier free environment for persons with disabilities; iii) to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-à-vis non-disabled persons; iv) to counteract any situation of the abuse and the exploitation of persons with disabilities; v) to lay down a strategy for comprehensive development of programmes and services and equalization of opportunities for persons with disabilities; and vi) to make special provision of the integration of persons with disabilities into the social mainstream[59].

The Chapter V on Education, Chapter VI deals with Employment, Chapter VII on Affirmative Action and the Chapter VIII concerned with non discrimination are relevant for the purpose of promotion of economic rights of persons with disability and they guarantee following rights:

- Right to Education: Free and compulsory education up to 18 years (See Sections 26 to 30 of Chapter V and Sections 39 to 41 of Chapter VI)[60].
- Right to Employment reservation in favor of the disabled including Private Sectors (See Sections 32, 41, of Chapter VI)[61].
- Preferential allotment of land at concessional rates for housing, setting up business and factories, special schools, Establishment of Research centers (see Sec. 43)[62].

In Union of India Vs Sanjay Kumar Jain[63], the Supreme Court categorically held that no person could be denied promotion merely on the ground of disability unless there was a notification exempting the establishment from the provisions of section 47 of the PMD Act. However, in Union of India Vs Devendra Kumar Pant and ors[64] the Supreme Court as if making a clarification held as follows:

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59. See *Geetaben Ratilal Patel Vs District Primary Education* , decided on 2 July, 2013Civil Appeal no. 9324 of 2012 Para 13 of the judgment.
60. For a detailed discussion see M.Abdul Wahi, *"Disabled Children's Right to Education"* in S.K Varma, (Ed) **Rights of The Person With Disabilities** (ILI, New Delhi 2002) page 117
61. For judicial application of these provision See Puskar Singh and others Vs University of Delhi, 2001(II) Apex Decisions (Delhi) 749, Smt. Shruti Karla Vs. University of Delhi & others., 2001 (II) Apex Decision (Delhi) 582.
62. Also see Godawari Bai Vs Delhi Development Authority 1990 Supp. SCC page 4.
63. 2004 (6) SCC 708.
64. Civil Appeal NO.4668 of 2007.

> *"Therefore we are of the view that the section 47(2) only provides that a person who is otherwise eligible for promotion shall not be denied promotion merely on the ground that he suffers from disability. The use of the words `merely on the ground' shows that the section does not provide that if the disability comes in the way of performing the higher duties and functions associated with the promotional post, promotion shall not be denied. In other words promotion shall not be denied to a person on the ground of his disability only if the disability does not affect his capacity to discharge the higher functions of a promotional post"*[65] .

IV. Conclusion

Disability is common in all societies and communities. In fact, except the Almighty nobody is perfect. The Physical Disability has become a major challenge to the developing societies. A person with disabilities has to face two kinds of problems i.e. (i) the challenges due to his\her impairment where in the impairment could be structural or functional;(ii) the sufferings he/she has to undergo due to the society's negative attitude towards such disabilities. Until recently, the disability Problem has been seen only from disabled individual's point of view and not from society's point of view. So for the 'welfare' flavor was more rather than the 'rights' flavor in approaching disability related issues. Any assistance, support or help was considered as charity and thus it was not mandatory. Persons with disabilities were not allowed to claim any rights and this position instead of extinguishing the fire added fuel to it.

In the 21st Century, human rights has become a household name and has become a governing principle in all govern mental activities. Both law and policy has in one-way or other the human rights dimension. When a right is addressed from the human rights point of view such right either strengthened or reinforced.

It is pertinent to note that some rights are guaranteed to the persons with disability but their implementation has not been encouraging due to the welfare approach and when human rights thrust is given to disabled rights, their implementation becomes wider and effective.

While hailing the PWD Convention, which gave human

65. See Para19 of the Judgment.

rights impetus to disability problem, Louise Arbour the United Nation High Commissioner for Human Rights strongly, believed that it comes 'at a time when there are broad shifts in attitude with in societies towards the rights of persons with disabilities[66]' . UK while signing the Convention made it clear that 'both in the UK and internationally, disabled people now have a clear statement that they enjoy the same fundamental human rights as everyone else – and on an equal basis with everyone else[67]' . Convention treats disabled persons as full-fledged citizens, and stresses that their full integration will require a change of attitude in society. In this fashion, the Human rights approach to the disability legal regime has indeed provided the much-needed magic touch to the same.

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66. Statement of Ms. Louise Arbour, UN High Commissioner for Human Rights at the4th Session of the Human Rights Council Geneva, 26 March 2007; available at www.un.org/disabilities/default.asp?id=153 - 17k; visited on 01.05.2014.
67. UK Statement the United Nations Convention on the Rights of Disabled People – 30 March 2007; Available at http://www.un.org/disabilities/default.asp?id=158; visited on 01.05.2014.

The Quest for the Elusive Gender Equality

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The Constitution's of the Eastern Countries, more specifically South East Asian Countries are deeply influenced by the political ideologies of the Western countries. The Constitution of India provides for a democratic republican political system wherein the doctrines of liberty and equality of the west find a secure niche as it is an inheritance from a colonial past. Yet, she retains the cultural traditions typical to Asia, where the institutions of family and marriage are distinctly structured and institutionalised based on holistic principles. In personal law, the legal relationship between man and woman as father, husband, brother, son vis-à-vis, mother, wife, sister and daughter, has not been structured on individualistic and egalitarian basis, but on a holistic and particularistic basis where the male members are deemed to be the heads and protectors of their counterparts. The social institution like the family is accorded primary importance over that of the individual. This is in contra to the western principle of liberal individualistic approach. Superimposing the western political ideology as embedded in the Constitution and statutes on a holistic society is the root cause for many socio-cultural conflicts with political ideology.

The Hindu social system is predominantly patriarchal. Women who account for nearly half the population are more susceptible in such conflicting situations, as they already bear the brunt due to the existing biased personal laws. This is more profound in countries where there are different communal and religious groups following their own personal laws.

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This article attempts to find out the provisions of equality in the Constitution of India, with its variance in reference to rights of only Hindu women especially in personal law and the influence of CEDAW on changing the gender policies. The Constitutional Approach including women's status in Personal laws, the influence of CEDAW on India in reducing gender discrimination and the impact of CEDAW on the Indian judiciary are analysed .

Constitutional Approach

The Constitution of India provides a political system based on democratic republic guaranteeing liberty and equality among other things. The demand for equality is the core causal factor of all seminal movements in the history of civilizations. This demand varies in its dimensions like racial equality, political equality, economic equality, social equality etc. Gender equality is probably the most discussed demand in the present age. Constitutions of various countries contemplate to secure equality to all its citizens. The Constitution of India in tune with the global trend aims at securing equality to its female citizens. In this context, it is relevant to analyse critically the rights conferred by the Constitution to men and women.

The Preamble of the Indian Constitution explicitly states to secure to all its citizens equality of status and of opportunity in order to provide constitutionality to such objectives. Articles 14 to 18 of the Constitution under fundamental rights, deal with equality provisions. Accordingly, "the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India[1]." This article is general in character and prescribes discrimination generally. It implies that any discrimination based on sex is offending this article. There are two dimensions. The first one is negative in character wherein, the State declares that it will not deny to any person equality. It implies that the State shall not be a party in discriminating any person, which is a status quoistic principle. The other dimension is an affirmative one. It is in accordance with the Preamble of the Constitution which aims to secure equality of status and opportunity for all including women. It has a revolutionary connotation in a traditional society like India where inequality has been institutionalised based on caste and sex.

Gender discrimination is explicitly prohibited in the Indian Constitution and it stipulates that, "the state shall not discriminate

1. Article 14, of the Indian Constitution

against any citizen on grounds only of… sex[2]." Likewise, it provides that, "There shall be equality in opportunity for all citizens in matters relating to employment or appointment to any office under the state[3]." It further provides that no citizen shall on grounds only of sex among other things be ineligible for or discriminated against in respect of any employment or office under the State. A careful analysis of these two Articles in the light of Article 14 enables one to infer two things. Negatively, it prohibits the State from discriminating its citizens on account of sex and affirmatively ensures equal opportunities to all its citizens irrespective of sex. It means that no woman citizen of India shall be discriminated by the State and every woman citizen shall be entitled to have equal opportunity in matters relating to employment or appointment to any office under the State.

Article 15(3) of the Indian Constitution provides that, "Nothing in this Article shall prevent the state from making any special provision for women and children[4]." This is a protective discrimination clause to protect women. Discrimination may be affirmative or negative, but in personal laws they are normally negative, whereas in other provisions, they are generally affirmative.

Position of Women in Personal Laws

In India, Articles 25 to 28, prescribe and facilitate Indians to adopt secularism in their practice. This right generally entitles all persons to have freedom of conscience and the right freely to profess, practice and propagate religion of their choice. With reference to Hindus, it implies that the personal laws which are legally sacramental in nature are allowed to continue with some modifications. It has to be noted that there are to this day discriminations against women in Hindu personal laws. There are four major enactments covering Hindu personal laws in India namely Hindu Marriage Act 1955, Hindu Succession Act, 1956, Hindu Adoption and Maintenance Act, 1956 and Hindu Minority and Guardianship Act, 1956. Hindu marriages in India to this day are sacraments and are devoid of several basic elements of contract including the requirement of consent of the parties, age of majority etc. Though the Hindu Marriage Act, 1955 provides that the State

2. Article 15 of the Indian Constitution
3. Article 16 of the Indian Constitution
4. Article 15 (3), of the Indian Constitution

Government may make rules for registration of marriages[5], yet the same is watered down thus, "Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry[6]." Likewise in matters of divorce, marriages can be dissolved on the grounds of mutual consent[7]. Section 13 of this Act provides various grounds for divorce[8]. Hindu married women can apply for divorce on more grounds than men.

With reference to Hindu Succession Act, 1956 a female can inherit from different sources like from her parent's family and from her husband's family. A careful enumeration of Class I legal heirs as enumerated in the Schedule reveals that there are 16 class I legal heirs of which majority of them are female legal heirs like daughters, mother, widow etc. From this it is clear that widow and mother are considered as Class I legal heirs while father is not class I legal heir, but father is made as a class II heir.

However, it does not mean that Hindu females always receive equal and better treatment. There was a special provision in this Act dealing with dwelling houses[9] , which states that a Hindu female has no right to claim partition in the dwelling house which was wholly occupied by members of the joint family. However, she is entitled to have equal share on par with other legal heirs. Despite this provision, prior to the 2005 amendment it was provided that, "where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling – house only if she is unmarried or has been deserted by or has separated from her husband or has become a widow"[10]. This provision was also removed from the Hindu Succession Act in the 2005 Amendment. In Hindu religion, mothers are venerated. Motherhood transforms an ordinary Hindu female to the level of Goddess. It is the child that brings all reverence to a mother. But, in the absence of a child, a Hindu female does not have the right to adopt while the marriage is in sustenance and her husband is alive. She can only give her consent to her husband, in taking adoption as well as in giving adoption. However, an unmarried woman or a divorced woman can adopt a child of her own. Similarly, in the case of guardianship as long as the father is alive, a mother is considered as a natural guardian only 'after'

5. Section 5(8)(1) of Hindu Marriage Act, 1955
6. Section 5(8) (5) of Hindu Marriage Act, 1955.
7. Section 13(b), Ibid
8. Section 13, Ibid
9. Sec.23 of Hindu Succession Act, 1956
10. Ibid.

the father. However until the child attains the age of five, a mother has right to custody of the child. This area perpetrates inequality blatantly.

In India, based on the Constitutional protection accorded in 15(3), political empowerment of women is sought to be achieved. In the political arena, women are given 1/3rd reservation to contest in the local body elections for the post of chairperson and members i.e. in Panchayat Raj elections. Likewise 30% of appointments in Government sector are reserved for women in Tamil Nadu. A Constitutional Amendment Bill, with a proposal to have 33% reservation of seats in the Lok Sabha and Assemblies is pending for a long time. If it comes into force, it would facilitate the political empowerment of women widely and they can sit as decision makers at the national level. Political arena, long considered as male bastion, has been captured by women in India, though there is still a long way to go.

Gender disparity in India is not only a social reality, but a legal reality also. Discriminatory laws "violate the right to non-discrimination enshrined in both international human rights law and national constitutions…. also inconsonant with the social, economic and political development of women in Asia[11]."

CEDAW and Non-Discrimination

Gender discriminatory national laws go against many international human rights norms. The Convention on the Elimination of All Forms of Discrimination Against Women, shortly called as CEDAW was adopted by the UN General Assembly on 18th December 1979 and it came into force on 3rd September 1981. CEDAW consists of a Preamble and 30 Articles. Article 1 of CEDAW defines the term 'discrimination against women' to mean, "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social,

11. Dinusha Panditaratne, "Towards Gender Equity in a Developing Asia: Reforming Personal Laws within a Pluralist Framework", N.Y.U. Review of Law & Social Change, Vol.31:1009, p.1032.

cultural, civil or any other fields[12]." Being aware that the traditional role of men and women in the family and the society is hampering equality between sexes, CEDAW expresses its determination to implement its principles to eliminate discrimination in all its forms and manifestations. This part of the paper analyses the impact of CEDAW on India in the quest for the elusive gender equality. The Reports of the Government to CEDAW committee and its Concluding Comments are also discussed to help us know the influence of CEDAW and the areas where it is unable to make any inroads, so as to concentrate more on the sensitive zones.

India and CEDAW

India ratified CEDAW on 9th July, 1993 and on 8th, August 1993, it came into force. It reserved Articles 5 and 16 which attack personal rights, that have sanctity under the fundamental rights of the Indian Constitution. Here it is pertinent to quote those reserved articles of CEDAW and also the reasons India gave for reserving them. This will make it easy to understand India's outlook towards gender discrimination. According to Article 5(a), "State Parties shall take all appropriate measures,

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[13]"

Likewise as per Article 16(1), the State Parties are urged to take all appropriate measures to put on end to discrimination against women in all matters relating to marriage and family relations and to "ensure on a basis of equality of men and women;

a. The same right to enter into marriage;

b. The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

c. The same rights and responsibilities during marriage and at its dissolution;

12. Ian Brownlie and Guy S.Goodwin – Gill (eds.) Basic Documents on Human Rights, New Delhi: Oxford University Press, 2007, 390.

13. Article 5(a) of CEDAW

d. 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;

e. The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

f. The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

g. The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

h. 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.[14]"

Article 29 deals with the procedure to be followed by the State parties in case of dispute between them regarding the interpretation or application of the Convention.

In its Declarations, India said that, "the Government of the Republic of India abide by and ensure these provisions in conforming with its policy of non-interference in the personal affairs of any community without its initiative and consent.

(ii) With regard to article 16(2) of the Convention on the Elimination of all forms of Discrimination Against Women, the Government of the Republic of India Declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.[15]"

"With regard to article 29 of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it does not consider itself

14. Article 16(1) of CEDAW
15. http://sim.law.UN.nl/SIM/Library/RATIF,nsf/C69 GC2(visited on 2- 8-2012)

bound by paragraph 1 of this article[16]." This declaration by India adds strength to the fact that absolute gender equality in India is neither recognised nor sanctioned. Personal Laws are still soft spots as far as gender discrimination is concerned. Another dimension of gender discrimination is the gap between rights of women in law and rights of women in practice. This huge gap between the law as found in book and law in practice as far as women's rights are concerned, can be considered as one of the main reason for the persisting gender inequality despite so many pro-women measures and policies in vogue.

The Indian legislatures both at the centre and the state, based on Article 15(3) have been enacting legislations to protect and promote the rights of women. Administrators correspondingly formulate policies and schemes through which attempts are made to sensitise women on their rights and thereby empower them. In its process of gender justice, provisions of CEDAW are referred and applied by the judiciary to interpret the existing provisions of law that affect rights of women, in a liberal and progressive manner As per the provisions of CEDAW, all the nation states which have ratified it should submit periodical reports every four years on the pro-women policies of the government and the general situation as far as gender rights are concerned. The first report submitted by India was in the year 1998 and the committee's comments came in January 2000. It highlighted the following as positive aspects. In para 45, it says, "The Committee recognizes that India has guaranteed in its Constitution fundamental human rights that can be enforced by an application to the Supreme Court. The Committee commends in particular the recognition of a fundamental right to gender equality and non-discrimination and a specific enabling provision on affirmative action in the Constitution[17]"

It further commended the adoption of the innovative concept of social action litigation in integrating the provisions of CEDAW into the domestic law[18], the establishment of the National Commission for women and the policies and programmes adopted by the Government of India to improve the quality of social indicators for women[19] , including the banning of sex selective abortions[20].

16. Ibid.
17. http://sim.law.uu.nl/SIM/Caselaw/Uncom.nsf/804bbl75b68baaf7c/125667f004c6333/flc.04 (visited on 7/3/2012)
18. para 46, ibid.
19. para 47, ibid.
20. para 50, ibid.

The principal areas of concern include persisting gender inequality in personal laws, protecting the honour, dignity and the rights of women and girl children in all walks of life. India's refusal to take back its reservations was highlighted by the committee as a barrier towards securing equality.

India submitted the combined 2nd and 3rd report of the CEDAW committee in 2005[21]. The committee's comments' to this report was given in 2007[22]. The following have been listed as positive aspects: National policy on the Empowerment of women, 2001, National Policy on persons with Disabilities, 2005; National Rural Employment Guarantee Act, 2005[23], amendments to the Hindu Succession Act and the Indian Divorce Act[24]. Under the principal areas of concern, the Committee expressed its concern on India not removing its objections. It recommended the modification of social and cultural patterns of conduct and stereotyping roles for men and women, to reform personal laws to ensure de jure gender equality[25]. The low number of women judges in the High Courts and no woman judge in the Supreme Court at that point of time was not appreciated[26]. It is found that in 2009 and 2010, Special reports were sent by India on the Gujarat Godhra issue and CEDAW Committee's comments also were limited to that.

The CEDAW Committee in these two reports commended the role of the judiciary in bringing about a positive change towards empowerment of women. In its Concluding Comment on the first report, 2000, the Committee said it, "appreciates the contribution made by the Supreme Court of India in developing the concept of social action litigation and a jurisprudence integrating the convention into domestic law by interpreting constitutional provisions on gender equality and non-discrimination[27]."

CEDAW'S Impact on Judiaciary

It is relevant to discuss the influence of CEDAW on the Supreme Court. From the date of ratification of CEDAW till 2010, there are ten cases decided by the Supreme Court, wherein the

21. http://www.un.org/womenwatch/daw/cedaw/cedaw36/India2-3E.pdf. (visited on 3/14/2012)
22. http://daccess_ddd_ny.un.org/doc/UNDOC/GEN/N07/243/98/PDF/N0724398.pdf?open element (visited on 03/14/2012)
23. para 4, ibid.
24. para 5, ibid.
25. para 11, ibid.
26. para 42, ibid.
27. para 46, of Concluding Comment on the first report of CEDAW, 2000, op.cit.

provisions of CEDAW have been referred and applied. Valasamma Paul's[28] case was the first case where CEDAW was referred. It relates to reservation for a backward class woman in jobs and whether marriage of a woman belonging to forward caste with a backward caste man would entitle her to get the job so reserved. The Supreme Court ruled that she is not entitled to benefit under the reservation policy. In this case principles of CEDAW were discussed in length and also quoted, though they bear little positive impact here.

In 1996 two cases relating to women's property rights were decided. Masilamani Mudaliar's[29] case was regarding a widow's ownership of her husband's property. The question was whether she can be considered as an absolute owner and not as a limited owner despite a will restricting her right. Citing the Constitutional provisions, the Court decreed that she is an absolute owner, and applied CEDAW's provisions in this case.

Madhu Kishwar's[30] case is about tribal women's right to property, which is denied as per the provisions of the Chota Nagpur Tenancy Act, 1908. Though the majority judgment by 2:1 allowed the tribal women to acquire their deceased husband's or father's property, the Court clearly laid down that only if the tribal women depended solely on the land for survival they can acquire the land otherwise it will go back to the male line. This Act's anti-women stance which is clearly unconstitutional was not changed. Though CEDAW principles were not applied, it was quoted in vain by the dissenting judge.

In the year 1997, a path breaking judgment was given in Vishaka's case[31], for preventing sexual harassment of working women in work place. The Court applying CEDAW provisions, issued guidelines to be strictly followed by the employers – both in the public and private sectors. The Court stipulated that the guidelines in Vishaka should be strictly followed till the Government passed a new legislation on these lines.

In Gaurav Jain's case[32], a public interest litigation under Article 32 came to the Supreme Court seeking relief and improvement in the plight of prostitutes and to rehabilitate them. Once again the Court gave elaborate directions to the Government by relying on CEDAW principles among others.

28. Valsamma Paul v. Cochin University, AIR 1996 SC 104.
29. C. Masilamani Mudaliar v. The Idol of Sri Swaminathaswami; Swaminathaswami, Tirukoil, AIR 1996 SC 1697
30. Madhu Kishwar v. State of Bihar, AIR 1999 SC 1864
31. Vishaka v. State of Rajasthan, AIR 1997 SC 3011
32. Gaurav Jain v. Union of India, AIR 1997 SC 3021

Sexual harassment of women at work place and what may be considered as sexual harassment was discussed in depth in Apparel Export Promotion Council case[33]. Criticising the lower Court for the lack of gender sensitive approach, the Court said that judiciary should forever remain alive to international instruments and conventions and apply the same to the domestic law.

Githa Hariharan's case[34] brought forth, the clear gender divide in personal laws. Hindu Minority and Guardianship Act, recognizes the natural guardians of a minor as "the father and after him, the mother." This got a beating in the Court wherein it said that 'after' should be understood as also 'in the absence of '". Here too the Court stressed the urgency to act according to CEDAW for effective gender justice.

The Supreme Court in Smt. Seema's case[35] stressed the importance of registration of marriages so as to help the cause of women. The Court said Article 16(2) of CEDAW should be accepted by India and gave directions to the Central Government to take appropriate steps and also to direct the State Governments to follow the same.

The Constitutional validity on the bar on employing women in Hotels and bars serving liquor was questioned in Anuj Garg's case[36]. The Supreme Court struck down Section 30 of Punjab Excise Act (1 of 1914), as it suffers from incurable fixations of stereotype morality and conception of sexual roles. Applying CEDAW principles, it said changing times demand a change in the attitude and mindset of the people.

Arun Kumar Agrawal's case[37] is on computation of compensation for a housewife, who died in a motor accident case. The Supreme Court was irked by a lesser compensation given by the lower Courts. It discussed in detail the measurement and quantification of the unremunerated domestic services of women and their recognition in the Gross National Product. It laid down that recommendation No.17 of CEDAW has to be followed to fix the monetary value of services of a house wife which is invaluable for the family.

33. Apparel Export Promotion Council v. A.K. Chopra AIR 1999 SC 1149
34. Githa Hariharan v. Reserve Bank of India, AIR 1999 SC 1149
35. Smt. Seema v.Ashwani Kumar AIR 2006 SC 1158
36. Anuj Garg v. Hotel Association of India, AIR 2008, SC 663
37. Arun Kumar Agrawal v. National Insurance Co. Ltd. AIR 2010 SC 3426

A critical analysis of these cases reveals that the approach of the Supreme Court differed from one case to another. In a bid to import meaning to the Constitutional and Statutory provisions the Court invoked CEDAW provisions in *Valsalmma Paul, Masilamani Mudaliar and Madhu Kishwar.* The judgments were not radical. In the later cases, the Court was proactive and liberal. But here too, it is observed that the decisions of the Court in secular matters were more proactive. In matters related to personal law, the Court instead of changing the status quo made an attempt to harmonize CEDAW norms with domestic laws and hence asked the Government to do the needful. In secular cases the Court was very liberal in the economic empowerment of women, rather than in social advancement. Despite all that, it can be concluded that CEDAW had and still has a great effect on the Supreme Court of India.

Conclusion

An analysis of the approach to women's equality in India reveals that non-discrimination of women is officially recognized in the Constitution. This commitment is further strengthened by signing international instruments like CEDAW. Yet, there is a duality in approach which is perceptible in their personal laws. This duality is in according, equality under the Constitution while in the same breath, denying equality to women on the basis of sex which is accepted in the respective personal laws. Normally the Government maintains that equality is provided for all. When matters relating to gender inequality in personal laws crop up in the courts, each case is decided on an individual basis. Though aware of the deep discrimination in personal laws, India to this day is not moving away from its stand i.e. not to disturb personal law equations. However, after the ratification of CEDAW there is a changing trend. It has to be admitted that India has definitely taken some legislative initiatives to stop discriminatory practices. As far as India is concerned, an activistic judiciary too has managed to dent some holes in the rusted iron walls of the personal laws and narrowed their scope to mitigate the sufferings of women.

Despite efforts taken to reduce the gender inequality in society, it still continues, mainly due to the patriarchal values and the belief that they are an inalienable part of the culture. The need to remove such discriminations is not only to benefit women, but to benefit the whole society. If 50 percent of the population lags behind, it is a logistic nightmare for a society which is keen on developing.

By abolishing this inequality the social, economic and political development of women and thereby their countries is possible. The contribution of women to the political and public process of a country cannot and should not be minimized. Hence if a country wants to develop holistically, it should not allow discriminatory laws and practices to continue.

Political democracy like India has wide cultural diversities. Equality is aimed in various domains of social reality. But in personal laws, despite the secular approach of the Constitution and commitment to CEDAW, discriminatory personal laws continue to exist . Discrimination against women in India is the accepted norm and a reality to this day. Hence, for the betterment of mankind, discriminations against women in all forms must be put to an end in social reality.

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Right to Self- Determination – Looking Through the Prism of International Human Rights

*Dr. V. Balaji**

Introduction:

The term self-determination is often traced from the American and French revolutions and they embodied the principle of individual liberty and freedom. By the beginning of the twentieth century, self-determination was a widely accepted concept throughout Europe and United States. It is evident the writings of Wilson [1] and Stalin early in the twentieth century, and was enshrined in the United Nations at its founding. However, self-determination had evolved to mean something quite different in central and Eastern Europe than in Western Europe and the United States.[2] In Western Europe, it has been in the notion of popular sovereignty giving rise to representative government.

During the time of World War I, the concept of self-determination served as a major tool in the creation of individual nation-states out of the ruins of the Austro-Hungarian and Ottoman empires. Yet, it was not until the adoption of the United Nations Charter in June, 1945 that the doctrine of self-determination was codified; or brought into the interest of positive international law.[3] Fifty years of the adoption of the charter, in

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1. President Wilson considered as the father of modern self-determination, in his fourteen points address (1918).
2. Thomas D.Musgrave, self-determination and National Minorities [New York: oxford University press.
3. Aaland Islands Case (1920) LNOJ special supp No.335 in which the international commission of jurists observed that the principle of self-determination, while currently garnering support in the division of European territories. (Such as Irelands independence had not yet attained the status of positive rule of international law. "The commission further concluded that the principle [of self-determination] was essentially political and, thus could not be employed as justification of dismemberment of a clearly established state [Finland]".

the case concerning East Timor, the international court of justice (ICJ) affirmed that: - the principle of self-determination has been recognised by the United Nations charter and in the jurisprudence of the court... [And] is one of the essential principles of contemporary international law.[4]

The principle was incorporated into the 1941 Atlantic charter and the Dumbarton oaks proposals which evolved into the UN charter. Its inclusion in the UN charter marks the universal recognition of the principle fundamental to the maintenance of friendly relations and peace among states. It is recognised as a right of all people in article 1, common to ICCPR and ICESCR entered into force in 1976.

Self-determination is now recognised as a right under customary international law. In other subsequent developments in international law in regard to non-self-governing territories as enshrined in the charter of UN made the principle of self-determination applicable to such territories. An important stage in the development of international law regarding non-self governing territories can be seen from the process of decolonization.

The current section will highlight and describe the path that self-determination has[5] passed through since 1945, including its place and status in international law, its nature and content and the controversies among scholars over certain aspects of the principle, mainly deriving from its loose formulations in international acts.[6]

The following document which defines the self-determination – the United Nations charter Article 1(2), 55 and 73 and chapter XII recognise the right to self-determination.

The United Nation Covenants on Human Rights – the covenant on civil and political rights and the covenant on economic, social and cultural rights, both includes an ariticle on self-determination.

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4. See case concerning East Timor, International Court of Justice report 102 [1995]
5. Frequent references will be made to the terms 'internal' and 'external' self-determination, which represent theoretical distinction. 'Internal' self-determination means the right to authentic self-government, that is the right for a people really and freely to choose its own political and economic regime, while 'external' self-determination implies the choice of the international status of the people and the territory where its lives.
6. This analysis takes into account the sources of international law enumerated in Article 38 of the statute of the ICJ.

Declaration on the Granting of Independence to Colonial Countries and Peoples 1960; Friendly Declarations 1970; the Helsinki Final Act; the Vienna Declaration and Programme of Action of 1993; in all these declaration the principle of self-determination is implemented.

In the jurisprudence of the international court of justice – the recognition of principle of self-determination in a number of cases mainly in Namibia case;[7] Western Sahara case;[8] and East Timor case [9] - where it leads to right of people and essential principles of contemporary international law. And for the first time the erga omnes obligation mentioned in the Western Sahara and East Timor cases.

Musgrave, Thomas D self-determination and National Minorities New York: oxford University Press, 1997 – This book explores the relationship between self-determination and minority rights in international law.

The self-determination is developed mainly from the American and French revolution. The jurisprudence on the self-determination has developed mainly due to the valiant efforts of the United Nations, providing an excellent opportunity to analyse, the jurisprudence evolved thus far. The judgement given by the ICJ will be useful to understand right to self-determination would be traced on different planes, namely, on peoples; non-self governing territories; minorities; Indigenous people.

The Role of United Nations

Although the United Nations (UN) Charter[10] (the UN Charter) contains rather few references to "Self-determination", it is in fact, the charter itself that is considered to have given expression to the doctrine of self-determination. The Principle[11] of self-determination is expressly mentioned for the first time in Articles 1(2) and 55 of the UN charter.

7. ICJ reports 1971, 31
8. ICJ report 1975, 32
9. ICJ report 1995, 90 at 102
10. The complete text of UN Charter. See 1. Brownle (ed), Basic Documents on Human Rights [oxford: clarendon press, 3rd edition, 1992]
11. The reference to self-determination as a principle or a right is done in accordance with the terminology used in the relevant instruments.

Article 1(2) provides that one of the purposes of the UN is "to develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples"[12] . Article 55 instructs the UN to promote higher standards of living, solutions to health and cultural problems, and universal respect for human rights "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based o respect for the principle of equal rights and self-determination of people...."[13]

The framers of the Charter, thus, identified self-determination as one of the purposes, or raisons d'etre, of the UN Organization. Moreover, although they did not construe the charter in a manner that would serve as an effective means for the use and expansion of the principle itself, they did identify self-determination as a major objective of new world organisation.

A subcommittee responsible for the consideration of the Dumbarton Oaks proposals and Amendments presented by the various governments gave its interpretation of the principle of self-determination, indentifying the following main points:

a. Free and genuine expression of the will of the peoples and that of self-determination;
b. The principle of equal rights of peoples and that of self-determination are two component elements or one norm;
c. That norm is a basis for the development of friendly relations, and is in effect, one of the appropriate measures to strengthen universal peace;
d. The principle in question should be considered in relation to other provisions of the charter;
e. The principle as one whole extends as a general basic conception to a possible amalgamation of nationalities if they so freely choose.[14]

The references to self-determination in Article 1(2) and 55 of the charter are complemented by chapters XI and XII on non-self governing territories, and the international trusteeship system, neither of which contains an express reference to self-determination. Article 73 of chapter XI of the UN charter describes

12. Charter of the United Nations, June 26, 1945, entered into force Oct, 24, 1945, at art. 1(2)
13. ibid. at Art 55
14. UN charter Debates, VI UNCIO 300, (May15) at 703-4; According to a commentator, the reference to amalgamation can only be taken to mean the merger of two sovereign countries based on the same nationality.

the development of self-government in non-self governing territories as a "sacred trust". Article 76 of the charter regarding the international trusteeship system provides for a progressive development n the Trust territories towards "self- government or Independence". It has been observed that Article 73, falls so short of what is today considered self-determination and that the provisions stipulated in chapter XI and XII particularly Article 73, support the thesis that Article 1(2) of the charter represents a moderate version of self-determination.[15]

The UN Covenants on Human Rights – the covenants on civil and political rights and the covenant on Economic, Social and Cultural Rights.[16] Both include an article on self-determination, which is phrased with exactly the same wording. In 1950, pursuant to a General Assembly Resolution, the commission on Human Rights was called upon b the Economic and Social Council of the United Nations" to study ways and means, which would ensure the right of peoples and nations to self-determination.[17] Two years later, the General Assembly decided that the Covenant on Human Rights should include an Article on the self-determination of peoples.[18]

An interpretation of the Article on self-determination:-

Article 1 of both covenants recognises and stipulates the content of the right to self-determination in the following terms:

1. All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.
3. The state parties to the present covenant, including those having responsibility for the administration of Non-

15. Higgins, R. Problems and process: International law and how we use it, Charendon Press, oxford, 1994.
16. The UN Covenant on Civil and Political Rights (ICCPR) and the UN Covenant on Economic, Social and Cultural Rights (ECOSOC), Brownlie, I (ed)
17. General Assembly (GA) Res. 421, UNDOC. A/1775 (1950)
18. G.A. Res. 545, UN DOC. A/2119 (1951). The commission of Human Rights completed the drafting of two international covenants at its tenth session, held from Feb 23 to Apr 18; 1954

> self governing and Trust Territories, shall promote the realisation of the right-determination, and shall respect that right, in conformity with the provisions of the charter of the United Nations.[19]

A first reading of the article makes it clear that it presents self-determination as a human right. An explanation of the Human Rights Committee in its twenty first sessions in general Comment 12, "self-determination is defined as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights".[20] It is placed "apart from and before all of the other rights" in the covenant.[21] Furthermore, self-determination is defined as an inalienable right of all peoples and imposes corresponding obligations, and "the rights and ... obligations concerning its implementation are interrelated with other provisions and rules of international law".[22] The comments forwarded by the Human Rights Committee suggest that self-determination is both interrelated and serves as a pre-requisite for the fulfilment of the range of human rights stipulated in the covenants. Furthermore, the right of self-determination in the covenants is universal.

According to paragraph 1 of Article 1, all peoples are entitled to freely determine their political status, and economic, social and cultural development. In other words, every people or nation is free to establish its own political institutions, to develop its own economic resources and to direct its own social and cultural evolution, without the interference of other people of nations.

According to Article 1(2) the right to self-determination includes the simple and elementary principles that a nation or people should be aster of its own natural wealth or resources. This article consists of two parts. Under the first, all peoples, regardless of whether they live in a non-self governing territory or in an independent state, are entitled to utilise their natural resources without them being exploited by others. Under the second part of Article 1(2), the right of peoples to utilize natural resources is subject to obligations of economic co-operation and to other rules of international law.

19. Article 1 of the UNICCPR and ECOSCO in Brownlie, supra note 6, at 114 and 125.
20. ibid. at para.1.
21. See id.
22. See id. At para2.

Under Article 1(3), all state parties, including those having responsibility for the administration of non-self governing and the Trust Territories, undertake two sets of obligations.

a. To promote the realisation of the right of self-determination in all their territories and
b. To respect the maintain of that right in other states.[23]

The drafters of the covenants imposed on contracting states the duty to implement the above obligations in 'conformity with the charter'. The latter applies not only to the provisions of chapter XI and XII or to Article 1, but also to the chapter as a whole.[24] Article 1(3) actually writes the principle of self-determination into the chapters governing dependent territories,[25] notwithstanding that self-determination is not specifically mentioned in chapters XI and XII, and the obligations laid down in those chapters could be altered only by amending the charter.

The adoption of the texts of the UN Covenants on Human Rights marked the next phase of legal development of the concept of self-determination from a legal obligation in the de-colonization area, to self-determination as human rights, with two resolution of the General Assembly[26] serving as a bridge. From this time onwards there was repeated reference to self-determination in human rights terms.

Self-Determination and the International Court of Justice

The International Court of Justice has recognised the principle of self-determination in a number of cases mainly within the decolonisation context. In its advisor opinion concerning Namibia,[27] it affirmed the right to self-determination as defined by the United Nations, declaring that "the subsequent development of international law in regard to non-self governing

23. The original proposal laid down obligations only upon states that were responsible for the administration of the non-self governing and Trust Territories. Later the proposal was amended to include all states whether or not they were administering such territories. The obligation imposed on the administering powers of the non-self governing and Trust territories is now almost completely outdates, because of the fact that almost all colonial people have achieved independence.
24. UNDOC A/C. 3/ SR.668,6 (ES)
25. See Self-Determination: A Legal Reappraisal.
26. G.A. Resolution 1514 (XV) of the Declaration on Granting Independence to colonial Countries and Peoples, UN DOC. A/4684 (1960) and Resolution 1541 (XV) UN DOC. 17/4684 (1960).
27. ICJ Reports 1971, 31 at Para 52

territories, as enshrined in the charter of the United Nations, made the principle of self-determination applicable o all of them".[28]

The court attempted to broaden the existing interpretation and the impact of self-determination in its Advisory Opinion on Western Sahara. Referring to GA Resolution 1514(XV), the court found that: "The above provisions, in particular paragraph 2 (defining self-determination) requires a free and genuine expression on the will of the peoples concerned".[29]

It is apparent from the latter wording, that the court held, that self-determination always entails "the need to pay regard to the freely expressed will of the peoples, but that exceptionally this requirement can be and has been dispensed in two instances: when one is not faced with a 'people' proper, and when 'special circumstances' make a plebiscite or referendum unnecessary. However the court did not elaborate and specified what it meant by 'people' or by 'special circumstances'.

Notwithstanding the lack of the ICJ authoritative opinion on the terms set out above, as a commentator argues, the court's interpretation is more in keeping with the general spirit and thurst of the principle of self-determination than the standards on the self-determination of colonial peoples that evolved in the 1960's.

More recently, and as it is already mentioned above, in the case concerning East Timor, the court stipulated that self-determination was one of the essential principles of contemporary international law.[30]

The international acts quoted above grant the right to self-determination to 'peoples', and despite their large number, no precise meaning of the term 'people' has been construed. Two possibilities have emerged, that 'peoples' means the entire people of a state or that it means all persons comprising distinctive groupings on the basis of race, ethnicity and perhaps religion.[31]

28. See ICJ Advisory Opinion legal consequences for states of the continued presences of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), ICJ reports, 1971.
29. ICJ Reports 1975, 32
30. ICJ Reports 1995, 90 at 102.
31. See Higgins R Supra note 15, at 124.

Further attempts to define the meaning of the word 'people' were made in the course of the preparatory works of the Covenants on Human Rights, where self-determination refers to 'all people'. To this end, it was suggested that this word mean people ain all countries and territories, whether independent, trust or non-self governing, large compact groups, ethnic, religious or linguistic minorities, or racial units in habiting well defined territories etc., however, it was thought, that the term peoples should be understood in its most general sense and that no definition was necessary.

The case of East Timor

East Timor became a part of international agenda in 1960 when UN General Assembly added this territory to the list of Non-Self-Governing territories. Before that, East Timor was administered by Portugal. 14 years later, Portugal attempted to establish a provisional government and a popular assembly that would determine the status of East Timor. A civil war broke out between the supporters of independence and those who favoured integration with Indonesia. Portugal withdrew being unable to control situation. Subsequently, Indonesia intervened by military means incorporated East Timor as its 27th province.[32] The United Nations never recognized the inclusion of East Timor in Indonesia, and both Security Council and the General Assembly demanded Indonesia to withdraw from East Timor.

In 1982, UN, Portugal and Indonesia started negotiations on the question of East Timor status. In 1998, Indonesia proposed a limited autonomy for East Timor within Indonesia. The discussions lead for conclusion of an agreement between Indonesia and Portugal signed in New York in 5 May 1999. Both governments entrusted UN Secretary General to initiate process of popular consultations with the purpose of establishing will of East Timorese to accept or refuse special autonomy offered to them within Indonesia. The Security Council decided creation of United Nations Administration Mission in East Timor (UNAMET) in 11 June 1999 to organize consultation process and to monitor for a transitional period implementation the will of East Timor people. The voting which took place on 30 August 1999 resulted in 78.5% of votes refusal to proposed autonomy and initiation of a transitional process towards independence.[33]

32. For more information, see hpp://www.un.org/peace/etimor(visited on 16/01/2014)
33. Ibid

After proclamation result of referendum, the police that was pro-integration and with the support of Indonesia security forces, started a campaign of violence, and slander throughout the country. As a result many people were killed and 500,000 were displaced from homes, half of forcefully displaced from territory. In response, the UNSC authorized deployment of a multinational force (INTERFET) to restore peace and security in East Timor, as well as to support and protect UNAMET in carrying out its tasks. Indonesian authorities left from East Timor, and on 28 September 1999, Indonesia and Portugal agreed that UN take authority over East Timor. On 25 October of same year, the SC decided through Resolution 1272 (1999) to create UN Transitional Administration in East Timor (UNTAET) with full responsibilities for the administration of territory of East Timor.

The Case of Yugoslavia

The international events in Yugoslavia consist recognition of former Yugoslav Republics by members of international community, is particularly significant because it represents first time that widespread international State practice has favoured secessionist movements engaged in armed struggles for independence outside colonial context.

Yugoslav crisis started in Kosovo[34] and abolition of its autonomy by Serbian authorities followed centralization acts that aimed to restrict powers of republics. The end of the Cold War created an incentive for resurgence of separatist claims in the former Yugoslavia. The rejection by central authority of Croatia's and Slovenia's demand for sovereignty within a loose Yugoslav confederation was followed by their demands for full-fledged independence.

The break out fighting in Yugoslavia started by end of June 1991, federal troops moved against secessionists in Slovenia. First reaction of International Community and the EU, expressed the support for territorial integrity of Yugoslavia.

The Security Council took strong position set unanimous resolution,[35] which maintained continuation of situation constituted threat to international peace. Response of Security Council falls under the scope of Article 39 of the Charter cleared

34. Malcom.N., Kosovo: A short history, Macmillan,1998
35. SC Res 713.UN SCOR 46th Sess. 3009 th mtg. Supp., UN DOC.S/713(1991)

way for acting under Chapter VII. Thus, international community dealt that crisis in Yugoslavia, as if it were an international crisis. Apparently, the secessionists were being seen in favourable light as confirmed by EC original formula for recognition of Croatia, Slovenia, Bosnia-Herzegovina, and Macedonia. Subsequently, the formula was accepted by EC, which recognition. The former Yugoslav Republics became also UN Members. On the other hand, so-called Federal Republic of Yugoslavia was not recognized as successor state to former SFRY.

Crisis in Yugoslavia as a threat to international peace and security, the Security Council relied on arguments, heavy loss of human lives, hundreds of thousands of refugee's consequence of war, as well as adverse consequences of war on countries region. Decisive factor prompting the EC to recognize new states stood in imminent threat and instability to regional security.

Conclusion :

The principle of right to self determination applies to entities whose right to self- determination is established under or pursuant to international agreements, and in particular to mandated, trust and non-self- governing territories.

The right to self- determination has been declared as a fundamental human right by all important human rights instruments, including the Universal Declaration of Human Rights. Self-determination is regarded as the right of all peoples to control their destiny, to choose their political status and their own development. Self- determination clearly recognised as a legal right from the Antarctica Treaty.

The principle of right to self-determination is represented by the rule against intervention in the internal affairs of that state, and in particular in the choice of the form of government of the state. Self-determination is not within the domestic jurisdiction of the states.

That state practice started to recognise a more expansive right to secede in the light of the cases of East Timor, Yugoslavia, Eritrea, and Kosovo, each case is different and it is impossible to deduce any clear rules from the above cases.

The Supreme Court of Canada in its decision concerning secession of Quebec from Canada did not hesitate to state that international law recognises no right of a political sub-unit to secede as long as the government of the state 'represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination' and the state 'respect the principles of self- determination in its own internal arrangement'[36]

In case of Kosovo, that even if a government violates the fundamental human rights of its oppressed minority the international community is not prepared to recognise the right of minority to secede from a state.

It is interesting to note that first 'International Conference on The Right to Self-Determination and the United Nations' held in Geneva in August 2000 unanimously adopted a number of resolutions intended to clarify the content and scope of application of the right to self-determination and to establish new UN mechanisms related to self- determination.

The Conference discussed the self- determination needs and aspirations of indigenous people, minorities and nations including the Kashmir's, Native Americans, African Americans, Irish, Tamils, Saamis, Dalits of India, Canada First Nation. Khmer Krom of Vietnam, Chechens, Mon of Burma, Puerton Ricans etc,

The Resolutions called for the establishment of an Office of the High Commissioner for Self-Determination; and the establishment of a Self-Determination Commission made up of representative of United Nations member states.

It also reaffirmed the importance of the right to self-determination and condemned all violations of the right, and invited the UN to set up a process under which individual cases may be comprehensively discussed at an international forum and appropriate resolutions adopted accordingly.

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36. (1998) 2 SCR 217 para130.

Vulnerable Woman and Climatic Change- Momentum for Change

Dr. N. Kayalvizhi *

"Poor people are more vulnerable to climate change due to their limited adaptive capacities to a changing environment. Among them the rural poor, rural women and girls are the ones most immediately affected"- Dr.Gro Harlem Bruntland[1].

"Climate change impacts are not gender neutral". The climate has never been static. Over generations the weather keeps changing. For millennia, since civilizations arose from ancient farming societies, the earth's climate as a whole was relatively stable, with temperatures and patterns of rainfall that have supported human life and its expansion around the globe[2] One of the root causes of climate change is human activity. Woman who enjoy equal rights and oppurtunity also contribute to climatic change. At present, the population of the world is 9 billion and number of woman is more than half of it .

Population, resources, economy consumption causes imbalance results in climatic change. Climate change's influence on people is also complex, spurring migration, destroying livelihoods, disrupting economies, undermining development and exacerbating

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1. Mrs. Gro harlem Brundtalnd, 'keynote address: Levers of global security: examining how a changing climate impacts women', IPCC, 'Fourth Assessment Report – Synthesis Report', WMO and United Nations Development Publications, 2007.
2. Thoraya Ahamed ." Facing a changing World : Women,Population and Climate".Report of United Nations Population Fund(UNFPA),State of the world Population 2009.

inequities between the sexes[3]. Climate change is no more an environmental concern. It has emerged as the biggest developmental challenge for the planet[4]. There are nebulous socio - economical issues which could be linked to climatic change. Women and men in rural areas in developing countries are especially vulnerable when they are highly dependent on local natural resources for their livelihood. Those charged with the responsibility to secure water, food and fuel for cooking and heating face the greatest challenges. Secondly, when coupled with unequal access to resources and to decision-making processes, limited mobility, places women in rural areas in a position where they are disproportionately affected by climate change[5]. Policy makers are faced with major difficulties in assessing how gender differentiated outcomes of climate threats can be mitigated[6].

India is one of the most disaster-prone countries in the world. As many as 1.2 billion people live in areas vulnerable to natural hazards such as floods, cyclones, droughts and earthquakes. Around 76 percent of India coastal line is prone to cyclones, floods, tsunamis, and earthquakes. 59 percent of the country is vulnerable to earthquakes, 10 percent of India 's coastline is prone to cyclones and tsunamis, while 59 percent of the country is vulnerable to earthquakes, 10 percent to floods and river erosion and 68 percent to droughts[7]. Rampant problems existed during the disaster during the response and mitigation. The Gujarat Earthquake, Tsunami (2004) and kosi floods. (2007 &2008)[8] Assam Floods (2009)and (2011) Andhra Pradesh and Karnataka floods, Yamuna Floods(2010) ,Thane cyclone (2011) ,Odisa floods (2011-2012) and Typhoon Phalin (2013) all these have highlighted certain degree by virtue of which shows the woman plight which is inherent in socio-economic vulnerability[9]. Woman have been systematically excluded from relief and rehabilitation efforts. There were varied forms of discrimination of the groups facing disasters . There is a

3. Supra note
4. Irene Dankelman ,Gender &climate change an introduction, Routledge,2010,pg5.
5. United Nations Women Watch , Women Gender Equality and Climatic change ,United Nations Publications h ttp://www.un.org/womenwatch/feature/climate_change/downloads/Women_and_Climate_Change_Factsheet. Last visited 3.03.2014. IST 10.00 p.m
6. Supra Note 4 .
7. Nita Bhalla,' Lower Caste people get less aid when Disaster strikes.' Report Thomas Reuters Foundation 28 Jan 2014. http://www.trust.org/item/20140128164500-a5psr/?source=quickview last visited 3.03.2014.at 9.29 p.m.
8. Lee Macqueen Paul & Binoy acharya ,"Vulnerability mapping and monitoring of the post disaster response(SWADIKAR) National Dalit Watch-National Campaign on Dalit Human Rights Dec,2013 .htt p://www.national dalit watch_ncdhr-blogspot.com. last visited 3.03.2014 at 10.00p.m.
9. Ibid.,

greater neglect of the governmental agencies is making assessment about the losses and the officials failed to account. Thus this has prevented cumbersome procedure of accounting the losses in order to claim . This has identified many glaring gaps in terms of women assessment and rehabilitation measures .

The presenter has applied sampling technique by identifying four major disasters and its effects and impacts so as to overall conclude about the general impact of natural disasters and its after effects on vulnerable woman.

Of all the disasters cyclone Phalin combating measures were simply applaudable. The negligence of the governmental authorities led to outburst of the glacial lake at Uttarkhand , the devastating cyclone Aila in West Bengal, the unexpected Tsunami strike in Tamil Nadu and other adjacent coastal areas , though happened many years back the scars that it has left is so deep and uncured."

When Cyclone Phalin struck Orissa coast, better remedial measures were taken as lessons were learnt from natural calamities of 1999 incidences were 10,000 people dead ,affected 13 million people. That sort of night mare was never allowed to happen again. Due to the swift preventive measures taken by Orissa government evacuated 5.5 lakh when phalin struck coastal areas. It affected population of 8,53,620 . 14 Villages in 12 districts were affected 2 lakh kaccha houses destroyed. Twenty one lives were lost[10]. The state's act of timely evacuation of people prior to the calamity, was appreciated by the United Nations[11]. However its impact on women was massive leading to water shortage problems, access to safe water became difficult, their sustainable livelihood was lost, water contamination , less nutritive meal, prominent health hazards leading to water borne diseases, etc., Majority of the gender victims do not get compensation pushing them further into poverty and deprivation.

"In a serious disaster situation many woman used loans to cope up e.g. to provide for lost homes, food and medicine, exposing them to a vicious cycle of bonded labour, where whole families can become indentured servants to repay a loan often several times over."[12]

10. Sudhanshu Shekhana Mishra ," Cyclone, Phailin Extensive loss to Pradhip port", Reported in Firsh Port India Oct,2013. http://www.firstpost.com/india/cyclone-phailin-extensive-loss-to-paradip-port-says-chairman-1169547.html?utm_source=fpstory_relatedarticles last visited 3.3.2014 at 11.47 p.m
11. Cyclone Phailin damage control recognition by United nations,20 Dec.2013 (Margareta Wahlstrom, a special representative of the UN Secretary General for Disaster Risk Reduction, toresented citation to Chief Minister Naveen Patnaik at the secretariat appreciating his government's efforts). http://www.dnaindia.com/india/report-cyclone-phailin-damage-control-recognised-by-united-nations-1938384 last visited 3.03.2014 6.a.m
12. id

The governments, civil society and international agencies publicly to recognise the problem of gender -based discrimination in aid and to form a common approach towards addressing it."While the state is having the primary duty to fulfill human rights obligations within its borders in disaster situations, NGOs, U.N agencies and international donors assisting disaster risk reduction and response have a responsibility to respect human rights obligations."

The exact nature scope and times scale of the consequences and local impacts cannot be accurately assessed. No doubt every part of the world is experiencing climatic changes may be at micro level . But socio economic issues here poses risk and managing it efficiently is the need of the hour. Steps must be taken in reality. Gender is vulnerable to climatic changes .In India, women faces many structural constraints. The constraints must be lifted so as to minimize vulnerability . Measures need to be taken in enhancing safety measures to women in various sectors.

A report [13] warned a decade ago about threat posed by the Glacial lake . But, the report was never taken in to consideration by the Government of Uttarkhand . Human activities led to bursting out of Glacial lake. It had resulted in 10,000 human beings killed in Uttarkhand due to outburst of the lake. The majority of percentage who were killed is women who were driven away , aftermath who were subjected to migration, human intervention of trafficking ,rape, displacement etc., The rains and floods in Uttarkhand resulted in large scale devastation and severely tested the efficacy of our disaster response mechanisms. There are important lessons to be learnt from the experience gained from the rescue and relief operations that were carried out. The concerned agencies of the Central and State Governments should try to utilize the experience of Uttarkhand in better management of disasters that we may face in the future[14].

Because there is so little current or reliable research on many aspects of climate change, scientists must some- times look at climate-change proxies for insights into how climate change affects women, men, boys and girls differently, or how each sex responds or adapts to natural disasters. Proxies are events that resemble climate change in some details. Periodically, this report uses extreme events of many kinds as proxies. It considers the impacts of storms

13. Report of Thomas Reuters Foundation 12 Dec 2013. http://www.trust.org/item/20131212233339-ewu52/?source=spotlight last visited on 2.3.2014. at 3.p.m

14. Dr.Man Mohan Singh Speech on 'National Commitment to Minimise the Negative Impacts of Disasters, Office of the Prime Minister, 20 th October,2013,17 2B IST http://pib.nic.in/newsite/erelease.aspx?relid=100288 Last visited on 3.3.2014 at 10.00 a.m.

and comparable natural disasters as one method of envisioning how climate change may affect migration, health, income-earning opportunities and gender relations in the coming years.

Tsunami that struck southern India , Tamil Nadu is one of the worst disasters. In Cuddalore in India, almost three times as many women were killed as men, with 391 female deaths, compared with 146 men. In Pachaankuppam village, the only people to die were women[15] . In Nagapattinam, the worst affected district of Tamil Nadu in South India, government statistics state that 2,406 women died, compared with 1,883 men[16]. Reproductive problems which are highly specific to their sex , the plight of the menstruating women or pregnant women who have to deliver or survive a situation where all construction wall has collapsed and when every one is out in open space is unfathomable[17]. Public-health which is imperative of women could be understood with reproductive health needs pregnancy and motherhood, gynaecological care, child spacing and family planning, sexually transmitted infections and HIV/AIDS, and adolescent reproductive health. 8300 women in the Tsunami region are estimated to have been pregnant, about 1380 of whom would have been in the last three months of pregnancy[18]. Even under normal circumstances a substantial proportion of these women could be expected to experience complications and require emergency obstetric care[19]. In the countries where maternal and neonatal health was a major challenge even before the Tsunami, the likelihood of pregnancy and delivery complications is higher. Other issues that merit consideration in the wake of disasters are vulnerability, gender violence and poor access to care[20]. Forcible displacement imposes an especially heavy psychosocial and physical load on pregnant women[21]. Spontaneous and induced abortion became more likely with their hazard to maternal life; [22] also, babies are more likely to be born preterm or small-for-gestational age. The breakdown in healthcare services and the confusion that typically surrounds forced displacement also reduces the chances of prenatal risk factors being identified and responded to promptly.

15. Oxfam Briefing Report, March, 2005http://www.oxfam.org/sites/www.oxfam.org/files/women.pdf last visited 3.03.2014.
16. id
17. Id.,
18. International Centre for Migration and Health. Interim Report of a Meeting on Public Health Impact of the Tsunami. Geneva: ICMH, 2005.
19. World Health Organization Regional South-East Asia Press Release, New Delhi/Geneva. 10 February 2005. Geneva: WHO, 2005.
20. M.Carballo and Others- Impact of Tsunami on reproductive health J R Soc Med. Sep 2005; 98(9): 400–403. http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1199634/
21. Carballo M, Simic, S. Health in countries torn by conflict: lessons from Sarajevo. Lancet1996;348: 872
22. Lehmann A. Safe abortion: a right for refugees? Reproduction Health Matters 2002;10: 151-5

Woman were at greater risk than men. The ratio of female death is 3:1 when compared to men[23]. Vulnerable woman survivors posed with socio-economic threats who withstood the disaster but were subjected to unemployment and poverty. Many of the woman did not know swimming, the traditional saree did not really help them to run away from tsunami, there are stories of women running back to the beach to search for missing children when the first wave receded, only to be caught by the second wave when it struck[24].

Another major issue when women are not safe in camps and settlement women who were displaced . Her life, liberty is at stake many of women bear social grunt her integration with the community is affected her ability to find job oppurtunity is minimized[25] . Women in many countries were tsunami struck were brutally raped, subjected to sexual violence thus women suffer Physical and Physiological damage[26]. Thus the consequences of sexual violence are many.

Many disasters make people seek emotional support and often enter into casual sexual relationships that are risky in terms of both unwanted pregnancy and sexually transmitted infections. The tendency for women to be forced into unwanted sexual relationships means that the need for emergency contraception and HIV post-exposure prophylaxis is also greater[27].

Women are in a eco-fragile position. The poverty and isolation of many women , disaster surroundings may lead to their having to sell sex or allow themselves to be sexually exploited. Overcrowded living conditions may also contribute to promiscuity and consequent spread of sexually transmitted infections. Other factors that could play a role include the arrival of military personnel,[28] relief and reconstruction workers, and transport personnel Also, with the large numbers of injuries, HIV-contaminated blood may have been used inadvertently in settings where there were insufficient facilities for testing and too little time to wait for supplies from elsewhere[29]. Exacerbating factors are the poor general awareness of HIV/AIDS

23. Nath L. Voluntary Health Association of India Tsunami Report. ICMH Expert Review Meeting on Public Health Impact of the Tsunami. Geneva: ICMH, 2005.
24. Id .,
25. UNFPA. Six Months After the Tsunami: UNFPA Helps Restore Reproductive Health Capacity and Promotes Women's Rights [www.unfpa.org/news/news.cfm?ID=636]
26. Global Action on Aging. As Tsunami Recedes, Women's Risks Appear. [www.globalaging.org/elderrights/world/2004/tsunami.htm] website last visited 3.03.2014.
27. Ibid.,
28. Cohen M. After the Tsunami: A drive to reverse tribal ligations in Tamil Nadu. July 2005. Connecticut: Population Reference Bureau, 2005.
29. After the tsunami: HIV prevention and disaster relief. VAX, International AIDS Vaccine Initiative Newsletter [www.iavireport.org] 2005;3:1-3.

and the fact that condom distribution to displaced people has not been given high priority in most of the countries[30]. The tsunami has affected the women in many ways . It caused sex-specific death on a scale that has devastated families and family life[31].

The evidence outlined makes it clear that women appear to have been killed by the waves in greater numbers than men. Local survivors cite various reasons why this may be so. When the tsunami hit, many men were fishing at sea while the women were waiting near the shoreline for the boats to come in with the catch, which they would collect, clean, and then take to the market to sell. The tsunami travelled relatively calmly out at sea, passing under the boats, but swelled up as it reached the shore. Many women also lost their lives in their attempts to save their children and elderly relatives who were with them at the time.

In the aftermath of the disaster, it is the woman survivors of the disaster who are left absolutely alone to deal with the near irreversible damages to life and livelihood wreaked by a sudden cyclone or a spell of bad drought. The 'silent killers' are on a rampage .

Aila, a devastating cyclone that swept across Southern part of West Bengal India on the wee hours of 25th May 2009, particularly the Sundarban delta's killing people, their livestock and rendering thousands homeless[32]. The very next day islanders were found lined up on the embankment pleading, shouting and jostling with each other trying to grab relief and aid that came their way. And many others having lost their land, houses, and also their family members already started to migrate out of the Sundarbans in search of an uncertain future . The West Bengal State Government and many non-governmental organization responded by providing aid and relief on a war footing.

Women and girls, who are generally responsible for household water collection, now have to travel long distance to fetch pure drinking water. Our study reveals that now women and girls in the affected area have to spend additional 2.5 hours every day to collect drinking water from nearby localities[33]. Since most of the area is still water logged, they have to use boat or sometimes walk in the

30. National AIDS Control Organization, India. Observed HIV Prevalence levels State wise1998-2004 [www.nacoonline.org/facts_statewise.htm]
31. Supra note 16
32. http://resourcecentre.savethechildren.se/sites/default/files/documents/4426.pdf last visited 12.-3-2-13
33. Utpal Kumar and others , Natural Disasters to Human Suffering, The Innovators,Dhaka 2010 p.16. Retrieved from http://www.unnayan.org/documents/Climatechange/ailareport_humansuffering.pdf last visited on 12.03.2013

polluted salt water to collect drinking water. Many of the school going girls are now engaged with household water collection instead of going to school. The dropout rate, therefore, has increased sharply in the study area after Aila. Even though, some NGOs are distributing drinking water in the affected areas, however these attempts are pretty insufficient compared to demands. Moreover, disrupted communication system results into irregular supply.

The relief and aid materials were short in supply to meet the needs of the victims. And secondly, even when relief materials were available in plenty they never reached the people who needed them badly. In other words, the story of aid and relief could provide insight into how politics was played out at the local level. In a land marked by ecological uncertainty, food insecurity, risky agriculture and the absence of industries, people's livelihood needs became pressing with limited options. Even the pursuit of these limited livelihood options is now viewed by many experts as detrimental to the conservation of the bio-diversity of the delta and many traditional livelihoods such as fishing are subjected to restrictions and bans.

Not surprisingly, migration over the years has grown to become a key livelihood strategy for many. Cases abound of entire families including women leaving the area. There are whole tracts of deserted and devastated lands which can be justly termed as 'the land of the old and those in the footsteps of death'. A substantial portion of it is disguised: a steady but unmistaken caravan of women of marriageable age is forced or is coerced to become domestic help in the cities or worse is being sucked into prostitution[34]. For these girls life is an unending uncertainty. The story of embankment protection in the Sundarbans is one of continuous land acquisition without any comprehensive policy of relocation or compensation offered to the people. The ring embankment proposed by the erstwhile left government in the aftermath of Aila has ran into problems with the villagers who are owners of the adjoining fields refusing to hand over their lands due to the poor track record of the successive governments in providing compensation at market price or for that matter any compensation at all.

Aila that struck the Sundarbans is formally over and emergency relief and aid had stopped. The electronic and print media are no longer interested in Aila and the Sundarbans and are now focusing on the next disaster. However, almost four years

34. Supra note 30

on from Aila, people are still living in tents and on embankments and their farmlands have been destroyed by saline water. Natural disasters like Aila cannot be prevented, but what can be prevented is the longstanding impact of such disasters. In the face of high and increasing uncertainty, it is important to enhance the resilience of such areas. Also it is clear that adapting through incremental changes is not sufficient and to tackle such extreme shocks also requires social transformation which include radical change, innovation and experimentation as well as addressing power imbalances, beliefs and value All this is about too much of water there are more worst issues about too less water Climatic changes also have significant impact on fresh water resources minimizing the availability of water for domestic and production purposes.

Let us take the situation of a flood prone water area and drought prone water scarcity area. Its far reaching to vulnerable women who have to ensure storage of water for house hold purposes. Women have to give up for the sake of families and spend significant amounts of time daily hauling water from distant sources. The water from distant sources is rarely enough to meet the needs of the household and is often contaminated, such that women and girls also pay the heaviest price for poor sanitation[35]. Experience of natural disasters in a wide range of contexts shows that events of this type can weaken the status of women and girls and their ability to negotiate both within and outside the family. The loss of assets, homes, and family members all contribute to increased gender inequality. In post disaster scenario Huge losses sustained by women due to climatic change and natural disasters , Women has to safeguard herself from such disaster losses . Lose suffered by an women may not be fully accounted for and neither subsequently compensated monetarily during the contingent times. Our early warning systems and response mechanisms should be strengthened that we are able to minimize the negative impact of disasters.

Natural disaster management authority efforts to strengthen community preparedness for disaster events and its engagement in activities related to disaster prevention, mitigation and preparedness need to be continued with greater intensity[36] .

The social science view found that impact of climate change risk must be better understood, plans for adaptation must start with

35. UNICEF. Arsenic Mitigation in Bangladesh. Rep. UNICEF. Web. http://www.unicef.org/bangladesh/Arsenic.pdf retrieved on 10.03.2013
36. Supra note13

the focus on women; and women's livelihood are most important link to both family's economy and the local economy[37]. The constant monitoring of weather patterns and warnings, clear instructions to district authorities, positioning of relief materials and teams well in advance, coordination with the central government for defense and other agencies' assistance, and most importantly, the evacuation of a large number of vulnerable citizens to safe locations[38].

" The key word is that these extreme events would increase under climatic change and we need to gear up quickly to counter it before its too late through cuts on fossil fuel emissions and micro-level climate vulnerability assessment at local levels". The capabilities of our disaster management mechanisms must be enhanced. Women are the most vulnerable groups to the adverse impacts of climatic change. Her problems need to be addressed . Government should analyze and identify gender - specific impacts and protection measures related to floods, droughts, diseases, and other environmental disasters. The United Nations Development Report states that

A ministerial task force could be set up towards this end[39]. Government should develop strategies to enhance women's access to and control over natural resources, in order to reduce poverty, protect environmental resources, and ensure that women and poor communities can better cope with climate change[40]. Precautionary measures need to be taken by the state to ensure that in the event of any natural calamity[41] . Problem areas must be culled out and in case if such problem occurs once again how to redress the issue must be determined. State must ensure there must be careful planning and management. Be it may be a drought prone area , or an earthquake or severe cyclonic storm or tsunami proper impact assessment must be made so that were ever lacunae occurs that could be addressed. State must be an actor or an agent in taking effective

37. Kyati halam,Gender & CSDRN approach : A social science cover ,Special Issue, Dec.2013 Southern Disasters.net. http://www//reliefweb.int/sites/reliefweb.int/files/resources/102%20Snet%20CSDRM%20in%20Action.pdf

38. Ibid.,

39. Dr.Jyoti Parekh, 'Is climate change a gender issue' UnitedNations Development Programme India p.3 Retrieved from http://www.disasterwatch.net/climatechange/gndr_climt07.pdf last visited.12.03.2013

40. Ibid.,

41. Principle 15 states that In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Rio Declaration, United Nation Conference on Environment and Development United Nations Publication Sales No. E.73.II.A.14 1992. Http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163 last visited,12..3.2013

steps mitigation and adaption of problems and perspectives which would attract vulnerability of women due to climatic change. It must be in a position to respond to the crisis situation.

1. Women are the key agents for mitigation , adaption to climatic change. Women has to be taught about potential threat of climatic change so that she could impart to the future generation .
2. Actions can and must be urgently taken to ensure that the needs of women , and women's responsibilities in households and communities, as stewards of natural and household resources, positions them well to contribute to livelihood strategies adapted to changing environmental realities.
3. All those involved in humanitarian assistance and policy making must collect and use sex-disaggregated information.
4. Protecting women from sexual violence and exploitation must be taken up as priority
5. Agencies that aid vulnerable women must ensure highest standards for protection given, even when there is going to be any slight abuse in conduct must be reported.
6. After disaster women must be encouraged to lively sustainable programmes
7. Women must be encouraged to take up non- traditional employment - oppurtunities after the disaster.
8. Funding must be given by international banking sector for Vulnerable group women to lead
9. Assessing the needs of women and men when planning the response programmes of government, NGOs, and other agencies is essential to the overall success of the reconstruction effort.
10. Women often have a strong body of knowledge and expertise that can be used in climate change mitigation, disaster reduction and adaptation strategies
11. Economic security of women must be enhanced
12. Women can play a role in bolstering communities and reduce future climatic impacts.
13. Gender must be an integral part of debates and discussion on climatic change.

14. Evolve sustainable ways that could address the gender issues
15 Gender must be tutored with coping up strategies which would provide space for sub alternatives.
16. To address the issues of resilence, long term transformation , policies and to straight the imbalances.
17. Action needs to be taken now if we are to avoid short-term impacts turning into long-term problems.
18. Women must have equal access to benefits and insurance payments to support themselves and their families

Conclusion :

Combating climatic change women has to play a critical role equipping women to adapt and mitigate climatic change impact. To address vulnerable women and climatic change responses done in a small way or big way would make a difference in momentum for change. If conditions of gender inequality determine who feels the impact of disasters, and then providing the finances that have for so long been promised to meet the gender-specific Millennium Development Goals has to be one of the best forms of disaster-preparedness for the future.

"To make a real difference it's time now to convert good intentions in to concrete actions."

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Environmental Concern in WTO Disputes-An Analysis

S. M. Balakrishnan *

Abstract

Trade liberalisation and environmental protection share a common aim to enhance social welfare by improving the quality of life. But often they are perceived as anti-thesis to each other. International concern for the environment is of relatively recent origin. Environmental protection is one of the main social policies affecting international trade. The trade and environment debate can also be seen as a clash of paradigms: the environmentalist's law based world view versus the trade community's economic perspective. In this paper an attempt is made to reconcile world trade with environmental concerns for a sustainable development.

Key Words: WTO, International Trade, Environment, Dispute Settlement, Appellate Body.

Introduction

Environment protection is one of the main social policies affecting international trade. Environmental protection has become a central issue on the public agenda and trade and environmental policies regularly intersect and increasingly collide[1]. Often they are perceived as anti-thesis to each other. Trade experts see dangers in protectionism masquerading as environmentalism[2]. The trade and environment debate can also be seen as a clash of paradigms: the environmentalist's law based worldview versus the trade community's economic perspective. The trade world's economic paradigm puts great emphasis to the proposition that free trade stimulates the opportunity and creates additional resources for

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1. Autar Krishen Koul (2005), GATT/WTO –Law, Economics and Politics, New Delhi: Satyam Books at p.547.
2. John.H.Jackson (1992), "Dolphins and Hormones- GATT and the Environment for International trade after the Uruguay Round", 1992 (14) University of Kansas Law Journal, pp.429-454.

environmental protection. Economists fundamentally see the trade and environmental issue as a matter of weighing the relative costs and benefits of trade and environmental policies to maximise social welfare. Many environmentalists recognise the value of cost internalisation and increasingly understand the potential of the 'polluter pays principle' for making trade and environmental policies mutually reinforcing. In this paper an attempt is made to reconcile world trade with environmental concerns for a sustainable development.

Article XX of the General Agreement on Tariffs and Trade (GATT).

Clauses (b) and (g) of Article XX of the GATT provides for trade restrictions on a non-discriminatory basis on environmental grounds. The relevant portion of Article XX of GATT, 1994 provides for the following:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) Necessary to protect human, animal or plant life or health;

(g) Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Trade Disputes with Environmental Concerns.

The inability of the erstwhile GATT dispute settlement mechanism and the present Dispute Settlement Body (DSB) of the WTO in matters concerning trade and environment can be explained by analysing the following cases. The problem of environmental concern first arose in the *Tuna-Import dispute*[3] and *Herring Salmon dispute*[4] . In the Tuna Import dispute the US claimed that the import prohibition it had imposed on Canadian tuna fish and tuna fish products was an action under Article XX (g) of GATT aimed at conservation of tuna- an 'exhaustible natural resource'. The panel of the GATT dispute settlement system rejected the US contention and held that import prohibition was not justified under Article XX (g). It found that the US action was a retaliatory measure aimed at

3. United States- Prohibition of Imports of Tuna and Tuna Products from Canada, GATT Panel Report, 1982 (L/5198-29S/91)
4. Canada- Measures Affecting Exports of Unprocessed Herring and Salmon, GATT Panel Report, 1988 (L/6268-35S/88)

protecting US domestic tuna fish industry and recourse to Article XX (g) was an 'expost facto' justification. The case was indicative of the scope for potential misuse of the environmental exceptions provided in GATT to justify trade restrictive measures driven by commercial and political interests[5] .In the *Herring Salmon case*[6] , Canada imposed export regulations on unprocessed Herring and Salmon fish and defended the regulation holding that it was aimed at preserving fish stocks and therefore justified under Article XX (g). The export regulation applied to purchase of unprocessed fish and discriminated between domestic and foreign processors and consumers. The GATT panel held that export prohibitions were not conservation measures and therefore not justified under Article XX (g).

In the *Thai cigarettes case*[7], Thailand justified import restrictions on cigarettes under XX (b). GATT panel though agreed that smoking was a serious risk to human health, held that the restriction is not covered under Article XX (b). The panel pointed out that GATT consistent options such as labeling and ban on advertising were available to Thailand to achieve its health policy goals and consequently the import restrictions was not justified under Article XX (b).

In *Tuna-Dolphin I case*[8] commercial yellow fin tuna fishing has been carried on through the use of 'purse seine' nets, which are large nets that are manoeuvred around shoals of fish and then drawn tight, so that the tuna remain trapped inside the nets and can be easily harvested. The problem was that tuna fishes are frequently found together with dolphins. Unless special protective measures are used, the dolphins get trapped in the purse seine nets along with the tuna, and many are fatally wounded or drowned. The US in 1972 passed the 'Marine Mammal Protection Act' prohibiting, 'killing of dolphins' and to permit incidental killing by tuna fishing boats only within certain strict limits. Meanwhile the US government imposed an embargo on imports of tuna from Mexico and several other countries on the ground that they had not met with the requirements of the US law. Challenging the above embargo, Mexico initiated dispute settlement proceedings in GATT. Mexico's contention was that the US restriction on tuna imports violated Article XI[9] of the GATT. The US defended its action under

5. Negi, Archana (2005), WTO and India: A Critical study of its First Decade, J.K.Mittal et. al (Eds), New Delhi: New Era Law Publications at p.307.
6. Supra note 5.
7. Thailand- Restrictions on Importation of and Internal Taxes on Cigarettes, Panel Report, 1990, DS10/R-37S/20.
8. United States- Restrictions on Import of Tuna, Mexico, Panel Report, (1991), BISD 395/155= DS21/R
9. Article XI deals with elimination of Quantitative Restrictions by Member Countries.

Article XX of GATT. The GATT panel found that the US embargo on import of tuna from Mexico could not be justified. Accordingly, the panel concluded that the prohibition of imports by the US of yellow fin tuna and products thereof pursuant to the US Marine Mammal Protection Act was contrary to Article XI (1) of the GATT and unjustified by Article XX (b) or (g).

In *Tuna-Dolphin II case*[10] a second complaint was brought by the European Community (EC) and Netherlands challenging the same regulation as in Tuna-Dolphin I case. The second GATT panel was convened and it came out with a ruling substantially like the first panel. The second panel focused more on Article XX (g), addressed to the conservation of exhaustible natural resources. The outcome, however, was much the same.

In the *Automobiles case*[11] , the US measure on imposing taxes on foreign automobiles and not on domestic automobile sector was held, not justified under Article XX (g). Thus in every case which came before GATT panel regarding environmental issue, the restrictions or measures adopted were struck down as not justified under the exceptions to Article XX. This position has undergone some change since the formation of the WTO.

In the *Reformulated Gasoline case*[12] , the Appellate Body of the Dispute Settlement Body of WTO made an interesting departure from the earlier rulings under the GATT dispute settlement system. The issue in this case was the alleged discrimination by the US government in making certain import restrictions on imported Gasoline from foreign countries and in favour of domestic refineries. This action was sought to be justified under Article XX exceptions. The panel ruled that the US measure was neither necessary under Article XX (b) nor primarily aimed at the conservation of natural resources under Article XX (g) and therefore not saved by the exceptions to Article XX. On appeal to the Appellate Body (AB) by the US, the AB dismissed the appeal upholding the ruling passed by the panel, but gave a different reasoning to its ruling. It held that though the import restrictions were actually justified under Article XX (g), it fell foul of the introductory clause[13] of Article XX. The AB held that the import restriction constituted 'unjustifiable discrimination' and 'a disguised restriction on international trade' and therefore

10. US-Restrictions on Import of Tuna from EC, Panel Report, (1994), DS 29/R.
11. US-Taxes on Automobiles, Panel Report (1994).
12. US-Standards for Reformulated and Conventional Gasoline (WT/DS2/AB/R)
13. Introductory Clause of Art.XX reads…. "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade……"

failed to meet the requirements of the introductory clause of Article XX. The AB clearly pointed out that the introductory clause does not emphasise about the restrictive measures or its content or the manner in which it is applied. The AB report recognised that a measure in furtherance of a legitimate environmental policy could fall into the scope of the allowed exceptions, provided it met with the stipulated caveat prescribed in the introduction to Article XX.

In the famous *Shrimp- Turtle case*[14] , the dispute was about the ban imposed by the US on the import of shrimp and shrimp products against which India, Pakistan, Thailand and Malaysia brought a joint complaint. The facts of the case were that in 1987, the US acting pursuant to the US Endangered Species Act, 1973 issued a regulation requiring all US flag shrimp trawlers in the Gulf of Mexico and in the Atlantic Ocean off the south-eastern coast of the United States to use turtle excluder devices approved in accordance with standards set by US government agencies. The law provides for the prohibition of shrimp harvested with technology that did not meet US standards. Nine states adopted regulatory measures meeting US standards and were granted certificates permitting them rights for export. Imports of shrimp from vessels registered in other states were subject to embargo. Four states-India, Pakistan, Malaysia and Thailand- which did not comply with US regulations, brought a complaint before the WTO alleging violation by the US of Article XI[15] of the GATT. The US defended its restrictions on the basis that it was carrying out the objectives of the Act and regulations were consistent with both the MFN and National Treatment requirements of GATT and they were within the exceptions to Article XX (b) and (g). The complaining parties argued that the US Endangered Species Act prohibited only trade in sea turtles but did not authorise, let alone require, restraints on import of shrimp which were not an endangered species but were significant source of revenue for the complaining states. The WTO panel concluded that the US import ban on shrimp and shrimp products was not consistent with Article XI of the GATT, and not justified by any of the provisions of Article XX. On appeal, the Appellate Body too dismissed the US claim and held that the US had abused Article XX by unilaterally developing a trade policy instead of proceeding down the multilateral path. The AB concluded that "if every member were free to pursue its own trade policy solutions to what it perceives to

14. United States- Import Prohibition of Certain Shrimp and Shrimp Products- WT | DS58 | AB | R, DSR 1998: VII, 2755.

15. Article XI of GATT deals with elimination of Quantitative Restrictions by Member Countries.

be environmental concerns, the multilateral trading system would cease to exist". The proper way to look at environment compatible measures, the AB held, is to look first at the specific provisions of Article XX (a) to (j), if a challenged measure is found to fit under one of the exceptions, it must then be tested under the Introductory Clause i.e. whether the measure is applied in a manner that would constitute unjustifiable discrimination or a disguised restriction on international trade. The complaining parties argued that exhaustible natural resources referred to finite resources such as minerals and not to living creatures. The AB rejected that view, holding that modern biological science had shown that living species, though in principle capable of reproduction are in certain circumstances susceptible to depletion, exhaustion and even extinction, frequently because of human activities. Living resources are just as finite as petroleum, iron ore and other non-living resources.

In contrast to the panel, the AB in the Shrimp-Turtle case was careful to quote from the Rio Declaration on Environment and Development, from Agenda 21, from the Convention on Biological Diversity, as well as from the report of the Committee on Trade and Environment of the WTO. The AB, in short was anxious to dispel the perception that the WTO system was indifferent to the concerns of the environment. Although the AB concluded that the US measure was not justified under Article XX, it made it clear that under the WTO rules, countries have the right to take trade actions to protect the environment. The US lost the case not because it sought to protect the environment but because it discriminated between WTO members. From the above decision it is clear the AB of the WTO had sought to tone down the conflict between trade and environment. The AB seemed to be attempting to give clear signals that it was not an 'enemy of the environment'. However, the AB does not provide any guidelines as to how protection of species should be tackled by member countries of WTO. It simply declined to decide what are the measures which should be taken individually or bilaterally or multilaterally. The initial shrimp turtle panel report elicited severe criticism, "the panel's report shows that WTO dispute panels are incapable of settling trade disputes in a manner that supports sustainable development"[16]. But it must be highlighted that the Shrimp-Turtle AB report represents a significant change in the WTO's interpretation of the interaction between WTO trade rules and environmental measures. The AB

16. WWF's Response to The Final Report of the WTO Shrimp-Turtle Panel, May, 1998, pp. 5-6.

clearly departed from earlier GATT jurisprudence, particularly the reasoning in the tuna- dolphin cases, in recognizing the potential legitimacy of unilateral measures.

Paradigm Shift

In the *Asbestos case*[17], Canada challenged the European Union's import prohibition on asbestos and asbestos products as unnecessary trade restriction and violative of the 'National Treatment' requirement under Article III[18] as it allowed the use of domestically produced asbestos. EC defended the import prohibition under the 'public health' exception provided in Article XX (b) claiming that asbestos was a known carcinogen. Canada did not contest the toxicity of asbestos but claimed that chrysolite asbestos was safe under properly 'controlled use'. It saw the EU import ban more as an attempt to protect domestic asbestos manufacturers. The WTO panel, armed with the advice of the scientific experts, concluded that chrysolite asbestos products constituted a great risk to health. Further it also held that 'controlled use' was neither effective nor reasonably available as an alternative to the banning of chrysolite asbestos. The panel held that the import prohibition by the EU was justified under Article XX (b) but violative of Article III. On appeal, the AB, in a significant holding, held that health risk constitutes a legitimate factor in determining whether to ban or not the import of products which may cause health hazard. It further held, "the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well known and life threatening health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree"[19] . In holding so, the AB modified the decision of the panel by holding that EU's import ban is justified under Article XX and also not violative of Article III.

This decision is a paradigm shift from the earlier rulings and applies a new legal reasoning. Never before in the history of GATT dispute settlement system or in the WTO dispute settlement system, an otherwise GATT inconsistent measure been upheld under Article XX (b) or (g) exceptions.

17. EC-measures containing Asbestos and Asbestos- containing products, WT|DS 135|AB|R.
18. The General Agreement on Tariffs and Trade.
19. See supra note 18, Para 172.

In previous WTO cases, such as Gasoline[20] and Shrimp- Turtle[21], though the respective measures had been held to be provisionally justified under the Article XX (g) exception, they failed to qualify the final justification required by the introductory clause of Article XX. This resulted in the criticism that though Article XX exceptions were being more liberally interpreted, the strings were being tightened on the requirements of introductory clause of Article XX, in effect making it impossible for any environmental measure to be justified under this provision. The asbestos panel ruling, which was upheld by the AB as well, marked the first time that an otherwise GATT inconsistent measure was upheld for non-trade reasons under the human health exemption provided in Article XX. Thus recent WTO jurisprudence has activated both the clauses that constitute the 'environmental window' in the GATT.

Concluding Remarks.

Trade liberalisation and environmental protection share a common aim to enhance social welfare by improving the quality of life. The environmental issues in international trade have grown in prominence during the last two decades and no doubt they are dictating the dynamics of domestic and international trade policies. Nothing in the WTO agreements requires that free trade be accorded priority over environmental protection. Rather, the preamble to the WTO agreement acknowledges that expansion of production and trade must allow for the optimal use of world's resources in accordance with the objective of sustainable development. The countries should understand that they are no more insulated from environmental concerns. They are duty bound to this issue and for that international cooperation is required. For the benefit of the member countries the author enumerates the following suggestions:

(1) International trade and protection of the environment are both essential for the welfare of the mankind. In a majority of the matters, these two values do not come in conflict with each other. Rather they supplement each other. UN Conference on Trade and Development[22] states that "Environmental and trade policies should be mutually supportive. An open multilateral trading system makes it possible a more efficient allocation and use of resources and thereby contributes an increase in production and incomes and to the lessening on demands on the environment. It

20. See supra note 13.
21. See supra note 14.
22. Sec 2.19 of Agenda 21 of the Rio Declaration, 1992.

thus provides additional resources needed for economic growth and improved environmental protection. A sound environment, on the other hand, provides the ecological and other resources needed to sustain growth and underpins the continuing expansion of trade".

(2) It is clear that the environmental protection is beyond the scope of the WTO. Its function is confined to the successful implementations of the provisions of various agreements covered under the WTO. The WTO agreements apply to measures protecting the environment only where and in so far as they have an impact on international trade. But to say that WTO has been established only to facilitate international trade and not for the protection of the environment is anachronistic in this contemporary world. It is suggested that the time has come for the WTO to lay the foundation for reconciling both the actual as well as potential conflicts between trade and environment. The Committee on Trade and Environment (CTE)24 which is part of the WTO has to put forth the environmental agenda in future trade negotiations. They have to pre-empt and persuade the states to restrain from trade affecting the environment.

(3) The Dispute Settlement Understanding (DSU) may be suitably amended to include trade disputes with environmental concerns. The member countries can be permitted to file complaints before the DSB for violation of environmental agreements though not covered under the WTO. However, the caveat is that the dispute concerned should be in pith and substance with the WTO agreements.

(4) The new environmental issues especially in areas of food safety, subsides, intellectual property and services urgently require attention keeping in view the interests of the developing countries. These issues which are now not part of the ten point agenda of the Committee on Trade and Environment should be included so that future trade negotiations will take into consideration these environmental issues.

(5) There is an urgent need to evolve a thorough and transparent decision making process to be evolved within the institutional framework of the WTO.

(6) Article XX (b) and (g) of the GATT, 1994 shall be suitably amended to provide general exceptions for trade measures that are reasonably necessary for the protection of the domestic environment.

(7) Introductory Clause to Article XX of GATT may also be suitably amended to provide a safety valve for environmental agreements that employ trade restrictions.

(8) There should be a clear policy statement on the imposition and use of environmental taxes. In fact, as environmental regulations become more incentive-based, the scope for clashes with free trade goals is largely reduced.

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Harmonization of Intellectual Property Right Laws in the Outer Space Activities in India – A Critical Study

Dr. R. Srinivasan *

"Property" is a concept relating to the ownership of something physical. It is important in all domestic legal systems. In traditional communist law, the private ownership of private property is anathema. In other societies, ownership of private property was recognized. The "Property rights" means the rights derived there from and the duties attached thereto[1]. Similarly, it has long been considered essential for society to non-physical property. This non-physical property has been classified into two broad categories. They are industrial property and intellectual property. The Intellectual properties are again classified into two namely, "Industrial Property", which meant for functional commercial innovations and "Literary and Artistic Property", for cultural creations. Beyond these, current technological developments necessitate the formation of certain sui generis systems also. While the Patents, Industrial Design, Trademarks, Geographical indications and Trade Secrets fall under this category, on the other hand copyright falls in the second category. Other Intellectual Properties protections like Plant Breeder's Rights, Integrated Circuits Layout Design Protections etc. are grouped under sui generis systems. In recent years the three key elements: inventions, jurisdiction and territory establishing an association between intellectual property rights and its application in space technology. The advancement of space technology in the technical areas leads to the development of more intellectual creations.

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1. Frans G.von der Dunk, "Intellectual Property Rights as a Policy Tool for Earth Observation Data in Europe", space and Telecommunication Law Program, Faculty Publications, University of Nebraska – Lincoln, fvonderdunk2@unl.edu, published in Earth Observation Data Policy and Europe, edited by Ray Harris (Lisse: A.A.Balkema, 2002), pp.51-59, Copyright © 2002 Swet & Seilinger B.V. (Division of Taylor & Francis).

International Instruments on Intellectual Property

The space technology was largely developed during cold war, and outer space activities are, in fact, the outgrowth of intellectual creations[2]. In recent years the intellectual property protection establishing relationship with outer space activities has caught wider attention[3]. The domestic intellectual property right laws drew the attention of the international community at an early date, results in number of international instruments on intellectual property rights and the foundation of ***World Intellectual Property Rights Organization*** (WIPO). A number of treaties resulted after wide ratification and it is discussed as follows.

The Paris Convention for the Protection of Industrial Property (hereinafter referred to as "Paris Convention"), is the basic international treaty in the field of intellectual industrial property. But it does not expressly consider the question of inventions in outer space. However it contains provisions establishing the national treatment principle[4], the right of priority [5] and common rules, including certain measures for the enforcement of intellectual property rights, which all the member states must follow[6]. As regard patents, it granted in different member states for the same invention are independent of each other[7]. This means that, on the one hand, the granting of a patent for a given invention in one member state does not oblige other member states to grant a patent for the same invention. In other words a patent for a given invention cannot be refused, revoked or terminated in a member state on the grounds that a patent applied for in another member state for the same invention. Article 5 provides that there is no infringement of the rights of a patentee in the case of (i) the use on board vessels of other countries of the Paris Union of devices forming the subject of the patent in the body of the vessel, in the machinery, tackle, gear and

2. The historic launch of USSR of Sputnik I on October 4, 1957 signaled the beginning of the space race. The following years witnessed such seminal events as the placing of men in orbit and eventfully on the Moon, the landing of vehicles on various celestial bodies, the launch of telecommunication satellites and space stations, the placing of space stations into orbit, and the development of space.
3. WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTELLECTUAL PROPERTY AND SPACE ACTIVITIES: ISSUE PAPER PREPARED BY THE INTERNATIONAL BUREAU (April, 2004, para.25), available at http://www.wipo.int/patent-law/en/developments/pdf/ipspace.pdf, at 82 (the WIPO issue paper)
4. Article 2 of the Paris Convention for the Industrial Property.
5. Article 4 of the Paris Convention of the Industrial Property.
6. Intellectual Property and Space Activities, Issue paper prepared by the International Bureau of WIPO, April, 2004
7. Article 4b of the Paris Convention of the Industrial Property.

other accessories, when such vessels temporarily or accidentally enter the water of the said country, provided that such devices are used their exclusively for the needs of the vessel; (ii) the use of devices forming the subject of the patent in the construction or operation of aircraft or land vehicles, when those aircraft or land vehicles temporarily or accidentally enter the said country[8]. Article 6 provides a similar rule with respect to registered marks[9].

Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as the "Berne Convention") is the basic treaty in the field of copyright and related rights. Both the Paris Convention and Berne Convention does not expressly consider the question of intellectual property rights in outer space. However, it contains provisions establishing basic principles such as "national treatment", the "independence" of protection and the principle of automatic protection. According to Article 3(1) (a) and (2) of the Convention, the Convention applies to authors who are nationals of one of the countries of the Berne Union or who have habitual residence in one of those countries. Only in case of non-protected authors, the place of the first publication is of importance[10].

World Copyright Treaty (WCT) is another instrument that provides the protection of computer programs, whatever may be the mode or form of their expression and the compilation of data or other material (databases) in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations. Article 8 assures the authors right to enjoy the exclusive right of authorizing any communication to the public of their works, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chose by them. This Article is also applicable to transmission to and from a spacecraft.

The agreement on ***Trade-Related Aspects of Intellectual Property Rights*** (TRIPS) does not specifically address the question of outer space as such. In addition to the principle of national treatment in Article 3, Article 4 provides that, in principle, any advantage, favour, privilege or immunity granted by a member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other members (Most-Favored Nation Treatment). Further Article 27(1) provides that patents must be available and patents rights enjoyable without

8. Paris Convention of the Industrial Property
9. Ibid.
10. Article 3(1) (b) of the Berne Convention.

discrimination as to the place of invention. Therefore, national law has to ensure that, with respect to invention created in outer space, patents must be granted and enforceable in the territory in which it applies under the same conditions applicable to inventions created elsewhere.

International Instruments on Space Law

Apart from that, the international space law contain five international agreements and the intellectual property rights principles. They are Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (1967 Outer Space Treaty)[11]; Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects launched into Outer Space (1968 Rescue Agreement); Convention on International Liability for the Damage Caused by Space Objects (1972 Liability Conventions); Convention on Registration of Objects Launched into Outer Space (1975 Registration Convention); and Agreement Governing the Activities of States on the Moon and other Celestial Bodies (1979 Moon Agreement)[12]. However, the intellectual property rights are not directly mentioned in those instruments, but the general principles in those instruments are highlighted.

1. **Outer Space Treaty:** Article 1 of the treaty design the *"space benefits"* clause, according to which the exploration and use of outer space should be carried out *"for the benefit and interests of all countries, irrespective of their degree of economic or scientific development and shall be the province of mankind."* Further it also states that outer space should be *"free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law"* and that there should be *"free access to all areas of celestial bodies"*. Article II provides for *"non-appropriation of outer*

11. The Outer Space Treaty is the foundation of international space law and entered into force on October 10, 1967. Since that time, 100 States have become parties to it through signature and ratification or accession. As early as 1958, the United States voiced a commitment to peace in outer space. President Eisehhover, answering a letter from Soviet Premier Nikolai A. Bulganin, proposed that the Soviet Union and the US "agree that outer space should be used only for peaceful purposes." Established in 1958, the UN Committee on the Peaceful Uses of Outer Space has grown from 24 members at its founding to 70 members currently. It now constitutes one of the largest standing committers within the UN. At the Chicago Convention on International Civil Aviation, held in Nov and Dec of 1944, 52 nations agreed to create the International Civil Aviation Organization, the UN committee responsible for issues regarding air travel.

12. In addition, the 1963 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water (Partial Test Ban Treaty) banned the testing of nuclear weapons in outer space.

space by any country," according to which outer space is *"not subjected to national appropriation by claim of sovereignty by means of use or occupation, or by any other means*[13]*."* Article VIII of the treaty established the principle that the State of registration has jurisdiction and control over space objects as well as personnel launched into outer space. It explain that *"A State to the treaty on whose registry an object launched into outer space is carries shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth. Such objects or component parts found beyond the limits of the State party to the treaty on whose registry they are carried shall be returned to that State party, which shall, upon request, furnish identifying data prior to their return"*[14].

2. **Registration Convention** provides that the launching State shall register the space object by means of an entry in an appropriate registry which it should maintain.[15] The term *"launching State"* is defined in Article I(a) as *"a State which launches or procures the launching of a space object"* or *"a State from whose territory of facility a space object is launched."* The term *"Space object"* includes component parts of a space object as well as its launch vehicle and parts thereof. Suppose if two or more States launches a space object, they should jointly determine which one of them should register bearing in mind the provisions of Article VIII of the Outer Space Treaty, and without prejudice to appropriate agreements among the launching States on jurisdiction and control over the space object and over any personnel thereof. Further Article VIII of the Convention explained the possibilities of an international intergovernmental organization registering its space objects under certain conditions.

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13. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies. (1967 Outer Space Treaty)
14. Ibid.
15. The international Telecommunication Union was founded in 1865 making it the oldest organization that is now part of the United Nations. It works, in part, to manage the radio-frequency spectrum and geostationary satellite orbits. The UN Secretariat has maintained a registry of launches since 1962, in accordance with General Assembly resolution 1721 B (XVI).

3. **Declaration by the United Nations Committee on the Peaceful Uses of Outer Space** on International Cooperation in the Exploration and Use of the Outer Space for the Benefit and the Interests of All States, 1996 provides that "States are free to determine all aspects of their participation in international cooperation in the exploration and use of outer space on an equitable and mutually acceptable basis. Contractual terms in such cooperative ventures should be fair and reasonable and they should be in full compliance with the legitimate rights and interests of the parties concerned as, for example, with intellectual property rights."
4. **International Space Station Agreement, 1998,** governs the construction and use of the international space station. It governs the construction and use of the international space stations. It also contains provisions for criminal jurisdiction and provides protection for intellectual property.

Thus, the treaties and conventions permit the countries to extend their domestic laws, including their patent laws, to their outer space activities.

Commercialization

The increasing of the space activities and altering of state owned activities to private and profit oriented commercial activities including remote sensing from space, direct broadcasting & research and manufacturing in micro-gravity environments[16]. Hence it increases privatization and commercialization of agencies and it's conscious over the tangible and intangible property rights. Further, now Government agencies are collaborating with the private enterprises for enduring space activities due to financial and technical resources. More licensing contracts are concluded between governmental space agencies and private companies. Such private financing has to be motivated by the expectation that the Research and development investment could be recovered in the future. Thus, the intellectual property rights protection in outer space activities definitely bears a positive effect on the participation of the private sector in the development of outer space activities.

16. In July 1999, a Workshop on Intellectual Property Rights in Space was held in conjunction with the Third United Nations Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE III) recommended that "More attention should be paid to the protection of intellectual property rights, in view of the growth in the commercialization and privatization of space related activities. The recommendations made by the workshop were adopted by the plenary of the UNISPACE Conference.

The United Nations Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE III) in 1996 focused on the protection of intellectual property rights in the backdrop of commercialization and privatization of space related activities. It observed that "More attention should be paid to the protection of intellectual property rights, in view of the growth in the commercialization and privatization of space related activities. However, the protection and enforcement of intellectual property rights should be considered together with the international legal principles developed by the United Nations in the form of treaties and declarations, such as those relating to the principle of non-appropriation of outer space, as well as other relevant international conventions[17]."

Globalization

Further the globalization of space activities is another reason for growing importance of intellectual property rights protection in space. In case of International Space Station (ISS), more and more space activities are conducted under international cooperation schemes. Consequently, there is a need for a simple, uniform and reliable international legal framework for enhancing the coordination and cooperation at the level of both the State and private sector. Further the possible need for rules or principles covering issues such as applicability of national legislation in outer space, ownership and use of intellectual property rights developed in space activities and contract and licensing rules. Besides this all the States grant protection of intellectual property rights involving space related technology, while encouraging and facilitating the free flow of education and basic science information[18]. Moreover space tourism is still a distant dream for the general public. But, now the advent of new space transportation technology clearing the way for space tourism[19].

Up to now, when discussing intellectual property rights protection for space activities, the primary concerns are related to patent protection of inventions created or used in outer space, or copyright protection of databases using data acquired through space activities. If the space tourism becomes reality, the protection

17. Ibid.
18. Ibid.
19. A company, which has brought two space tourists to space, is scouting location for a spaceport to send travelers on suborbital flights. (Posted on March 16, 2004 at: http://www.cnn.com/2024/TRAVEL/03/16/Space.tourism.reut/index.html

of trademarks and industrial design in outer space may also become an important issue. Therefore, the importance of having a legal regime that protects IPR in space activities has been emphasized. The absence of such regime decreases the efficient international cooperation among states and other entities engaged in space research. IPR protection intends to stimulate the creativity of the human mind for the benefit of the public in such a way that the creator and the investor will be encouraged to be more active in space research and exploration.

To this ending the harmonization of the domestic intellectual property law in outer space activities is focused. The domestic laws generally apply only to the territory of the relevant country. Thus, the enforcement of intellectual property in a particular country is governed by the domestic intellectual property law of the country[20]. Though *World Intellectual Property Organization* (WIPO) treaties and *Trade related aspect of intellectual property rights* (TRIPS) have achieved certain level of incorporation of international convention into intellectual property laws but still there is a considerable gap among the domestic and international law, which lead to a different level of protection in the territory of each country[21].

For instance in USA US Space Laws, Land Remote Sensing Policy Act, of 1992; Commercial Space Act, 1998 were enacted to give effect to the international agreement. Under Section 105 of 35 U.S.C. reads as follows,

(a) *"Any invention made, used or sold in outer space on a space object or component thereof under the jurisdiction or control of the United States shall be considered to be made, used or sold within the United States for the purposes of this title , except with respect to any space object or component thereof that is specifically identified and otherwise provided for by an international agreement to which the United States is a party, or ... carried on the registry of a foreign state in accordance with the Convention of Registration of Objects Launched into Outer Space[22] ".*

20 . For more in-depth discussions on the application of national patent laws to outer space activities, See Francis Lylall and Paul B. Larsen, SPACE LAW: A TREATISE (Ashgate Publishing Company, 2009), 124-27; Kurt G. Hammerle and Theodore U.Ro, The Extra-Territorial Reach of U.S. Patent Law on Space-Related Activities: Does the "International Shoe" Fit As We Reach For the The Stars?, 34 J.SPACE, 241-75 (2008).

21. For example, according to Article 27(1) of the TRIPS Agreement, Patent should be available and patents rights enjoyable without discrimination as to the place of invention. Therefore, the same principles should apply to inventions created in outer space and used in the territory of a given country. That is, in order to enforce a patent for an invention created in outer space in a territory of a certain country, an application for a patent shall be filed and a patent shall be granted, in, or with effect for, that country in accordance with the applicable law of that country.

22. The USA is the only country that has enacted an explicit provision establishing a link between the three key elements: inventions, jurisdiction and territory.

(b) *"Any invention made, used or sold in outer space on a space object or component thereof that is carried out on the registry of a foreign state in accordance with the Convention on Registration of objects launched into Outer Space, shall be considered to be made, used or sold within the United States for the purposes of this title if specifically so agreed in an international agreement between the United States and the state of registry."*

Therefore, the amended patent laws extending its territorial jurisdiction to space object. Relevant provisions for the applicability of domestic laws to Space Activities exist only in US law today, found within the US Space Bill and the NASA Act. The US Space Bill extends the applicability of US patent law into Outer Space. The NASA Act includes a provision to consider a "space object" as a vehicle. Similarly, in 2007, State of Virginia (USA) passed the Spaceflight Liability and Immunity Act, making it the first state in the US to make space law[23]. Recently, US enacted in the name of Title 51 of the US Code: National and Commercial Space Programs. It is the positive law codification of all US national space law promulgated since 1958[24].

Likewise, the Commission of the European Communities issued a proposal for the Council Regulation on the Community Patent, states a proviso in their Community Patent system, which is as follows: Article 3(2) "apply to inventions created or used in outer space, including on celestial bodies or on spacecraft, which are under the jurisdiction and control of one or more Member states in accordance with international law"[25]. Some revisions in the French Patent Law are also contemplated to accommodate the outer space inventions.[26] Japan's first national space law, the Basic Space law, became effective on August 27, 2008 which contains the provisions for the protection of intellectual property rights[27]

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23. The UN Secretariat has maintained a registry of launches since 1962, in accordance with General Assembly resolution 1721 B (XVI). On Dec.20, 2010, Pres.Obama signed H.R. 3237 into P.L. 111-314 which enacted the newest Title to the US code: Title 51, National and Commercial Space Programs.
24. Rob Sukoi, "Positive Law Codification of Space Programs: The Enactment of Title 51, United States Code," Journal of Space Law, Volume 37, Spring 2011, number 1.
25. European Commission Document COM (2000) 412.
26. Anna Maria Balsano, "Industrial Property Rights in Outer Space in the International Governmental Agreement (IGA) on the Space Station and the European Partner", 35th Colloquium on the Law of Outer Space, Washington D.C., August 28 to September 5, 1992;
27. WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTELLECTUAL PROPERTY AND SPACE ACTIVITIES: ISSUE PAPER PREPARED BY THE INTERNATIONAL BUREAU (April, 2004, para.25), available at http://www.wipo.int/patent-law/en/developments/pdf/ipspace.pdf, at 82 (the WIPO issue paper).

Further the harmonization of international intellectual property rights in the domestic law is deliberated in the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS), a legal subcommittee of the UN, which is the primary international forum for the development of laws and principles governing outer space.[28] Finally it proposed to give due respects to international obligations. In its proposal it states that the total system of patent administration could be managed under the auspices of WIPO through its Patent Co-operation Treaty (PCT) with a new country code as "Space Patent". It further articulated that a dispute settlement mechanism also could be set up under WIPO, in the form of a board that is empowered to arbitrate on patent related disputes in the area of space[29]. WIPO suggests a broad debate on the long term prospects of space activities, so as to avoid any legal complexities and to strengthen the co-operative space efforts. It asserts that this effort would result in progressive development of a less ambiguous and better co-ordinated international intellectual property framework, which would further promote collective utilization of public and private resources in the area of space technology for the benefit of all nations.

Space laws in India

India, like many others countries, has not enacted any space legislation. Therefore, the absence of domestic space legislation as a major lacuna in the Indian Legal System when compared to other developed and developing countries. Suggest the need for drafting of a comprehensive and futuristic domestic enactment on outer space activities. India is a party to all international space treaties, which form the main body of international space law. India has also played a significant role to adopt five sets of legal principles by the U.N General Assembly Resolutions, which provide for the application of international law and promotion of international

28. The UN Office for Outer Space is the Secretariat for the UNCOPUS prepares legal studies and background documents of various aspects of space law to assist member States in their deliberations. In accordance with the Action Plain endorsed by the General Assembly in its resolution 55/122, the office provides information and advice, upon requests, to governments, non-governmental organizations and the general public on space law in order to promote understanding, acceptance and implementation of the international space law agreements concluded under the UN auspices.

29. In this context, the recommendations of the World Commission on the Ethics of Scientific Knowledge and Technology (COMEST), an advisory body of UNESCO, also looked into the issues relating to the ethical dimensions of outer space activities, were adopted at its second session held from December 17 to 19, 2001. It argued that every space policy must be based on the concept of mutual and reciprocal benefits while safeguarding fair competitions and the principle of return on investment. It recognizes that the importance of ethics in the choice of a specific project and its long term assessment from the view point of human security and economic criteria.

cooperation and understanding in space activities[30]. It is also an obligation of Parliament to give effects to the various rules contained in these norms through the medium of appropriate legislation in the domestic field as under Article 253 of the Constitution[31].

All the areas which directly or indirectly related with space activities under the Indian Constitution fall within the domain of the Union by virtue of a series of entries in List I of the seventh schedule to the Constitution of India[32]. Thus it is for the Parliament of India to take the starting step in the direction of enacting a law for India for the purpose of the effective regulation of various aspects of India's space policy[33]. Because of recent national and global developments, active involvement of the private sector and commercialization of space activities need space law in India.

The second most important reason for the need of space law in India is, the Indian space activities have become vastly diversified and have come to stay, having successfully demonstrated their implicational capabilities, there is a need to redefine and formalize the existing set up of institutional mechanism, and to facilitate inter-departmental coordination, making it a legal norm.

Thirdly, there is a need to clarify applicable legal norms and rules relating to both public laws and private law aspects of space activities, as demonstrated by the experience of the other western countries. The public laws deals with competence of authorities in the space field, legal status of space objects, control of space activities, control over space industries, dispute settlement and jurisdiction of courts and security aspects of space activities and installation. On the other hand, Private Laws include fair trade practices, company law, insurance and indemnity, securities, contracts and specific performances, torts, personal property, patents, copyrights and other intellectual property rights etc.

30. WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTELLECTUAL PROPERTY AND SPACE ACTIVITIES: ISSUE PAPER PREPARED BY THE INTERNATIONAL BUREAU (April, 2004, para.25), available at http://www.wipo.int/patent-law/en/developments/pdf/ipspace.pdf, at 82 (the WIPO issue paper)
31. Article 253 of the Constitution of India states that "Notwithstanding anything in the forgoing provisions of this Chapter, parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body
32. Seventh Schedule of the Indian Constitution states under Entry 49 of List I confess that Patents, inventions and designs; copyright; trademarks and merchandise marks, Entry 13 says that Participation in international conferences, associations and other bodies and implementing of decisions made thereat and Entry 14 states that entering into treaties and agreements with foreign countries and implementing of treaties, agreements, and conventions with foreign countries.
33. Article 51 (c) of the Constitution of India provides that "the State shall endeavour to foster respect for international law and treaty obligations in the dealing of organized peoples with one another and in (d) provides for encourage settlement of international disputes by arbitration."

Fourthly commercialization of the space activities is in the process of establishing a vast space activities and vast space market where India plans to and has already begun to sell, its space products. Thus the question of private participation in space activities both in India and in international ventures, transfer of technology and products marketing may need to clarify. So, it is the need of the hour that India should enact a legislation keeping in view of the dramatic changes that are taking place in the domestic as well as international spheres.

Mario Apalisok Magdoza, in his work ***International Law of Outer Space and the Protection of Intellectual Property Rights***, mentioned that *"Given the rapid expansion of operations in outer space, much international effort, both multilateral and bilateral, has been made for the guidance and regulation of activities in outer space. During the initial states of space explorations, the UN played a dominant role in the regulation of these activities. However, these efforts are not longer adequate to deal with present issues relation to the uses of outer space, largely for the failure to keep abreast with the rapid technological advances."* [34] Therefore, India needs to enact a national Space Legislation after critically and objectively address all legal and commercial issues related to domestic and international space activities. It will also deal with associated regulatory risks in grant of authorizations, licenses, permits and approvals for communication satellite operations are required to be minimized by the guidelines and procedures. A well-defined space law shall enable better capitalization and optimization of existing infrastructure and resources by promoting orderly and organized growth of space business by providing recognition and legitimacy to on-going space programs; providing opportunity to potential space operators at the domestic and international level; promoting development of indigenous technology matching international standards; providing mechanism for enforcement and prevention of misuse of space activities and providing stringent punishment for violators of space law.

India needs to critically and objectively study the provisions contained in the space laws of other countries including US Space Laws, Commercial Space Act, 1998; Land Remote Sensing Policy Act, of 1992, inter-governmental agreements in the European

34. Mario Apalisok Magdoza-Malagar, "International Law of Outer Space and the Protection of Intellectual Property Rights," Boston University International Law Journal, Vol.17, No.311, 1999.

Countries[35] and inventions in outer space etc. to frame and adopt its own space laws and include following provisions for peaceful use of outer space for the benefit of all mankind worldwide and aimed at welfare and security of India and also provide for aeronautical and space activities to be controlled by a civilian agency except those associated for development of weapons systems, military operations, or the defence of India, promote commercial use of space, promote development and operation of vehicles capable of carrying instruments, equipment, supplies, and living organisms through space, provide for licensing norms for space entrepreneurs associated with various commercial activities and applications, protect property rights in inventions and stipulate provisions on environment safety, provide for promotion and management of autonomous educational institutions of international standards for nurturing space professionals, provide for liability provisions and include insurance and indemnification matters, provide for international co-operation in promoting public safety and space business and provide for co-operation with defence machinery.

Therefore the proposed legislation should provide for Creation of National Space Agency, Licensing and Certification of space activities, Economic conditions of space activities, a provision on space infrastructure, space safety and space liability, space insurance, international cooperation and protection of intellectual property rights in outer space. This draft should be a convergence of divergent regulations in order to bring a comprehensive and harmonious space legislation that would be beneficial for our Nation.

Conclusion

Space, the "Common Heritage of Mankind", promises ample opportunities for many joint venture programmes involving multi state partners and private entrepreneurs for various innovative applications towards the cause of human kind. The intellectual property rights acquires certain special dimensions in the outer space particularly inventions made therein. The conflicts between Intellectual Property Laws and Space Law regime could be resolved

35. Inter-government Agreement (IGA) leads to specific agreement on jurisdiction and control over the elements of an international space station between US, European Space Agency, Japan and Canada. Although these agreements are upgraded in 1988 by the Agreement Concerning Cooperation on Civil International Space Station, concluded in 1998, which included the participation of the Russian Federation to the cooperation project. Article 21 of these agreements contains a provision establishing an intellectual property regime for the international space station.

through a harmonized system which could be developed by the international IPR and Space Law community under the auspices of UN Bodies like UNCOPUOS and WIPO. Such a harmonized system of IPR regime for the outer space should fully comply with the basic principles of international space law and such other international obligations. Further it is strongly recommended that the harmonized system takes into account the interests of developing countries as well and promotes moral and ethical usage of the Outer Space for the benefit of the entire humanity.

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Maternal Mortality – Denial of Women's Right to Life

Dr. R. Haritha Devi *

Maternal mortality or maternal death is one of the world's most neglected problems, and a progress on reducing the maternal mortality ratio has been far too slow. Maternal death is defined as: "The death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and state of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes. [1]

The issue was prominent in the Millennium Development Goal 5, to improve maternal health, with one of its boldest targets the reduction of maternal mortality ratio by three quarters between 1990 and 2015.[2] The health and well being of mothers and their newborns are true indicators of the efficacy of the healthcare system in a country. It is paradoxical that India is one of the fastest-growing economies in the world, yet the cost of maternal mortality to the nation's economic development has not been recognized or tackled. At the country level, the two countries that accounted for one third of all global maternal deaths in 2013 are India at 17 per cent with 50,000 maternal deaths and Nigeria at 14 per cent with 40,000 deaths. India was among the 10 countries that comprised 58 per cent of the global maternal deaths reported in 2013.[3]

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1. http://www.who.int/healthinfo/statistics/indmaternalmortality/en/ as on 2.05.2014
2. Target 5.A. Reduce by three quarters, between 1990 and 2015, the maternal mortality ratio. Details available at www.who.int/topics/millennium- development-goals/ maternal-health/en/index.html.
3. http://timesofindia.indiatimes.com/india/Decline-in-maternal-mortality-rates-in-India-since-1990 UN/articleshow/34771739.cms

Maternal Mortality: Legal Developments

During the past few years, human rights bodies at the international and regional levels have begun to recognize that preventable maternal mortality and morbidity is a human rights violation and that states should be held accountable for the failure to prevent these deaths and disabilities. In June 2009, the United Nations Human Rights Council (UNHRC) adopted a landmark resolution, Preventable Maternal Mortality and Morbidity and Human Rights (Resolution 11/8), marking the first time that this U.N body has officially recognized maternal mortality as a human rights concern.[4] Through the UNHRC resolution, governments have, acknowledged that unacceptably high rates of maternal mortality and morbidity is a human rights issue, and have committed to enhancing their efforts at the national and international levels to protect the lives of women and girls worldwide. They have officially recognized that the elimination of maternal mortality and morbidity requires the effective promotion and protection of women's and girls' human rights, including their rights, to life; to be equal in dignity; to education; to be free to seek, receive, and impart information; to enjoy the benefits of scientific progress; to freedom from discrimination; and to enjoy the highest attainable standard of physical and mental health, including sexual and reproductive health.

The resolution also commissioned a study by the Office of the High Commissioner for Human Rights (OHCHR) that examines the International Human Rights framework and standards on maternal mortality and morbidity and how the UNHRC can add value to existing initiatives through a human rights analysis. The study by OHCHR states unequivocally that maternal mortality and morbidity are matters of human rights and that a human rights-based approach is essential to addressing these serious global problems[5]. The study notes that preventable maternal mortality and morbidity reflect stark inequalities and multiple forms of discrimination and violence faced by women and girls throughout their lifetime.

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4. United Nations (U.N), Human Rights Council, Resolution 11/8, Preventable Maternal Mortality and Morbidity and Human Rights, U.N Doc. A/HRC/11/L.16/REV.1 (Jun. 17, 2009), available at http://ap.ohchr.org/documents/E/HRC/ resolutions/A_HRC_RES_11_8.pdf [hereinafter U.N, Human Rights Council, MM Resolution (2009)].

5. United Nations, Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on Preventable Maternal Mortality and Morbidity and Human Rights, para. 59, U.N Doc. A/HRC/14/39 (Apr. 16, 2010), available at http://www2.ohchr.org/english/bodies/hrcouncil/ docs/14session/A.HRC.14.39_AEV-2.pdf.

It emphasizes that sustainable progress can only be made by guaranteeing the full range of women's human rights, including sexual and reproductive rights. The report explicitly states that International Human Rights obligations require states to "take legislative, administrative, and judicial action, including through the commitment of maximum available resources to prevent maternal mortality and morbidity." Such actions include implementing effective programming, strategies, and policies that integrate these seven key human rights principles: accountability, participation, transparency, empowerment, sustainability, non discrimination, and international assistance and cooperation. The report notes that regular monitoring of the health system and of the underlying physical and socioeconomic determinants that affect women's health and ability to exercise their rights is essential to correct systemic failures in reducing maternal mortality and morbidity and ensure that vulnerable communities are benefiting from healthcare schemes. In addition, the report emphasizes that "effective access to remedies and reparation contributes to a constructive accountability framework by focusing on system failures and encouraging repair" to prevent and redress maternal deaths and disabilities. In December 2010, the U.N established the Commission on Information and Accountability for Women and Children's Health, which was charged with developing a framework for global reporting, oversight, and accountability regarding women and children's health. The Commission held its first meeting in January 2011, and released its final report in May 2011.

The Commission's report keeping promises, measuring results, sets out ten recommendations for practical actions towards greater accountability[6]. The recommendations proposed by the Commission focus on the establishment of a robust health information system to track birth and death registration; use of indicators to monitor reproductive and maternal health which take into account measures of gender equity; and putting in place an effective national accountability mechanism to review data and track progress.

Apart from the UN Resolution several regional instruments have expressed their concern about maternal mortality and morbidity. In June 2010, the Inter-American Commission on Human

6. United Nations, Commission on information and accountability for Women's and Children's Health, Keeping Promises, Measuring Results (May 2011), available at http://www.who.int/topics/millennium_ development_goals/accountability_commission/Commission_Report_advance_copy.pdf.

Rights published Access to Maternal Health Services from a Human Rights Perspective, a report analyzing the connection between states' human right obligations and maternal health [7]. The report describes states' obligation to guarantee that women, especially those who have historically been marginalized, have equal access to health services related to pregnancy and childbirth as well as other reproductive health services.

The European Parliament passed a similar resolution in 2008 recognizing preventable maternal deaths as a violation of women's rights to life, to the highest attainable standard of physical and mental health, and to nondiscrimination in access to basic healthcare [8]. The resolution called upon the European Union to intensify efforts to eliminate preventable maternal mortality and morbidity through development, implementation, and regular evaluation of road maps and action plans for the reduction of the global burden of maternal mortality and morbidity.

That same year, the African Commission on Human and Peoples' Rights adopted a resolution recognizing that maternal mortality is a human rights issue and calling upon states to integrate a human rights-based approach when formulating country programs and strategies to reduce maternal mortality in Africa [9]. The resolution called for the participation of women and civil society in the formulation, implementation, monitoring, and evaluation of policies and frameworks aimed at addressing maternal mortality.

So the steps taken by the international community and regional instruments maternal mortality has been brought to the forefront with a human rights perspective. This is a positive development in preventing maternal mortality and morbidity which forms part of the reproductive health of women.. As governments worldwide acknowledged in Resolution 11/8, maternal mortality is not solely a result of a lack of equitable access to quality maternal healthcare, but a consequence of gender discrimination that must be addressed.

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7. Inter-American Commission on Human Rights (IACHR), Access to Maternal Health Services from a Human Rights Perspective, OEA/Ser.L/V/II. Doc. 69 (Jun. 7, 2010), available at http://cidh.org/women/SaludMaterna10Eng/MaternalHealth2010.pdf.
8. European Parliament, Resolution on maternal mortality ahead of the UN High-level Event, 25 September – Review of the Millennium Development Goals (2008), available at http://www.europarl.europa.
9. African Commission on Human and Peoples' Rights, ACHPR/ Res. 135 (XXIIII), Resolution on Maternal Mortality in Africa (2008), available at http://www.achpr.org/ english/ resolutions/resolution135_en.htm

Maternal Mortality; Indian Scenario

The National Rural Health Mission (NRHM) is the Government of India's flagship program, designed to deliver healthcare to vulnerable populations in 18 states with a strong focus on women living below the poverty line (BPL). It establishes a key target of reducing maternal mortality to fewer than 100 per 100,000 live births by 2012. Evaluations undertaken by civil society organizations, government agencies, and the United Nations Population Fund (UNFPA) indicate that despite the launch of the NRHM and the implementation of the Janani Suraksha Yojana (JSY), women throughout the country, particularly marginalized women, still lack equitable, affordable, and quality maternal healthcare. So it is not just policies and programmes that would improve the reproductive health of women.

It is to be seen whether women under these programmes have sufficient choice to access these services and whether these programmes are designed in such The National Health Policy 1982 aimed at reducing the maternal mortality in India from the over 400 per 100,000 live births by the end of year 2000. But even in 2005, this target is far from reality. According to the United Nations Interagency Maternal Mortality Estimates for 1990–2008, released in September 2010, the absolute number of maternal deaths in India has fallen from 117,000 to 63,000[10] . This data is supported by a study published in The Lancet in April 2010, which shows that India's maternal mortality ratio (MMR) declined from 677 maternal deaths for every 100,000 live births in 1980 to 254 in 2008 [11].

There has been some controversy as to the accuracy of the MMR claims, with experts from the Indian Institute of Population Sciences carrying out simultaneous assessments and arriving at estimates for MMR in the range of 325 to 350.[12] Despite this apparent progress, however, India is not on track to meet either its national or international targets. The impact of children is enormous. Evidence

10. In 2005, the United Nations (U.N) estimated that India had the largest number of maternal deaths in the world. U.N, Trends in Maternal Mortality in 2005: Estimates developed by WHO, UNICEF, UNFPA, and The World Bank 15 (2007), available at http://www.unicef.org/vietnam/ Maternal_Mortality_2005_24_9b.pdf. In 2008, the U.N estimated that though India still has the largest number of maternal deaths in the world, the overall number has droppedto63,000. U.N, Trends in Maternal Mortality: 1990-2008: Estimates developed by WHO, UNICEF, UNFPA, and The World Bank 17, 24 (2010), available at http://whqlibdoc.who.int/publications/2010/9789241500265_eng.pdf
11. Margaret C Hogan et al., Maternal Mortality for 181 countries, 1980–2008: A systematic analysis of progress toward millennium development Goal 5, 375 The Lancet 1609, 1614 (2010).
12. Aditi Tandon, Govt claim on maternal deaths 'deflated' Experts project 350 deaths per lakh live births against govt claims of 254, Tribune News Service, Apr. 13, 2010 (citing Dr. S. Ram, Director, Indian Institute of Population Sciences, Mumbai), available at http://www.tribuneindia. com/2010/20100414/nation.htm#7.

shows that infants whose mothers die within first six weeks of their lives are more likely to die before reaching age two than infants whose mothers survive.

Maternal mortality – Denial of right to life

The Government of India has introduced several maternal health schemes, but the continued lack of implementation of these policies and schemes combined with corruption within the health system and public distribution systems have prevented women from receiving these crucial benefits and services and contributed to the high incidence of preventable maternal deaths. Preventable maternal mortality occurs where there is a failure to give effect to the rights of women to health, equality and non-discrimination. Preventable maternal mortality also often represents a violation of a woman's right to life guaranteed under Article 21. Behind maternal mortality is a failure to guarantee women's right to life. But until recently the courts in India have failed take into consider that when a woman dies during delivery due to lack of care it is the failure of the state to protect her right to life as guaranteed under the Indian Constitution. But this trend is changing only recently.

The Human Rights Law Network has filed a law suit [13] seeking accountability of the state for maternal mortality. The facts of the case is that on January 28, 2010, Shanti Devi, a migrant woman belonging to a scheduled caste, gave birth prematurely at home without a skilled birth attendant and died. A maternal death audit conducted after the case found that Shanti Devi had tuberculosis, was severely anaemic, and died of postpartum hemorrhage. Shanti Devi's legal case began in 2008, when Human Rights Law Network filed a lawsuit on her behalf seeking compensation for payment demanded for emergency medical care that should have been free under the NRHM and the JSY.

In Shanti Devi's case, the Court found that her death was "clearly avoidable" and ordered the following compensation for Shanti Devi's death: INR 240,000 (USD 5,088) from the State of Haryana to her family for "the avoidable death of Shanti Devi", Consideration of Shanti Devi's death as the death of a primary breadwinner under the NFBS, entitling Shanti Devi's family to INR 10,000 (USD 212) for her death, Payment to Shanti Devi's husband the benefits she should have received, including INR 500 as required under the NMBS and INR 500 as required under the Balika Samridhi

13. Consolidated Decision, Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others, W.P. (C) No. 8853/2008 & Jaitun v. Maternal Home MCD, Jangpura & Others, W.P. (C) Nos. 8853 of 2008 & 10700 of 2009 (Delhi High Court, 2010).

Yojana as a post-birth grant to mothers of female babies and INR 1,000 (USD 21.20) to Shanti Devi's husband to compensate for the costs improperly charged by the Deen Dayal Hospital during her fifth pregnancy as treatment should be free for anyone with BPL status.

Another case which deserves mention is that of Fatema was ultimately forced to give birth in full public view under a tree. Her birth was entirely unattended, and Fatema never received outreach services from government health workers as guaranteed under India's healthcare schemes. Fatema suffered serious health complications as a result of anemia, but also never received her food rations under the ICDS and the AAY and was never visited by an Anganwadi worker, a government trained worker trained to deliver basic child- and maternal-health and education services, or a ANM.

The Court while dealing with these petitions speaking through Hon'ble Justice S. Muralidhar held that, "*These petitions are essentially about the protection and enforcement of the basic, fundamental and human right to life under Article 21 of the Constitution. These petitions focus on two inalienable survival rights that form part of the right to life: the right to health (which would include the right to access and receive a minimum standard of treatment and care in public health facilities) and in particular the reproductive rights of the mother.*"[14]

This decision clearly articulates the right to be protected from maternal mortality as an unequivocal, legally enforceable right, and establishes that where women are deprived of this right, compensation must be provided. The decision held that, "no woman, more so a pregnant woman should be denied facility or treatment at any stage irrespective of her social and economic background.… This is where the inalienable right to health which is so inherent in the right to life gets enforced."[15] This is probably one of the first decisions where the judiciary has used the reproductive rights framework into its decisions dealing with Article 21.

The Court also ordered the Government of India to take specific steps to ensure accessibility of maternal health services and benefits to pregnant women living below the poverty line, including by clarifying that participation in one benefit scheme does not exclude eligibility for other schemes. The decision clearly establishes that the benefits guaranteed under maternal health schemes such as the

14. Consolidated Decision, Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others, W.P. (C) No. 8853/2008 & Jaitun v. Maternal Home MCD, Jangpura & Others, W.P. (C) Nos. 8853 of 2008 & 10700 of 2009 (Delhi High Court, 2010).

15. Id. at 43- 46.

JSY and the NMBS are legal entitlements protected by the Indian Constitution and human rights law, and that denial of these benefits constitutes a justiciable violation of legal rights. Further, citing a past Supreme Court order in PUCL,[16] the Delhi High Court emphasized that the nutritional benefit under the NMBS and the childbirth cash incentive under the JSY are independent, and women are entitled to both benefits simultaneously without discrimination based on their age or number of children.

As a result of Shanti Devi's avoidable death and the humiliation experienced by Fatema, the Court has ordered the State Government of Haryana and the Government of the National Capital Territory of Delhi (the Delhi Government) to provide compensation for the pain and suffering experienced by the women and their families and to make retroactive payments of the benefits that were denied. The Court also emphasized that under the NFBS, the death of a family's breadwinner entitles the family to INR 10,000 (USD 212) in compensation, and it established that pregnant women who are homemakers should be recognized as breadwinners of their household, meaning that in maternal death cases the families should be provided reparation under the NFBS. Finally, the Court stated that a woman who qualifies for healthcare benefits must be able to avail herself of care even when crossing state lines, and that the onus is on the government to ensure that the benefits promised by the state reach women. Apart from the right to maternal health services the court has recognised the services of women as homemakers and granted compensation which is an important step towards protecting the reproductive health of women at home. This judgment would go a long way in implementing the health schemes available to women under various laws.

The Courts have interpreted the basic right to life provision bringing in a clear link between basic right to food and shelter as part of reproductive health and thereby expanding the scope of reproductive health. In November 2010, HRLN filed a petition in the Delhi High Court on behalf of five pregnant and lactating women living below the poverty line in the Nangloi slums in Delhi.[17] They had been denied their constitutional rights to food since August 2009 and their reproductive and child health benefits during and/or after their pregnancies, and they are currently suffering

16. People's Union for Civil Liberties (PUCL) v. Union of India & Others, W.P. (C) 196 of 2001.

17. Premlata w/o Ram Sagar & Others v. Govt. of NCT Delhi, W.P. (C) 7687/2010 & CM No. 19980/2010 (High Court of Delhi, 2010)

from malnutrition and anaemia. HRLN's petition highlights the critical links among food security, nutrition, and reproductive health, particularly maternal health, and seeks accountability for the mismanagement of Fair Price Shops (FPS) in Delhi. After the initial hearing in October 2010, Justice Muralidhar, also the judge in the Laxmi Mandal/ Jaitun case, ordered the state government to organize a camp in which people who had been denied benefits could have the cards necessary to procure rations reauthorized quickly.

He also ordered the government to undertake an intensive survey of the FPS in the region. These interim orders establish that pregnant and lactating women, among others, have a right to food and as with the decision in the Laxmi Mandal/Jaitun case, emphasize that the onus is on the government to ensure that women can access the necessary ration cards and food supplies. The same has got a mention in the Prime Minister's proposed draft food security bill by the National Advisory Council as follows, "*A large majority of Indian women across all ages suffer from under nutrition and are especially vulnerable during pregnancy and while nursing their infants. Maternity benefits are therefore essential in order to compensate for income loss in pregnancy and maternity, provide financial support for adequate nutrition during this period, ensure women get adequate rest, and enhance their food intake.*[18]"

Just months after its historic ruling in the Laxmi Mandal and Jaitun consolidated case, the Delhi High Court initiated a suo moto legal proceeding[19] affirming the government's obligation to protect the fundamental right to life of pregnant women. This case arose on the basis of a report published on August 29, 2010, in the Hindustan Times concerning a destitute woman, Laxmi, who died in the middle of a bustling market in Delhi four days after giving birth. The chief justice issued an interim order in October 2010 to the Delhi Government to establish five shelters exclusively for destitute pregnant and lactating women. The government was ordered to provide adequate medical assistance, food, and professionally trained personnel in these shelters. The Court further ordered the creation of outreach mechanisms, including mobile medical units, hotlines, and awareness camps and campaigns.

18. National Advisory Council (NAC), New Delhi, Draft National Food Security Bill, Explanatory Note, Feb. 21, 2011, para. 1, available at http://nac.nic.in/foodsecurity/explanatory_ note.pdf
19. Court of its own Motion v. U.O.I., W.P. (C) 5913/2010, available at http://delhihighcourt.nic.in/a15122010.pdf.

"We just cannot become the silent spectators waiting for the Government to move like a tortoise and allow the destitute pregnant women and lactating women to die on the streets of Delhi.… Such a situation cannot be countenanced … in the backdrop of Article 21 of the Constitution."[20] These were the words of Hon'ble Chief Justice B.C. Patel and Hon'ble Justice Sanjeev Khanna in the above case which has brought in a new dimension to reproductive rights of women. The right to food and shelter which is considered to be the very basic s of life has also been included within the framework of reproductive rights by this case.

New cases are being filed in India in various High Courts highlighting the need for a more nuanced understanding of the right to maternal health. These cases aim to ensure that maternal health services reach women who are at particularly high risk for pregnancy-related complications[21], including HIV-positive women[22] and women living in areas with a high prevalence of malaria.[23] They also expose the systematic discrimination experienced by certain groups of pregnant women on the basis of their health status. Thus a new dimension and a broader framework have been provided by the Indian judiciary to prevent maternal mortality.

A high incidence of maternal mortality indicates a breach of international legal obligations to protect women's most important human rights: their rights to life, health, reproductive autonomy and equality and nondiscrimination. As the nation leading the world with respect to the number of maternal deaths, the Indian government has an immediate obligation to take meaningful steps to dramatically reduce maternal mortality by fully implementing national policies on maternal health and holding those responsible for the failure of its policies accountable.

Maternal mortality and morbidity can be averted and tackled if the real problems are indentified and appropriate strategies are adopted. A holistic approach is needed to tackle all the stages of pregnancy. Maternal health should not be viewed as only women's problem but it should be viewed as a violation of a woman's basic

20. Ibid.

21. Snehalata 'Salenta' Singh v. State of U.P. & Others, 2008, W.P. (C) No. 14577/2009 (U.P. High Court, Allahabad, 2009)

22. Mr. X v. Union of India & Other, W.P. No. __(W) of 2010 (High Court of Calcutta, 2010.

23. Petitioners v. State of Orissa, Chandragiri Area Hospital & Others, W.P. (PIL) No.__ of 2011 (High Court of Judicature for Orissa, 2011) and Centre for Health and Resource Management (CHARM) v. The State of Bihar & Others, C.W.J.C. (PIL) No. 7650 of 2011 (High Court of Judicature at Patna, 2011).

human right to life. If a woman dies during pregnancy or delivery due to lack of care which she ought to have got should be viewed as a failure on the part of the state to safeguard her right to life. Medical records only capture part of the story, documenting the biological causes of death. An accurate understanding of the situation is called for. Most maternal deaths can be averted but in order to do so, the right kind of information is needed to understand the underlying factors that lead to the deaths. Only then can effective actions be taken.

The importance lies not in framing new policies or changing existing policies. It is about getting both new and existing policies implemented. This is the real challenge in the Indian context. Maternal health, nutrition and education are important factors for the survival and well being of women in their own right, and are key determinants of the health and well being of the child in infancy. Rights in paper are not rights. Rights can get their true meaning only when exercised. Hence the attitude of women herself should change in dealing with health issues. It is she who has to come forward to exercise her right and make her 'right to life' more meaningful.

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Non-recognition of the Recognized, Recognition of the Non-recognized-World Court at Lens: Epistemological Approaches in Learning the Law of the Nations

C. Elaiyaraja *

Introduction

Recognition is a cruel and composite word to be followed in this politically, economically, socially, and ideologically[1] diversified world. International history, a kind of dormant spectator, witnessed and indeed recognised the presence of arms race, the great tragedy of the human family–the world wars, the shame of cold wars, the liberation of the self determined people, the evolution of international order-birth of the United Nations Organization (UN), the hegemonic mirage–'legitimacy of United States of America'[2](US) in hanging ordere public international. So what is next? The problem of recognition is a matter of concern at the international as well as

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1. The phenomenon called ideology is one way the starter of all the differences and on the other way it also generates relations. When explained, the nazist ideology created division amongst the mankind, in turn it also paved the way for a united force, the allied forces (again to be questioned as victors justice-an ideological phenomenon in itself) and in another way it also saw the formulation of a united international organ; Another example, would be the ideology of the Europeans and the Westerners in expanding their wealth by way of the draconic colonial expansions which created unparalleled misery to the African, Asian and Latin American regions, but it also paved the way for the birth of the National Liberation Movements and the Right to Self–determination.

2. The general saying 'Might is Right' is literally true in the case of the US; time and again the US administration has grossly violated the basic norms of international law, series of examples may be cited. However, it is easy to identify a common phenomenon in the US actions–the blatant disrespect and violation of Article 4 of the UN Charter. Article 4 reads: All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations. The Iraq episode is another typical US stamp. To be more specific as rightly pointed out by the third world scholars there are three common issues in which the US as a political demon is always concerned or co relates itself, viz, (I) Oil; (II) Islam; (III) Anti–US stand or policy.

in the national. One such classic example is that of the recognition of the human rights or the basic rights of the human beings. The Universal Declaration of Human Rights (UDHR) adopted by the UN General Assembly (UNGA) and termed as the so called mother document[3] for the promotion of human rights of all the people, in its preamble, pleads to recognise the inherent dignity, equal and inalienable rights of all members of the human family for achieving freedom, justice, and peace in the world[4.] The above factors reflect the misconceptualised chapters vis a vis recognition in dichotomous spheres. The terminologies 'developed, developing, under developed and much more nations' [5] indicate the presence of an unequal and unmindful world. One cannot imagine a universal solution to fix the la legalite (rule of law) at this juncture; for sure time and other factors are not waiting. However a sincere attempt can be made as to understand the proposition of the problem.

The paper consists of three core sections, for convenience, the author will rely upon the corpus juris pioneered by one of the greatest Afro-Asian Scholar of our century, Judge Christopher Gregory Weeramantry (Weeramantry.J) of the International Court of Justice (ICJ), popularly referred as to the world court. Section I details the introduction of the notion of Recognition in its societal paradigms, its modes and the proposed linkages with IL. Section

3. The UDHR albeit identified as Universalisation of Human Rights fails to satisfy the threshold for various reasons; one vital factor is the intentional omission of the notion Right to Self-determination. It explicitly indicates the imperialistic attitude of the developed nations to exploit their colonies forever. A classic/cruel example would be the abstention of the developed nations (importantly three of the permanent five nations were involved, France, United Kingdom and United States of America) in the UNGA's adoption of the Declaration of Granting Independence to Colonial Countries and Peoples, 1960, which is considered to be the magna carta on decolonization. Another such instance would include the inhuman support extended by the developed nations for the erstwhile racist regimes in South Africa and in other areas. The UNGA by way of its resolution 3222(XXIX) 6 November 1974, titled as 'Human Rights and Fundamental Freedoms' under Paragraph 5 noted: 'Strongly condemns the policy of those States members of the North Atlantic Treaty Organization and of other Powers which are assisting the racist regimes in Southern Africa and elsewhere to repress the profound aspirations of peoples for the enjoyment of human rights and to prevent the exercise of those rights'.

4. The preambular part of the UDHR indicates the non-recognition of the basic rights and freedoms of the people of the world, mainly attributed with that of the holocausts and massive human rights violations of the world war era. Basically the instrument is an international cry for the recognition of human rights for all the people of the world with serious limitations.

5. The imperialistic attitude of the European and Western nations resulted in the adaptation of the term 'civilized nations' under the Statute of the International Court of Justice. Article 38 of the Statute of the Court contains the sources of law to be applied by the world court. The Statute under Article 38 (1) (c) reads: the general principles of law recognized by civilized nations. The third world scholars have severely criticized the artificial classification of the nations into civilized and uncivilized ones, as in reality there cannot be such difference. After much protest, in the present context the disputable terms are to be taken to include the general principles of law recognized by all the nations. In the context of isolation or discrimination of the northern part against the south, it is a hard fought victory for the subject of Afro-Asian jurisprudence.

II concentrates on the relevancy of the world court with regard to the contribution of dissenting judges as the spirit of justice in general. Section III examines the fine interpretation of jus naturale projections of IL orchestrated by Weeramantry.J in his dissenting opinion rendered in the Case Concerning the Legality of the Threat or Use of Nuclear Weapons. The summative part submits the gist of changing stances.

SECTION I: THE CASE OF RECOGNITION, SOCIETAL PARADIGMS AND MODES- *Foundational Views and Linkages*

The paper is focused on the issue of Recognition. The content and context of the subject is not the typical Recognition attributed to the question of Statehood in IL. The author introduces the subject centered on the social phenomenon. It is a self destructive one. What does it mean? In the context of this work, it is a situation of not recognising the useful men (the men of potential calibre) of the society, which in turn affects the society representing the nation more than the individual. In simplistic terms, it can be said that non-recognition is nothing but not utilising the better talents of the potential, by way of not picking them or denying access or space for them to contribute at the possible fronts which in turn will destruct the overall development of the nation. On the contra when the system recognises the inefficient or the unworthy, then the result is much more rampant and it pierces, resulting in societal death.

While addressing the problem of recognition, two types of groups emerge, one the useful or potential and the other inefficient or unworthy. It is meaningful saying that 'speak good through good'. Thus the author will examine the problem of recognition from the former perspective. The term 'useful or potential lot' represents those persons who either by their personal capacity which may be by knowledge, by ideology or thought, by skill, or by their excellence in any field are recognised by their respective standing and would prove useful to the development of the society, when recognised. However, when these recognised are unrecognised by the people representing the society–the policy makers or persons who have the authority to take formidable decisions, then the impact of the useful or potential will be lesser on the society as they are denied the platform as representatives of values. What is the ulterior effect? When there is no quality or excellence in a society it invariably affects the progress of the nation and to an extent it becomes impossible.

Importantly, the ill effects will be disastrous when seen in the quotient of time and space and the loss of opportunities to build the different institutions according to their needs and performances.

Modes of Non-recognition

Non-recognition can take place by several forms, where the useful or potential men are let down by the society. For example, it becomes functional inter alia by way of lack of encouragement/ support, lack of opportunity, lack of visionaries in the field to utilize the beneficial, lack of position, lack of understanding, lack of knowledge (ignorance), lack of co-operation/co-ordination, disrespect, lack of honesty (corruption), lack of prudence, lack of humane principles (ego, arrogance, jealous, vengeance), suppression of knowledge/Truth. When understood, the problem of recognition unleashes devastating effects especially in nations where the reforms are needed in large. In order to understand the situation pragmatically once again, history has a dependable witness, comes to the fore. It is a matter of truth that in acute circumstances Non-recognition can also happen with subjects of law wherein again the damage relates to the growth and prosperity of the oppressed societies. The most classical and crystallized example is that of the Right to Self-determination (Recognised) popularly attributed as the Principle of International Democratic Governance. The concept of independence and sovereign equality has been a controversial theme to understand and unfold in the sphere of the law of the nations, chiefly due to the dark colonial era and that of the continuing neo-colonialist approaches of the developed nations. The colonial era also witnessed the deprivation of the basic human rights to the native people/local inhabitants; history of international law reveals that the international community majorly represented by the developed nations never really accepted the Principle of Sovereign Equality [6] of the States.

In the context of the knowledge in IL the Principle of Right to Self-determination is misconceptualized for political gains and the proper understanding remains hidden. Although the Principle has been incorporated in innumerable major international legal

6. The Friendly Declaration, 1970 defines the essentials of the said Principle in the following notions: (a) States are juridically equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the States are inviolable; (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems; (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

instruments[7] and has attained the status of erga omnes obligation still it is seen as a concept of political question. The simple reality is that the situations of Afghanisthan, Chechenya, Iraq, Kosovo, Palestine, Sri Lanka and many other oppressed societies have to be addressed with the Independence of the native people. The chord has to be connected with national liberation movements and people, which the international community is unwilling and that is another reason to promote Refugee law (Non-Recognised) though not as a protective device, temporary in terms of international obligations and universal in continuum with the abuse of human rights.

The linkage of the issue of Non-recognition in the present theme is channelized in the context of the jurisprudence evolved by the dissenting judges representing ICJ. The dissenting views expressed by the afro-asian judges have become a matter of neglected understanding, which sounds a case of conspiracy in itself. The scholarship from the world court is attributed majorly to the majority views. However in reality the scholarship that is the spirit of the jus gentium as a source is available mostly in the cases of dissent. In the context of understanding the learning of IL from the afro-asian perspective the contribution of the dissenting judges is pivotal. In particular due to skeptical views adduced by majority of the european and western authors on the subject aimed to favour and protect their interest, the art of understanding the subject itself is in peril. The situation gets worsened for our students, researchers and practitioners, when they do not recognize the recognised. In the pragmatic sense it removes our schools of legal learning on the discipline virtually resulting in a dependent information and mutilated practice devoid of values.

7. Charter of the UN (Article 1 Paragraph2); International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) and that of the International Covenant on Civil and Political Rights, 1966 (ICCPR) (Common Articles 1) respectively; Declaration on Granting of Independence to Colonial Countries and Peoples, UNGAR 1514 (XV) 14 December 1960; Declaration on the Permanent Sovereignty over Natural Resources, UNGAR 1803 (XVII) 14 December 1962; Declaration on Social Progress and Development, UNGAR 2542 (XXIV) 11 December 1969; Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGAR 2621 (XXV) 12 October 1970; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGAR 2625 (XXV) 24 October 1970; Declaration on the Establishment of a New International Economic Order, UNGAR 3201 (S-IV), 1 May 1974; Charter of Economic Rights and Duties of States, UNGAR 3281 (XXIX) 12 December 1974; Declaration on the Right to Development, UNGAR 41/128, 4 December 1986; World Conference on Human Rights: Vienna Declaration and Programme of Action, adopted by UNGAR 48/121, 20 December 1993; Draft UN Declaration on the Rights of Indigenous Peoples, 1994,; Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally recognized Human Rights and Fundamental Freedoms, UNGAR 53/144, 9 December 1998; UN Millennium Declaration, UNGAR 55/2, 8 September 2000.

When explained the crux of Non-recognition lies in the accepted fact that the learning method of IL in general and with regard to the world court is primarily understood with the majority views expressed by the Non-Recognised (european and western judges). International Law and its finer spirit contributed by the Recognised (Afro-Asian Judges) scholarship are suppressed. The objectives thus simpliciter is to lay emphasis on the works of the dissenting judges and to highlight the new horizons of learning the knowledge of IL and with that resolve the issue of Non-Recognition. Thus the views expressed here constitute an earnest attempt to underline the tremendous jurisprudence shouldered and strengthened by the dissenting voices of justice in the world court.

SECTION II: WORLD COURT AND PROGRESSIVE DEVELOPMENT OF IL - *Theory and Practice*

The notion of progressive development of the law of the nations is one such subject which remains afresh and continues to be a challenge for the determined actors involved in the process of evolving the law. The introduction of the UN indeed signaled the existence of an international legal apparatus making serious contributions to the said cause albeit having started with the character of a political body it has poignantly transformed in to a massive/meaningful legal body, eventually leading the international community in the finer understandings of the jus gentium. The role played by the ICJ, the principal judicial organ of the UN, [8] has been instrumental in evolving the jurisprudence on the subject matter. The Court's work in this concern started around the period of late 1940's and is going stronger till to date. The journey of wisdom has not been a smooth sailing all the way, it had its moment, the challenge of non-cooperation from the international community, the politicization of its functioning by the powerful member states, the issue of superior power and the constant trespass by the UN Security Council (UNSC) in its rightful domain, the problem of lack of faith, the psychological fears of the third world over its neutral position, the frequent resort of use of

8. Article 92 of the Charter of the UN, 1945 affirms that the ICJ shall act as the principal judicial organ of the Organization.

force as a mode of resolving international disputes[9] by the US and other giants of the international community, the list is endless. The position of the world court as a true international judicial body itself has been a matter of survival in the initial years and it was achieved only through uncompromising labour and strong commitment. One such example of classic work by the Court would be that of the advisory opinion given by the ICJ in the Reservations Case (1951). The Court in the context of the international concern for the crime of genocide, noted that the principles envisaged in the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 are such that it is recognised by all the nations as binding on the States, irrespective of any conventional obligation. The ruling evolved the erga omnes obligatio nature of the prohibition of the crime of genocide [10]. In wider terms it may be recorded that the 20th century indeed witnessed the birth and benefit of many international judicial bodies. The principal judicial institutions include that of the following: Permanent Court of Arbitration (PCA); Permanent Court of International Justice (PCIJ); International Military Tribunals-Nuremberg and that of the Tokyo (IMT/IMTFE); ICJ; International Tribunal for the Law of Sea (ITLOS); International

9. The notion that use of force as a mechanism to resolve international disputes is for sure allowed only as an exception (Article 2(4), 2(7), 51 of the Charter of UN) and not as a general rule; it is a settled proposition that the principle of the prohibition of the use of force to resolve international disputes has achieved the status of jus cogens. Further the principle is one which has been strongly/systematically disseminated and directed by the UN legal mechanisms. To illustrate: It constitutes one of the purposes of the UN-Article 1 (1) of the Charter of the UN reads: 'To maintain international peace and security, and to that end: take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'; Chapter VI of the UN Charter titled as 'Pacific Settlement of Disputes' under Article 33 states that: (1) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. (2) The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means; The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN-the UNGAR 2625 (XXV) 24 October 1970 gives a detailed understanding of the elements of the principle of pacific settlement of international disputes (States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice is not endangered), in particular the declaration intends to cast a duty upon the disputing parties to settle their issues by adopting peaceful means; The UNGAR 3283(XXIX) 12 December 1974 titled as 'Peaceful Settlement of International Disputes' lays emphasis on the said principle by way of recognising the role played by the UN, its judicial organ, the ICJ and also projecting the option of the Permanent Court of Arbitration, other established regional agencies or arrangement in advancing the appreciation/application of the subject by the UN Member States.

10. See, Case Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Reports of Judgements, Advisory Opinions & Order. International Court of Justice (1951), at p.12.

Criminal Tribunal for the Former Yugoslavia (ICTY); International Criminal Tribunal for Rwanda (ICTR); International Criminal Court (ICC). The composite nature of the listed judicial bodies indicate the pragmatic/pristine worth of such institutions, endorsed by the international community, in particular it is a testimony of the trust, which eventually is the triumph of the judicial institutions, Wherein by way of laborious work they have widened the horizons of new institutional IL knowledge. The process of evolving IL by way of interpreting it, in its pristine glory in the ICJ is a contribution to be traced not from the majorities but from that of the minorities, the dissenting views expressed by the judges. The interpretation done by the giant individual judges in their dissent forms an ocean of knowledge in understanding the magnificent spirit of IL, and it is consistent with the traditional maxim judex est lex loquens (the judge is the law speaking/law speaks through the mouth of the judge)[11].

11. The popular issue of judge made law or judicial legislation (legis-law;latum-making;)/judicial decisions and its respect as law and its relevance as a source can be affirmed by way of varied legal resources, to start with, the maxim judicium est quasi juris dictum (judgment is a declaration of law), augurs well. In the context of international law a series of legal proposition support the same, the propositions inter alia consist the following: (i) Article 38 (1) (d) of the Statute of the ICJ notes, judicial decisions as subsidiary means for the determination of rules of law (subjected to the rule of consent of the parties to the litigation-Article 59 of the same); (ii) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered, has attained jus cogens status and importantly judicial settlement is one of the prescribed inherent tool of the said principle, the same is incorporated under Article 33 of the Charter of the UN and detailed in the landmark document which reflects customary international law, namely the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN-the UNGAR 2625 (XXV) 24 October 1970; (iii) The principle of natural justice in its third wing represents the speaking order/ reasoned decision phenomenon. In the context of national legal systems, at its basis the criteria for reasoned decision includes, (i) clarity of thought; (ii) Awareness to the litigants on their position in lis; (iii) Awareness to the public at large (Principle of Predictability); (iv) Concept of Scrutinization (superior courts), Adherence (subordinater courts). When effectively implemented it advances the evolution of law and strengthens the legislations, and also checks the Principle of Hurried Justice is Denial of Justice. The Statute of the ICJ under Article 56 paragraph 1attributes the same, it states: 'The judgment shall state the reasons on which it is based'. The said understanding is wonderfully explained by Judge Sir Hersch Lauterpacht in his work "The Development of International Law by the International Court", reprinted edition, 1982, p.37, which is quoted by Judge Nabil Elaraby in his Dissenting Opinion in the Oil Platforms Case; According to Judge Sir Hersch Lauterpacht: "there are compelling considerations of international justice and of development of international law which favour a full measure of exhaustiveness of judicial pronouncements"- see, Dissenting Opinion of Judge Nabil Elaraby, Case Concerning Oil Platforms (Islamic Republic of Iran Vs. United States of America), Judgment of 6 November 2003, para. 33, p.147-148; (iv) The authority of the ICJ as a world court is recognized by way of the larger membership of the States in the UN. The UNSC which his considered to be the leading political body of the organization as a general rule in deciding matters of settlement of legal disputes involving parties must resort to the ICJ for clarifying the question of law-Article 36 paragraph 3 of the Charter of the UN apart from the earlier stated source that is Article 92 of the Charter of the UN. Thus the authority of the world court indicates the values of its pronouncements; (v) In the field of IL as the concept of treaty law is based on the consent factor, the roots of originating customs takes a passive orbit, the role of international courts in contributing to the progressive development of the law becomes integral/indispensable. This view was advanced by Judge Sir Hersch Lauterpacht as early in the 1930's, in his papers. Accordingly he remarked: "In international law, where conscious law-making by legislation is in a rudimentary stage, where the creation of customary law is slow and difficult of ascertainment, where judicial precedent is relatively rare and of controversial authority, and where, in consequence, the field of detailed concrete regulation is small and that of general principles of law wide and elastic, the scope of judicial discretion and judicial law-making is considerable"- see, Sir Elihu Lauterpacht (2004) "International Law: Collected Papers of Hersch Lauterpacht", United Kingdom: Cambridge University Press, Vol. No.5, pp. 210-211.

Where in the scholarliness of the spirit of the law of the nations in its true nature can be unearthed for its better understanding and application, in particular the common/core[12] goal of the UN per se that is the maintenance of international peace and security. When examined some of the dissenting opinions of the learned judges have truly attributed to the achievement of international peace, in particular the works are in with the attainment of the traditional principles on the subject. To illustrate, such as the Essentials of Peace, has envisaged under the UNGAR 290 (IV), 1 December 1949[13] and that of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGAR 2625 (XXV) 24 October 1970 , popularly called as Friendly Relations Declaration[14] .

SECTION III: JUS NATURALE SCHOOL OF IL AND DISSENTING OPINION - *Voices of Justice and Envisioning Legal Conscience*

In terms of understanding the jus naturale school of IL, the dissenting opinions have demonstrated in clear content and context in consonance with the traditional maxim jus naturalae sunt immutabalia (laws of nature remains unchangeable). The dissent of Weeramantry.J disproved the destructionist view taken by the Majority in the Case Concerning the Legality of the Threat or Use of Nuclear Weapons. The UNGA posed by way of its powers to invoke Advisory Jurisdiction of the ICJ 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?' The Court answered with uncertain conditions

12. See, Declaration on the Right of Peoples to Peace, UNGAR 39/11, 12 November 1984.
13. The resolution elaborates certain cardinal principles/plan of action, has instrumental/integral components of peace and seeks co-operation/compliance from all nations, members of the UN and that of the permanent members of the UN respectively. The dissenting opinions of the judges indeed have given a comprehensive understanding of the said subject, by way of evolving the jurisprudence, importantly in the context of effectively interpreting the Charter of the UN. The above said principles/plan of action includes the following: (i) Prohibition of Threat or Use of Force; (ii) Prohibition of Intervention aimed against Right to Self-determination; (iii) Pacta Sunt Servanda (pacts must be respected); (iv) International Co-operation to the UN Bodies; (v) Promotion of Human Rights; (vi) Promotion of Transfer of Technology; (vii)Settlement of International Disputes by Peaceful means; (viii) Restraint in the Use of Veto; (ix) Effective International Regulation of Conventional Armaments; (x) Prohibition of Atomic Energy save Peaceful uses. See UNGAR 290 (IV), 1 December 1949, available at www.un.org..
14. It has to be noted that the principles enshrined in the declaration have attained the status of customary rules of international law. More importantly the instrument stands as the sole authority in establishing the legal values of the Principles of the UN Charter. In the context of understanding the art of learning IL it is obligatory for the students to explore, examine and acquire expertise on the contextual values of the Friendly Relations Declaration. The original instrument is available at www.un.org. Also refer R.P. Anand (1994), Salient Documents in International Law, Vikas Publications: New Delhi.

that the existing position of IL indicates a non-liquet. On the contra in conspicuous terms it recorded the view that States always posses their fundamental right to survival and right to resort to self-defence in accordance with Article 51 of Charter of the UN when its survival is at stake in the context of Nuclear Weapons[15]. In his dissenting opinion Weeramantry.J with great finesse of the epistemological substance held that the use or threat of use of nuclear weapons is illegal in any circumstances whatsoever. The notions of Peaceful Settlement of International Disputes (Article 2(3)) and that of the Prohibition of Threat or Use of Force against the Territorial Integrity or Political Independence of any State (Article 2(4)) of Charter of the UN were interpreted to strengthen the stance of Prohibition on the subject. The laborious jurisprudence identified and advanced by the learned judge captures the spirit of the IL scholarship in the subject. The prudential digest of the dissent included innumerable reference to related knowledge[16] inter alia involving International Law, International Humanitarian Law, International Human Rights Law, International Criminal Law, International Air Law, International Institutional Law and International Law on Disarmament, Energy Law, Jurisprudence, Schools of Interpretation, Science, Political Science, International Relations, Theology, Comparative Jurisprudence, Judicial Decisions,

15. See, Case Concerning the Legality of the Threat or Use of Nuclear Weapons, ICJ, Advisory Opinion of 8 July 1996, Page No. 263, Para. No. 96.

16. The learned judge has referred to such voluminous references in order to disprove the legality of nuclear weapons importantly the method adopted indicates a multi-disciplinary approach. The corpus includes inter alia the following: H.G. Wells (1913), The First Men in the Moon and The World Set Free; J.B. Scott (1920), "The Conference of 1899", The Proceedings of Hague Peace Conferences; Spaight (1947), Air Power and War Rights; Julius Stone (1954), Legal Controls of International Conflict; H. Lauterpacht (ed.) (1952), Oppenheim's International Law; E.Castren (1954), The Present Law of War and Neutrality; G. Schwarzenberger (1958), The Legality of Nuclear Weapons; N. Singh (1959), Nuclear Weapons and International Law; M.S. Mc Dougal and F.P. Feliciano (1961), Law and Minimum World Public Order: The Legal Regulation of International Coercion; Ian Brownlie (1965), "Some Legal Aspects of the Use of Nuclear Weapons", International and Comparative Law Quarterly; James B. Randall (edit) (1970), Thomas Hobbes, The Leviathan; Dias (1976), Jurisprudence; Falk, Meyrowitz and Sanderson (1980), "Nuclear Weapons and International Law", Indian Journal of International Law; Professor Joseph Rodblat (1981), Nuclear Radiation in Warfare; Jonathan Schell (1982), The Fate of Earth; R.J. Lifton and Richard Falk (1982), Indefensible Weapons; Burns H. Weston (1982-1983), "Nuclear Weapons and International Law: Prolegomenon to General Illegality", New York Law School Journal of International and Comparative Law; L.S. Wolfe (1983), "Chemical and Biological Warfare: Effects and Consequences", Mc Gill Law Journal;Burns H. Weston (1983), "Nuclear Weapons versus International Law: A contextual Reassessment", Mc Gill Law Journal; John Finnis, Joseph Boyle and Germain Grisez (1987), Nuclear Deterrence, Morality and Realism; Antonio Cassese (1988), Violence and Law in the Modern Age; C.G. Weeramantry (1988), Islamic Jurisprudence: Some International Perspectives; Lauri Hannikainen (1988), Peremptory Norms (jus cogens) in International Law; A. Timoshenko (1990), "Ecological Security: Global Change Paradigm", Columbia Journal of International Law and Policy; D.L.Cady and R. Werner (1991), Just War, Non-violence and Nuclear Deterrence; A. Gore (1992), Earth in the Balance: Ecology and the Human Spirit; R.C. Karp (1992), Security Without Nuclear Weapons? Different Perspectives on Non-Nuclear Security; D. Fleck (1995), The Handbook of Humanitarian Law in Armed Conflicts;

and Scholarly Works. The conclusive dimensions explicitly covered the uniqueness of nuclear weapons and the blanket ban thereof, accordingly the list encompassed the following in terms of the nature of the ill effects: (i) Cause death and destruction; (ii) Induce cancers leukaemia, keloids and related afflictions; (iii) Cause gastro-intestinal, cardiovascular and related afflictions; (iv) Continue for the decades after their use to induce the health related problems; (v) Damage the environmental rights for future generations; (vi) Cause congenital deformities, mental retardation and genetic damage; (vii) Carry the potential to cause a potential nuclear winter; (viii) Contaminate and destroy food chain; (ix) Imperil the eco system; (x) Produce lethal levels of heat and blast; (xi) Produce radiation and radioactive fallout; (xii) Produce a disruptive electromagnetic pulse; (xiii) Produce social disintegration; (xiv) Imperil all civilization; (xv) Threaten human survival; (xvi) Wreak cultural devastation; (xvii) Span a time range of thousands of years; (xviii) Threatens all life on the planet; (xix) Irreversibly damage thale rights of future generations; (xx) Exterminate civilian population; (xxi) Damage neighbouring states; (xxii) Produce psychological stress and fear syndromes as no other weapons do. In terms of irreversible damage the Judge noted the areas, involving (i) Indiscriminate slaughter; (ii) Environmental devastation; (iii) Future generations; (iv) Neutral states. In matters of Principles of IL the seminal ones were, (i) Humanity; (ii) Public conscience (iii) Prohibition against causing unnecessary suffering; (iv) Proportionality; (v) Discrimination between combatants and non-combatants; (vi) Obligation to respect the territorial sovereignty of non-belligerent states; (vii) Human rights law; (viii) Prohibition against causing lasting and severe damage to the environment; (ix) Prohibition of genocide and crimes against humanity. In consonance with the significance of International Environmental Law the reflections were on, (i) Precautionary Principle; (ii) Polluter Pays Principle; (iii) Principle of Trusteeship of Earth Resources; (iv) Principle of Ecological Security; (v) Principle of Good-neighbourliness. The general observation that the ICJ missed a golden opportunity in declaring a blanket ban on nuclear weapons augurs well however as a matter of truth the prudential concerns on the subject in line of such a legal discourse was brought home solely by the work of Weeramantry.J, as a matter of concern of the entire humanity [17].

17. See, the Dissenting Opinion of Judge C.G. Weeramantry available at the www. icj.org

In the jurisprudential sphere to the argument and the finding advanced by the majority (Non Recognised) (11:3) view that there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such, Weeramantry.J in his minority view (Recognised) and by way of mammoth reference of applicable law[18] and its determination in the subject has proven that the majority erred in the choice of method ultimately the decision negating the expected proposition favouring human values. He has also shown the way and lessons for understanding the art of learning IL in its pristine virtue for the coming generations of students, Recognised futurological values[19] .

SUMMATION-Changing Stances

The present theme demonstrates the need for attitudinal changes in understanding the art of learning IL in times of misconceived dimensions. The dissenting work of Weeramantry.J, in the Legality of Threat or Use of Nuclear Weapons Case questions the authority of the commonly cited majority opinions present in the available IL scholarship. The opinion rejuvenates various notions of IL including the general principles of the subject in particular the Principle of Humanity, Prohibition of Nuclear Weapons in terms of Right to Basic existence. The traditional maxim actus legis nemini damnosus (act of legislation shall not prejudice the interest of the parties), in fact the wisdom of the dissent revolved

18. Professor Franz Lieber Code, 1863 (Instructions for the Government of the Armies of the US in the field); St. Petersburg Declaration,1868; Brussels Conference,1874; International Declaration Respecting Expanding Bullets, 1899; International Declaration Respecting Asphyxiating Gases, 1899; Hague Regulations of 1899 and 1907; Geneva Gas Protocol, 1925; Charter of UN 1945; Geneva Conventions 1949 with its Additional Protocols; Convention on the Prevention and Punishment of the Crime of Genocide 1948; Universal Declaration of Human Rights, 1948; European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; Partial Test Ban Treaty, 1963;International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966; Nuclear Non-Proliferation Treaty, 1968; International Law Institute, Edinburg Conference, 1969; American Convention of Human Rights, 1969; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970; Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, 1971; Convention Concerning the Protection of World Cultural and Natural Heritage, 1972; Stockholm Declaration on Human Environment, 1972; Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1977; Convention on International Trade in Endangered Species, 1973;London Ocean Dumping Convention,1979; Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1980 with three extended instruments (Human Body Escape Detection-Protocol I, Mines, Booby Traps and Other Devices-Protocol II and Incendiary Weapons-Protocol III); World Commission on the Environment and Development, 1987.

19.. For a detailed analysis of the concept of futurology in the context of IL see, Prof. M.K. Nawaz (1972), "International Law Research in India", Indian Journal of International Law, Vol. 12, No.2, pp. 233-246.

under the foundational objectives of jus gentium. The view also thoroughly demolishes the outdated and obsolete debates whether IL is a true law, matter of courtesy or that it is the vanishing point of jurisprudence. It is time that the students and the persons concerned of IL in our part of the world in particular understand the values of Recognising the Non-Recognised, the dissenting opinions and thoroughly scrutinize and question the methodological patterns of the majority opinions and to Non-Recognise their Recognition.

Finally it is also be observed that the whole series of dissenting opinions in the world court involving the scholarship of Afro-Asian Judges (for example, Judge Mohamed Bedjaoui, Judge Shahabudeen, Judge Al-Khaswneh) have been at the order of highest degree in terms of promoting common good under the law of the nations. Thus the learning modes of the subject have to be refined in line with the critical jurisprudence adduced by them. The spirit of the decisions of the ICJ ranging from Case Concerning Certain Phospate Lands in Nauru, Paramilitary Activities in and against Nicaragua, Provisional Order in Lockerbie, Provisional Order in La Grand, Dissenting Opinion of Weeramantry.J in East Timor, Kasikili Sedudu Island, Legal Consequences of Construction of Wall in Occupied Palestine, Unilateral Declaration of Independence in Kosovo are rich traditions of epistemological values. It is time that we understand our knowledge, our values, our visions, and not to forget our resources (our spirit) the Recognised in IL which includes the available Afro-Asian approach reflected by the scholars of the world, that will lead as for ad infinitum.

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Digital Rights Management and Techno-legal Protection Measure for Digital Piracy - A Critical Analysis

Ranjit Oommen Abraham *

Introduction

The rapid advances in the field of information technology (IT) are affecting the society in more than one way. The digital technology have brought lot of developments in all fields of life and culture but at the same time it creates an imminent danger to some of the basic rights that individual and industries possessed before its influence.The publishing industry is also no exception as we see the traditional printing & publishing activities are fast giving way to electronic publishing. The objective of copyright is to create an incentive to the creators of the copyrightable subject matter. We can very well understand that the very sustenance of copyright itself is been challenged because of the impact of digital technology. Digital technology has revolutionized the publishing industry and hence we have very few takers who don't opt for electronic publishing. Today we are living in a world of paperless publication where the flow of information from the author to the reader takes place in machine readable forms. Putting the same in other words it can be stated that cyberspace has changed the phase and concept of electronic publication. For the holder of the copyright, cyberspace appears to be the worst of both worlds – a place where the ability to copy could not be better, and where the protection of law could not be worse[1]. "The copyright legislation in India is one of the most remarkable and dynamic legislation that

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1. Lawrence Lessig,Code and other laws of Cyberspace(Basic Books).p.125

encompasses technological changes within its contours swiftly. The present copyright amendment was actuated by the government of India in order to make the Indian copyright law compliant with the WIPO copyright treaty (WCT) and the WIPO Performance and Phonograms treaty (WPPT) although India is not a signatory to both the treaties. This copyright amendment has embarked the concept of digital rights management, technological protection measures and anti-circumvention measures in the Indian Copyright scenario. One of the most important changes made by the recent Copyright (Amendment) Act, 2012 is the introduction of specific provisions for protecting the technological measures applied by the copyright holders (hereinafter referred to as 'DRM provisions')[2]. As is evident from the statement of objects and reasons in the Copyright (Amendment) Bill, 2012 aswell as the debates in the Parliament, the DRM provisions were introduced primarily with theobjective of facilitating India's membership in the WIPO Copyright Treaty (WCT) and the WIPOPerformers and Phonograms Treaty (WPPT)[3] .The stimulus behind India's copyright amendment on Digital Rights management was the profuse demand and compulsion of the powerful industrial lobbying groups. The concept of Digital Rights Management and its implications has not been examined and analysed by the Indian Parliament before enacting these amendments and the Indian legislative machinery is totally bereft of the situation wherein it is imperative to balance the rights of copyright holders through DRM. The dual punch relating to constraints for innovation relating to such copying technologies and dissemination of information is a matter of concern for the knowledge crusaders and innovators as it subtly supersedes the fair use provisions.

This paper attempts to analyse the need for DRM provision and to ascertain the appropriate legislative perspective of DRM in Indian copyright regime and gives suggestions to incorporate provisions which would strike a balance between the inevitable DRM provisions and the fair use by genuine stakeholders of such copyrighted work. This paper also compares the issues pertaining to DRM in other countries and the judicial approach on DRM provisions is analysed so as to understand the possibilities of various difficult circumstances that might prevail in Indian scenario.

2. Sections 65A and 65B of the Indian Copyright Act, which were inserted by the Copyright (Amendment) Act 2012. The Copyright (Amendment) Act 2012 came into force on 21 June2012 and the copy of the legislation is available online at http://copyright.gov.in/ Documents/CRACT_AMNDMNT_2012.pdf (27 July 2012).

3. *SibalKapil, Statement of Objects and Reasons- Copyright(Amendment) Bill 2012,* http://164.100.24.219/BillsTexts/ RSBillTexts/asintroduced/copyright.pdf

Optical Disc Law-Legal Measure

The WIPO advisory Committee on enforcement of Industrial Property Rights observed that the optical disc regulation offers a cost effective way to tackle the piracy problem in this medium at this source. Companies that manufacture, duplicate and export VCDs, DVDs and music CDs will now have to obtain licences to do so.Strict licensing norms have been proposed in the draft optical disc law prepared by the Ministry of Information and Broadcasting in consultation with disc-manufacturing companies and the Federation of Indian Chamber of Commerce and (Ficci).

Currently, there are no regulations governing the manufacture, duplication and export of discs. The proposed law will be applicable to pre-recorded discs and also to blank optical media (discs). According to industry estimates, India produces 350 crore units of discs and CD-drivers annually that are used to produce music CDs, film DVDs and video CDs. The Rs 1,500-crore disc-production market is expected to reach Rs 6,000 crore by 2010, but the mounting losses as a result of piracy has forced the government to come up with this law.It is estimated that in Hong Kong alone the losses to the US Motion Picture Industry due to optical media piracy of film titles is estimated at US $ 30 million in 1998 and has more than doubled in 1999[4] .Manufacturing optical discs is essentially a five-step process that involves premastering, mastering, electroforming or preparing the stampers and injection moulding[5]

According to the draft law, there will be separate licences for the production, duplication and export of discs. “This means that the company which gets a licence to manufacture can not export and those who get the licences for export may not manufacture," a senior Moser Baer official said. Once passed, the law may result in music companies like T-Series, Saregama, and Yash Raj Films applying for multiple-location licences. Currently all these companies not only manufacture their own CDs but are also engaged in commercial duplications.According to one of the provisions of the draft law, the government will constitute an independent competent authority on the lines of the Telecom Regulator (Trai). These authorities will not only issue licences to the companies for manufacturing or export of any recordable devices, it will also have the rights to inspect and

4. See The Motion Picture Association, Trade Barriers to Exports of U.S. Filmed Entertainment-2000 Report to the USTR at 1 (2000).

5. See 2001 IFPI Music Piracy Report at 3,www.ifpi.org/library/piracy2001.pdfnews, (June 2001).

confiscate any equipment for a period of 30 days. The competent authority will also have the right to cancel any licences of the companies if any of its officers, directors, managers, shareholders, or partners, commit an offence involving registration conditions covered under the law," a I&B ministry official said. Welcoming the law, RatulPuri, executive director, Moser Baer India Ltd, said the industry needs strict regulations for manufacturing of discs and the optical disc law will solve the menace of piracy. Optical disc law of India

According to estimates, the film sector loses Rs 2,000 crore and music industry Rs 700 crore every year, due to piracy. In this backdrop, the government decided to curb the menace.The draft law has been prepared by the members of film sector at the initiative of Government of India. The Secretary said that the I&B Ministry is actively pursuing the creation of a National Centre for Excellence in Animation, Gaming and Visual Effects with a view to promote this emerging sector. The optical disc law allows Governments to regulate the manufacturing and replication of optical discs manufactured through the mechanisms of licensing. An optical disc law includes four key features: (1) registrations and licenses; (2) identification coding; (3) criminal remedies; and (4) enforcement. The effectiveness of anti-piracy laws depends more in being a deterrent than punitive. Since the incidence of optical disc piracy is large, criminal sanctions under optical disc laws include heavy fines and imprisonment. Three to four tiers of penalties are provided, each tier of penalties dependent on the magnitude of the offence. Optical disc laws contain provisions of inspection, seizure, closure, forfeiture, removal, disposal of any unlicensed equipment, raw material or optical discs. However, for searches and seizures to be constitutionally valid, they are normally conducted only on obtaining a warrant from a court. However, in case of delays in obtaining a search warrant, a search can be conducted without a warrant in order to avoid destruction of evidence. Provisions for making forcible entry are provided for in optical disc laws. Often enforcement officials encounter strong and sometimes armed resistance by pirates during raids. Therefore, forcible entry with police assistance sometimes becomes crucial. There are several parties involved in the process of an optical disc product with embodied copyrighted content reaching the consumer. They include: Copyright owner (content or data) Manufacturer (mastering, preparing stamper, replication) Distributors (finished products) Retailers (finished products) Consumers. An optical

disc law aims at regulating only the manufacturing level in the chain (viz. manufacturers and suppliers of raw materials). Over-regulation could lead to regulating even the distribution channels of data embodied optical discs, the dangers of which would be several.

Relationship between WTO obligations and the optical disc law

Though enacting a sui generis optical disc law is not an explicit obligation under TRIPS, however, in Part III of TRIPS[6] rest the obligations of member countries to provide adequate enforcement measures for protecting intellectual property rights. It is under the ambit of enforcement and cross-border measures that member countries facing a high problem of optical media piracy have resorted to adopting the optical disc regulatory law as another tool to strengthen its enforcement arm. While Section 1 Article 41(1) sets out the general obligations of member countries, the civil and criminal measures are detailed in subsequent provisions. Section 4, Article 51 et seq. mandate border control measures and Section 5, Article 61 mandate criminal remedies of monetary fines, imprisonment, seizure, forfeiture, destruction of infringing goods, material and implements the predominant use of which has been for commercial piracy. The provisions of an optical disc law fit within these enforcement obligations of member countries. However, this obligation is selective and is imposed only in countries that firstly, face high levels of optical disc piracy and secondly, where the traditional anti-piracy laws are insufficient to meet the challenges of optical disc piracy.

Problems of Optical Disc Law

Optical disc piracy is unusually challenging due to the nature of the technology and the efficiency with which it can be replicated. One of the key reasons for the high frequency and volume of piracy is that the manufacturing capacity exceeds legitimate demand. A large portion of the manufacturing capacity is expended in pirated production.A legislation is in the making to curb piracy in the entertainment sector. The government has already initiated steps to work out a framework on 'Optical Disc Law,' which is in force in most other countries. Once this is enacted in India, every factory manufacturing CDs and VCDs has to be licensed[7]. In 2001, the International Federation of the Phonogram Industry (IFPI), an

6. Trade Related Aspects of Intellectual Property Rights
7. http://www.financialexpress.com/news/story/97867.

organization representing the recording industry reported that the supply of optical disc media has substantially outstripped legitimate demand and the resulting overloading has fuelled the pirate market. Pirates profit from this overcapacity by filling in the difference between legitimate and actual demand with unauthorized reproductions of entertainment content. IFPI reported that the most significant reason for the growth of optical disc piracy in the last seven years was the explosion in the compact disc manufacturing capacity around the world. It is precisely this overcapacity problem that an optical disc law seeks to regulate through the mechanisms of licensing, coding and enforcement. The provisions of the Prevention of Copyright Piracy Ordinance, 1998 of Hong Kong are examined in relation to the problems addressed here.

TECHNOLOGY PROTECTION MEASURES:

Digital network technologies, however, pose a fundamental challenge to the existing order. Digital technologies permit perfect copying of information at zero marginal cost. The Internet enables the rapid transmission of such information around the world in real time, also at marginal cost zero. Anybody with a personal computer and a moderately fast Internet connection can therefore engage in copying and distribution of music on a scale that dwarfs the abilities of previous music pirates.

But digital technologies are a double-edged sword. The very same technologies that can undermine intellectual property can also grant a measure of control far greater than anything familiar from previous eras (Lessig 1999; 2004). Dubbed "Digital Rights Management" or DRM, these technologies are a set of electronic locks for digital content such as music, video, and text. Content is not distributed as raw data but rather inside a secure container. Accessing the content requires a key and control over key distribution grants de-facto control over content distribution. It allows the rights holder to safely distribute and sell their content online in a digital form. With DRM content owners can configure access and content rules. Access refers to the price of the content, frequency and duration and whether the end user is authorised to save print and transfer the content to other users. This allows for new business models such as trial before purchase, promotional preview, rentals based on play counts, subscriptions and purchase of streaming or downloadable data.

An example of DRM is the Content Scrambling System (CSS) that is built into every DVD player. Contrary to most music CDs, data on DVDs is encrypted and requires a decryption key for playback. DVDs can therefore not be copied as easily as music CDs. The obvious problem with DRM is the need for uniform standards, however. Lock and key have to go together. In the case of DVD players, America's motion picture industry has been able to force manufacturers to incorporate the industry's CSS standard into every device. This influence stems from the motion picture industry's controlling of critical DVD technology patents that every manufacturer must license. The recording industry has not enjoyed the same influence over equipment manufacturers as their Hollywood colleagues. Its Secure Digital Music Initiative (SDMI) has so far not led to the ubiquitous adoption of a single standard .Some industry representatives have therefore called on policymakers to mandate all devices capable of playing digital music to be equipped with DRM .In the meantime, multiple corporate solutions are competing in the market place. Microsoft's technology, embedded in its Windows Media Player, is an industry leader, but some providers of legal online music services have decided to go with Microsoft's competitors instead, fragmenting the market . DRM as such of course does not restrict copying. All it does is return a measure of control to content producers. What industry does with this measure of control is a matter of corporate strategy. In the case of music, for example, DRM provides record companies almost limitless latitude. It can be used to prevent any copying, to permit only a single copy, to prevent burning of songs onto CDs, or to only permit playback during the first 48 hours after purchase, to name only a few. In short, it gives the record industry close control over what users actually do with the industry's products.

With DRM the publishers can gain access to new consumers, lower the cost of distribution, and greatly increase their knowledge of consumer's interest and needs. In addition the provider can permit the re-use of all or portions of its information by others in the value chain, increasing collateral sales. Software can be physically distributed to users or downloaded, demonstrated, purchased or rented with payments and usage information going back to the participants as determined by their agreements. The use of DRM software application during the creation phase of digital content works towards creating a trusted environment where both the sender and the consumer can be assured that the content they receive was sent by the appropriate party and the consumer is authorised to receive the content.

According to copyright holders, DRM are simply tools to combat piracy and counterfeiting. Anybody who downloads music from the web without paying royalties is committing theft, the reasoning goes, and DRM is merely a way for owners of intellectual property to defend their rights. A second perspective is about the character of information goods as a starting point. If the problem is indeed that information goods are non-excludable, then DRM may just be the saviour of markets. In other words, DRM enables information goods to function more or less like conventional goods, re-establishing excludability and thus an artificial notion of rivalry and scarcity. One set of technologies challenged the status quo by separating music from its physical carrier; a second set of technologies now re-establishes that status quo by wrapping music inside an electronic container whose distribution can again be controlled. The only point of DRM, in short, would be to prevent market failures on a massive scale.

DRM consists of broadly two elements: the identification of the intellectual property and enforcement of access and usages restrictions. The use of metadata and rights management information (RMI) or Digital Object Identifiers (DOI) is used to manage this. Metadata is information that is held about a particular piece of content. They are commonlystructured around a set of keywords and data categories. Metadata keywords are created whenthey are needed and names that actually make sense like. The most common protection given byDRM is through encryption and digital watermarking. The identification consists in the attribution of a standard identifier and marking the content with a watermark. The enforcement works via encryption that is by ensuring that the digital content is only used for purposes agreed by the right holder. The first step in providing a deployable and expandable DRM technology strategy involves the appropriate met tagging of the contents that are created and stored within databases and digital media asset management technologies. After the assets are met tagged, the information is encrypted to ensure the security of the content. After sufficient authorisation and clearing of the account, asset is accounted for, the content can be transmitted and displayed in a secure and trusted environment via client technology such as adobe acrobat, internet explorer.

From a sceptical consumer rights point of view, finally, a different pictureemerges. The main goal of DRM mandates is not, as the industry often claims, to stop ‘piracy’ but to change

consumer expectations. In the content industry's view, consumers don't have rights; they have expectations. These expectations are about what consumers may and may not do with digital content. If content providers do not give consumers permission to burn legitimately downloaded songs onto a CD, consumers may just have to accept it. If listening to a song five times during a 48-hour period were a lot cheaper than purchasing a right to unlimited listening, consumers better adjust their listening patterns. DRM, in short, gives the music industry a set of tools to initiate a paradigm shift in the entertainment and information industries. Rather than selling physical music carriers and leaving it up to consumers what to do with them, the industry would exert much greater "after sales" control over consumers and their consumption. Each of these perspectives has credence. Digital network technologies have indeed made copyright infringement vastly easier and have probably undermined legitimate music sales. DRM is certainly one way to turn the tables on pirates. It is also true that DRM – by re-establishing excludability and rivalry – could resolve the underlying tension between digital information goods and copyright. It might thereby enable established business models, policies, and law enforcement strategies to continue to work, or at least to minimize adjustment costs.

DRM is also about fundamentally changing the producer-consumer relationship. There are several indications that content producers are employing DRM for much more than merely fighting piracy or ensuring that markets work properly. To curb the re-import of DVDs produced for foreign markets, for example, Hollywood is equipping discs with regional codes. DVDs produced for the Asian market will not work in a European player and vice versa. The goal here is market segmentation and differential pricing, not preventing unlawful copying. In the case of music, online music services operated by or on behalf of the major record companies are using DRM to diversify their product offerings. Music Net, for example, offers AOL users three different subscription levels. Listening to twenty songs a month online and downloading another twenty costs $3.95 a month. Unlimited listening and downloading comes at $9.95 a month. In both cases, however, users cannot burn downloaded songs onto a CD. The right to burn ten downloaded songs per month increases the monthly fee to $17.95. In addition to these existing subscriptions, AOL is considering a variety of their packages, including à la carte burning .Only with DRM do

service providers have the ability to control which songs users may listen to while being online, which songs they can download to their own computers, and which songs they can burn. It is evident that industry is beginning to deploy DRM for much more than just battling piracy.

Technology-enabled market segmentation and differential pricing are of course entirely legitimate tools of corporate strategy.18 In fact, across many sectors, incumbents and new entrants alike deploy e-commerce tools precisely toward those ends (Bar 2001). From a public policy and public interest perspective, however, the near-universal digital lock-up of information goods that is necessary for some of these strategies to work is a substantial concern. Most importantly, it tilts the balance of producer and consumer rights that is the core of intellectual property regulation considerably toward the former. Universally deployed DRM gives producers a measure of post-sale control that is unlike anything seen in a previous era. In this world, consumers no longer buy music, they merely contract music services, as producers retain tight digital control over the actual product. The producer-consumer relationship, in short, is fundamentally altered. In addition to the implications for consumer rights and the threat such tight controls may pose to creativity, possible effects on market competition are an additional concern. High switching costs may lock in consumers, stifling competition.

It is already clear that DRM could be a panacea to copyright holders. Not only does it help them turn the table on pirates; it also provides the capability for a set of product and marketing strategic options that are truly unprecedented.Of product and marketing strategic options that are truly unprecedented. The only problem is that electronic locks, like all locks, can be broken. Breaking sophisticated electronic locks is certainly not easy and ordinary users generally lack the skills to do so. But a small group of experts – be they underground hackers, technology buffs, or encryption experts – regularly take on such challenges. In the most prominent recent case, a Norwegian teenager broke the motion picture industry's CSS encryption code for DVDs and shared his new know-how via the Internet .The music industry, in turn, gained first-hand experience when its deliberate challenge to hackers to crack its SDMI secure music standard yielded several successful cracks in a matter of just weeks.DRM technology focuses on making it impossible to steal content in the first place, a more efficient approach to the problem t

han the hit-and-miss strategies aimed at apprehending online poachers after the fact [8].

Copyright holders thus know that reliance on technology alone is insufficient. No electronic lock is perfect. The challenge alone is sufficient motivation for a select few to find ways around electronic locks. Consequently, what is critical for copyright holders is that expert knowledge on code breaking does not translate into applications that are easily available to ordinary users. The free availability of specific code-breaking technology obviously makes a strategy resting on digital encryption unviable. To make the world "safe for DRM," copyright holders have therefore pursued a complimentary strategy of lobbying for swift legal penalties against lock breaking and lock breakers. These two elements – DRM and sweeping laws banning tampering with them – constitute the double punch of law and technology that is fundamentally remaking copyright. As the following analysis of recent legal developments in the United States and Europe shows, intense industry lobbying has already led to significant legal changes in the legislations.

DMCA AND ITS IMPLICATIONS ON THE SOCIETY

The rapid rise of the Internet and electronic commerce accelerated already ongoing efforts in the United States and Europe to adopt copyright to new digital realities.Yet in age of global information networks, many regulatory issues can no longer simply be settled in the domestic realm, as digital goods and services cross borders at the click of a mouse. Animated by influential copyright holders, the United States and European governments thus sought a new international copyright treaty through the World Intellectual Property Organization (WIPO), a Geneva-based United Nations affiliate. The treaty's provisions have been incorporated into U.S. law through the Digital Millennium Copyright Act (DMCA) and are becoming law in Europe as national governments implement the European Union Copyright Directive (EUCD).

The treaties encouraged signatories to provide legal sanctions for unauthorized circumvention of DRM measures that encrypted a copyrighted work in order to promote the adoption of DRM measures. These measures did not have to be foolproof or unbreakable to attract legal protection. Provided that a given measure was sufficiently effective in operation to be categorized

8. http://searchcio.techtarget.com/definition/digital-rights-management

as an effective technological protection measure under relevant legislation, a remedy would be available to a content owner who claimed unauthorized access to or use of the work as a result of some-one cracking a DRM system.

According to the text of the legislation, circumvention is defined as "descrambling a scrambled work, to decrypt an encrypted work, or otherwise to bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner"(Harvard). There are two types of security measures that copyright owners may employ, both of which are addressed under this provision, and are illegal to circumvent. The first of which is an access control, which is defined as something that must be bypassed to obtain access to a work, like a password or encryption. Not only is it a violation to circumvent access controls, but also to provide tools to others that would help them do this (like linking to a site, bypassing a log-in screen, or distributing passwords). The second is a copy control, which involves whether a protected material can be copied, how many copies can be made, and how long you can have possession of the work. The DMCA prohibits the manufacture and distribution of programs that can circumvent copy control securities; however, it is oddly not a direct violation of the DMCA to engage in the act of circumventing copy controls, but that falls under traditional copyright law.With the focus on regulating decryption technologies, the issue of protecting legitimate interests in copyrighted works against restrictive DRM measures was sidelined. Legislation enacted pursuant to the WIPO treaties inadequately protects the ability of individuals to make fair uses of a digital copyrighted work, partly because fair use is not regarded as a legal right to access and use a protected work. Instead, the prevailing view is that fair use is a mere defense to an act of copy-right infringement.

Legislation that prevents acts of circumvention or trafficking in circumvention devices will encroach on fair use if it does not place affirmative obligations on copyright holders to make some allowance for fair use. To place such affirmative obligations on copyright holders realistically requires acceptance that fair use is a legally guaranteed right and not merely a tolerated allowance. Absent recognition of such a right, there appears no legal basis for the proposed obligation. Although the acceptance of fair use as a legal right may seem like a new concept in copyright law that unfairly shifts the balance of interests away from copyright holders,

it is not such a conceptual departure from the current law. While it is unclear whether fair use is recognized as a legal right, fair use has been established as an integral part of the social bargain embodied by copyright law .Along with the idea-expression dichotomy ,fair use is an essential part in the balance of rights and interests to ensure an appropriate flow of information and ideas throughout society. Thus, even if there were good reasons in the past for relegating fair use to the status of a mere defence to copyright infringement, the advent of DRM measures that can restrict access to copyrighted works may require a shift in thinking, and elevation of that defense to an independent right of action. In other words, perhaps digital technology necessitates transforming fair use from a shield into a sword.

Conclusion

Implementing strong laws against circumvention of DRM systems, which could stop piracy completely, promotes progress of useful arts in developed countries but willdeprive access to information, knowledge and entertainment to people in developingcountries like India[9] .By including the DRMprovisions in the Indian copyright law, withoutengaging in due economic analysis as to their need as well as consequences, the proponents of the newDRM provisions have risked a reduction in socialwelfare. The danger is further aggravated by the factthat the new legislation does not even provide amandatory periodical review of the working of thoseprovisions[10] .DRM provisions should also balance the human rights of various stakeholders like right to resell and redistribute etc. Finally to conclude it is apt to state that "it is better to light a small candle rather than to face darkness".

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9. Anti-Circumvention laws to protect Digital Rights: An Indian Perspective by *Author- Kalyan C. Kankanala1 , Chief Knowledge officer, Brain League IP Services*

10. Does India Need Digital Rights Management Provisions or Better Digital Business Management Strategies? By Arul George Scaria†published by Journal of Intellectual Property RightsVol. 17, September 2012, pp 463-477

ciscenje- Understanding the Evil of 'Cleansing the Womb': Conflicting Dichotomy under International Criminal Law

A. Vijayalakshmi *

INTRODUCTION

Gender violence occurs during times of peace and war and it is widely committed in the latter. However the legal question of its prevention and punishment by way of prosecution are yet to be recognized under jus gentium. The content and the context of International Crimes [1] (delictum juris gentium) majorly got its due attention in the aftermath of the massive human rights violations of World Wars, in particular by the major efforts of the United Nations (UN)[2] . The international community recognized the subject by way of establishing International Military Tribunals, Nuremberg and that of Tokyo[3] and enacting the Convention on the Prevention and

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1. The notion of international crimes originate from the schools of jus naturalae (natural law), wherein neither the nature of the offender nor that of the victim is a matter of concern but the nature of the crime per se attracts apriori its prohibition. When explained the nature of crimes are in such a nature which shock the basic conscience of mankind and liable to prosecuted and punished in all times. Further it is also supplemented by the concept of Universal Jurisdiction recommended by the father of the law of the nations Hugo de groot Grotius. The locus classicus illustration is that of Piracy wherein the principle hostis humanis generis-enemies of the mankind to be tried and punished any where found highly confirms the view of ICL.
2. The International Law Commission under the aegis of the UN General Assembly has contributed by way of progressive development and codification of ICL. The work are as follows: (i)Formulation of Nuremberg Principle of International Law recognized in the Charter of Nuremberg Tribunal and in the judgment of the tribunal., (ii) Draft code of offences against the peace and security of human mankind(Part I), 1954, Part (II) including the draft statute for an International Criminal Court, (iii) Draft statute for an international criminal Court, 1994, (iv) Draft code of Crime Against Peace and Security to human mankind, 1996, and Rome Statute of 1998. Available at www.un.org/law/ilc
3. In the case of the Nuremberg Tribunal the jurisdiction was established by the Allied powers (notion of victors justice)-London Agreement, August 8, 1945, in the case of Tokyo it was the commander-in-chief of the Allied forces, Douglas Mac Arthur's Directives, January 19, 1946-Charter of International Military Tribunal for the Far East.

Punishment of the Crime of Genocide (Genocide Convention), a contribution of Prof. Raphael Lemkin[4] which was adopted by the UN General Assembly (UNGA)[5]. However except to the reference of gender crimes committed by the National Socialist regime of Adolf Hitler, the legal mechanisms did not provide a comprehensive understanding of the notion of gender crimes under the available mechanism of International Criminal Justice system.

The massive violations of human rights that occur in the contemporary times, for instance in countries like, Albania, Afghanistan, Bosnia and Herzegovina, Chechenya, Croatia, Georgia, Kosovo, Palestine, Sri Lanka, Syria, the women are targeted. In the context of criminal behavior there does not exist a uniform pattern of sexual violence. The perpetrators camouflage their techniques however when properly understood it may be even Genocide or Crimes Against Humanity or War Crimes (violations of the Geneva Conventions governing the law regulating the conduct of hostilities)[6]. The international community witnessed during internal armed conflict or external armed conflict commit violations of International Human rights law or that of the Laws of War of Customs of War or serious breaches of International Humanitarian law.

The existing legal complexities and inadequacies in the branch of International Criminal Law (ICL) are to be addressed and analyzed by way of focalizing a modern technique of international crime identified as Cisenje or Ethnic cleansing. It is also a matter of foundational understanding that the nature of scope of ICL is interlinked with General International Law (GIL), International Human Rights Law (IHRL) and that of International Humanitarian Law (IHL)[7].

The varied techniques practiced by the perpetrators of the war criminals against women community during war are to be analyzed in a holistic manner.

4. Prof. Raphael Lemkin is considered to be the father of the jurisprudence on the international crime of genocide, he coined the "geno" meaning 'tribe and latin suffix 'cide' relating to killing to conjunctively called as genocide in his famous work Axis Rule in Occupied Europe: Analysis and Redressal of the Government (1944).

5. The Genocide Convention was adopted by the result of twin UNGA Resolutions namely, (I) UNGAR 96(I) 11 December 1946 and UNGAR No. 260 A (III) 9 December 1948.

6. Throughout the history of armed conflict, women have been the prime targets. As a symbol of humiliation that is by way of attacking the women the perpetrators target the pride of the society. In all cases of human rights violations systematic sexual violence was adopted by the offenders. When examined in all instances the proximity of applying ICL is larger in particular the concept of Biological Genocide.

7. It is a settled understanding that special law will override general law which is also established by the maxim lex speciailis derogat lege generali. Under International Law in situations of non-liquet in special law than the general law will prevail.

GENDER CRIMES

Gender crimes are considered to be the serious violations of the individual rights. Human rights of an individual safeguarded under IHR as envisaged under the Universal Declaration of Human Rights, 1948 [8] (UDHR), International Covenant on Civil and Political Rights (ICCPR)[9] UNGA/Res/2200A (XXI), 16, Dec, 1966, Declaration of the Elimination of Violence Against Women (DEVAW), UNGA/Res/48/104, 20 Dec 1993, Convention of All forms of Elimination of Discrimination Against Women (CEDAW)[10] etcetera. Under the International Conventions individual rights of women have been guaranteed either directly or indirectly[11] . Gender crime includes both physical as well as psychological forms on injury. It is in this background the nature of the crime attains a composite state wherein the victimological basis becomes a challenge for the administration of criminal justice system. However sexual violence in the form of rape plays the predominant role as the perpetrators techniques invariably revolves around them. In the context of defining the gender crimes in the context of human rights the understanding adopted by the UNGA in the DEVAW is noteworthy and in fact constitutes a path breaking jurisprudence[12] .

ETHNIC CLEANSING

"Etnicko Ciscenje" is the Serbian, Croat and Bosniak term meaning "Ethnic Cleansing". The term "Ethnic Cleansing" entered the English language through the news media in the summer of 1992. The term 'ciscenje' which was frequently used in the Bosnian Muslim Genocide in the former Yugoslavia during ethnic conflict

8. Articles 1, 3 and 5 of the UDHR are pertinent to the subject. Article 1 states that 'All human beings are born free equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. Article 3 reads: 'Every one has the right to life, liberty and security of person'. Article 5 enunciates the principle that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.
9. Article 6 para 1 of the ICCPR states: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
10. Convention on Elimination of All Forms of Discrimination Against Women,1979, Art 1. www.un.org
11. The definition from the above Conventions, it didn't directly gives the definition for gender violence but indirectly speaks about it.
12. Article 1 For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. Article 2 Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

which means 'Ethnic Cleansing'. The term ethnic cleansing has its origins in the 1990's Yugoslav conflict and is in fact a literal translation of the Serbo-Croatian/Croato-Serbian etnicko ciscenje. However it is impossible to determine who was the first to employ the expression-although the suggestion has been made that etnicko ciscenje was in fact part of the Yugoslav National Army's (JNA) military vocabulary and was used by the JNA to denote their policy of removing Croats and Muslims from territory conquered and claimed by rump Yugoslavia (Serbia-Montenegro). To achieve the goal of destructing a particular group or ethnicity, the perpetrators of the heinous crime choose ethnic cleansing through women, the varied techniques inter alia involved rape, systematic mass rape, forced impregnation, forced sexual slavery, forced prostitution, forced abortions, public nudity have been part of the criminological behavior at the international level. Due to the varying techniques of the perpetrators of international crimes the question of preventing and punishing such crimes pose a composite challenge to the committed international actors concerned. Thus the practice of ethnic cleansing has attracted the question of International Criminal Justice system.

LEGAL PERSPECTIVES

The UNGA Resolution 47/121 (1993) is significant in relating ethnic cleansing with genocide. The International Criminal Tribunal of Former Yugoslavia (ICTY)[13] for the first time in the history of the ICL by way of invoking Rule 61 Order relating to The Prosecutor Vs.Radovan and Karadzic and Ratko Mladic, (Case No. IT-95-5-R61, IT-95-18-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996) upheld that the abhorrent practice of ethnic cleansing constitutes genocide and it is also significant that the Tribunal actually exposed the definitive understanding of the term ethnic cleansing[14] However

13. ICTY was established as per the Chapter VII of Charter of United Nations under Article 39 by way of twin UN Security Council Resolutions namely 780/1992 on 6 October 1992 in which the Security Council requested the Secretary General to establish an impartial Commission of Experts to examine and analyze and in UNSC Resolution 808/1993 on 22 February 1993 based on the interim report of the Expert Commission, a decision to establish an ad hoc international tribunal in relation to events in the territory of the Former Yugoslavia. The objectives of establishment of the ICTY was to put an end to the widespread violations of the international humanitarian law in the territory of Former Yugoslavia including reports of mass killings, and continuance practice of 'ethnic cleansing' and to take effective measures to bring justice to the person who are responsible for them, in particular for the prosecution of person responsible for serious violations of IHL committed in the territory of the FRY.
14. The ICTY had the opportunity to explore the definition of the prohibited act from the criminological perspective. It was identified as a practice which means that you act in such a way that, in a given territory, the members of a given ethnic group are eliminated, aiming to make the territory ethnically pure, majorly by involving forced impregnation as a form of sexual violence and thereby resulting in the genocidal objectives.

the fundamental problem in ICL is the practice of ethnic cleansing is defined and lack of such an understanding will prove fatal in the spectrum of preventing, prosecuting and punishing and significantly in understanding the rights of the victims of this form of biological genocide. Thus it is only through the resolutions of the UNGA and that of the UNSC (780 (1992), 808 (1993) 819 (1993) 827 (1993), decisions entered by the International Tribunals, and the scholarly works[15] the jurisprudence is evolving which is a danger in itself as justice cannot be circumstantial but it must be a firm. To be precise, the available law in this regard only by way of interpretation of the prohibited acts. The possible remedy is to amend the existing substantive and procedural laws under ICL to include the distinct crime of ethnic cleansing, which can be committed also during times of peace and war.

SUMMATION

The works of scholars like Prof. Raphael Lemkin that ignited the jurisprudence on international crimes and solely aimed at universal justice have to be revisited. It is time that Rape and Systematic Sexual Violence have to be re-determined with the abhorrent practice of ethnic cleansing from the perspective of the changing techniques of the offenders wherein the victimological concerns can be effectively understood. The present mechanism as said above is a product of interpretation but the permanent solution is legislating the composite crime, which goes to the extent of involving the elements of Genocide considered as the crime of crimes. The notion of ICL has to be broadened purely for safeguarding the welfare of gender in particular the human family as a whole.

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15. For a detailed understanding on the subject generally see, William A Schabas (2000) "Genocide in International Law", United Kingdom: Cambridge University Press; Damir Mirkovic (1996) "Ethnic Conflict and Genocide: Reflections on Ethnic Cleansing in the Former Yugoslavia", Annals of the American Academy of Political and Social Science, Vol.548, pp. 191-199; Kelly Dawn Askin (1999), "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status", The American Journal of International Law, Vol.93, No.1,pp. 97-123; Kelly Dawn Askin (2005), "Gender Crimes Jurisprudence in the ICTR, Positive Developments", Journal of International Criminal Justice, 3, pp. 1007-1018; Kathleen A. Cavanaugh (2002), "Forced impregnation and Rape as a Means of Genocide", Journal of International and Comparative Law, Vol.8, No.2. pp.1-21; Siobhan K. Fisher (1996), "Occupation of the Womb: Forced Impregnation as Genocide", Duke Law Journal, Vol.46, No.1, pp.91-133; Karen Engle (2005), "Feminism and Its (Dis) contents: Criminalizing war time Rape in Bosnia and Herzegovina", The American Journal of International Law, Vol.99, No.4, pp. 778-816; Alex Obote Odora (2005), "Rape and Sexual Violence in International Law: ICTR Contribution", New England Journal of International and Comparative Law, Vol.12, 1, pp.135-159.

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – An Appraisal.

Dr. S. Sheeba *

Introduction

Right is an interest protected by law and proprietary right means right to or over property. Right to property has steady bearing on social economy and is subject to the law of social control reflected in state's right of taxation, its police power and eminent domain [1]. These are notions which precincts the rights of individual in exercising the rights connected with property.

Life, liberty and pursuit of happiness, a solemn promise made in the American Declaration of Independence, though a slight deviation from the actual phrase[2] coined by Thomas Jefferson, reflects a much more deviation from the intended purpose of limited influence of government on people thereby curtailed its prophecy. Truly a real deviation or rather an addition but gives a huge implication and difference in the achievement of the right

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1. Police power denotes power of the government to interfere with the use of private property in the interest of public welfare. It arises from the obligation of state to protect its citizen. It has its effect on social and economic structure of society. See , Charles Hughes CJ. in Noble State Bank v. Haskell, 1911 US defines police power as the power to care for health, safety, morals and welfare of people. It extends to all great public needs.This principle of U.S. origin has not been explicitly incorporated in the Indian Constitution but it acts as a guideline in India. See, Sooraram Pratap Reddy v. District Collector Ranga Reddy District, 2008 9 SCC 552.

2. Term was first coined by Hugo Grotius, father of International law in his work, De Jure Belli Et Pacis in the year 1625.Under the concept, the State can alienate and destroy property not only in times of extreme necessity but also in other situations. In extreme situations even private persons have right over the property of others, but for ends of public utility that means private ends should give way to public ends. However state is bound to make good the loss.

and empowering government though in a limited sense as often highlighted by imposing control over property. Not the situation in United States only but the same in India. Being a welfare oriented society where state is tuning its activities with the preambular notions or objectives is not at all unaware of the noble ideals or rather those natural rights to life, liberty and property . But those principles are subsided by an even higher principle of social revolution. And in pursuance of that, state has changed its approach towards the property rights of individual citizens within three decades of the coming into actual force of the Constitution. That has further expanded the scope of regulatory power as could be exercised by the state over proprietary rights of the citizens.

Property does not exist because there are laws, but laws exist because there is property[3].There can be seen an evolution in the concept of wealth or property. There existed a time where persons with a large number of slaves were considered as rich, then those who own large acres of landed property as rich, then a slight shift from property to possession of liquid cash, then to intellect or even intellectual property. But still the dignity or status attached to a person with landed property is gaining strength in the wake of emerging norms relating to industrialization, urbanization and globalization and its immediate consequent of property dealings where huge acres of land are taken from landowners either by government or private individuals in pursuance of public private partnership projects or government projects. Whatever it is landed property regained its value. But the tragedy is with respect to land owners. Once wealthy land owner is dragged to the position of a mere landless, homeless beggar without any means of livelihood, specifically if the land acquired is an agricultural land. Though we have a state legislation[4] which prevents conversion of agricultural land for commercial or the like purposes, one thing, not to be devalued is 'might is wealth'. It is really an area reflecting imperialistic symptoms.

Though initially right to property was guaranteed as a fundamental right under Art. 19 (1) (f)[5] and Art 31[6], it was denigrated

3. Luigi Marco Bassani,'Life, Liberty and Jefferson on Property Rights' Journal of Libertarian Studies, 31–87 Volume 18 (Winter 2004) See, www.mises.org (accessed on 30-1-2014 at 1.00p.m.)
4. The Kerala Conservation of Paddy Land and Wetland Act , 2008.
5. Deleted by Constitution 44th Amendment Act, 1978.
6. ibid

to the status of a mere Constitutional[7] or else a legal right under Art 300 A[8], by reason of which, it is not enforceable by invoking the writ jurisdiction of High Courts and Supreme Court stipulated under Arts.226 and Art 32 of the Constitution respectively, but only recourse to ordinary legal remedy. Moreover, since it has lost the status of fundamental freedom of right to property it is not possible to challenge any action from the part of the state on the ground that deprivation of property does not come under reasonable restrictions[9]. Again Art . 300 does not stipulate the requirement of adequate compensation to be paid to the land owner or the deprived. It only says that land can be taken by state with the authority of law. If the government appears to have acted unfairly, the action can be challenged in a court of law by citizens.

Thus the power of state to acquire property of private individuals in exercise of regulatory role creates a block in constitutional harmony. This breakage of harmony could be witnessed from the implementation of the age old legislation framed by British Government in India namely, the Land Acquisition Act 1894. Albeit, various amendments made to the original Act, it could not address a number of issues relating to farmers, those directly affected from loss of livelihoods due to deprivation of land while facilitating land acquisition for industrialization, infrastructure and urbanization it miserably failed in the case of former. There felt a need for balance and it was found, though late, that it can be achieved only by a Combined Law where Land Acquisition and Rehabilitation & Resettlement need to be seen necessarily as two sides of the same coin. Thus the heightened public concern involved in Land Acquisition issues clubbed with the absence of a national law to provide for fair compensation, rehabilitation & resettlement led to the enactment of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation, and Resettlement Act , 2013[10]which has repealed the earlier Act.

Objectives of the Act

- Aims to establish the law on land acquisition as well as the rehabilitation and resettlement of those directly affected by the land acquisition in India.

7. *Bishamber v. State of Uttar Pradesh* , AIR 1982 SC 33
8. Art 300 A reads: "No person shall be deprived of property save by authority of law". It is inserted by Constitution 44th Amendment Act, 1978.
9. Prior to 44th amendment to the Constitution, fundamental freedom under Art 19(1) (f) was subject to reasonable restrictions under Art 19(5).
10. The Act has received the assent of the President on 27th Sep 2013 and came into force on 1st January 2014.

- Provision for just and fair compensation to the affected families whose land has been acquired or proposed to be acquired or are affected by such acquisition.
- Ensure that the cumulative outcome of compulsory acquisition results in making the affected persons partners in development leading to an improvement in their post acquisition, social and economic status.
- Ensure in consultation with institutions of local self-government and Gram Sabhas established under the Constitution, a humane, participative, informed and transparent process for land acquisition for industrialization, development of essential infrastructural facilities and urbanization with the least disturbance to the owners of the land and other affected families.

Scope of the Act

The Act applies[11] when Government acquires land for its own use, hold and control; when it is acquired with the ultimate purpose to transfer it for the use of private companies for stated public purpose and when it is acquired for public private partnership projects.

However the provisions of the Act does not apply to acquisitions under 13 existing legislations including the Special Economic Zones Act, 2005, the Atomic Energy Act, 1962, the Railways Act, 1989, etc. It also exempts land acquisition for all linear projects such as highways, irrigation canals, railways, ports and others.

Major Attributes of the Act

- The Act centers round the concept of Public Purpose[12]. And the term 'public purpose' includes project for strategic purposes,[13] infrastructure projects, projects for project affected families, project for planned development or the improvement of village sites or any site in the urban areas or provision of land for residential purposes for the weaker sections in rural and urban areas; project for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced

11. Section 2 of the Act
12. Section 2 (1)
13. Relating to naval, military, air force, and armed forces of the Union, including central paramilitary forces or any work vital to national security or defence of India or State police, safety of the people;

or affected by reason of the implementation of any scheme undertaken by the Government, any local authority or a corporation owned or controlled by the State. When government declares public purpose and control the land directly, consent of the land owner shall not be required. However, when it acquires the land for private companies, the consent of at least 80% of the project affected families shall be obtained through a prior informed process before government uses its power under the Act to acquire the remaining land for public good, and in case of a public-private project at least 75% of the affected families should consent to the acquisition process. And as far these two applications are concerned public purpose once mentioned should not change afterwards.

- Another feature of the Act is the existence of the Urgency Clause[14] for expedited land acquisition. The urgency clause may only be invoked for national defense, security and in the event of rehabilitation of affected people from natural disasters or emergencies.
- To avoid any confusion regarding the term 'land owner', the Act defines it to include: a) person whose name is recorded as the owner of the land or building or part thereof, in the records of the authority concerned; or b) a person who is granted forest rights under The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006[15] or under any other law for the time being in force; or c) a person who is entitled to be granted Patta rights on the land under any law of the State including assigned lands; or d) any person who has been declared as such by an order of the court or authority.
- Another usage in the Act is 'livelihood losers' and 'affected families'[16]. It is calculated on the parameter of last three years. Over the last three years, a family whose livelihood is primarily dependent on the land being acquired, including agriculture labourers, tenants or sharecroppers; or families which are dependent on forests or water bodies for their livelihoods when these are acquired; or any family whose livelihood is dependent primarily or residing on the land being acquired in the urban areas are termed Livelihood losers and Affected families.

14. Section 40
15. This is the first Act which confers substantive rights to scheduled tribes and other traditional forest dwellers in India.
16. Section 3

- It is also a law safeguarding food security[17] in the sense that the Act prohibits multi-crop irrigated land from being acquired but as a demonstrably last resort measure, which in no cases lead to acquisition of more than such limits as should have been set by the State Government under this law. Wherever multi-crop irrigated land is acquired an equivalent area of cultivable waste land shall be developed for agricultural purposes or an amount equivalent to the value of the land acquired shall be deposited with the appropriate Government for investment in agriculture for enhancing food-security. States are also required to set a limit on the area of agricultural land that can be acquired in any given district.
- Social Impact Assessment[18] is yet another feature of this Act. As per this the Government shall carry out a Social Impact Assessment after consultation with the concerned Panchayat, Municipality or Municipal Corporation, in the affected area and the same shall be published in the affected areas and uploaded on the website. Adequate representation has to been given to the representatives of Panchayat, Gram Sabha, Municipality or Municipal Corporation in the stage of carrying out the Social Impact Assessment study and it must be conducted within a period of six months from the date of its commencement and the report must be made available to the public [19] after giving them an opportunity to be heard, reflecting the element of public hearing [20]. Specifically the study concentrates [21]on : (a) assessment as to whether the proposed acquisition serves public purpose; (b) estimation of affected families and the number of families likely to be displaced;(c) extent of lands, public and private, houses, settlements and other common properties likely to be affected by the proposed acquisition; (d) whether the extent of land proposed for acquisition is the absolute bare minimum extent needed for the project;(e) whether land acquisition at an alternate place has been considered and found not feasible;(f) study of social impacts of the project, and the nature and cost of addressing them and the impact

17. Section 10
18. Section 4
19. Section 6
20. Section 5
21. Section 4(4)

of these costs on the overall costs of the project vis-a-vis the benefits of the project.

- The Social Impact Assessment report is required to be evaluated by an independent multi-disciplinary Expert Group [22] constituted under the Act. If the Expert Group is of the opinion that, the project does not serve any public purpose; or the social costs and adverse social impacts of the project outweigh the potential benefits, it shall make a recommendation within two months from the date of its constitution to the effect that the project shall be abandoned forthwith and no further steps to acquire the land will be initiated in respect of the same. If Expert Group feels the existence of public purpose and the like it shall make specific recommendations within two months from the date of its constitution as to whether the extent of land proposed to be acquired is the absolute bare-minimum extent needed for the project and whether there are no other less displacing options available, along with the grounds for such recommendation in writing and the same shall be published. The Government shall then, after examining the report of the Collector, the report of the Expert Group and after considering all the reports and the satisfaction as to the requirement of consent, recommend such area for acquisition which would ensure minimum displacement of people, minimum disturbance to the infrastructure, ecology and minimum adverse impact on the individuals affected [23].

- Next important feature is the publication of preliminary notification[24] of acquisition of land. If the preliminary notification is not issued within a period of twelve months then social impact assessment report will stand lapsed and a fresh assessment need to be conducted[25]. After the date every type of transaction of or any further encumbrance on the land will be strictly prohibited unless expressly exempted based on a request from the land owner. And consequently for the purpose of determination of extent of land, the officers are legally authorized to enter upon and survey the land, dig into the subsoil, mark boundaries by

22. Section 7(2)
23. Section 8(2)
24. Section 11
25. Section 14

placing lines or cutting trenches even to clear away any part of standing crop, fence if survey cannot be completed otherwise. However it shall not be conducted in the absence of owner or any person authorized by him unless they are served with sufficient notice.

- After the publication of preliminary notification next significant step is the preparation of Rehabilitation and Resettlement scheme by the Administrator for Rehabilitation and Resettlement[26] and the consequent declaration of acquisition. The scheme shall be published and based on the objection, report will be submitted to the Collector and after being approved by Rehabilitation and Resettlement Committee[27] it shall be published again and soon the Collector makes a declaration[28] as to acquisition along with the rehabilitation and resettlement scheme. The Requiring body is required to submit the amount prescribed by the government as the cost of acquisition and if it is not done, declaration cannot be made. Collector shall then serve notice to interested person as to the intended acquisition asking them to present their claims any as to compensation, resettlement and rehabilitation. The Collector shall make an award within a period of twelve months from the date of publication of declaration and if it is not made it will lapse[29]. After determining the market value, the Collector shall calculate the amount of compensation to be paid taking into consideration a number of relevant factors like damage caused because of taking away of any standing crops or trees, damage caused on account of severance of the land from other lands of the owner, damage due to diminution of profits attached to the land, damage caused due to compelling necessity of changing residence and the like[30].In addition to the compensation amount, solatium[31] shall also be paid which shall be 100% of compensation amount.

26. Section 16
27. Sections 17 and 18
28. Section 19
29. Section 20
30. Section 28
31. Section 30

- Another important feature is the rehabilitation and resettlement award[32] . In addition, certain infrastructural amenities need to be provided in the resettlement area, including: a) schools and playgrounds; b) health centres; c) roads and electric connections; d) assured sources of safe drinking water for each family; e) anganwadis providing child and mother supplemental nutritional services; f)places of worship and burial and/or cremation ground depending on the caste-communities and the like[33.]

- The Act stipulates special provisions for Scheduled Castes and Scheduled Tribes (SCs/STs). As far as possible, lands under scheduled areas should not be taken unless as a last resort. If it is to be taken, the consent of Gramsabha or Panchayat or the Autonomous District Councils must be received before the issue of notification. In case of displacement, a Development Plan is to be prepared. In case they are displaced they should be provided with a compact area so that they could retain their ethnic, cultural and linguistic traits. Even though they are removed from the scheduled area they should be made available of all the statutory entitlements, benefits, reservation, safeguards enjoyed by them in the reserved area[34].

- The Act enhances the role for Panchayati Raj Insitutions (PRIs). These institutions must be given representation in the process of carrying out of the Social Impact Assessment and in the composition of the Expert Group. Again PRIs is recognized as a powerful body that has the power to reject a project. Moreover, the consent of Gram Sabha is mandatory for acquisitions in Scheduled Areas under the Fifth Schedule referred to in the Indian Constitution.

- There has been a significant reduction of the powers that the Collector enjoyed under the 1894 Act. Under the 1894 Act, the Collector had complete authority to decide what activity constituted 'public purpose'. Under the new law he has been completely stripped of this function. Public purpose must fall strictly within the parameters prescribed under this law. The Collector cannot add or subtract to the list given. Under the 1894 Act, the Collector could decide

32. Section 31
33. Section 32
34. Section 42

what quantum of compensation could be paid to those displaced. Under the new law, there is a formula that does not require the Collector to exercise any discretion. All he has to do is make sure that the rate is calculated as directed. Under the 1894 Act, the Collector could decide when to take possession. He could dispossess any family by giving a moment's notice. Now possession can only be taken once all the requirements under the law relating to the payment of compensation, rehabilitation and resettlement have been discharged. Under the1894 Act, the Collector had sweeping powers to invoke the urgency clause. What constituted an urgent situation was entirely a function of the Collector's interpretation. This loop hole has been plugged conclusively by limiting urgency to only two cases –natural disasters and national defence. The Collector can no longer acquire land citing 'urgent' reasons.

- The Act is given retrospective operation in certain situations. Where no award under Sec. 11 of the 1894 Act has been made, the new law will apply with regard to compensation. Where an award has been made but the affected individuals have not accepted compensation or have not yet given up possession and the proceedings have been pending for 5 years or more, provisions of the new law will apply. Where a majority of individuals in an affected area have not received compensation then the new law will apply.
- The provisions of the new law shall be fully compliant with other laws such as The Panchayats (Extension to the Scheduled Areas) Act, 1996[35] and The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 .
- Land that is not used within 5 years in accordance with the purposes, for which it was acquired at the time of acquisition, shall be transferred to the State Government's Land Bank or to the original land owner [36].
- There exists comprehensive penalty regime[37] for Companies and Government on grounds of providing false information, mala fide action, contravention of provisions of the Act and

35. The Act aims to extend the Panchayat Raj system to the Fifth Schedule areas and allow the tribal communities grass-root democracy by activating the Gram Sabhas (village assemblies). The Act empowers the Gram Sabhas to take authority over local natural resources also
36. Section 101
37. Sections 84,85,86

- The Act provides for the constitution of a National Monitoring Committee for Rehabilitation and Resettlement[38] to review national or interstate projects and monitor the implementation of R&R schemes and plans under the Act. If the land intended to acquire is one hundred acres or exceeds, then the appropriate government constitute a Rehabilitation and Resettlement Committee under the chairmanship of Collector[39] And an officer not below the rank of joint collector, deputy collector, additional collector or equivalent officer of revenue department will be appointed as the administrator who is also the member convener of the committee[40]

- The Act further provides for the constitution of one or more authorities as the Land Acquisition, Rehabilitation and Resettlement Authority [41] for the speedy disposal of disputes arising from it [42]. Consequently jurisdiction of civil court is barred. Again any person who is not accepting the award may by application to the Collector require him to make a reference to the appropriate authority but within the time limit specified[43]. However the requiring body or any person aggrieved by the award of the Authority can file an appeal to High court under Section 74 of the Act.

- The law has given much flexibility to states in the sense that it can frame rules [44] to give effect to the Act. Along with this states are conferred with power to make any law which could further the rehabilitation and resettlement benefits of the concerned population[45].

- There are 13 Acts of the Central Government in force that allow for land acquisition. These are listed in the Fourth Schedule of the Act .The new law does not apply to the activities covered under these Acts. However, within one year, the provisions of the new law which relate to compensation, rehabilitation and resettlement will be applied to the 13 Acts by a notification of the Central Government.

38. Section 48
39. Section 45
40. Section 43
41. Section 63
42. Section 51
43. Section 64
44. Section 109
45. Section 107

Conclusion

The present Act replacing and repealing the existed Act of 1894 intends to ensure social and economic justice enshrined in the Constitution. When justice means, to give what is due to one, where from the past experience it is evident that by interpreting some activities as public purpose and without due regard to the cardinal duty vested upon the state to protect the rights of the individuals rather concentrating highly on the usually held larger issue of industrialization, urbanization and globalization have brought the economic and social life in misery and gross violation of human rights. This issue is sought to be highlighted in positive through the enactment of this Act, which gives a ray of hope to the common man that state cares for its constitutional duty towards the people and it has not forgotten the concept of social welfare state even in the era of globalization, but still it is not free from flaws and lacunae for there exist provisions that can be interpreted to favour the aspirers of development neglecting social and economic justice.

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Public Interest Litigations in India a Positive Step in Protecting the Human Rights of Women and Children

S. Murugesan *

Introduction

The concept of Human Rights occupied prime location in ancient Indian Society. The concept of human rights had deep rooted traditions since time immemorial in Indian Society. Human right has always occupied a important place in India's rich legacy and believed in "Vashudhaive Kutumbakam" i.e., 'welfare of all'. Kautilya in Arthasastra stated that "the king shall provide the orphan, the aged, the infirm, the afflicted and helpless with maintenance; he shall also to provide subsistence to the helpless expectant mothers and also to the children they gave birth to". The Latin Maxim ubi jus ibi remedium means "where there is a right there is a remedy". The Supreme Court has been making an indefinite use of Public Interest Litigation in protecting human rights of the marginalized, deprived, under privileged members of the society. The Indian courts are quite enthusiastic in using the law as a tool of social revolution and to serve the larger social interest. Chief Justice Bhagwati in *Bandhua Mukti Morcha Vs. Union of India*[1] has observed that courts should be guided by the paramount object and purpose for which the constitution has been enacted. Law must be treated as a tool of social reform and social transformation for creating a new social order where human rights of each and every individual can be enforced with a possibility of greater common good. The

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1. 1984 (3) SCC 161

public interest litigation is an extremely important jurisdiction exercised by the Supreme Court and the High Courts.

Indian Constitution and the Protection of Human Rights

Human rights may be said to be rights that are inherent in people by virtue of being human being, the rights are absolutely essential for the full and complete development of human personality. The human rights are recognized as civil and political, economic, cultural and social rights. Indian constitution is a document rich in human right jurisprudence. The preamble which is the key to open the mind of the framers of the constitution concisely sets out the quintessence of human rights. Democracy, secularism, liberty and equality as they appear in the preamble are considered as the basic features of Indian constitution. The preamble of Indian constitution aimed at the protection and promotion of human rights of each and every individual. Many of the human rights and freedoms provided by Universal Declaration on Human Rights, 1948 and International Covenant on Civil and Political Rights, 1966 are envisaged under Fundamental Rights and Directive Principles of State Policy of Indian Constitution.

Definition of Public Interest Litigation:

Black's Law Dictionary (6th Edition) defined Public Interest Litigation as "Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government"

Advanced Law Lexicon has defined `Public Interest Litigation as "The expression `PIL' means a legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or a class of the community has pecuniary interest or some interest by which their legal rights or liabilities are affected".

The Council for Public Interest Law set up by the Ford Foundation in USA defined public interest litigation in its report of Public Interest Law, USA, 1976 as *"Public Interest Law is the name that has recently been given to efforts provides legal representation*

to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the proper environmentalists, consumers, racial and ethnic minorities and others" [2].

The Supreme Court in *People's Union for Democratic Rights & Others v. Union of India & Others*[3] defined public interest litigation as, *"'Public Interest Litigation' and observed that the Public interest litigation is a cooperative or collaborative effort by the petitioner, the State of public authority and the judiciary to secure observance of constitutional or basic human rights, benefits and privileges upon poor, downtrodden and vulnerable sections of the society"*.

Indian Judiciary on protection of Human Rights of the Women and Children

The Supreme Court of India through judicial interpretation has widened the horizon of Human Rights. Mere declaration of Fundamental Rights is meaningless unless there is effective machinery for enforcement of the rights. If there is no remedy there is no right. Indian Constitution have provided a machinery and procedure under Article 32 and 226 of constitution for safeguarding the fundamental rights. It empowered the Supreme Court and all High Courts of India to issue Writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-Warranto and Certiorari. Article 32(1) guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of Fundamental Rights conferred by Part III of the Constitution. Clause 2 of Article 32 confers powers on the Supreme Court to issue appropriate directions or orders or writs. Article 226 is substantially of the same effect as Article 32(2).

Rights of Juvenile and women under trial prisoners

In *Munna & Others v. State of Uttar Pradesh & Others,*[4] the allegation was that the juvenile under- trial prisoners have been sent in the Kanpur Central Jail instead of Children's Home in Kanpur and those children were sexually exploited by the adult prisoners. This Court ruled that in no case except the exceptional

2. M/s Holicow Pictures Pvt. Ltd. v. Prem Chandra Mishra & Ors. - AIR 2008 SC 913, para 19
3. (1982) 3 SCC 235
4. (1982) 1 SCC 545

ones mentioned in the Act, a child can be sent to jail. The Court further observed that the children below the age of 16 years must be detained only in the Children's Homes or other place of safety. The Court also observed that a Nation which is not concerned with the welfare of the children cannot look forward to a bright future.

In *Sheela Barse v. State of Maharashtra*[5] Sheela Barse, a journalist, complained of custodial violence to women prisoners in Bombay. Her letter was treated as a writ petition and the directions were given by the court.

In *Dr. Upendra Baxi (I) v. State of Uttar Pradesh & Another*[6] two distinguished law Professors of the Delhi University addressed a letter to this court regarding inhuman conditions which were prevalent in Agra Protective Home for Women. The court heard the petition on a number of days and gave important directions by which the living conditions of the inmates were significantly improved in the Agra Protective Home for Women.

Violence against women

In *Delhi Domestic Working Women's Forum v. Union of India & Others*[7] the Court expressed serious concern about the violence against women. The Court gave significant directions and observed that compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape.

Child labour prohibition

In *M. C. Mehta v. State of Tamil Nadu & Others*[8] the Court was dealing with the cases of child labour and the Court found that the child labour emanates from extreme poverty, lack of opportunity for gainful employment and intermittency of income and low standards of living. The Court observed that it is possible to identify child labour in the organized sector, which forms a minuscule of the total child labour, the problem relates mainly to the unorganized sector where utmost attention needs to be paid.

5. AIR 1983 SC 378
6. 1983 (2) SCC 308
7. (1995) 1 SCC 14
8. (1996) 6 SCC 756

Protection of working women and sexual harassment

In *Vishaka & Others v. State of Rajasthan & Others*[9] this Court gave directions regarding enforcement of the fundamental rights of the working women under Articles 14, 19 and 21 of the Constitution. The Court gave comprehensive guidelines and norms and directed for protection and enforcement of these rights of the women at their workplaces.

Minimum Safety measures in schools

In *Avinash Mehrotra v. Union of India & Others*[10] a public interest litigation was filed, when 93 children were burnt alive in a fire at a private school in Tamil Nadu. This happened because the school did not have the minimum safety standard measures. The court, in order to protect future tragedies in all such schools, gave directions that it is the fundamental right of each and every child to receive education free from fear of security and safety; hence the Government should implement National Building Code and comply with the said orders in constructions of schools for children.

Parental care

Parental care for every child was held a human right of every child in *Laxmi Kant vs. Union of India* [11]. It was also held in this case that parental care is an inherent right of every child and must be given preference over any other concern. A child becomes a man and he becomes the mind, hand and body of a country, so it is not only in the interest of child but also in the collective interest of a country that its children should be given living, food, education and other required necessities. Every effort should be made to abolish child labour which presents the worst picture of a country claiming to be rich in protection of human rights. The problem is not a new one for us and therefore our constitution framers under Article 15(3), 24, 45, 47 made provisions for securing the interest of children.

Equality for Women and protection from abuse

Though constituting half the population of the world and often referred to as the 'Better half of man', women throughout history have had the worst deal at the hands of the society.

9. (1997) 6 SCC 241
10. (2009) 6 SCC 398
11. (1987) 1 SCC 66

The Indian Judiciary has taken an active role in protecting the Human rights of Women and in maintaining gender equality. In *C. B. Muthamma v. Union of India* [12], the Supreme Court held that the compulsory resignation of women Foreign Service officials after marriage amounts to gender discrimination.

In *Mohammad Ahamad vs. Shah Bano*[13] Case it was held that *"Large segment of the society have been traditionally subjected to unjust treatment. Women are one of such segment."* Court in various cases as *Visakha case* [14], *Chandrimadas vs. Chairman Railway Board*[15] has made efforts for creating equality for women to save their human rights

Education as a human right

For implementation of this very human right Supreme Court in various cases provided education a status of Fundamental right. Unnikrishnan J.P. vs. State of Andhra Pradesh 16 and *Mohini Jain Vs. State of Karnataka* [17] case are remarkable on the point. It is the effort of judiciary in its various judgments due to which the legislature was compelled to give right to education a constitutional status and Article 21 A was added as fundamental right.

Sexual Exploitation of Children:

In *Vishal Jeet v. Union of India*[18] Supreme Court in this case deals with some seminal questions relating to the sexual exploitation of children. Here it has been observed that it is highly deplorable and heart rending to note that many poverty stricken children and girls in the prime age of youth are taken to the 'flesh market' and forcibly pushed into "flesh trade" which is being carried on in utter violation of all cannons of morality, decency and dignity of mankind. In *Gaurav Jain v. Union of India*[19] The Supreme Court held that the children of the prostitutes have the right to equality of opportunity, dignity, care, protection and

12. AIR 1979 SC 1868
13. (1995) 2 SCC 556
14. (1997) 6 SCC 241
15. (2000) 2 SCC 556
16. (1993) 1 SCC 645
17. AIR 1992 SC 1858
18. 1990 AIR 1412
19. (1997) 10 SCC 549

rehabilitation so as to be part of the mainstream of social life without any pre-stigma attached on them. The Court directed for the constitution of a committee to formulate a scheme for the rehabilitation of such children and child prostitutes and for its implementation and submission of periodical report of its Registry.

Sakshi v. Union of India 1999[20] in this Public Interest Litigation matter, the Supreme Court of India asked the Law Commission to consider certain important issues regarding sexual abuse of children submitted by the petitioner and the feasibility of amendment to 375 and 376 IPC.

Conclusion

The brief survey of the above mentioned illustrative cases shows that the activism of the Indian Supreme Court through the public interest litigation to protect the human rights of women children from various type of exploitation and endangerment. Although the Supreme Court made laudable directions and suggestions in many instances to protect basic rights of poor children, unfortunately these directions and suggestions are not followed and implemented by the government machinery effectively. In this regards, the performance of the Indian Judiciary stands out as a signal contribution to the implementation of human rights generally and that of Child and women Rights in particular. As such in the M.C. Mehta v. State of Tamil Nadu and Goodricke Group Ltd v Center of West Bengal Supreme Court of India emphasized on national Constitution and international instruments, including the Convention on the Rights of the Child, the Indian government is required to ensure that children do not engage in hazardous work. In Lakshmi Kant Pandey v Union of India with object of ensuring the welfare of the child J. Bhagwati directed the Government and various agencies to follow some principles as their constitutional obligation to ensure the welfare of the child.

Also judiciary has taken the lead to save the child from exploitation and improve their conditions. To mention a few, the Asiad case (1981), L.K.Pandey case (1994), M.C.Mehtas case (1991), Vishal Jeet v. Union of India (1990), and Gaurav Jain v. Union of India (1997) are some of the famous decisions where

20. Cri.LJ 5025

the judiciary has shown enough courage to uphold the interests of the children and spared no one to improve the working conditions of the child workers. The judiciary has always made concrete efforts to safeguard them against the exploitative tendencies of their employer by regularizing their working hours, fixing their wages, laying down rules about their health and medical facilities.

The judiciary has even directed the states that it is their duty to create an environment where the child workers can have opportunities to grow and develop in a healthy manner with full dignity in consensus of the mandate of our constitution. Likewise the judiciary has pronounced many judgments for the protection of the rights of the women in many cases. To conclude in the Hon'ble words of Justice Venkatachelliah "The task of protection and promotion of Human rights is a complex one and requires the co-operation of all sections of the Society"

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Forest and Eco-Tourism: Judicial Check, Socio - Economic Evolution – A Study

Belmont Sathia Swamy*

'Ecotourism means many things to many people. In my view it should mean travel to enjoy the world's amazing diversity of natural life and human culture without causing damage to either...A vital requirement is that visitors should show respect for both the environment and the people who live in it...Above all, the tourist industry has to remember a central precept: do not kill the goose which lays the golden eggs.'

-Sir Crispin Tickell
British Diplomat, environmentalist & academic.

Abstract:

This paper is an effort to assess forests and eco-tourism and its potential, and the socio-economic impact on the local population. An overall study relating to tourism, forest tourism or jungle tourism and its ecological effects are done and judicial look and its veracity is tested by conducting a case study about the forest wealth and eco-tourism prospects and developments in Kanyakumari District, Tamil Nadu which is the southernmost tip of our country, and the confluence of three seas; Indian ocean, Bay of Bengal and Arabian sea, having lot of potential to attract the tourists.

Tourism links man to man, community to community and civilization to civilization. It can be evidenced from the foreign travellers who visited our country during the reign of Monarchs. In the present time when people have lot of money in their pockets, leisure at hand, easy mobility with numerous means of transportation, travel and tourism have expanded. People

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thronging to places of green pastures, trees, waterfalls, birds of different species and temples and placid places of worship in hill tops which gives them pleasure, release from tension and a mind full of peace.

Tourism, a tool of social harmony:

'Tourism' now is not restricted to a leisure time activity people indulge in but it now influences many aspects of life like; economic, social, political, geographical, cultural at both national and international level.

Government of India Tourist Office, 'Tourism fosters friendship and contributes to social well being'[1]. Tourism in India is a growing industry. In an article on eco-tourism, a Mexican eco-tourism consultant is given the credit for introducing the term 'eco-tourism'. The International Eco-tourism Society (IETS) considers eco-tourism to be 'responsible travel to natural areas which conserves the environment and improves the well-being of local people'. As IETS notes, eco-tourism is 'an environment friendly smokeless industry for the many beautiful but destitute regions of the world'[2]. The travel industry defines eco tourism as 'purposeful travel that creates an understanding of cultural and natural history, while safeguarding the integrity of the ecosystem and producing economic benefits that encourage conservation. The long term survival of this special type of travel is inextricably linked to the existence of the natural resources that support it'[3]. Eco-tourism is a niche market for environmentally aware tourists who are interested in observing nature.

According to the World Tourism Organization (UNWTO), tourism that involves travelling to relatively undisturbed natural areas with the specific objective of studying, admiring and enjoying the scenery and its wild plants and animals, as well as any existing cultural aspects (both of the past and the present) found in these areas is defined as eco-tourism. An optimum number of environment friendly visitor activities, which do not have any serious impact on the eco-system and the local community and the positive involvement of the local community in maintaining the

1. Staff Reporter, 'Tourism can generate 20 million Jobs', The Hindu, Madurai ed., (October 13, 1999), 5.
2. Richard Sharpley, Tourism Development and the Environment: Beyond Sustainability?, (New York: Earth Scan, 2009), 59.
3. Andy Drumm, 'Tourism planning in and around protected areas', (Australia: The nature conservancy, Nov.21,2004), http://www.uws.edu.au/tourism, (accessed March 2, 2013).

ecological balance are some of its key elements (UNWTO, 2002). On a global scale, eco-tourism is growing because of its international appeal. The proponents of eco-tourism believe that humans are part of nature and that their impact is part of the natural process, whereas critics of eco-tourism maintain that people simply should not visit natural areas because they invariably degrade them[4].

Eco-tourism and forests in India:

The eco-tourism in India is sad caricature of what it was originally meant to be. The environment must be protected to keep tourism sustainable. Rampant violation of environmental ethics and protective legislation is only going to destroy countless treasures capable of sustaining a vibrant tourist economy[5].

As per the Hindu religious scriptures, one is expected to follow certain rules, or Dharma regarding sanctity to be maintained in hills, sanctuaries, water bodies, villages and market place. By and large these are followed in rural and tribal settlement[6]. The promotion of forest tourism also known as jungle tourism with the higher priority being the preservation of the fragile ecology and environment , encourage eco-friendly tourism and permit resorts in the lush green forest surroundings which are very attractive and enjoyable. Wild life sanctuaries, National parks, Marine National parks, Bird sanctuaries and Biosphere reserves are contemplated more and more, not only as a conservation measure but also to inculcate in the tourist a sense of compassion for flora and fauna and to cohabit with the other living things to bring them close to nature. Trekking tours are organized in forest areas to promote 'soft' adventure tourism in India. The trekking inside the forest areas create conservation awareness as seeing is believing, good will for conservation, and learn about nature. For nature lovers the forest's resplendent green cover with its tropical rain forest, sholas and vast meadows, and its varied flora and fauna is enthralling. As forests become logged, as streams become polluted, and as other signs of human activity become ubiquitous, the requirements of a true eco-tourism experience are increasingly difficult to fulfill. To compensate for the 'invasion' of human disturbance eco-tourism has promoted the educational aspects of the experience. Examples include opportunities to work with scientists to collect full data in

4. Margaret, Ph.D., 'Eco-tourism and its impact on Forest conservation', http://www.actionbioscience.org/environment/lowman.html, (accessed March 4, 2013).
5. 'Eco-Tourism' The Lion India Magazine, Bombay, (September 2009), 8-12.
6. Tor Stein John Hundloe, Linking Green Productivity to Ecotourism : Experiences in the Asia-Pacific Region, (Tokyo: Asian Productivity Organization, 2002), 63-84.

a remote wilderness (e.g., Earth watch) or travel with a naturalist to learn the secrets of a tropical rain forest (e.g., Cherrapunji, Meghalaya trips). Environmental education serves to provide information about the natural history and culture of a site, it also promotes a conservation ethic that may infuse tourists with stronger pro-environmental attitudes and also support local economies.In some sense, eco-tourism is a western concept of putting the 'old wine in a new bottle' as it is not new or unique for countries like India where eco-logical balance is a way of life for a large section of its population.

The socio-economic implications in forest tourism:

At the national level most published effect of foreign tourism has ability to earn foreign exchange and contribute positively to the balance of payments. Spin off results from tourist activities in other sectors of the economy which creates increased demand for capital and consumer goods resulting in the increase in Gross Domestic Product. The local level tourism is encouraged due to the ability to generate employment, increase standards of living and provide linkage effect with other sector of the economy[7]. Wild life, jungle tourism, cave tourism helps to promote economic activities that brings money through tourism by strong visible life style, spending pattern, which have many demonstrative effect[8]. In the wake of tourist activities in forests there is low resistance to mass tourism, due to problems of landslides, rock falls, destruction of vegetation and wild life with alteration in the physical structure. The Manila Declaration (1980) of the World Tourism Organisations (WTO) emphasizes the importance of both natural and cultural resources for the benefit of both tourism and residents of the tourism area. The Hague Declaration on Tourism (1989) organised jointly by the Inter-Parliamentary union and the WTO pointed out the importance of protection and development of the physical environment and cultural heritage, as well as improvement of the quality of life[9]. Developing an eco-friendly destination is a complex activity. This specifies that planning and development of eco-friendly destination is purely site specific, through a broad frame work can be set and maintained for ensuring sustainability[10].

7. Suhita Chopra, Tourism & Development in India,(New Delhi :Ashish Publishing House, 1991), 16-23,57,62- 64,90-107.
8. Sharma P.D., Ecology and Environment, (Meerut: Rastogi Publications, 2007), 23-41.
9. Dr. S.P. Bansal, et.al., Tourism in the New Millennium-challenges and opportunities, (Chandigarh: Abhishek Publications, 2002), 87-98.
10. Dr. K. Raghavan Nambiar, Textbook of Environmental Studies, (Chennai : Scitech Publications(India) Pvt. Ltd., 2008), 3.49-3.64

These eco-systems have become the major resources for forest eco-tourism in India. They are deserts, mountains and forests flora and fauna, caves. The country also has a great variety of fauna, numbering a little over 65,000 known species, including 1,228 birds, 428 reptiles, 372 mammals, 204 amphibians and 2,546 varieties of fish[11]. The cave temples are devoted to Buddhism, Hinduism and Jainism demonstrating the religious harmony of the time[12]. Disturbance brought about by humans, plays a pivotal role in the creation of patches and corridors and thus landscape heterogeneity. Human visitation can cause significant disturbance as a result of walking and trampling, resulting in an increased risk of egg and chick predation, nest desertion, reduced to hatching success and increased stress for the birds and decline of wild primates[13].

Constitution of India, statutory laws, policy and guidelines for forest and eco-tourism:

The Constitution of India, Part-IV, Articles 48A, 51A (g) provides for protection and improvement of environment and safeguarding of forests and wild life. Article - 48A: Protection and improvement of environment and safeguarding of forests and wild life. It states that the state shall endeavor to protect and improve the environment and to safeguard forest and wild life of the country. Article - 51A(g) is meant to protect and improve the natural environment including forest, lakes, rivers and wild life, and to have compensation for living creatures[14]. The laws pertaining to eco-tourism are current environment and forest laws, and there are no laws on tourism at the national or state levels. Wild life (Protection) Act, 1972: the Act permits tourism in protected areas along with scientific research and wild life photography. However, the character and volume of tourism in protected areas has changed considerably since this law was framed. Hence, there is an urgent need to amend the Act or at least bring out guidelines that regulate tourism and tourist activity in and around the protected areas. Forest (Conservation) Act, 1980 prohibits conversion of forest land for 'non-forest' activities (any activity that does not support protection and conservation of forests). However, eco-tourism is being propagated on the notion that it supports conservation and

11. Dr.Manohar Sajnani, Encyclopaedia of Tourism: Resources in India, (Delhi: Kalpaz Publications, 2001),39-52.
12. Batta R.N., Tourism and the environment a quest for sustainability, (New Delhi: Indus publishing Company, 2002), 106-117.
13. David Newsome et.al., Aspects of Tourism, Natural area Tourism, (London : Viva Books Private Ltd., 2006), 34-45.
14. Dr. S.R. Bhansali, The Constitution of India, vol. 1, (Jodhpur: India Publishing House, 2010), 523-535.

hence is being allowed in forest areas. Although this Act has the potential to regulate eco-tourism, there is an urgent need to verify the claim that eco-tourism supports conservation in the context of implementation of this Act.

Under Environment (Protection) Act, 1986: there are two very important Notifications that are closely linked to the development of eco-tourism – the Coastal Regulation Zone, Notification 1991, and Environmental Impact Notification, 2006. Coastal Regulation Zone Notification, 1991: this is an important piece of legislation guiding anthropogenic acts over the years and it has been diluted and has rendered many of the protective clauses meaningless. Environmental Impact assessment Notification, 2006: the Notification has totally omitted environmental impact assessment for tourism projects as against its predecessor, the Notification of 1991, which required Environmental Impact Assessment of tourism projects. The Schedule Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006: millions of people live in and near India's forest lands, but have no legal right to their homes, lands or livelihoods. The recognition of forest rights- and, more importantly, making conservation democratic - is the only way forward. Eco-tourism Policy & Guidelines, 1998: Drawing from international guidelines prepared by tourism industry associations and organizations, the Eco tourism Policy & guidelines, 1998 issued by the Ministry of Tourism, Government of India represents the interest of global industry players. The more power the forest bureaucracy retains, the more it will harm both wildlife and people[15].

The 73rd and 74th Amendments to the Indian Constitution recognize the principles of participatory democracy by creating and empowering local self government institutions in rural India through Panchayats and in urban India through Municipalities under the section 'Empowerment of Institutions of Local Government'. Article-243-G of the Indian Constitution 'directs the Central and State Government machinery to endow panchayats and municipalities with such powers and authority as may be necessary to enable them to function as institution of self-government with respect to, the preparation of plans for economic development and social justice. The implementation of schemes for economic development and social justice in relation to matters listed in the Eleventh Schedule for Panchayats and Twelfth Schedule of the Indian Constitution for all urban local bodies'[16]. Maintenance of

15. Justice T.S. Doabia, Environmental and Pollution Laws in India, 2nd ed., vol. 2, (Nagpur: LexisNexis Butterworths Wadhwa, 2010), 2730-2746.
16. Id., see (note 14)

environment and ecological balance is an obligations cast upon State and Central Governments. Uncontrolled and regulated exploitation of natural environment causing massive despoliation of flora and fauna affects ecological factors and might therefore be disastrous to human life in the long term. Protection and preservation of natural environment is an investment in future and help in maintenance of ecological balance or stability[17].

The judicial upheavals:

The Apex Court has been quite active in forestry and wild life aspects. It has been a green bench. Given the general feeling that eco-tourism ends up in many cases as economic-tourism, one can say that the step by the Apex Court is timely. But with the directive, a plethora of issue arises. Sustainable tourism can therefore serve as a conduit for bio-cultural conservation and regeneration, and has major potential to raise investments for conservation. The eco-tourism activities are to be taken as complementary activities to conservation so that the conservation efforts too can be marketed well and people are socially, economically and academically benefited in addition to the conservation objectives.

The judiciary, an important pillar of democracy has been active in this time of environmental activism. In *State of Tamil Nadu v Hind Stone*[18], the Apex Court held that rivers, forests, minerals and such other resources constitute nations natural resources. These resources are not to be frittered away and exhausted by any one generation. Every generation owes a duty to all succeeding generations to develop and conserve the natural resources of the nation in the best possible way. As observed by the Supreme Court in *Rural Litigation and Entitlement Kendra v State of UP*[19] natural resources have got to be tapped or the purpose of social development but one cannot forget at the same time the tapping of resources has to be done with requisite attention and care so that ecology and environment may not be affected in any serious way. In *Niyamavedi and etc. etc. v State of Kerala and others*[20], the Kerala High Court held that establishment of biological park is one of the objects of wild life tourism and it is within the ambit of forest conservation of Act, 1980 and for the formation few trees are cut in the area to which a road passes, one cannot jump to the conclusion that as a result of establishment of the park, the forest has been plundered. In *Fernandez, Co-convenor*

17. Dr. Krushna Chandra Jena, 'Ecological and Environmental protection movements: A brief conspectus', AIR 2005 Jour. 288.
18. AIR 1981 SC 711.
19. AIR 1987 SC 469.
20. AIR 1993 Kerala 262.

Coastal Action Network, Chennai, v T N Pollution Control Board and others[21], the First Bench of Madras High Court rules that forest and wild life has to be protected and preserved by experts scientifically. But protection of environment is incidental to industrialization. A balance has to be struck between the two to promote the welfare of the people. The same view has been reiterated in another form by the Supreme Court in *Indian Council for Enviro-legal Action v Union of India and others*[22] where it states that Government should endeavor to strike a balance between ecological interest and economic, social and cultural interest. In T N G *Thirumulkpad v Union of India*[23], the Supreme Court issued interim direction to stop running of a saw mill in forest area to prevent the unauthorized felling of trees and sawing. Preserving trees and agro forestry will provide one additional benefit. The trees will control speedy flow of wind and thereby prevent soil erosion due to wind and humidity will be maintained in the soil resulting in increase in productivity[24]. In *Union of India v Kamath Holidays Resorts Pvt. Ltd.*, the Supreme Court held that in the name of promoting tourism granting permission to conduct snack bar in the forest area is impermissible[25] and in *Magarahole Budakattu Hakku Sthapana Samithi and others v State of Karnataka and others*[26], the Karnataka High Court concluded that ecological balance is an environmental requirement and in *Forest Friendly Camps Pvt. Ltd. v State of Rajasthan and others*[27], the Rajasthan High court held that tourism must be eco-friendly and environmentally, economically, socially and culturally sustainable. Tourism should be developed in such a way that it benefits the local community, strengthens the local economy, and employs local work force. But the Supreme Court in the latest in *Sansar chand v state of Rajasthan*[28] cautioned that our scientific understanding of nature and in particular of the ecological change and the linkages there in a still very primitive, incomplete and fragmentary. It is all the more important today that to, preserve the ecological balance because disturbing it may cause serious repercussions to human society of which we may have no idea today. To ensure all these aspects, policy of tourism should be such that the tourists are not put to inconvenience. The United Nations Conference on Human Environment held in Stockholm during June, 1972 brought into focus several alarming situations

21. (2005) 1 M L J 191 (HC).
22. (1996) 5 SCC 281.
23. AIR 1997 SC 1228.
24. Dr. A.K. Azad, 'Deforestation, Environment and the Law', AIR 2002 Jour. 139.
25 (1996) 1 SCC 774.
26. AIR 1997 Kant. 288.
27. AIR 2002 Raj. 214.
28. (2010) 10 SCC 604

and highlighted the immediate need to take steps to control the menace of pollution to mother earth, air and of space failing which, the Conference cautioned mankind. It should be ready to face the disastrous consequences. The suggestions noted in this conference were reaffirmed at successive Conferences followed by Earth Summit held at Rio-de-Janeiro (Brazil Rio declaration) on environmental and development in 1992 and this is referred to in most of the environmental cases by the judiciary. The Constitution of India has also laid the foundation of Article 48A and 51A for a jurisprudence of environmental protection and judiciary played a major role in developing it. Thus the Judiciary has been quite active in forestry and wild life aspects.

Case study; forest and eco-tourism in Kanyakumari District, Tamil Nadu:

Kanyakumari district is a district of Tamil Nadu State, India, and is the southernmost land area of mainland India. The district is the second most urbanized district in Tamil Nadu. Kanyakumari shares its name with the town of Kanyakumari, which is at the tip of the India Peninsula and faces the Indian Ocean, but the administrative capital is Nagercoil. The district is also known as 'The District of Ponds' or 'The Lands End'[29]. The district also has a huge forest cover, accommodating a wide variety of plants, and shrubs[30]. There are also several varieties of Storks and migratory birds are commonly found in the water bodies and wetlands, during specific seasons[31]. The hills contain outstanding ecological and biological processes. The area contains important and significant natural habitats for in-situ conservation of biological diversity, including forests containing the threatened species of outstanding value to science and conservation. The hills are home to the Kanikkaran tribe, one of the oldest surviving hunter-gatherer tribes in the world[32]. By looking at the prevailing forest eco-tourism in the world and our country and judicial verdicts, the potentials in the forest of Kanyakumari District are not fully permitted to be exploited by the tourists visiting Kanyakumari district as there is lack of guidance to them. The harnessing the eco-tourism potentials of the forests

29. Gopalakrishnan M., Gazetters of India, Tamil Nadu State, Kanyakumari District, (Madras: Govt. of Tamil Nadu, Commissioner of Archives & Historical Research, 1995), 1-39.
30. Padmanabhan S., Forgotten History of the Lands End, (Nagercoil: Kumaran Pathipagam,1981),11-16.
31. Staff Reporter, 'Kanyakumari to be declared National Tourism Centre', Trinity Mirror, Madras ed., (August 19, 1998), 8.
32. Focus on KanyaKumari Dt, Tourist attractions all around', The Hindu, Madurai ed., (May 8, 1998), A-D.

have far reaching socio economic impacts on the local population residing around the area.

The latest study by Tamil Nadu Forest Department brings the truth that an eco-tourism initiative is proving to be a roaring success. Tribal people are getting employed, tribal men who work as rowing men besides tribal women who work as cleaners and cooks providing food to the tourists. The tribal people's participation in eco-tourism has generated more interested participation in tourism and indirectly it contributed for conservation efforts. Exploitation of tribal people for plundering of forest wealth has been brought to an end. The initiatives have changed the outlook and perception of the tribal people and improved their socio-economic conditions as well and enabling people to enjoy nature at its pristine glory[33]. By proper guidance and control by trained persons, the flora and fauna is affected by the enthusiastic tourists by trekking, littering garbage and wastes and causing disturbance to animal life which often ends in animal-human conflict can be prevented. The guidelines for eco-tourism in and around protected areas formulated by Government of India is in vogue, no proper implementation is done to encourage forest eco-tourism.

Suggestions:

The world's tourism and recreation industry provides considerable benefits to protected areas and the communities adjacent to or with them. These benefits include greater appreciation of cultural and natural heritage and greater knowledge of the interplay between humans and their environment. Therefore tourism in and around protected areas must be a tool for conservation, building support and raising awareness of the many important values of protected areas including ecological, cultural, sacred, spiritual, aesthetic, recreational and economic.

In our country, enhancement of forest eco-tourism needs a business management vision, and planning which is essential for successful economic and environmental results. Further Kerala model of responsible tourism accolades by UNCTAD has to be adopted throughout the country as a source of economic growth[34]. An overall, contending remarks leveled against our country India today is an environmental basket-case; marked by polluted

33. Special Correspondent, 'Promoting eco-tourism through trekking', The Hindu, Thiruvananthapuram ed., (June 7, 2013), 2.
34. BS Reporter, 'UN body praises kerala's responsible tourism', Business Standard, Chennai ed., (weekend 23/24 March, 2013), 5.

skies, dead rivers, falling water-tables, ever increasing amount of untreated wastes, disappearing forest. Meanwhile, tribal and peasant communities continue to be pushed of their lands through destructive and carelessly conceived projects. A new Chipko Movement is waiting to be born[35]. To sum up, the Government should come forward with a comprehensive plan combining the experts in tourism industry, nature lovers, and community developers to have a flourishing forest eco-tourism in our country.

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35. Ramachandra Guha, 'The Past & Present of Indian environmentalism', The Hindu, Thiruvananthapuram ed., (March 27, 2013), 8.

National Human Rights Law (The Protection of Human Rights Act, 1993) and Jurisprudence – A Critical Analysis

R. Manicka Vinayagam *

Human Rights are to be protected and not to be violated are the universal slogans which give rise to a lively thought by looking into its protection aspects. Human rights must be preserved, cherished and defended if peace and prosperity are to be achieved and they are the very essence of a meaningful life, and to maintain human dignity is the ultimate purpose of the government.[1] The Human Rights of First Generation, Civil and Political Rights are the rights which would affect the physical body of human being and may result in irreparable injury to a man; more perforce, it should be prevented by a law. Laws on this point be enacted by making the acts which are amounting to violating such rights are crimes and the same shall have to be met with penalty for the protection of those rights. Any law sans sanctions would have the face of international law described by the jurists as which is lacking sanction although sanctions like War and Economic Barriers be the way of enforcement in the words of Hans Kelsen, protecting human rights (in the case of individual) from violation could not be met with those sanctions. It is the States obligations that they shall ensure that all acts of torture are offences under its criminal law[2] and these offences punishable by appropriate penalties[3] . The aired purpose of investigation/

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1. Dr. H.O. Agarwal: Human Rights, Central Law Publications, Thirteenth Edition – 2011.
2. Article 4, para 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
3. Ibid. at para 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

inquiry by the Human Rights Commissions constituted under this perfunctory Act, without providing penalties for violations, makes everyone to search an answer for this 'better protection of human rights' as stated in the Preamble of the Act of 1993[4] and this clearly shows that the Act runs on the footpath of International Law which was described as mere positive morality by the celebrated English Jurist John Austin. Hence, this Article has been designed to rendering its hand in examining the Protection of Human Rights Act, 1993, a National Law in India for protecting human rights, is jurisprudentially a law?

Human Rights Protection Law in India

The Indian Law on Human Rights Protection is the Protection of Human Rights Act, 1993[5] which is a self-styled enactment in the Sub-continent for the protection of human rights which has the provisions for the establishment, constitution and functions of the National Human Rights Commission, State Human Rights Commission and Human Rights Court for the promotion and safeguarding of the human rights. The measures for the promotion and safeguard of human rights, which are considered the true end of rendering help/aid to the people who are in need of human rights protection to be evolved and addressed, the National Human Rights Commission has to take a step, provided the Act.

Internationalization of Human Rights Law

The orthodox view was that states are the only subjects of international law. The basic and real thing behind the Internationalization of the concept of Human Rights is that a moral right is borderless.[6] The whole universe considers a human being as a human being none other than that. Its protection sounds everywhere. Even though States are the territorial divisions of the world, life of human being has no such division at all. Life of human being is common to the whole world. A view that the individuals are the subjects of International Law was given by Kelsen and a similar view was earlier taken by Westlake, who had observed: "The duties and rights of states are only the duties and rights of

4. Preamble to the Protection of Human Rights Act, 1993 states as An Act to provide for the Constitution of a National Human Rights Commission, State Human Rights Commission in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto.

5. Act (10 of 1994), received the assent of the President on 8-1-1994 and published in the Gazette of India, dated 10-01-1994.

6. See. Theodor Meron (ed.), Human Rights in International Law: Legal and Policy Issues, vol. 1(1984) p.3, quoted in A.B. Kalaiah: Human Rights in International Law, Edited by T.R. Subramanya – Deep Deep PublicationsThe topic of 'human rights' is of universal concern that cuts across major ideological, political and cultural boundaries.

men who compose them."[7] Thus green-flagging of opinion with regard to whether the individuals are subjects of international law gives way for the recognition to human rights of individual on an international foot through the adoption of Universal Declaration of Human Rights by the United Nations General Assembly on 10th December 1948 was the land-mark episode in the development of World Human Rights Jurisprudence.

Legal Theory – An Over-view

A short opening to Jurisprudence is vital here to analyze the selected law. Jurisprudence is a study of fundamental principles of law and it deals with what the law is. It deals with the principles of law generally and promptly referred to as Legal Theory. "Jurisprudence is the eye of law giving an insight into the environment of which it is the expression. It relates the law to the spirit of the time and makes it richer. Law is the ultimate aim of every civilized society as a key system in a given era, to meet the needs and demands of its time"[8]. The science of Jurisprudence is concerned with positive law, according to celebrated English Jurist John Austin.

In the view of Austin, "Every positive law or every law simply and strictly so-called is set by a sovereign individual or a sovereign body of individuals to a person or persons in a state of subjection to its author." To him, sovereign power commands the law which is backed by sanction. Positive law is the fittest and only subject of Jurisprudence according to this celebrated jurist. Therefore a law which is not fit for his definition to law would be a law by analogy. That is named by Austin as Laws improperly so called. And to quote Austin: "An imperfect law (with the sense wherein the term is used by the Roman Jurists) is a law which wants a sanction, and which, therefore, is not binding. A law declaring that certain acts are crimes but annexing no punishment to the commission of the acts of the class is the simplest and most obvious example. For the term imperfect denotes simply, that the law wants the sanction appropriate to laws of the kind."[9]H.L.A. Hart points out that Markby, Holland and Salmond did not differ from Austin in their conception and arrangement of the subject even when they opposed his doctrines.[10] Although Austin's was less direct in the United

7. Westlake: Collected Papers, Vol, p.78 (1914) quoted in Starke: International Law, p.59 (10th Edn.)
8. Observed by Justice K. Ramaswamy in Consumer Education and Research Centre and Others v. Union of India and Others (1995) 3 SCC 42, 67
9. John Austin: The Province of Jurisprudence Determined, Universal Law Publications, Indian Economy Reprint, 2008, p.27 & 28
10. V.D. Mahajan: Jurisprudence and Legal Theory, Fifth Edition, Eastern Book Company, p.526

States, yet the same could be seen in Nature and Sources of Law by Gray.[11] There is a lot in common between the views of Austin and Kelsen.[12] Also, according to Kelsen, Law is a normative ordering of human behavior backed by force.[13] H.L.A. Hart in his Theory observed as: Law is a Union of Primary Rules with obligations of Secondary Rules and Secondary rules are mainly procedural and remedial and include not only the rules governing sanctions but also go far beyond them.[14] In the customary law also, it is able to find the existence of sanction. It appears from the view of Jurists of the Historical School of Jurisprudence like, Henry Maine, Savigny, law rests on the social pressure and law is the rule within which each individual obtains a secure and full space.[15] One of the celebrated philosophers of Philosophical School of Jurisprudence, Kant, by giving stress to the force as requires as far as the end to secure the liberty of the individual, writes: "Woe to the political legislator who aims in his Constitution to realize ethical purposes by force, to produce virtuous intuition by legal compulsion." According to the Continental Jurists belong to the Sociological School of Jurisprudence, the coercive force is also an essential element in the concept of law, in this view Ihering writes, "A legal rule without coercion is a fire which does not burn, a light that does not shine"[16]. The borderline between realist jurisprudence and sociological jurisprudence is not very clear, as F.S. Cohen, a prominent realist, defines the realm of realist jurisprudence as the "definition of legal concepts, rules and institutions in terms of judicial decisions or other acts of State force" and the realm of sociological jurisprudence as "the appraisal of law in terms of conduct of human beings who are affected by the law."

Law and its objectivity

Enacting legislation depends on, in the first instance, the achievement of objectives which it aims at. The purpose, which may also be referred to as objective, be considered first before the making of legislation. Bentham's writing which may be of relevance here to quote is, "Law which favours the security, favours, at the same time, subsistence and abundance. In legislation, the most important object is security. Though no laws were made directly for

11. Ibid.
12. Ibid.
13. Ibid at p.549
14. V.D. Mahajan: Jurisprudence and Legal Theory, Fifth Edition, Eastern Book Company, p.535
15. Ibid at, p.585
16. Ihering: Law as Means to an End, p.24, quoted in V.D. Mahajan: Jurisprudence and Legal Theory, Fifth Edition, Eastern Book Company, p.528

subsistence, it might easily be imagined that no one would neglect it. But unless laws are made directly for security, it would be quite useless to make them for subsistence. You may order production; you may command cultivation; and you will have done nothing. But assure to the cultivator the fruits of his industry, and perhaps in that alone you will have done enough. To lay down as a principle that all men ought to enjoy a perfect equality of rights, would be, by a necessary connection of consequences, to render all legislation impossible. The laws are constantly establishing inequalities, since they cannot give rights to one without imposing obligations upon another. What can the law do for subsistence? Nothing directly. All it can do is to create motives that if, punishments or rewards, by the force of which men may be led to provide subsistence for themselves"[17]. Generally, legislations which are for preventing acts, having the object of preventing such acts, for which, it undertakes to prevent are really evils and it employs to prevent them are greater evils.[18]

According to Jeremy Bentham, the very essence of legislation consists in evils. Jeremy Bentham provides the kinds of evils as Evil of the first order, Evil of the second order and Evil of the third order[19] and some other evils one of which is Evil of permanent nature. Permanent evils are those one which cannot be remedied. Examples of permanent evils are irreparable injury, death, etc. Legislation has to provide security against such evils. The evils of human rights are also of such a nature, which would result in evils of permanent nature.[20]

Then, it is very important here to have a focus on the Evil of the second order. To quote Bentham:"Evil of the second order may be distinguished into two branches: according to Jeremy Bentham, 1st alarm; 2nd, danger. Alarm is a positive pain, a pain of apprehension, the apprehension of suffering the same evil which we see has already fallen upon another. Danger is the probability that a primitive evil will produce other evils of the same kind"[21]. Though the violations of Human Rights may have the nature of Evil of the first order, it may also have the nature of Evil of the second order is reflected from the observation of Supreme Court of

17. Upendra Baxi: Bentham's Theory of Legislation – with a Revised and Enlarged Introduction – Tripathi, Fifth Reprint 2000 p.60.
18. See, ibid at p.29; He ought tobe certain of two things: 1st, that in every case the acts which he undertakes to prevent are really evils; and 2nd, that these evils are greater than those which he employs to prevent them. He has then two things to note: the evil of the offence, and the evil of the law; the evil of the malady, and the evil of the remedy.
19. Ibid at p.29
20. Ibid at p.31
21. Ibid at p.30

India while condemning the handcuffing of prisoners in Sunil Batra v. Delhi Administration and others[22], the Court said:"In spite of weighty pronouncement made by this Court decrying and severely condemning the conduct of the escort police handcuffing the prisoners without any justification, it is very unfortunate that the Courts have to repeat and re-repeat its disapproval of unjustifiable handcuffing…."

With regard to enforcement of law, the words of George White Cross Paton as follows, "The validity of a legal system as a whole depends on the fact that it is accepted by, and therefore, capable of enforcement over, a given community"[23].Apropos the same, Bentham also wrote that "The civil law is, in fact, only another aspect of the penal law; one cannot be understood without the other. To establish rights, is to grant permission; it is to make prohibitions; it is, in one world to create offences. To commit a private offence is to violate an obligation which we owe to an individual, - a right which he has in regard to us. To commit a public offence is to violate an obligation which we owe to the public,- a right which the public has in regard to us. Civil law, then, is only penal law viewed under another aspect. If I consider a law at the moment when it confers a right, or imposes an obligation, this is the civil point of view. If I consider a law in its sanction, in its effects as regards the violation of that right, the breaking through that obligation, that is the penal point of view."[24]

If the legislation is for one to create and declare rights and which only declares the right be a dubious one. If legislation is aiming at prevention of an act and is not declare that act is a crime and is not provide punishment in the case of commission of such act be an imperfect legislation on that subject.[25] Legislation must be a one providing punishment for the crimes which is referred to as sanction to become perfect. The evils which legislations provide must be uniform with regard to the evils unless it will result in un-uniform of sanction so that the concept of justice is tilted.Uniform evils/sanctions will result where the legislation does not provide sanctions at all. Undoubtedly, the apt example for such legislation, without adhered to the principles of legislation, is the Protection of Human Rights Act, 1993.

22. AIR 1980 SC 1579
23. G.W.Paton: Jurisprudence, Third Edition edited by D.P. Derham, Oxford Publications, p.81
24. Upendra Baxi: Bentham's Theory of Legislation – with a Revised and Enlarged Introduction – Tripathi, Fifth Reprint 2000, p.53
25. ibid at p.28. An imperfect law (with the sense wherein the term is used by the Roman jurists) is a law which wants a sanction, and which, therefore, is not binding. A law declaring that certain acts are crimes, but annexing no punishment to the commission of acts of the class, is the simplest and most obvious example.

International Law and Positive Law in Jurisprudence

International law is the aggregate of rules to which nations have agreed to conform in their conduct towards one another. Generally, International Law is in the form of Declarations, Conventions, Covenants, Treaties, etc. According to Wheaton, International Law is "the body of rules which by custom or treaty civilized States regard as binding upon themselves in their relations with one another, and whose violation gives the injured party a legal right to redress."[26] According to Oppenheim, Law of nations or International Law is the name for the body of customary and conventional rules which are considered legally binding by states in their mutual intercourse with each other.[27] Though it has been defined as like above by Wheaton and Oppenheim, on the other hand jurists like John Austin, Willoughby and Holland regard International Law as positive morality or as the moral code of nations and do not concede that it is law properly so-called.[28] According to Salmond, international law is a special kind of law comprising conventional law and Prize Law. Conventional law, even though, is of binding the States to observe those agreed in the Convention, it has no physical force of compulsion by any super power. According to Ihering, international law is an incomplete form of law.[29] Kant, also, saw no possibility of international law without an international authority superior to the States and however, he was doubtful of the practical possibility of a State of Nations.[30]

According to John Austin, law is a command of sovereign backed by a sanction. Austin's theory holds that international law is included in the 'laws improperly so called' and described as 'laws by analogy'. To Austin, International Law, as it is the law between the nations, is not a positive law; as it is set by a general opinion, is a mere positive morality. Austin says, "There are laws which regard the conduct of independent political societies in their various relations to one another: Or, rather, there are laws which regard the conduct of sovereigns or Supreme governments in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereign by opinions

26. Wheaton: International Law,p.5, quoted in G.C.V. Subbarao: Jurisprudence and Legal Theory, Eastern Book Company, Nineth Edition, p.67
27. L. Oppenheim: International Law, Vol. I , pp.6 (8th Edn. 1970 Reprint), quoted in Dr. S.K. Kapoor: International Law and Human Rights, Central Law Agency, 17th Edition, p.24
28. G.C.Venkata Subbarao: Jurisprudence and Legal Theory, Eastern Book Company, 9th edition, p.67
29. Ihering: Law as Means to an End, p.24, quoted in V.D. Mahajan: Jurisprudence and Legal Theory, Fifth Edition, Eastern Book Company, p.528
30. V.D. Mahajan: Jurisprudence and Legal Theory, Fifth Edition, Eastern Book Company, p.593

current amongst nations, are usually styled the law of nations or international law."[31] Furthermore, according to him, "The positive moral rules which are laws improperly so called, are laws set or imposed by general opinion: that is to say, … by that of a nation or independent political society: others by that of a larger society formed of various nations."[32] By testing international law with Austin's positive law the revealing output yields that international law is not a command of sovereign and sans sanction. In this sense, it can be concluded that international law is not a law strictu sensu. International law is not a true law and merely a positive morality if it is accepted that John Austin's Imperative theory of law had some truth. International Human Rights Law, therefore, appears in the form of Declaration, Covenants, Conventions, etc., and has no enforcement provisions like sanctions. International Law has been under incapacity to establish its fitness as true law within the purview of definition of Positive Law given by Austin.

International Law and Municipal Law [33]

The relationship between International Law and Municipal Law has been dealt with by few theories. One of them is Transformation and Specific Adoption Theory. By this theory, international law and municipal law are treated as two distinct systems. The rules of international law are after it is specifically adopted by the municipal law through transformation only becomes a complete law. The positivists consider treaties as promises and municipal legislation as commands.[34]Treaties become binding on municipal systems through the process of transformation, i.e., enabling legislation for giving effect to a treaty.[35]

International Human Rights Law and Municipal Human Rights Law

The fact that the Protection of Human Rights Act, 1993 is on the foot-step of International Law styled as Declaration, Convention, Treaties, etc is being substantiated by the following aspects with comparing the international human rights law with the national human rights law. The International Human Rights Law Documents includes the Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights, 1966, etc.

31. John Austin: The Province of Jurisprudence is Determined, published by Universal Law Publishing Co. Indian Economy Reprint 2008, p.140
32. Ibid at page 140
33. Observation of Lord Alverstone, C.J. in West Rand Gold Mining Co. v. R. (1905) 2 KB 391 where he uses the words "our municipal tribunals" for national courts, quoted in K.C. Joshi: International Law and Human Rights 2006 Edition p.39
34. K.C. Joshi: International Law and Human Rights 2006 Edition p.44
35. Ibid.at p.44

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 [36] provides that a Committee against Torture shall be established.[37] As like, the Act of 1993 provides for the constitution of the National Human Rights Commission [38] , State Human Rights Commissions [39] and Human Rights Courts [40] .

The Commissions are referred to as fact-finding body with powers to conduct inquiry into complaints of violation of human rights. For the fact finding process, the Commission will be assisted by investigating agencies of the Central and State Government[41] . The State Government may set up Human Rights Courts for speedy trial of offences, arising out of violations of human rights and may also specify a Public Prosecutor or appoint an advocate as Special Public Prosecutor for the purpose of conducting cases in such courts [42] . The Act of 1993 does not define or explain the meaning of "offences arising out of violations of human rights" and Act does not give any clear indication or clarification as to what type of offences actually are to be tried by the Human Rights Courts.[43] Definition for the "offences arising out of violations of human rights" is necessary to take cognizance of the offences and try them and till then the Human Rights Courts will remain only for namesake.[44] The Act provides that the Commission may make recommendations for the effective implementation of the existing laws and treaties on human rights [45] . The Act also provides that the Commission may undertake research in the field of human rights and take measures to promote awareness of human rights among all sections of society [46] .

The Commission shall inquire into complaint of violation of human rights or abetment thereof; or negligence in the prevention of such violation by a public servant [47]. The purpose of inquiry is mere recommendation to the concerned Government or authority. Commissions appointed under the International law also have the

36. India has signed this Convention on October 14, 1997. UN Treaty Collections; Source: www.treaties.un.org
37. Article 17
38. Section 3 under Chapter II of the Protection of Human Rights Act, 1993
39. Section 21 under Chapter V of the Protection of Human Rights Act, 1993
40. Section 30 under Chapter VI of the Protection of Human Rights Act, 1993
41. Section 14 under Chapter III of the Protection of Human Rights Act, 1993
42. Section 31 under Chapter VI of the Protection of Human Rights Act, 1993
43. www.legalserviceindia.com ; Human Rights Courts in India - by N.Chandrashekharayya, Advocate, Raichur
44. ibid
45. Clause (f) of Section 12 under Chapter III of the Protection of Human Rights Act, 1993
46. Clause (g) and (h) of Section 12 under Chapter III of the Protection of Human Rights Act, 1993
47. Sub-clause (i) and (ii) of Clause (a) of Section 12 under Chapter III of the Protection of Human Rights Act, 1993

power to work and collect information with a view to submit report and under the International Law, the States are being directed to implement the obligations provided under it. While the International Conventions are directing the States Parties to perform their part obligations, the Commission under the Act of 1993 provided power to recommend the Government or Authority for the action, which is weaker than direction.

It is in Standard-Setting by the United National Organizations, Declaration On The Protection Of All Persons From Being Subjected To Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, 1975 provides that, Where it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation in accordance with national law.[48] As like the same, the Act of 1993 National Law on human rights provides that the Commission may take any of the following steps during or upon the completion of an inquiry held under this Act [49] , which includes, where the inquiry discloses the commission of violation of human rights or negligence in the prevention of violation of human rights or abetment thereof by a public servant, it may recommend to the concerned Government or authority to make payment of compensation or damages to the complainant or to the victim or the members of his family as the Commission may consider necessary. The compensation amount is not liquidated and also the award of compensation is by way of recommendation given by the Commission. In addition to the compensation, the Commission may recommend to the Central Government or authority to initiate proceedings for prosecution or such other suitable action as the Commission may deem fit against the concerned person or persons, to take such further action as it may think fit [50] .

The Commission may approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary [51]. The Commission may recommend to the concerned Government or authority at any stage of the inquiry for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary[52] . The Commission shall send a copy of its inquiry report

48. Article 11
49. Section 18 under Chapter II of the Protection of Human Rights Act, 1993
50. Sub-clause (i), (ii) and (iii) of Clause (a) of Section 18 of the Protection of Human Rights Act, 1993
51. Clause (b) of Section 18 of the Protection of Human Rights Act, 1993
52. Clause (c) of Section 18 of the Protection of Human Rights Act, 1993

together with its recommendations to the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission[53] . The Commission shall publish its inquiry report together with the comments of the concerned Government of authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission. The Commission hall submit an annual report to the Central Government and to the State Government concerned and may at any time submit special reports on any matter which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report[54] which is similar to that the Committee shall submit an annual report on its activities under the Convention to the States Parties and to the General Assembly of the United Nations[55] provided under Convention against torture and other cruel, inhuman or degrading treatment or punishment, 1984. The Central Government and the State Government, as the case may be, shall cause the annual and special reports of the Commission to be laid before each House of Parliament or the State Legislature respectively, as the case may be, along with a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non-acceptance of the recommendations, if any[56] . In total, the Act has no provisions for arraying the violations of human rights as offences/crimes (without defining offences arising out of violation of human rights) and even though provides protection without binding nature of enforcement provisions and penalties makes clear that this Act styled the International Law which is jurisprudentially described as not a true law in one view and a different kind of law in another, and therefore, it may be referred to gimmick law making by India.

Performing International Obligations: Diversified Stand of India

The State has to perform the part of its obligations imposed by international documents. The Draft Declaration on Rights and Duties of States, 1949 also provides in Article 13 as under: "Every state has the duty to carry out in good faith its obligations arising

53. Clause (e) of Section 18 of the Protection of Human Rights Act, 1993
54. Sub-section (1) of Section 20 of the Protection of Human Rights Act, 1993
55. Article 24
56. Sub-section (2) of Section 20 of the Protection of Human Rights Act, 1993

from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."[57] Therefore, it is clear that a State could not invoke the provisions of Constitutional Law for to perform the international obligations. The Act while defining the term human rights, inter alia includes human rights embodied in the Constitution of India, 1950 and International Covenants. The Act [58] under Section 2(f) defines International Covenants which means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify;

It is indispensable to discuss here by citing an illustration for India's diversified stand on the performance of international obligations. The Environment (Protection) Act, 1986 which has been enacted by the Parliament of India stands in the path of National Law since it was the move for performing international obligations imposed for the protection of environment in the United Nations Conference on the Human Environment held at Stockholm in June, 1972 and referred to as Stockholm Declaration, 1972 and named as The Declaration on Human Environment. This is evident from the Preamble[59] and the following passage found in the part of the statement of Objects and Reasons that: The World Community's resolve to protect and enhance the environmental quality found expression in the decisions taken at the United Nations Conference on the Human Environment held in Stockholm in June, 1972. Government of India participated in the Conference and strongly voiced the environmental concerns. The nature of Environment (Protection) Act, 1986 is that of municipal law would be well established on the penal provisions [60] contained in it. Similarly, India, in respect of performing the international obligations imposed

57. Quoted in K.C. Joshi: International Law and Human Rights 2006 Edition p.45
58. The Protection of Human Rights Act, 1993.
59. Whereas decisions were taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972, in which India participated, to take appropriate steps for the protection and improvement of human environment;
60. Section 15 Penalty for contravention of the Act and the rules, orders and directions
Whoever fails to comply with or contravenes any of the provisions of this Act, or the rules made or orders or directions issued there under, shall, in respect of each such failure or contravention, be punishable with imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees, or with both, and in case the failure or contravention continues, with additional fine which may extend to five thousand rupees for every day during which such failure or contravention continues after the conviction for the first such failure or contravention.

by the Universal Declaration of Human Rights, 1948, International Covenants signed on 1966, enacted the Protection of Human Rights Act, 1993. It is evident from the following passage found in the Statement of Objects and Reasons given in the Act: India is a party to the International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966 adopted by the General Assembly of the United Nations on the 16th December, 1966. But, the Protection of Human Rights Act, 1993 has no penal provisions. This is worth quotable here that: Starke has compared it with the Universal Declaration of Human Rights, 1948 and says that " This declaration may be regarded as doing for the protection of the environment of the earth what the Universal Declaration of Human Rights, 1948 accomplished for the protection of human rights and fundamental freedoms, that is to say it was essentially a manifesto, expressed in the form of an ethical code intended to govern and influence future action and programmes, both at the national and international levels."[61] India is to stand in the foot of National Law instead of International Law for the Protection of Human Rights. India is a member State to the United Nations Organization and also a member signatory to the Universal Declaration of Human Rights, 1948. In spite of this Declaration is as like that of the Declaration on Human Environment, India adopts a shifty strategy in enacting a National Law on the Protection of Human Rights.

Concluding remarks

International Human Rights Law, which appears in the form of Declaration, Covenants, Conventions, etc., had no enforcement provisions like sanctions. But, undoubtedly, they demand the protection of human rights and also seek its endurable ways and measures. Indeed, the member nations had to take steps for its protection by way of citing appropriate sanctions like punishment, quantum of damages as fine, etc. But, the Protection of Human Rights Act, 1993 a National Law on Human Rights does not have such like provisions lead a way to discuss and criticize the Statute on its achievable ambit and scope. "A weak law nevertheless still law" opined, with regard to International Law than none other else, by Dr. Oppenheim is worth quotable here as it is one aptly fit for the Protection of Human Rights Act, 1993. Indeed in fact, International Law could have no force by sanction, how the national laws could stand on the same foot. Continuing incidents of human rights

61. J.G. Starke, Introduction to International Law, 10th edition (1989) p.406,

violations clearly emphasizing the fact that the National Legislation on Human Rights Act failed to meet its objective. Therefore, the above examination leads to be concluded that the Protection of Human Rights Act, 1993 had no scope for to stand in the line of National Law. The critical analysis with Jurisprudence reflects that the Protection of Human Rights Act, 1993, the National Law for the protection of human rights is not a fit national law. By adopting finesse in enacting a law, without adhering to Jurisprudence (Legal Theory) mere for the etiquette and name sake leaves us a lesson of non-intermittent continuousness of such things which the law seeks to prevent, prohibit and protect, the writer with displeasure leave this to the readers to think…

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Independent Directors who are not Really Independent Faces Vicarious Liability

A. Mary Lenita *

Under the Stock Exchange Listing Agreement, 2000, Clause 49 Article 1 (A) (iii) sets out the criteria for the "independence" of Independent Directors. In late 2002, Securities Board of India constituted the Narayana Murthy Committee to assess the adequacy of current corporate governance practices and suggested improvements. Based on the recommendations of this committee, SEBI issued a modified Clause 49 on 29th October 2004 (the 'revised Clause 49') which came into operation on 1st January 2006. Independent Directors are non-executive directors of the company who also plays a major role of company activities. The roles they play in a company include improving corporate credibility, ensuring good governance, functioning as a watchdog for the company, and playing an important role in the risk management etc. This paper explores the independency of the Independent Directors and their liabilities with related provision under Securities Exchange Board of India Act 1992, Companies Act 1956, Clause 49 of the Stock Exchange Listing Agreement, 2000 by SEBI and Negotiable Instruments Act 1881.

Independent Directors Criteria:

Amended Clause 49 of the SEBI guidelines on Corporate Governance, made major changes in the definition of Independent Directors, strengthening the responsibilities of audit committees, improving quality of financial disclosures, including those relating to related party transactions and proceeds from public/rights/ preferential issues, requiring Boards to adopt formal code of

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conduct, requiring Chief Executive Officer / Chief Financial Officer certification of financial statements and for improving disclosures to shareholders. Certain non-mandatory clauses like Whistle Blower Policy (a mechanism of employees to report to the management concerns about unethical behaviour, actual or suspected fraud or violation of company`s code of conduct) and restriction of the term of Independent Directors have also been included.

The Companies Act, 1956 does not specifically give definition of the Independent Director but Clause 49 of the Listing Agreement gives the definition of the term 'Independent Directors'. Independent Director is a non-executive director who does not have a pecuniary relationship with the company, its promoters, senior management or affiliate companies, is not related to promoters or the senior management, has not been an executive with the company in the immediately three preceding financial years, is not a partner or executive of the auditors/lawyers/ consultants of the company for the last three years, is not a supplier, service provider or customer of the company and he who does not hold 2 per cent or more of the shares of the company[1]. Normally Nominee Directors of Bank or Financial Institution will not be considered as Independent Director as per the Companies Act, 1956. Independent Director plays an active role in various committees to be set up by a company to ensure good governance. Listed companies are required to set up audit committees of minimum three directors, on which, two-thirds should be Independent Directors[2].

Need for Independent Directors:

In spite of their appointment by majority shareholders, 'Independent Directors' are expected to pay particular attention to the interests of the minority shareholders. Independent Directors should have unbiased attitude, highest standards of personal integrity, excellent judgment and an ability to make informed decisions within time constraints, professional credibility, capacity to think strategically, demonstrate sound communication skills, sound interpersonal skills and team orientation.

In reality who appoints these Independent Directors ?

Directors of a company play a major role in better performance and execution of the activities of the company. They are also held responsible for shareholders and stakeholders of the company.

1. www.nseindia.com/getting_listed/content/clause_49.pdf
2. http://wirc-icai.org/wirc_referencer/Company%20Law/ Duties_and_Responsibilities.htm.

Independent Directors are non-executive directors of the company who also plays a major role in audit and company activities. Independent Director's selection is still in the hands of owners of the company. No process of selection has been prescribed for the Independent Directors, as they are directly handpicked by the promoters. Such procedure for their selection raises question on their independence at the board. They cannot be as independent as they are expected to be, if they are going to be appointed by the owners.

Independent Director's qualifications:

There is no age limit prescribed under Companies Act, 1956 and by the SEBI for selection of Independent Director[3]. There is need to focus on the quality of Independent Directors who are going to be appointed. Independent Directors should be qualified enough so that they can ask right questions at the right time when they are at board.

Independent Director participation:

According to the definition, an Independent Director has no right to interfere in the day-to-day operations of company. If a director cannot get into a company's day-to-day operations, he cannot understand how it is governed and will not be in the position to fulfill his duties and responsibilities. For the involvement of Independent Director in day-to-days operations it is important, Independent Director is given some authority in the company so that he may be able to raise their voice fearlessly. There is no guideline prescribing a time limit for replacement of an Independent Director in case there is a resignation or removal or death of an existing one. Here in this case mostly promoters are taking a plea that they have not been able to find a replacement and stretch their time.

An Independent Director is compensated for his services by way of sitting fees and commissions. The very reason of taking up the post of an Independent Director by a man of repute is the commission which he receives under Section 309 of the Companies Act, 1956[4].

Where the commission is linked to the Company's performance, doesn't this create an Independent Director to act in favour of the interest of the Company and stakeholders? The fees or

3. http://legalservicesindia.com/article/article/independence-of-independent-directors-in-india-992-1.html.
4. Gower`s, Principles of Modern Company Law, Sixth Edition, London, Sweet & Maxwell, 1997.

remuneration of an Independent Director has grown so substantially in the last three years that an individual is often tempted to have an extended stay in the organization [5].

To retain the independence of director there is need to rotate such directors periodically. Since they are handpicked by the promoters they prefer to be a friend rather than be the watch dog of the board. It is true that Independent Directors are hired neither for better corporate governance nor for protecting minority shareholders interests but actually hired for compliance of listing agreement. Hence they can be rightly named as dependent directors and who cannot stand and think independently.

Satyam scam case 2009:

This was perhaps India's biggest corporate fraud case where M/s Satyam Computer Services Limited (M/s SCSL) caused loss to the investors to the tune of Rs.14,162 crore. The company head, Ramalinga Raju and members of his family secured illegal gains to the tune of about Rs.2,743 crore by various tricks. The fraud was perpetrated by inflating the revenue of the company through false sales invoices and showing corresponding gains by forging the bank statements with the connivance of the Statutory and Internal Auditors of the company. The annual financial statements of the company with inflated revenue were published for several years and this lead to higher price of the scrip in the market. In the process, innocent investors were lured to invest in the company [6].

The Satyam scam is a proved case which brought out the failure of the present corporate governance structure. Independent Directors lacked commitment and failed to live up to the expectation of the stakeholders. The company had a hole in its balance sheet, consisting of non-existent assets and cash reserves unrecorded. Mangalam Srinivasan, Vinod K Dham, Krishna who was the Independent Directors of Satyam was arrested [7].

Independent Directors whether truly independent:

In 31 big Indian companies, 88 Independent Directors have served their boards for more than 10 years, according to a survey by Stakeholders Empowerment Services (SES), a proxy advisory firm. Companies such as HDFC Ltd, Tata Steel Ltd and Apollo Hospitals Enterprise Ltd have retained their Independent Directors for 33-35

5. http://legalservicesindia.com/article/article/independence-of-independent-directors-in-india-992-1.html.
6. http://cbi.nic.in/fromarchives/satyam/satyam.php.
7. http://tejas-iimb.org/articles/104.php, Corporate Governance & Independent Directors In India,

years. In another case where R.A. Shah a lawyer and an Independent Director on the boards for 13 listed companies (including Asian Paints Ltd, Colgate-Palmolive (India) Ltd and Wockhardt Ltd) has been with Colgate for 29 years and for 11 years with Asian Paints [8].

Independent Directors and Vicarious Liability:

Under section 141 of the Negotiable Instrument Act 1881, apart from the company itself, the following persons are deemed to be guilty of the offence and shall be liable to be proceeded against and punished:

- Every person who at the time the offence was committed, was in-charge of and was responsible to the company for the conduct of the business of the company;
- Any Director, Manager, Secretary or other officer of the company with whose consent and connivance, the offence under Section 138 had been committed;
- Any Director, Manager, Secretary or other officer of the company whose negligence has attributed to the offence under section 138 being committed by the company [9].

Despite several judgments of the Supreme Court, laying down clear guidelines in respect of the offence of dishonour of cheque under Section 138 of Negotiable Instruments Act 1881, Independent Directors continue to face problems under this law. The Companies Act, 1956 looks at all directors alike. Independent Directors have to face the same liabilities as that of executive directors [10].

Section 141 of this Negotiable Instruments Act 1881 imposes a vicarious liability on the directors of a company who are prosecuted in respect of dishonour of cheque [11].

The law does not make any distinction between directors who are in charge of the day-to-day affairs of the company and non-executive members (Independent Directors) attending only the board meetings once in three months. It is however unreasonable to make such non-executive directors liable for the actions and decisions of the company which they may not be aware of. Efforts by Ministry of Corporate Affairs (MCA), in shielding Independent

8. www.livemint.com/Companies/1fZ5yrYIGe0dFdeeb7Q2QL/Are-longserving-independent-directors-truly independent.html) Sep 24 2012
9. http://www.nidhi.caclub.in/2011/09/cushioned-crown-of-thorns-liabilities.html
10. S.N Gupta, Supreme Court on Banking Law, Fourth Edition, 2012, New Delhi, Universal Law Publishing Co. Pvt. Ltd.,
11. Prof. Ram Naresh Chaudhary, Law relating to cheques : New horizons, 2010 Edition, New Delhi: Deep &Deep publications Pvt. Ltd

Directors from the harsh realities of frivolous proceedings are certainly welcome. Much of the harassment faced by them emanates from frivolous complaints under Section 138 of the Negotiable Instruments Act, 1881 [12].

The Circular says that penal action can only be initiated against the non - executive directors when the Register of Companies (ROC), after taking due care, has come to the conclusion that such directors are the officers in default and has not acted diligently in the Board process. The non - executive directors cannot be prosecuted if the violation of the law or any omission is on the part of the company or by any other officers of the company that have occurred without their knowledge and consent.

The Hon'ble Supreme Court of India, in a case, titled *Harshendra Kumar D. V. Rebatilata Koley, decided on 08th February 2011*, has held that:

"In this view of the matter, in our opinion, it must be held that a director – whose resignation has been accepted by the company and that has been duly notified to the Registrar of Companies – cannot be made accountable and fastened with liability for anything done by the company after the acceptance of his resignation".

The Hon'ble Supreme Court of India in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*,[13]

The case is concerned with criminal liability on account of dishonour of a cheque. It primarily falls on the drawer company and is extended to officers of the company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company… The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, persons who had nothing to do with the matter need not be roped in…

Neeta Bhalla's Case, the Hon'ble Supreme Court of India has held in a case titled *Saroj Kumar Poddar v. State (NCT of Delhi)*,[14]

…there is no averment in the complaint petitions as to how and in what manner the appellant was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning.

12. http://justlawandpolicy.wordpress.com/2011/04/26/liabilities-of-independent-non-executive-directors-in-india/.
13. (2005) 8 SCC 89
14. (2007) 3 SCC 693

He had not issued any cheque. How he is responsible for dishonour of the cheque has not been stated. The allegations do not satisfy the requirements of Section 141 of the Act.

The Hon'ble Supreme Court of India has, in the case titled *Central Bank of India v. Asian Global Ltd.*,[15]

"Admittedly, except for the aforesaid statement, no other material has been disclosed in the complaint to make out a case against the respondents that they had been in charge of the affairs of the Company and were responsible for its action. The High Court, therefore, rightly held that in the absence of any specific charge against the respondents, the complaint was liable to be quashed and the respondents were liable to be discharged".

The Hon'ble Supreme Court of India in National Small *Industries Corpn. Ltd. v. Harmeet Singh Paintal, reported at*[16], has held that

Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

Although there have been a number of reforms related to corporate governance, the single most important one is the growth of Independent Directors under Clause 49 of the Stock Exchange Listing Agreement, 2000 by SEBI. Violation of the clause 49 could result in the de-listing of the company and also could generate both financial penalties and criminal sanctions for directors under the Securities Contract (Regulation) Act 1956. However, delisting or suspension is generally not considered an investor friendly action and therefore, cannot be a routine solution for all repetitive non-compliance of listing agreements by the company [17]. A Whistleblower Policy (employees to report to the management concerns about unethical behavior, actual or suspected fraud or violation of company`s code of conduct) should be approved by the board of directors for better corporate governance.

15. (2010) 11 SCC 203
16. (2010) 3 SCC 330
17. http://tejas-iimb.org/articles/104.php

In all practicality, one is invited to join a board to act as a non-executive director only if he is well known to the promoters or the chairman or the managing director. The Companies Bill 2012 fails to acknowledge the hardship faced by Boards while evaluating an individuals integrity for appointment as an Independent Director [18].

All non-executive directors, whether or not independent, need support of Promoter Group for their re-election. Consequently, the boards of directors have largely functioned as rubber stamps of the management. Independent Director's selection is still in the hands of owners of the company. In reality Independent Directors work to safeguard themselves from liability and work in accordance to the wishes of Board of Company. Independent Directors, who have served on the boards of companies for more than a decade, cannot be practically independent. The fees or remuneration of an Independent Director has grown so substantially in the last three years that an individual is often tempted to have an extended stay in the organization.

In the crux of the above analysis it is proved that Independent Directors are hired neither for better corporate governance nor for protecting minority shareholders interests but actually hired for compliance of listing agreement. At this point it may be suggested that Independent Directors shall be nominated by the SEBI or by minority shareholders, compensation or sitting fees payable to the Independent Directors may be revealed in the Company website, time limit relating to replacement in case of death, removal or resignation may be prescribed, SEBI shall prescribe certain age limit and qualification for the Independent Directors for the proper functioning of the Board.

Though the Independent Directors play important role to improve corporate credibility, ensure good governance, function as a watchdog for the company if his act is not independent the duties and responsibilities towards the company board cannot be fulfilled and thereby he may not be in a position to stop management fraud which happens at the highest level. Despite several judgments of the Supreme Court, laying down clear guidelines in respect of the offence of dishonour of cheque under Section 138 of Negotiable Instrument Act, Independent Directors continue to face problems under this law. Ministry of Corporate Affairs (MCA), in shielding

18. http://www.thehindubusinessline.com/industry-and-economy/taxation-and-accounts/better-boards-for-india-inc/article4302061.ece

Independent Directors from the harsh realities of frivolous proceedings is certainly justifiable. When law does not make any distinction between directors who are in charge of the day-to-day affairs of the company and non-executive members it is moreover unreasonable to make such non-executive directors liable for the actions and decisions of the company which they may not be aware of.

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Patent on Biotechnology and the Problem of Non - Obviousness

S. Shangamithirai *

INTRODUCTION:

Today, biotechnology industries operate in manufacture of different products in various fields like agriculture, food processing, bio-weapons, bio-drugs, pesticides, fertilizers, diagnostic aids, power generation, etc.[1]Realizing the market potential of biotechnology products developed countries are investing heavily in this field and the law and legal system were compelled to address the issue of granting patents on living beings particularly in the context of globalization of trade and investment. But the developing countries are of the view that biotech patenting will take away their control over supply of agricultural and pharmaceuticals products and place it in the hands of multinational corporations thereby, affecting their economic and political sovereignty[2]. The basis for deciding for the fate of patent application involving biological material as well as other kinds of inventions described in trips agreement in the Uruguay Round should help because it is violation of that agreement to exclude any "field of technology" from patent production[3]. This article is to attempt to illustrate the development of non obviousness and comparative study of non-obviousness or inventive step in the patent on biotechnology.

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1. Dr.N.S.Gopala Krishnan,Biotechnology and intellectual property protection,The Academic law review,1995,vol 19,p-3
2. Dr.T.G.Ajitha,patenting life form: Problems and perspectives.C.U.L.A.R.1994,p-343/ www.manupatra.com
3. Agreement on trade related aspects of intellectual property rights.(Trips)Art.27(1) says patents shall be available for any invention,whether products or processes in all fields of technology,provided that they are new,involve an inventive step and are capable of industrial application.

BIOTECHNOLOGY: MEANING:

Biotechnology means any technique that uses living organism or parts of such organism to male or modify products to improve plants or animals for human needs to develop microorganism for specific use. According to CBD, Biotechnology means any technological application that uses biological systems, living organisms, or derivative thereof, to make or modify product or process for specific use[4].

BIOTECHNOLOGY AND PATENT:

Biotechnology has faced problems in achieving equal protection in the patent system. Nearly every principle in patent law has to be revisited and interpreted in a new light. In biotechnology, for this reason, and in order to explore more deeply the application of the incentive and access principles to contemporary patent law it is worth reviewing. The courts have handled other core patent issues, such as novelty, non-obviousness/inventive step and utility in biotechnological field[5]. Biotechnological inventions are inventions which concern a product consisting of containing biological material or process by means of which biological material is produced, processed or used[6].

BIOTECHNOLOGY PATENT REQUIREMENT:

Biotech product patent application must face the three hurdles novelty, non-obviousness/inventive step and useful/utility[7]. Those three hurdles are provided it is patentable, otherwise it is discovery not an invention, so discovery is not patentable subject matte[8]. Justice Sandra Panem has concisely summarized the early promise of biotechnology, "The power of this new technology lies in the ability to produce rare biological products in large quantity, with high purity and at low cost.[9]"

NOVELTY:

Sec. 2(1) deals with new invention under Indian patent act, 1970. Novelty means new product or new process. Whether naturally occurring product is new or not? (e.g.) the protein is isolated and purified, it is ultimately, the result will be new organism. New

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4. The CBD,1992.Art.(2)
5. Biotechnology patenting,journal of intellectual property rights,vol-9,sep 2004
6. sec.130(1) PA and rule 23b(2)and(33)EPC
7. Merck&co Vs.Olin mathieson chemical corp.253 F.2d 156,162 (4th cir.1958)
8. Sec.3(d) mere discovery is not patentable subject matter
9. Copy right living genetically engineered works,George Washington law review,50(2) 1982,216-218.

organism means a new or different character of organisms. In Fung bros seed co Vs Kalo inoculants co[10]. Nitrogen fixing bacteria is naturally occurring product. The general public known as nitrogen fixing bacteria helps the agricultural sector. The supreme court was faced with the question whether a mixture of naturally occurring nitrogen fixing bacteria was patentable subject matter? A mixture of product is not consider as new thing, so the naturally occurring nitrogen fixing bacteria is consider as a discovery.

NON OBVIOUSNESS/INVENTIVE STEP:

Non obviousness/inventive step[11] second hurdle to the patent-ability. How can the isolated, purified form of a protein fail to be naturally occurring protein, which was already know about? The crucial point is that prior art is not what is known to nature, but what is known to man[12]. Example, if what is known to man is a protein and what is claimed is a gene and the gene has been isolated and purified, so that is person skilled in the art. Expart Hibberd case[13]. U.S. patent office board of appeals viewed a mutant of maize plant invented by the application as patentable held that the case claimed plant does not constitute product of nature but it constitute a product of man, since it is non natural and human man made. It was patentable subject matter. Genetically engineered or biotechnology produced plants animals are non obvious.

UTILITY:

It means whether it should be used by society or not? Example, Harward onco mouse case[14] a non natural animal was patented. The claim was for a genetically modified mouse susceptible to cancer disease that is useful in cancer research and drug development.

THE PROBLEM OF NON OBVIOUSNESS:

MEANING:

Non-obviousness means when any one gives information, the general public does not know. Obviousness is evaluated on a claim by claim basis[15]. Non-obviousness presents special challenges as well as opportunities for patent applications, patentees, and challengers

10. 333 US 127(1998)
11. sec.2j(a),Indian patent Act 1970.(inventive step must be technical advancement,economic significance and person skilled in the art)
12. supra note p2
13. 227 Us PQ 443,448
14. T19/90(1991)EPOR 525
15. Dystar textilfarben Gmbh Vs.G.H.Patrick co.464 7.3d,1356,1372(fed.cir.2006)

alike. In a Recent case[16] in the Supreme court decisioned regarding the teaching-suggestion-motivation-to-combine test(TSM test) and stated that non-obviousness is evaluated in three ways.

1. Identification of the prior art.
2. The difference between prior art and claim art.
3. Person ordinary skill in the art

IDENTIFYING THE SCOPE OF THE PRIOR ART:

Analogues Art Test: to rely on a reference as a basis for rejection of the application invention, the reference must either be (1) in the field of the applicant's endeavor or, if not, then (2) be reasonably pertinent to the particular problem with which the inventor was concerned[17]. When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. So, identifying the scope of the prior art give result whether it is unique or not? Difference between the claimed invention and the prior art.

DIFFERENCE BETWEEN PRIOR ART AND CLAIM ART:

Assessing distinctions between the prior art and the claimed invention is analyses the obviousness, including motivation to combine, reasonable expectation of success and whether a reference 'teaches away' from the invention. But how big do the differences between the prior art and the claims have to be for the claimed subject matter to be non-obviousness? 'Minor' differences and those achievable by simple modification are in sufficient[18]. The claim art must useful and multiple difference from the prior art mean it is consider for the non- obviousness.

DEFINING THE PERSON OF ORDINARY SKILL:

Many aspects of evaluating obviousness include more indistinct factor are motivation to combine prior art, obviousness of modifying the prior art etc. So, defining the level of ordinary skill can be important strategic consideration for both the patentee and challenger. So, how to determine the ordinary level of skill in the art? A number of factors[19] given below:

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16. KSR int' Co.vs.Teleflex inc.127s.ct 1727,1745(2007)
17. In re oetiker,977 T.2d 1443,1447(fed.cir.1992)
18. miles lab inc vs.shandon inc 997 f.2d 870,878 (fed.cir1993)
19. Non obviousness,biotechnology and pharmaceutical patent.

1. Educational level of the inventor.
2. Type of problems encountered in the art.
3. Prior art solution to those problems.
4. Rapidly with which innovation are made.
5. Sophistication of the technology.
6. Educational level of active workers in the field[20].

These factors are not necessarily of equal importance, in any given case, some may be more important than others[21].

COMPARATIVE ANALYSIS IN NON-OBVIOUSNESS:

U.S.:

The source for the requirement comes from sec.130 of title 35 of the U.S. code[22] forth that even if an invention is new, a patent may not be obtained if the difference between the subject matter sought to be patented and the prior art are the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

35 U.S.C. & 103: THE NON-OBVIOUSNESS REQUIREMENT:

A 1995 amendment to 35 U.S.C. & 103 somewhat revamped the non obviousness requirement in order to incorporate biotechnology[23]. The basic tenets have remained the same, however. In order to ascertain the obviousness of an invention, the invention must be viewed in light of other inventions in the prior art. If the prior invention is one could be easily accomplished by one with skill in the prior art, the invention will not be granted a patent[24]. Obviousness has been a sticky subject in the realm of biotechnology because scientists use similar techniques to isolate different gene sequences, even though the gene sequence may be new[25]. As can be seen from the above a member of different concepts are involved in considering the issue of non obviousness including the concepts of prior art, a person having ordinary skill in the art and the time of the invention.

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20. Daiichi sankyo co.Hd vs.Apotex inc.128s.ct 1259(v.s.2008)
21. Id.At 1256
22. 35 v.s.c9103
23. 35U.S.C.A.& 103(b) (west supp.1997)
24. Graham vs.john Deere co,383U.s.1(1966)
25. Rebecca S.Eisenberg,patenting the human Genome,39Emory L.J.721,736(1990)

The basic test for the determination of obviousness in U.S. is governed by the landmark Supreme Court decision from 1996 in Graham vs. Deere co[26]. And consists of three parts:

1. Determine the scope and content of the prior art.
2. Ascertain the different between the prior art and the claim at issue.
3. The level of ordinary skill assessed.

In the U.S. in the ex party stern[27] case the invention related to a purified preparation of Protein the prior art disclosed an unpurified mixture containing the protein, the invention was conclude with obvious because the application of the new method had a reasonable expectation of success in the right of prior art. From case in re mayne[28] one can infer that a recombinant protein will be considered obvious when structure similarity can be shown and when no unexpected effects can be shown. In other words, international amino acids sequence modifications which are made in order to produce recombinant protein are not sufficient to avoid a finding of prima facie obviousness based on structural similarity.

Clearly, many biotechnology advances are capable of satisfying the requirements for patent-ability. From a purely legal standpoint, innovations in biotechnology are as capable as those in any other field of being useful, novel, and non obvious. Patents are legally appropriate. The crux of the patent debate, however, has never really been the ability of biotechnology to satisfy the requirements. The debate has centered primarily on whether we should reject patents for biotechnology for social reasons, regardless of their novelty, utility and non obviousness.

UK:

Inventive step is definable as the quality or steps that make an invention unique or new. However, there has been a great deal of controversy about what exactly compromises an inventive step. In 1985 in the classic case, in windsurfing international inc vs. Tabor Marine Great Britain Hd[29].

Four steps test:

1. Identified the inventive step.
2. What was before by the prior art and public general knowledge.

26. 383U.S, 1(1966)
27. 13USPQ2d
28. 41NSPQ 2d.14516(A7c)1997
29. (1985)RPC 59,73.

3. The difference between public general knowledge and the used or alleged invention.
4. The degree of invention.

In Biogen vs. Medeva[30], the house of the lords examined the requirements to be satisfied in case of biotechnological invention. UK court held that biogen had taken the initiative and attempted something uncontemplated by others.

But it was reversed by the court of appeal which was consistent with the approach adopted in gene test case. Thus the above cases are evident that UK have stringent rule in determining inventive step and were on their own way. It is now the time to realize how judiciary has reached towards biotechnological inventions.

EUROPE:

EPO for the determination of non-obviousness is generally the problem solution Approach three steps are used to determine whether there is non-obviousness.

1. The closest prior art the technical effect achieved by the closes prior established subsequently the claimed invention and the technical effect achieved by the claimed invention are established subsequently the claimed invention and the technical effect achieved by the claimed invention are established.
2. Staring from the closest prior and technical problem, the claimed inventions are considered whether or not would have been obvious to the skilled person[31].
3. Non-obviousness is also known as could-would issue. The question is not whether the skilled man in the art could have found the solution to the problem with the aid of the prior art, but whether the prior art would have prorated the man skilled in the art to reach the solution as claimed in the invention[32].

INDIA:

The granting of patent in India is different from US and UK, where as first the life forms were rejected from being patented. In India patent are granted for invention involving an inventive step[33]. Inventive step is defined to mean a feature that makes the

30. (1996)R.P.C 1
31. EPO Guide lines,2007 2 CIV 11.7
32. EPO Guide lines,2007 2CIV 11.9
33. The Indian patents act as amended in 2005,sec.2(j) invention.

invention not obvious to a person skilled in the art[34]. Any new product or process that involves an inventive step is patentable in India. In India the patent law provides that when an application for patent is made, the patent examiner[35] will have to conduct an investigation to find the relevant prior art. It in the investigation it is found that the invention has been anticipated by publication India or elsewhere before the date of the application filing of the complete specification. The patent shall not be granted. In such circumstances the invention falls within the interest of prior art, the knowledge in the public domain involving no inventive step. Public domain being obvious to a person skilled in the art, so in the relevant art is not given to the patent.

The requirement is no different with reference to biotechnology. For the first time in India inventive step involved in a biotechnology invention had come before the courts in domminaco A.G vs. Controller of patents design & others[36]. The Calcutta high court was confronted with a question whether the claimed invention relating to a process for preparation of infections bursitis vaccine did involve inventive steps. The vaccine was useful for protecting poultry against contagious bursitis infection. The invention contended that the process claimed involved certain chemical steps under specific scientific condition. So that the process claimed did involve in inventive step, as it required certain chemical step to be protected in vaccine virus.

CRITICAL ANALYSIS:

INVENTION vs. DISCOVERY:

The question as to whether certain substances isolated or derived from naturally occurring organisms are "inventions" or "discoveries" has triggered widespread discussion. Its operating principle, which is traceable back to the nineteenth century, is entirely straight forward: one cannot patent a product that occurs in nature refers to a composition of matter that does not compromise patentable subject matter because it is indistinguishable from something that occurs in nature.

The basic notion of discovery is new knowledge of something already existing in nature which means that the phenomenon pre-

34. Sec.2(j)(a) inventive step
35. The Indian patent act (as amended in 2005) sec.13
36. Dimminoca case 2002 IPLR 255.

exist and is first waiting to be discovered. It is the art of finding a new form of a known substance in the course of a search or imply become aware of, observing that form for the first time[37].

Invention is the addition of new idea to the existing stock of knowledge. It is the conversion of an idea into a tangible form which is previously unknown, non-natural and it is the result of human ingenuity of human intervention[38] such substances are new or novel because they recently came into existence and do not resemble something previously known or used[39].

LEGAL PROSPECTIVE: INDIAN LAW

Sec.3 (d) the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or a new use for a known substance or of the mere use of a known process result in a new product or employs at least one react.

Sec.3 (d) deals with four categories. The term, the mere discovery, is used before the first category. It is also used before the reference to the second category, but not the third or the fourth category.

Sec.3 (c) discovery of a living thing in nature: merely because the end product contains a live varies, the process involved cannot be considered as a non-invention. A vendible product containing a living organism can be a subject of invention[40].

Thus, the patent how clearly specifies that discoveries are not patentable.

INVENTION OUT OF DISCOVERY:

The fact is that patents cannot be granted for discoveries, while at the same time bio-technical invention consisting of gene sequences are patented.

EXISTING IN NATURE:

The basic notion of discovery is new knowledge of something already existing in nature, which means that the phenomenon pre-exist and is just wait to be discovered. Though under US laws discoveries are not explicitly held non-eligible for protection, in the beginning it was believed that living organisms and their part were

37. Schecter E & Thomas John R,principles of patent law,73(Thomas West)2004;35USC&102. Novelty complimented by the requirement of non-obviousness.
38. Marian-Websters collegiate dictionary 615(10th edition)
39. Raju.K.D.'' The debacle of Novartis patent case in India strict implementation of patent-ability criteria under 27 of the TRIPS agreement,'' http;// papers.sm.com/sol ppapers. cpm
40. Dimminaco vs.controller 2002 IPLR 255

non-patentable products of nature. When there is to be an invention from such a discovery, it must come from the application of the law of nature to a new and useful end. Although the mixture[41] was found useful, patent protection was denied because only naturally occurring processes led to the value of the mixture. The natural forms are not patentable, then are all non-natural forms a subject matter of patent?

NON-NATURAL FORM:

With reference to patent protection of biological substances, the issue of discovery vs. invention must be clearly distinguished. All findings in biology- where a biological substance and its properties already existed in nature but were noticed for the first time individually or collectively by humans should be termed as discovery[42]. Natural process such as crossing or selection of plants and animals should be considered as essentially biological processes and does not patentable inventions. This was reversed in 1980 by the US supreme court where for the first time in the patent history, patent was granted for non-naturally occurring living things in the case Diamond vs. Chakrabarthy.[43] Thus court made a classic in this case that "anything under the sun made by man is patentable". Thus from this case it is clear that inventions require human intervention. If such an intervention leads to something that is new, if it involves inventive steps and if it is useful then it can qualify for patent protection. Therefore, discovery helps in revealing the natural from whereas, invention out of discovery is adding some technicalities to make it useful thereby gives out a non-natural form.

TECHNICAL SOLUTION:

One basic pre-condition for patent-ability is that the social phenomenon is a technical solution to a specific technical problem[44] basis condition of an invention suggests that the theoretical definition of a concept. The concept of invention as used in patent laws means a technical solution.

Technology may be described as experience and knowledge accumulated by man during procedures of recognizing and imporing the nature, as well as skills for carrying out various operations. The

41. L Wester Lund,Biotech patents,'Inventions or discovery' pg.28
42. Shahid A likhan and R(aghunath Mashelkar,''Intellectual property and competitive strategies in the 21th century'' Biotechnological Inventions,2nd edition.
43. 447U.S 303 1980.Chakrabathy had succeeded in using genetic engineering techniques to construct bacteria that could digest oil,and discovered a process by which four different plasmids,which had previously isolated,could be transformed by genetic engineering techniques in to and be maintained stably by the pseudomonas bacterium.
44. Under European patent law,technical solution is required while this is not a requirement under US. Law.

guidelines for the examination in the European patent office were revised in feb.2001, which reads. To find a previously unrecognized substance occurring in nature is also a mere discovery and therefore not patentable. However, if a substance found in nature can be shown to produce a technical effect it may be patentable. An example of such case is that substance occurring in nature which found to have an antibiotic effect. In addition, if a micro organism is discovered to exist in nature and to produce an antibiotic, the micro organism itself may be patentable as one aspect of invention.

In land mark decision, a micro organism extracted from the earth's sample was considered a discovery and could not be patented per se, but since the patent micro organism had a technical solution or application i.e. production of sugar inhibitors the specific use of it was patentable.

Thus, if it is shown that the end product when viewed as a whole, an application that incorporates a discovery brings about a technical change, it may be patentable. This means that if a person finds a new property of a known material or article it is a unpatentable discovery.

IN RE RELAXIN [45]:

A patent for human relax in DNA sequences was challenged on the ground of not being an invention but it was overruled. The court held that a substance freely occurring in nature is discovery. The invention must have a technical character. Thus, technical solution is an important criteria in differentiating whether an end product is an invention or discovery.

HORMONE RELAXIN[46]:

In 1995, the court granted a patent for a DNA sequence encoding a human protein, produced by pregnant women which assisted pregnancy. It was held that the subject matter in question was more than a mere discovery as it had to be isolated from its surroundings and process that had to be developed to be obtaining it.

Thus, this case restricted the applicability of the products of nature doctrine. The ability to isolate gene and genome related technologies.

THE PRODUCT OF NATURE DOCTRINE:

Appears as early as 1889, when, in Ex Parte Latimer[47],

45. EP 131 112 143
46. 1995 O.J.EPO(opp.div)
47. 1889 commr dec.123(1889)

the commissioner of patents rejected a claim on a new article of manufacturing consisting of the cellular tissues of the Pinus australis [southern pine] eliminated in full lengths from the silicious, resinous, and pulpy parts of the pine needles and subdivided into long, pliant filaments adapted to be spun and woven. In the initial rejection of the claim, the examiner emphasized the identity of the claimed substance and its natural counterpart: the claim and description do not set forth any physical characteristics by which the fiber can be distinguished from other vegetable fibers. Hence, since the fiber claimed is not, and cannot be, distinguished from other fibers by any physical characteristic, the claim therefore must be refused[48].

The case has laid down following elements for product of nature: a product whose physical characteristics are indistinguishable from those of its naturally occurring counterpart does not constitute patentable subject matter. Alternatively, it may be said that such a product is non patentable because it lacks novelty. Neither the novelty of a process used to produce a product of nature, nor the unprecedented status of its discovery, can cure the inherent non patent-ability of the product.

It is quiet clear that it does not prohibit any invention which is result of human intervention, where living beings has been used initially for conducting experimentation. Moreover, Draft Patent Manual of India reads that there is a difference between discovery and invention. A discovery adds to the amount of human knowledge by disclosing something already existent, which has not been seen before, whereas an invention adds to the human knowledge by creating a new product or processes involving a technical advance as compared to the existing knowledge[49].

A scientific theory is a statement about the natural world. These theories themselves are not considered patentable, no matter how radical or revolutionary an insight they may provide, since they do not result in a product or process. However, if the theories lead to practical application in the process of manufacture of article or substance, they may well be patentable. A claim for formulation of abstract theory is not patentable. For example, the fact that a known material or article is found to have a hitherto unknown property is a discovery and not an invention. But if the discovery leads to the conclusion that the material can be used for making a particular article or in a particular process, then the article or process could be patentable.

48. Id.at124
49. Draft patent manual,2008

CONCLUSION:

I conclude non-obviousness is back bone in biotech patent requirement. I tell about one case law diamond vs. chackrabarthy[50]. The inventor Dr.chackrabarthy sought a patent on genetically modified bacteria being capable of eating oil spills.

The first time the U.S. supreme court held that non naturally occurring, man made life such as genetically engineered micro organisms are patentable. It was held that the role of human agency and addition of human ingenuity differentiates a product of man from a product of nature.

In order to diverse a technical solution to technical problem, man has to use the natural forces available from the natural world. A technical solution unavoidably involves the use of natural force. Which means technical advancement, human intervention and human ingenuity are important to the patent on biotechnology. Which means those end resulted only decided, whether the product comes invention or discovery? The biotech patent is very complicated, but the non obviousness helps the biotech patent. Which means non obviousness involves, novelty should be compromised. But the non-obviousness requirement should be followed: otherwise biotech patent will be compromised.

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50. 447 us 309-310

"Impact of Privacy Rights of HIV/AIDS Patients in Matrimonial Relationships" – A Truth Bitter but Better

Tmt. Lakshmi Viswanath *

"Pleasure impedes wise thinking for a while;
(They) lost no one think of anything"- Aristotle

The Greek poet Homer[1] wrote in the 'Iliad' of a deadly illness common during the Trojan War. He was referring to plague, one of the oldest and most devastating global scourge, which killed about 20 million people, a quarter of the European population. After plague, many other infectious diseases like small pox hit the world. Here fortunate was the human community, because vaccines were found out to eradicate these diseases. But again in 1981, the world witnessed the arrival of a new scourge, from which till now the entire human community has not survived, i.e. Acquired Immunodeficiency Syndrome or AIDS. Since its common mode of transmission is unprotected sexual contact, it spreads all over the world and the impact of it is reflected much in matrimonial relationships also. It is correctly pointed out by the Honorable Supreme Court of India:

> *"AIDS is the product of undisciplined sexual impulse, this impulse, being a notorious human failing, if not disciplined, can afflict and overtake anyone howsoever high or, for that matter, how low he may be in social strata"*[2]

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1. Homer is a legendary ancient Greek epic poet, traditionally said to be the author of the epic poems the Iliad and Odyssey
2. Mr X v Hospital Z 1998 (8) SCC 296

Manusmrithi[3] says about the three stages of a woman's life i.e.., childhood, youth and finally old age[4] . Among these three stages, solid part of her life is the second stage i.e. life with her husband. All the obligations start and end in this stage. Obligation means not only obligations as of wife, but as mutual, because in a marital tie, both the husband and wife have equal rights. In our society, marriage is considered as sacred, a bond of love, affection, understanding and trust. It is a foundation which serves many purposes like bringing two families living in two circumstances together, creating a new generation etc. If viewed from a sociological aspect, a marriage creates a family, a family into a society and a society into a nation. In law marriage has been given an important place. Laws relating to succession, inheritance, partition etc. come under the shield of marriage. In addition, it is a concept which has been internationally recognized[5] .

Right to privacy :

The Constitution of India recognized the right to marriage as a matter of privacy under Art. 21. The term 'Privacy' means the rightful claim of an individual to determine the extent to which he wishes to share himself with others and his control over the time, place and circumstances to communicate with others. It means that an individual has the right to withdraw or participate or the right to have control and dissemination of information about himself. In short, right to privacy includes right to be let alone, right to marry, right to maintain confidentially etc. Privacy is a right which is essentially derived from two sources, the Common Law of Torts and the Constitutional Law. In common law, a private action for damages for unlawful invasion of privacy is maintainable. Though privacy has not been expressly recognized in the Constitution of India, it is indirectly brought under Art. 21[6] .

As referred earlier, right to marry is a matter of privacy. Though considered as fundamental right, it is not without limitations. It can be restricted for want of public health, safety and

3. Manusmrithi is a work of Hindu law and ancient Indian society and for spiritual life and conduct. It is also known as "the laws of manu". They were not codes of law but norms related to social obligations and requirements for Aryan-Spiritual noble soul – Manusmrithi – The Laws of Manu – Spiritual Aryan Book / Com/ manusmirithi
4. Ibid chapter IX verse 3.
5. Art. 16(1) of Universal Declaration of Human Rights says that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
   Art. 23(2) of International Covenant on Civil and Political Rights says that the right of men and women by marriageable age to marry and to find a family shall be recognized. See also Dr. Umesh Chandra,' Human Rights' 4th Edn, 2002, p.378.
6 Kharak Singh v State of U.P AIR 1963 SC 1295, See also. Rajagopal V State of TN AIR 1994(6) SCC 632

in public interest. So was held by the supreme court of India in Mr X V Hospital Z[7] , while dealing with the privacy rights of HIV/ AIDS patients. In this case, the court held that right to marriage of HIV /AIDS is a suspended right[8] , disclosure of HIV status does not violate the confidentiality and further by giving clarification in the second case, it held that the intended spouse has the right to know about the HIV positive status of the other[9] . Though the court settled the case eight years ago, due to the increasing prevalence and litigations regarding HIV/AIDS, it is expedient to consider the matter with more concern in the present day.

Marriage and HIV/AIDS:

Marriage is a martial tie between a man and a woman of healthy body and healthy mind. Unfortunately in HIV/AIDS, the said essentials cannot be fulfilled. Studies of HIV progression rates shows that in HIV patients there are rapid progressor's[10] and long term non-progressors. Rapid progressors indicate that a small percentage of HIV infected individuals rapidly progress to AIDS within four years and in some individuals it is known to progress to AIDS and death within a year after primary infection. In long term non-progressors, individuals who are persistently infected with HIV, shows no signs of disease progression for over 12 years and remain asymptomatic. In long term non-progressors, HIV infection has been halted with regards to disease progression over an extended period of time[11]. The study indicates two facts i.e. once a person is infected with HIV, there is no guarantee for his life or in other words his death is certain. Secondly, even though he remains asymptomatic for many years he will be the carrier of this infection which is utmost dangerous. Apart from this, reports reveals that without proper nutrition, health care and medicines, large number of people suffer and die from AIDS related complications, they will also require significant medical care. The forecast is that this will probably cause a collapse of economics and societies in countries with a significant AIDS population[12]. In some heavily infected areas, the epidemic has left behind many orphans cared for by elderly

7. Supra note 2
8. ibid at p.301 para 1
9. AIR 2003 SC 664
10. D. Holten, S.Moses and F.A. Plummer, "Rapid Progression to disease in African Sex Workers, "Rapid Progression to disease in African Sex Workers with human immune deficiency Virus type I infection", Journal of Infectious Diseases, Vol.17 issue 3, 1995 p.686-689.
11. L.Z hang, J. Safrit, "Virologic and immunologic characterization of long –term survivors of human immuno deficiency virus type 1 infection" New England Journal of Medicine, Vol.332 issue. 4, 1995 p. 201 - 208.
12. Greener.R, "AIDS and macro economic impact, 4th Edn, 2002, p.49-45

grandparents. Right to marry means right to have children, which is one of the objectives of marital relationship? Children and youth are said to be the future and backbone of a nation. But pathetic is the plight of children infected with HIV/AIDS. According to the UNAIDS report in 2008, the number of children under 15 years who are directly affected by HIV/AIDS are 2.1 million around the world and an estimate of 430,000 children became newly infected with HIV. Of the two million people who died of AIDS during 2008, more than one in seven were children and in every hour around 31 children die as a result of AIDS[13]. HIV can damage a child's life in three main ways through its effects directly on the child; on that child's family and on the community where the child is growing up i.e. they act as caretakers for sick parents who have AIDS and also being their family principal wage earners, as AIDS prevents adults from working[14]. One of the harshest effects of the global AIDS epidemic is the number of orphans it has created and continues to create. According to UNAIDS report in 2010, 16.6 million children aged 0-17 years have lost their parents due to HIV/AIDS and that it will be doubled by 2015, if present trend continues.

Like a healthy body, a healthy mind also cannot be expected from these people, as this, deadly disease exposes them to severe stigma, discrimination which leads them to certain psychological problems. A study conducted in India reported that emotional problems are among the most common symptoms in HIV patients with up to 98.6% prevalence and also HIV infected individuals are recognized to be at high risk of suicide in the period immediately after coming to know of their HIV status[15]. On the other side of the spectrum recent reports and cases shows that HIV infected persons has a tendency to spread the disease knowingly[16]. It should also be remembered that right to life also means right to live with human dignity[17]. Marrying an HIV positive person does not serve the above said purpose due to stigma, discrimination and fear of death. Thus protecting HIV infected person's privacy right means violating both the healthy and dignified life of the intended spouse who comes into a marital bond with all expectations for their own future and their future generations. At this juncture an obvious question which is worth maintainable is that whether consented marriage can be allowed in the case of HIV/AIDS patients?

13. 'Report on the global AIDS Epidemic' UNAIDS (2009)
14. ibid
15. Chandra – P.S., Krishna V.A. and others, HIV related admissions in a psychiatric hospital:A five year People "Indian Journal of Psychiatry, Vol.41, Issue 4, 1999, p. 320 - 324
16. Dinakaran, Aug, 19, 2010 p12
17. Francis coralie v Union territory AIR 1981 SC 746

"Consent" is a term which has wide applications in law. It is a tort as well as a crime. In Criminal law, consent may be used as an excuse and prevent the defendant from liability for what was done. But public policy requires the court to lay down limits on this excuse[18]. Consent is valid in a range of circumstances including contact sports such as boxing or mixed marital arts, as well as body modifications, but it's applicability in sexual offences has led to discussions in various English cases. In *R v Donovan*[19] the court stated the general rule that no person can license another to commit a crime. But in an earlier decision, *R v Clarence*[20], where the defendant knowing that he was suffering from a disease, he had sexual intercourse and communicated the disease to his wife, the court held that he was not guilty of an offence because he had not committed an assault on his wife, having consented to the contact. But his decision was overruled in *R v Chan-Fook* [21] where it was held that psychiatric injury could be an actual harm in the body. By the above decisions, in matters involving the transmission of psychological conditions and in other sexual matters, the court rejected the notion that consent can be a defense to anything more than a trivial injury. In India, sexual offences involving spreading of infectious diseases dangerous to life is brought under sections. 269 and 270 of Indian penal Code and it is also provided as a ground for divorce under various personal law of our country[22]. Till now disease categorized under infectious diseases are small pox, cholera, plague and sexually transmitted infections like Syphilis[23]. But the supreme court has brought and criminalized the offence of transmission of HIV/AIDS under the category of sections 269 and 270 of IPC by ruling that there is moral and legal duty cast upon the HIV/ AIDS patients to inform the women with whom the marriage is proposed that he was not physically healthy and that he was suffering from a disease which are likely to be communicated to her[24] and if a person is suffering from the dreadful disease "AIDS" knowingly marries a woman and thereby transmits infection to that woman, he would be guilty of offence indicated in sections.269 and 270 of the Indian Penal Code[25]. The above decision points out that

18. Dennis J. Baker," The Moral Limits of Consent as a Defense in the criminal law, "vol 12, issue 1, New criminal law Review, 2009
19. 1934 AER 207
20. 1882 22 QBD 23
21. 1994 IWLR 689. See also. R V Burstow 1998 I CAR 177
22. S.13 (1) (V) of Hindu marriage Act, 1956. Also see S.2 Dissolution of Muslim Marriage Act, 1939, S.32 of Parsi Marriage and Divorce Act, 1936, S.10 of Indian Divorce Act, 1869, S.27 of Special Marriage Act, 1954
23. B.M. Gandhi, 'Indian Penal Code' 2nd Edn, 2006,p.371
24. Supra note 2 at p.308 para 38
25. ibid at p.309 para 41

before marriage an HIV infected person should inform the intended spouse of his HIV status. But the court has not made it clear the position after obtaining informed consent and marry i.e. whether he can be penalized for transmission of the infections or whether he can claim the defense of volenti non fit injuria.

In India, an individual cannot waive his fundamental rights. In *Basheshar Nath v I.T. Commissioner*[26], where the question of fundamental rights was specifically examined, the court declared that fundamental rights are mandatory on the state and no citizen can by his act or conduct relieve the state of the solemn obligation imposed on it. But in HIV/AIDS, this rule requires twice thinking. Here two fundamental rights are collided in two circumstances; in the first instance if right to marriage of HIV/AIDS patients is taken away by the law, that right is compulsorily being waived by the patient; in the second instance, if the marriage (with consent or without consent) is allowed the intended spouse is being permitted to waive his or her fundamental right to life which is constitutionally wrong. The court while dealing with the privacy right of HIV/AIDS patients has noted out that when there is a clash between two fundamental rights's under Art.21 the right which advocates public morality or public interest would alone be enforced through the process of court for the reason that moral considerations cannot be kept at bay[27]. The verdict of the court gives a clear cut interpretation that when two interests collide, the interest which advocates majority will prevail and in the context of HIV/AIDS, the rights of the rest will overrule the privacy rights.

By a deep analysis, it is to be noted that in the context of HIV/AIDS, the usage 'Consent', 'informed consent' or consented marriage itself is wrong, because the fact is that no person will knowingly marry an HIV infected person. On the other hand, an HIV infected person will hesitate to reveal his status not only to his intended spouse, but to anyone. Under these circumstances, as there is a least possibility of consented marriage, the only possibility is that the person will hide his setback and fraudulently marries. Thus, once infected with HIV, filing a petition for divorce or compensation or convicting the person under various sections of criminal law will not really compensate his or her losses as already the person has dropped into death.

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26. AIR 1959 SC 149 see also Union of India v Tulsiram Patel ; AIR 1985 SC1416; Suraj mall mehto V A V. Viswanath Sastri ; AIR 1954 SC 545;Muthiah v. Commissioner of income tax AIR 1956SC2695

27. Super note 2.at p.310 para 44 See also Mohanpatnaik v Govt. of Andhra Pradesh 1999 Andhra LT504

Another point which is essentially be considered is that in sexual offence, 'Consent' is difficult to prove, because in our community sexual relationships are considered to be a private matter between the individuals involved. Then in HIV/AIDS related sexual offence, it is even more difficult to prove that there was no informed consent and that the (spouse or anyone) brings a criminal case against an HIV/AIDS patient for knowingly transmitting the infection or disease before the court, the infected person will easily claim the defense of volenti non fit injuria in each and every case and escapes from the punishment. Yet another factor which is to be considered is that the concepts such as duty to inform, consent and right to know etc has relevance only prior to marriage. Now-a-days, suggestion has been raised for a pre-martial certification against HIV/AIDS and other infectious diseases. Prima-facie, it seems reliable to prevent fraudulent marriages done by HIV/AIDS patients concealing their status. But in a second thought, it seems to serve only a limited purpose. Since HIV/AIDS is an infectious disease, it can infect any time before or after the marriage. A further thought may even question its validity as it is difficult to detect the HIV infection, if the person is in a window period. Since HIV is still incurable; here the only remedy is to absolutely prohibit the marriage of HIV/AIDS patients. It should also be understood that in front of an HIV/AIDS patient, there is only sky and earth as he has nothing to lose being near to death. Stigmatizing, discriminating or punishing will not be a solution as it has the same effect of giving one punishment for a murderer of mass killing.

Apart from being a privacy matter HIV/AIDS is a matter of high public policy and to an extreme a national interest matter. The European convention on Human Rights states that "as one of the basic human rights, the right to privacy is not absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others." Thus here, a concept of fundamental duty to take care or maintain public health or public policy is involved. Now fingers are raised on the question 'who has the fundamental duty to take care on the rights of the rest'?

Under the tort law, there is a rule of duty to take care, in which duty is interpreted as a legal obligation to confirm to a certain standard of conduct towards another person. In HIV/AIDS, this duty makes an obligation to disclose the HIV/AIDS status to the sexual partner of the infected person, so as to protect the partner from avoidable health risk. It was contented by the court that timely

disclosure of HIV status of the patient to his fiancée saved her from being contracted with HIV and hence the disclosure did not violated the right to privacy (confidentially) of HIV/AIDS patients[28].

The Supreme Court also pointed out that in the context of HIV/AIDS, right to marry and duty to inform about this ailment are vested in the same person. It is a right in respect of which the corresponding duty cannot be claimed as against any other person. Such a right would be an exception to the general rule that every right has correlative duty[29]. Here it is to be remembered that, even though the court has vested the fundamental duty to inform in the patient itself, the HIV infected person will rarely reveal his HIV status to anyone, even to his family members due to stigma, discrimination etc, but it becomes the fundamental duty of the doctor to take care by disclosing the information to the intended spouse. The medical council of India also confirms the above.

The Code of Professional Conduct made by the Medical Council of India, provided for the non-disclosure of the secrets of patients that have been learnt by a doctor in exercise of his profession and that it should be disclosed only in a court of law under the orders of the presiding judge. But at the same time, the code also carved out an exception to the rule of confidentially and permits the disclosure in the rule of circumstances where public interest would override the duty of confidentiality, particularly where these is an immediate or future health risk to another. It means that disclosure of confidentiality of patients can be limited in public interest[30]. The above position has also been made clear in an American case; *Mac Donald v. Clinger*[31] where the court stated that disclosure of confidential information to a spouse will be justified whenever there is a danger to the patient, spouse or another person, otherwise information should not be disclosed without authorization. The rule is that whatever information a doctor has acquired during the treatment of the patient has to the kept confidential, but the doctor has a duty to society also. In such case, disclosure of information is protected under privilege communication[32]. In *Raj Narain v State of UP*[33], it has been rightly stated that the people cannot speak or express themselves unless they know. Also in 2003, the Supreme Court has ruled that the intended spouse has the right to know

28. Supra note 2.at p.307 para 29
29. Super note 2.at p.308 para 38
30. S.33(m) read with S.20-A of the Indian Medical Council (amendment) Act, 1964
31. 446.N.Y.S.2 d 801
32. Vinod K.Sharma, Sexually Transmitted Diseases and AIDS,1st Edn,2003, p 376
33. AIR 1966 SC 112

about the HIV status of the other[34]. Fundamental duty towards the society has also been attributed to the state under Art.47 of the constitution of India. It imposed a duty upon the state to raise the level of nutrition and standard of living of its people and improve public health. In *Lucy R. D'Souza v State of Goa*[35], the court held that interest of public health supersedes an individual interest. Also in *Vijaya v. Chairman and M.D.Singaran Clothes Ltd*[36] the court pointed out that subjecting an individual to compulsory HIV testing was not unconstitutional, even though it infringes the individual's right to privacy, because the state has an obligation under the constitution to take steps to improve public health. The above cases indicate that interest of the public is the most important factor and will even prevail or override the fundamental rights. The Honorable Supreme Court in an earlier decision, *Dargao v. State of UP* [37] had vehemently held that fundamental rights are intended not only to protect an individuals right, but they are based on high public policy. From the above discussions and analysis, it is inferred that HIV/AIDS is not merely an infection or a disease, but a great problem, trouble or menace, which can not be limited to privacy, as it has great impact upon the society, transcending to the extent of threatening National interest[38] . Here are few suggestions which are to be considered effectively.

Premarital HIV screening certificate of both male and female should be made mandatory for marriage and marriage registration. And for the credibility of the result the screening should be done at government hospitals compulsorily, since it was held that subjecting an individual to compulsory HIV testing was not unconstitutional, even though it infringes the individual's right to privacy, because the state has an obligation under constitution to take steps to improve public health.

HIV/AIDS should be made a disqualification for marriage as well as it should be included as a ground for divorce under s.13 (1) (v) dealing with venereal diseases

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34. supra note10 at p 665 para 6
35. AIR 1990 Bom 355
36. AIR 2001 AP 502
37. AIR 1961 SC 1457 See also Behrin v State of Maharastra AIR 1955 SC 123
38. It is reported that Rs.993 crore has been allotted to National AIDS Control Programme (NACP phase-III) for the year 2009-2010 that is, the overall allocation has marked an increase of 15% over the allocation in 2007-2008. The estimated budget indicates that every year the government is spending crores and crores of money for the prevention and control of HIV/AIDS which should be actually spent for the development of the country

Law should make public interest a core factor whenever the question of privacy rights of HIV/AIDS patients arise. HIV related crimes are to be brought under the category of the most serious crimes under the Indian Penal Code.

When HIV Prevention Bill becomes a reality, besides health, protection, literacy and awareness, the Legislature should also give priority to HIV related legal matters with due concern.

Premarital counseling giving importance to HIV/AIDS should be made compulsory by all the religious community.

It is hereby concluded by saying that, where "AIDS" is ravaging the entire world and in a country like India where poverty and illiteracy is still a curse and where the whole health system is fighting to curb this disease and where the three pillars of our constitution is still in a dilemma on their stand regarding HIV/AIDS the only thing, the last but not the least is that what the people can do is to care for the rest.

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The Notion of Empowerment of Women – Unresolved Questions, Untested Answers: Shifting Paradigms

R. Karuppasamy *

Introduction

Woman; the word sounds so powerful. Since eternity women have played a role more important than men and that is no exaggeration. Today, there are lots of things that are happening in the name of women empowerment in India and lot of resources are spent in this direction. Keeping this in mind it is crucial to have a reality check on what is happening on paper and what is the actual ground situation. It is worthwhile to ponder on the fact that we are one of the worst in terms of worldwide gender equality rankings. In India, women are discriminated and marginalized at every level of the society whether it is social participation, economic opportunity and economic participation, political participation, access to education or access to nutrition and reproductive health care. A significant few in the society still consider women as sex objects. Gender disparity is high, crimes against women are increasing and violence against women is all time high and in most cases go unreported. All this is happening despite the fact that there are number of programmes and policy initiatives that is being run by the government and other bodies. There has been a shift in policy approaches from the concept of 'welfare' in the eighties to 'development' in the nineties and now to 'empowerment' in the twenties. The year 2001 was declared as the National policy for empowerment of women. So it is time to ask the question whether we are moving in the right direction and where are we in terms

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of the paper actions and the actual ground realities for which an attempt has been made in this paper to reconsider and reconcile the issues.

Women's empowerment has been articulated in the policy statements put forth at several high level international conferences[1] in the past decade. From the beginning, civilization shows its footprints on the sand of history that gender based discrimination are a deep rooted social malice practiced[2]. Woman suffers discrimination and injustice in all stages of her life. ILO report says that despite progress in equality, women are behind on job front.[3] The Government of India has taken various welfare measures to present equal status to women in man oriented society [4]. On the other hand, if more and more women join work place they become 'broiler wife' which refers to the growing breed of working women exploited by their own husbands financially.[5] The 73rd and 74th amendments to the Constitution empowered women to represent in the Panchayati Raj system and urban local bodies as a sign of political empowerment. According to World Economic Survey this year, placed India ahead of many western countries in terms of women's political empowerment [6]. Throughout history and in many societies including India, gender inequality was part and parcel of an accepted male-dominated culture. Atrocities and discrimination are the two major problems, which the Indian women face in the present day society. The traditional mentalities of India assume that the place of women is mainly concentrated to the household activities like kitchen work and upbringing of the children. They have been considered as the sex object and inferior to the men in different spheres of knowledge. Even after fifty seven years of Indian independence, women are still one of the most powerless and marginalized sections of Indian society. Despite of all these measures, women in this country are mostly unaware of

1. The Beijing Platform for Action, the Beijing Declaration and Resolution, The Cairo Programme of Action, The Millennium Development Goals (Goal 3& 4) and the Convention on the Elimination of All Forms of Discrimination against Women.
2. Purushotam. Sangetha, "Empowerment of Women in India: Grass root Women's network and State", Indian Journal of Public Administration, Vol.45.
3. THE HINDU dated on 6-3-2010.
4. On July 12, 2001, the Mahila Samriddhi Yojana and Indira Mahila Yojana were introduced to made women self-sufficient or 'Swayam Siddha'. In addition, some other steps like the Rashtriya Mahila Kosh, Balika Samrudhi Yojna, were launched to provide equal status to women economically.
5. THE HINDU dated on 28-3-2010.
6. Women upliftment and empowerment in India first received National and International recognition when the Indira Gandhi's Government launched the Indira Mahila Yojana and when the United Nations Development Programme (UNDP) incorporated the issue of Women Upliftment as one of its primary objective. Since then a string of social programmes and yojanas have been undertaken to empower the rural women like the Rashtriya Mahila Kosh and Mahila Samridhi Yojana.

their rights because of illiteracy and backward tradition.[7] And yet, millions of women are in darkness, and suffer from deprivation of minimum necessities of life.[8] There was still mistrust among people who felt women were too "temperamental" or could not fit into top posts. Of course, it was not possible for women to become leaders overnight, but they could do so over time.[9] By refusing to intervene in the family unit to protect the rights of individual woman within that family unit, the state actively contributes to the sexist definition of woman as no-distinct form their families and thus denies women their rights as individuals.[10] Women empowerment is determined by their involvement in decision making and change in [11].

Empowerment of any section of a society is a myth until they are conferred equality before law. The foundation of freedom, justice and fraternity is based on the recognition of the inherent dignity and of equal and inalienable rights to all the members of the society. The Universal Declaration of Human Rights adopted and proclaimed by the General Assembly of the United Nations on 10th December 1948, envisaged in Article 2 that "every one is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind."[12] Further, it also recognized that "the family is the natural and fundamental group unit of the society and is entitled to protection by society and the State."[13] It has traditionally been accepted that the thread of family weaves the fabric of Indian society. Women are considered as the hub center of the family. Still, in the era of political domination by foreigners, the women in India suffered most.[14] A few social reform measures were taken towards the later 19th and early 20th century during the British regime.

What is Women Empowerment?

Women Empowerment literally refers to increasing the spiritual, political, social or economic strength of Women.[15] It

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7. THE HINDU dated on 2 - 4 - 2003
8. The 'Sarva Siksha Abhiyaan' has tremendously changed the nature of elementary education in rural areas to some extent, but it can not work without the complete support of the society and self awareness of the women itself.
9. THE HINDU dated on 8-3-2009.
10. Z. Eisenstein, "Radical Future of Liberal Feminism (1981), pp.15-16.
11. Self-confidence level, status, social and political participation, control over income, awareness of social issues and problems and domestic violence.
12. Panda Snehalata, 1996, "Emerging Pattern of Leadership Among Rural Women in Orissa, Indian Journal of Public Administration, Vol. 42, No. 3-4.
13. Kaushik, Susheela, "Women and Panchayati Raj", Indian Journal of Rural Development.
14. THE HINDU dated on 17-12-2002
15. Mohanty bidyut, 'Women and Political Empowerment", ISSN, New Delhi, (2000)

often involves the empowered developing confidence in their own capacities[16] and includes social, economic, political and psychological empowerment. Simply speaking, it is the ability of women to exercise full control over one's actions.[17] Empowerment is probably the totality of the following or similar capabilities:

* Having decision-making power of their own;
* Having access to information and resources for taking proper decision;
* Having a range of options from which you can make choices;
* Ability to exercise assertiveness in collective decision making;
* Having positive thinking on the ability to make change;
* Ability to learn skills for improving one's personal or group power;
* Ability to change others' perceptions by democratic means;
* Involving in the growth process and changes that is never ending & self-initiate;
* Increasing one's positive self-image and overcoming stigma.

Constitutional Provisions

The makers of the Constitution of India tried to ensure liberty, equality and dignity of all the citizens of India. To ensure this equality, the Indian Constitution eliminated almost all discrimination based on caste, creed, sex or religion. It accepted in principle the equality of men and women. Articles 14[18] , 16[19] , 39[20] , 42[21] , 51(A) (e)[22]. To make this de-jure equality into a de-facto one, many policies and programmes were put into action from time to time, besides enacting/enforcing special legislation, in favor of women.

Legislative Measures

Various legislative measures were designed to reinforce the provisions enshrined in the constitution. The Government of

16. Saxena, Kiran, 1994, "Empowerment of Women: The Indian Context, Indian Journal of Public Administration, Vol.55.
17. VOICE OF INDIA dated on 15-12-2009.
18. The Article 14 confers equal rights and opportunities on men and women in the political, economic and social spheres. Article 14 empowered the State to make affirmative discrimination in favor of women.
19. Similarly, Article 16 provides for equality of opportunities in the matter of public appointments for all citizens;
20. Article 39 stipulates that the State shall direct its policy towards providing men and women equally the right to means of livelihood and equal pay for equal work;
21. Article 42 directs the State to make provisions for ensuring just and humane condition of work and maternity relief;
22. Article 51 (A) (e) imposes a fundamental duty on every citizen to renounce practices derogatory to the dignity of women

India had enacted both women specific [23] and women related [24] legislations to safeguard the rights and interests of women, besides protecting against social discrimination, violence and atrocities and also prevent social evils like child marriages, dowry, rape, practice of sati etc. The government has reviewed and amended these Acts from time to time to take care of the interests of women in the changing situations and societal demands and obligations. The newly introduces Section 6 of the Hindu Succession Act, 1956 would be applicable to all daughters, whether married or unmarried prior to the said commencement date. The Amendment therefore goes a long way towards the establishment of gender equality and abolition of patrilineal system of inheritance prevailing among Hindus.[25] Apart from these, various welfare measures [26] have been taken up by the Government form time to time to empower to the women. They are the support to Training for –. On the 12th July 2001, the Mahila Samriddhi Yojana and Indira Ahila Yojana have been merged into the integrated self-help group programme i.e. Swayam Siddha.[27] For the emancipation of women empowerment, National Mission has been created and women will be able to avail a single window service for all programmes run by the government for them.[28] The 73rd and 74th amendments to the Constitution, empowered women to represent in the Panchayati Raj system and

23. The Immoral Traffic (Prevention) Act. 1956, The Dowry Prohibition Act, 1961 (28 of 1961), The Indecent Representation of Women (Prohibition) Act, 1986, The Commission of Sati (Prevention) Act, 1987 (3 of 1988).

24. The Guardians and Wards Act, 1860 (8 of 1890), Indian Penal Code, 1860, The Christian Marriage Act, 1872 (15 of 1872), The Indian Evidence Act, 1872, The Married Women's Property Act, 1874 (3 of 1874), The Workmen's Compensation Act, 1923, The Legal Practitioners (Women) Act, 1923, The Indian Succession Act, 1925 (39 of 1925), The Child Marriage Restraint Act, 1929 (19 of 1929), The Payment of Wages Act, 1936, The Muslim Personal Law (Shariat) Application Act, 1937, The Factories Act, 1948, The Minimum Wages Act, 1948, The Employees' State Insurance Act, 1948, The Plantation Labor Act, 1951, The Cinematography Act, 1952, The Special Marriage Act, 1954, The Hindu Marriage Act, 1955 (28 of 1989), The Hindu Adoption & Maintenance Act. 1956, The Hindu Minority & Guardianship Act. 1956, The Hindu Succession Act, 1956, The Maternity Benefit Act, 1961 (53 of 1961), The Beedi & Cigar Workers (Condition of Employment) Act. 1966 The Foreign Marriage Act. 1969 (3 of 1969), The Indian Divorce Act, 1969 (4 of 1969), The Medical Termination of Pregnancy Act. 1971 (34 of 1971),Code of Criminal Procedure, 1973, The Bonded Labor System (Abolition) Act, 1976, The Equal Remuneration Act, 1978 The Contract Labor (Regulation & Abolition) Act, 1979, The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act. 1979, The Family Courts Act. 1984, Juvenile Justice Act, 1986, The Child Labor (Prohibition & Regulation) Act, 1986, National Commission for Women Act, 1990 (20 of 1990), The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992,The Pre-Natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994 and Domestic Violence Act, 2005 and so on.

25. LAWZ Magazine, April 2009 p.19.

26. Employment Programme (1987), Mahila Samiriddhi Yojana (1993). The Rashtriya Mahila Kosh (1992 93), Indira Mahila Yojana (1995), DWACRA Plan (1997) and Balika Samriddhi Yojana (1987).

27. Siddhardha Dash, "Women Empowerment in India" Orissa Review, December 2004.

28. The Business Standard dated on 15-12-2009.

urban local bodies as a sign of political empowerment but there are many elected women representatives at the village council level. However, their power is restricted, as the men wield all authority. In addition to these, Central Social Welfare Board, National Commission on Women. In addition to this a recent mile stone in the journey of women empowerment is that the laws relating to Rape and Sexual assault are set to undergo a radical overhaul in accordance with the recommendation of Law Commission of India in its 172nd Report.[29] Despite all the official proclamations about empowerment and the numerous government schemes designed to improve women's economic conditions, their material status still shows much cause for concern.[30]

Approach of the Indian Judiciary on Women issues

The laws enacted by the Government of India have direct and indirect bearing on the status women. Since the enactment of the laws women have been approaching the judiciary to safeguard their rights and interests. They have been many instances wherein our Supreme Court has done justice to women community in issues like social discrimination, violence, Right to live with dignity,[31] Right to economic empowerment,[32] Recognising Right to Stridhana and right against dowry,[33] Protection of women from Prostitution and Rehabilitation of their children,[34] Protection against illegal arrest and detention with Compensation,[35] Compensation to rape victim,[36] recognizing mother as natural guardian,[37] restitution of conjugal rights,[38] dowry demand,[39] maintenance,[40] sexual harassment at work places [41] , Protection from husband indulging in mud slining and character assassination,[42] Protection from matrimonial cruelty,[43] safeguarding women prisoners from custodial violence[44] and immoral trafficking [45] etc. Indian judiciary has been very sensitive

29. THE HINDU dated on 24-3-2010.
30. Business Line of THE HINDU dated on 3-9-2002.
31. Maneka Gandhi v. Union of India AIR SC 1976.
32. Masilamani Mudaliar v. Idol of Swamy Nathan Thukkoli, AIR 1996 SC 1967.
33. Prathiba Rani v. Suraj Kumar, AIR 1985 SC 628.
34. Gourav Jain v. Union of India, AIR 1997 SC 3021.
35. Rudul Shah v. State of Bihar AIR 1983 SC 1086.
36. Delhi Domestic Working Women's Forum v. Union of India, (1995) 1 SCC 14: 1995 SCC (Cr.).7.
37. Geetha Hariharan v. Reserve Bank of India, (1999) 2 SCC 228 at p.234.
38. T.Sareetha v. Venkata Subbiah AIR 1983 AP 356
39. Shoba Rani v. Madhukar Reddi AIR 1988 Sc 121.
40. Shah Bano Begum v. Mohammed Ahmed Khan, AIR 1985 SC 945.
41. Vishaka v. State of Rajasthan AIR 1997 SC 3011.
42. Mukund Martland Chitnis v. Madhuri Mukund Chitnis AIR 1992 Sc 1804.
43. Savitri Devi v. Ramesh Chand, 2003 (3) Crimes 100 at pp.105-106 (Delhi)
44. Sheela Barse v. State of Maharastra, AIR 1983 SC 378 at pp.379-383.
45. Vishal Jeet vs. Union of India (1990) 3 SCC 318

to women and women related issues. It has showed great interest in discharging cases concerning women. The Apex Court of India took special interest in discharging its legal and constitutional obligations and safeguarding the interests of women in changing situation and societal demands. The judgment proclaimed by the Judiciary show that its attitude towards women related issues is very impressive and progressive in nature. This has direct and indirect bearing on the society and its environment. People in general and women in particular are becoming more and more aware of their rights and probable redress through judiciary. They are approaching courts in greater number to get justice and to safeguard their human and constitutional rights. The old stigma and fear of being looked down upon by the society has been hammered by the judgments of the Hon'ble courts. The reporting of judgments and debate on important cases has strengthened the confidence of women in judiciary. Even till recently, the Court has sentenced death penalty to five persons for 'Honour Killing' of a couple in Haryana which is a glaring for the role of judiciary on women empowerment.[46]

It must be admitted that legislation and judiciary has its own limits as the needs of the women are diverse and multiple. The problems like ignorance, illiteracy, discrimination and violence continue to persist. The judicial redress still remains a costly, time taking and rare commodity. Even with the provision of best safeguards and sensitive judicial approach, women's rights continue to be a casualty in any conflicting situation with the other sex. Constitutional provisions and the legislation enacted by the Government of India to safeguard the interests of women have been bringing slow but effective change in social, economic and political status of women in India and thus laying a strong foundation of women empowerment.

Women Empowerment and Gender Equality

Women's empowerment is the increased capacity of women to make decisions at the household, political, economic, and social scales.[47] Gender equality is the equal treatment of women and men in laws and polices, equal participation of women and men in planning and management and equal access for women and men. Women's empowerment, along with empowerment of marginalized communities, is an important part of achieving gender equality. If a

46. THE HINDU dated on 1-4-2010.

47. Pandey, Saroj, ' Women's Education and Development in Orissa & Social Change' Vol.22, (1998).

law, practice, or policy contributes to the subordination of women or their domination by men, it violates equality. If it empowers women or contributes to the breakdown of male domination, it enhances quality.[48] The reconeptualization of equality as anti-domination, like the model of equality as acceptance, attempts to respond directly to the concrete and lived-out experience of women. Like other asymmetrical models, it allows different treatment of women and men when necessary to effectuate its overall goal of ending women's sub-ordination. However, it differs substantially from the acceptance model in its rejection of the membership, belonging, and participatory aspects of equality[49]. The perception among feminist legal thinkers that the stakes in the symmetrical versus asymmetrical debate are correct. Difference indeed makes a difference. Yet, the frantic nature of the debate about difference between the sexes makes the divergent views within feminist legal though appear as a deadly danger rather than an exciting opportunity.[50] Through a model of equal acceptance, the legal system, which ahs historically been a conduit through which perceived difference between both sexes has rationalized concrete disadvantage to one, may finally become an arena for reclaiming equality across difference.[51]

Empowerment of Women through Human Rights

Women represent half of the population and one third of the work force; they receive only the 1/10 of the global income and less than 1% of world property, and do 2/3 of all working hours. Still, day in and day out, our conscience is shocked by news of violation of human rights.[52] The reason that we emphasize "women's rights" within human rights goes beyond history. Traditionally, women have not enjoyed equal access to basic human rights, protections, resources, and services.[53] Unfortunately, gender inequality is still present in every society and remains as a huge barrier for the world. Unequal situations for women vary significantly by region, country, culture, society, community and etc. Also, there are various conditions and places where women are disadvantaged. The origin of the discrimination is sometimes religion, beliefs, cultural traditions or political interests. These excuses in some occasions encourage the unequal and discriminatory treatment of women, thus creating

48. V.N. Mishra, "Women's Issues and Concerns" (2003) at p.92.
49. Ram Vilas Saxena, Staus of Women: A Central Issue (2003) at p.313.
50. P.R.Pandey, Globalization and Emerging Socio- Political issues (2002) at p.46.
51. K.V. Rao, Globalization and Goal of Women's Equality (2001) at p.20
52. Anil Dutta Mishra, Persppectives on Human Rights, New Delhi, Radha Publications, 2002, p.72.
53. Manikymba, ' Women presiding officer at the tertiary political Structure, Journal of Rural development' vol. 9(6)

oppressed communities. Moreover, women's categorization according to their race, sexual orientation, disabilities, economic status and some other factors triggers more and more discriminative actions in societies.[54] Most women's experiences of human rights violations are gendered, and many forms of discrimination or abuse occur because the victim is female. Women's rights are being violated for reasons other than gender (as political prisoners or members of persecuted ethnic groups) often also experience a particular form of abuse based on gender, such as sexual assault.[55] Certain groups of women are particularly vulnerable to human rights violation. Women who come from marginalized groups are in double jeopardy. Discriminated against as women, they are also the victims of prejudice.[56] In terms of security, the countless surveys only show how dismal the situation is in the metropolitan cities which stand as glorious symbols of national progress. Any working woman with late night shifts is looked upon with suspicion. If she chooses not to care about the prying eyes of the society, she is forced to care about her own security. This is because hers would be only one of the thousands cases of harassment that pile up in the cities. It's not just at night, even in broad daylight; attacks on women like the one in a pub recently in Mangalore under the pretext of moral supervision are prevalent.[57] Therefore, all the Nations in the Asia Pacific should work towards empowering women not only as a laudable goal and human right but also to boost their economies.[58]

Gender Equity and Women Empowerment

There exists some ambiguity in interpreting the concept of gender, which is often confused with sex. While sex is biological determined, gender is socially determined on the basis of social and cultural patterns of behaviour in particular historical and social circumstances. Socially determined gender patterns impute values to the roles performed by men and women manifesting in gender bias or hierarchy between sexes.[59] Gender equality and women's empowerment are human rights issues that lie at the heart of development and the achievement of the Millennium Development Goals. Despite much progress in bringing women out of poverty, six out of ten of world's poorest people are still women. Since women

54. THE HINDU dated on 21 – 5- 2008
55. Julie Peters and Andrea (Eds.), Women's Rights Human Rights, Routledge, 1995, p.12.
56. Human Rights are Women's Right, Amnesty International, London, 1995, pp.85-86.
57. The Views Paper dated on 16-3-2009.
58. THE HINDU dated on 9-3-2010.
59. Anjana Mangalagiri, " Gender and Role of Education in Structural Adjustment", in Education, Culture and Media, Vol. 2, Centre for Women's Studies, Mysore, IDS, University of Mysore, p.28.

comprise the majority of the population below the poverty line, are often in situations of extreme poverty, and experience harsh intra-household and social discrimination, poverty eradication programmes must specifically address their needs and problems.[60] Problems include: women being more tied to the home with young children; limited awareness of and participation in self-employment activities; limited access to appropriate resources; absence of tailored support systems and programmes; and lack of expression of their needs and demands in addressing their income enhancing opportunities. These factors combined with a low economic condition and the standard of living result in a precarious situation that limits their capacity to improve the quality of their lives through their own income.[61] Total literacy campaigns have provided illiterate adult women, who have been denied access to formal schooling, with a great opportunity for reading, writing, increasing awareness levels and skills training. Literacy campaigns have thus actively promoted gender equity and have sought to empower them as to decision making about themselves, their families and their communities.[62] The impact of literacy on women's life has often been dramatic. All these show that the process of gender equality and women's empowerment still has a long way to go and may even have become more difficult in recent years. It has to be understood that unless we change the basic social attitude which cultivates gender inequality and gender bias we would not be able to achieve much in terms of women empowerment in India. There are many laws and there have been many amendments that have been carried out to end the discrimination against women and empower women in all aspects of life. Gender equality is enshrined in Indian constitution and constitution empowers the state to end the gender based discrimination against women. There is reservation of seats in local bodies and municipalities and another law is being envisioned for reservation in parliament. But the sad part is that all these laws and amendments have become toothless as the fundamental problems lies in the attitude of the society which is highly biased against women. The only solution is for women to come together as a unifying force and initiate self empowering actions at the ground level. Let it happen even if it is at a slow pace initially but it must happen despite however small the

60. Narayan, Usha, 'Women in Panchayats: The Path Ahead, Mainstream' Nov.16.
61. Athreya, V.B& Bhargava, B .S. & Bhaskar, Manu, 1992, Women in Grassroots Democracy-A study of Kerala, University of Kerala/ ICSSR, New Delhi.
62. Srinivas, M, N, ' *The Changing Position Of Indian Women,* Oxford University press, New Delhi

initial steps might look like. So the connection is very clear. Once we work towards self empowerment through small number of infinite actions, we become aware of the ground realities and then we can think about taking further recourse towards changing the mindset of the society which fosters gender inequality and bias.

Impediments to Empowerment of Women

Things have not remained the same in last few decades or even centuries. The social fabric has acquired completely new dimensions. The women are considered less powerful and important than men yet situation is not entirely bleak. In general the following are main hurdles for women empowerment:

- Female infants are often denied the same food, education and medical care as boys. As a result they suffer from malnutrition, poor health and lack of education.
- Many poor families, who can't afford to pay dowry to their daughters, choose to murder their female infants as the dowry is a symbol of status in the society.
- Domestic violence is common and a serious problem.
- In remote villages, witchcraft accusations and punishments still occur.
- Sexual harassment and discrimination at the workplace is common.
- Early marriages also contribute miserably to their hard life.

Concluding Remarks

We have to accept the fact that things are not going to change overnight but because of this we cannot stop taking action either. At this juncture the most important step is to initiate ground level actions however small it might seem. The ground level actions should be focused towards changing the social attitude and practices prevalent in the society which are highly biased against women. This can be initiated by working with the women at the root level and focusing on increasing women's access and control over resources and increasing their control over decision making. Further working on the aspect of enhanced mobility and social interaction of women in the society would positively influence all round development and empowerment of women in India. The emancipation of women is not a simple matter. It requires the attitudinal change of the husband, other family members and society as a whole to the women. The community consciousness and bureaucratic efforts are integral parts of the implementation of the programmes. The first and foremost

priority should be given to the education of women, which is the grass root problem. The struggle for gender justice will be slow, strenuous and protracted, as the change cannot be brought about easily. It has to be fought at emotional, cognitive and action levels. The struggle has to be carried on within caste, class, race, religion, everywhere in which man- woman relationships figure and matter. Still, the violence towards women is an epidemic against which no country is immune- And today, we face the greater challenges of human rights and a non-melodious tune! Determined efforts must be taken to end the impunity surrounding this lamentable claw- And the perpetrators must be brought to justice, and told that they are not above the law! For which a major surgery is required and not mere cosmetic changes. The need of the hour is: not welfare, but development; not charity, but entitlement; not assistance, but empowerment; not structural adjustment, but structural change; not even social security but social and gender justice, If the women is to survive and flourish in the given situation. Therefore, it is high time to go beyond ideology and theory to protect the woman folk who are in a world of greater hardship, and who sacrifice their identity, communication and hopes, in a society dominated by male values.

This is not a fight of 'us v. them', but it is a struggle of women to be considered as 'we' and it is high time to recognize a woman not only as just a daughter, wife or mother but also as an equivalent citizen, much more fearless, responsible & strong.

Suggesting Measures

* Pass the Women's Reservation Bill without fail at least this time
* Gurantee the de-jure and de-facto enjoyment of all human rights and fundamental freedom by women on equal basis with men in all spheres – political, economic, social, cultural and civil.
* Ensure equal access to participation and decision making of women in social, political and economic life of the nation.
* Equal access to women to healthcare, quality education at all levels career and vocational guidance, employment, equal remuneration, occupational health and safety, social security and public office etc.
* Strengthening legal system aimed at elimination of all forms of discrimination against women.
* Changing social attitude and community practices by active participation and involvement of both men and women.

* Mainstreaming a gender prospective in the development process.
* Elimination of discrimination and all forms of violence against women and the girl child.
* Building and strengthening partnership with civil society, particularly women's organizations.
* To reemphasize once again, women's empowerment cannot take place unless women come together and decide to self-empower themselves. Self empowerment should be all round in nature. Once this happens then we can think about galvanizing the system towards the direction of better health facilities, nutrition and educational facilities for women at a very large scale. Self empowerment can begin by addressing day to day issues faced by individual women and tackling them with a mindset of improving the overall living conditions of women at every level and strata of the society. A movement has to be build which awakens the individual self in each and every woman for creative and generative action. In this regard progressive and resourceful women in the society need to come forward to help their less privileged sisters in as many ways as possible. This shall help us sow the seed for real women empowerment in India.
* Women should be encouraged to bring their vision and leadership, knowledge and skills, views and aspirations into the development agenda from the grassroots to international levels. Science and technology brings economic growth and well-being to people and it is not only the empowerment of women through science and technology, but also the enrichment of science and technology through women's participation.
* Our predominant patriarchal system doesn't provide enough chances for women to have higher education even if they wish. Girls should be motivated to take up higher education. Universal education for all below 14 years should be strictly implemented. There is an urgent necessity of framing gender sensitive curricula at all stages of primary education to address sex-stereotyping menace.
* Women should be allowed to work and should be provided enough safety and support to work. Legislatures such as Equal Remuneration Act, Factories Act: Constitutional

safeguards such as maternity relief, and other provisions should be strictly followed.

* Poverty eradication policies need to be implemented. Macro economic policies would help in this drive. Through economic empowerment women's emancipation could be realized.
* Dowry still remains the major reason for all the discrimination and injustice shown to women. It is ridiculous to see that even among highly educated sections; the articles of dowry are proudly exhibited in the marriage as a status symbol. The practice of dowry abuse is rising in India. The most severe is "bride burning", the burning of women whose dowries were not considered sufficient by their husband or in-laws. Most of these incidents are reported as accidental burns in the kitchen or are disguised as suicide which should be rooted out and women should be more economically empowered and should be educated properly regarding the various legal provisions such as Section 498ACrPC, protection from domestic violence etc. Only then only this evil menace could possibly be eradicated from Indian social system.
* We should make the projection of woman not only as a mother but also a rational political being that paved the way towards her subjugation rather than emancipation revolving around right to education, right to vote and all other rights involving the positions of power outside home.
* It is true that laws are made for the welfare of the people but laws alone do not themselves solve all the problems. It's strict and implementation which matters. The need for more and more laws is always felt in a welfare state like ours, yet, for the time being, the existing laws with necessary modifications and amendments are sufficient to take care of women folk.
* Even the best legislations will have no effect unless the mentality and perception of people undergo a radical change. The same way, the efficacy of laws will constantly be undermined if social attitudes, especially widespread cultural tendencies are not transformed.

* Empowerment in fuller sense is possible only if all state organs, social institutions, social instrumentalities and the masses march together with zeal to enhance the status of women and to protect her from exploitation and harassment.
* But despite all these measures there should be a strong determination among every man that every woman in this country should be honoured. Only then empowerment in its true meaning will be realized and in pursuit of making India a great nation, let us work towards giving women their much deserved status.
* Further, women should be better educated, better informed - only then can take rational decisions. It is also necessary to sensitise the other sex towards women. It is important to usher changes in the societal attitudes and perceptions with regard to the role of women in different spheres of life. Adjustments have to be made in traditional gender specific performance of tasks.
* Meanwhile, a woman needs to be physically healthy in order to work equally. This is sadly lacking in a majority of women especially in the rural areas. They have unequal access to basic health resources and lack adequate counseling. The result is an increasing risk of unwanted and early pregnancies, HIV infection and other sexually transmitted diseases.
* Civil Society activists suggest that bringing in legislation is inadequate if not backed by sufficient resources. "We need to train protection officers and sensitise police officers to be able to handle cases related to crimes against women.[63]
* Thus, a clear vision is needed to remove the obstacles to the path of women's emancipation both from the government and women themselves. Efforts should be directed towards all round development of each and every section of Indian women by giving them their due share.
* What is needed in addition is the recognition of women's equal humanity and a continuing response to the persistent realities of the contemporary world and the law must ensure that women are able to enjoy the rights promised by the Constitution. Therefore, much more remains to be done.

63. THE HINDU dated on 9-3-2009

"I am the woman who holds up the sky.
The rainbow runs through my eyes.
The sun makes a path to my womb.
My thoughts are in the shape of clouds.
But my words are yet to come."

Therefore, let her speak and let us hear her words not only on March 8th but also throughout the year then only we can celebrate at least 2015 as Women Empowerment Year.[64]

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64. The aim fixed by the UN Millennium Development Goals

The Supreme Court in Balancing Horizontal Federalism in India Vis-A-Vis Inter State River Water Dispute

*B. Muthu Kumar**

Introduction

In the late 20th century, inter-State river water disputes[1] pose a major problem and are being a worrying factor now and then. It disrupts the basic constitutional framework by affecting the national unity and integrity leading to federal instability. It became a hot, debatable and never ending issue today. The existing constitutional and legal mechanism to solve ISWD has been criticized when the states are not obliging with the directions or orders of any organ or institution, which include the Supreme Court of India. The role of the Supreme Court is significant on this issue although its jurisdiction was ousted by the Constitution[2] as well as by a specific provision[3] in Inter-State River Water Disputes Act, 1956[4]. Further, it was clear enough that the ISWD (Amendment) Act, 2002 provides

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1. Inter-State River Water Disputes herein after referred to as "ISWD"
2. Art. 262: Adjudication of disputes relating to waters of inter-state rivers or river valleys._
   (1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-state river or river valley.
   (2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).
3. Sec.11: Bar of jurisdiction of Supreme Court and other courts.- Notwithstanding anything contained in any other law, neither the Supreme Court nor any other court shall have or exercise jurisdiction in respect of any water dispute which may be referred to a Tribunal under this Act.
4. Act No. 33 of 1956.

that the decision of the Tribunal "shall have same force as an Order or Decree of the Supreme Court" [5]. This conveys that once a dispute has been referred to a Tribunal set up under the Act, there can be no appeal from the award of the Tribunal to the Supreme Court.

The ISWD Act provides ad hoc tribunal to decide disputes regarding ISWD. However, the disputing States often approach the Supreme Court for immediate relief and the Supreme Court also involved in assessing certain issues concerning the jurisdiction of the Tribunal constituted under ISWD Act and implementation of the ISWD Tribunal's Order and other similar legal disputes. But, there are situations where the order of the Supreme Court itself is undermined by certain States.

In this context, the researcher has taken the imbroglio engulfed in the latter half of 2012 to the beginning of 2013 due to failure of both monsoons (South-West Monsoon and North-East Monsoon) between the State of Karnataka and the State of Tamil Nadu in sharing the waters of Cauvery river and the role played by the Supreme Court in resolving the dispute and the response of the State of Karnataka in complying the Orders of the Supreme Court poses lot of questions challenging the Constitutional Government. In this background, the present article critically analyses the ousting of jurisdiction of the Supreme Court and brings out the importance of the Supreme Court in balancing horizontal federalism in the State with the instance of Cauvery row occurred in the latter half of 2012, where the Supreme Court with different approaches made a valiant effort in solving the water crisis between the State of Karnataka and the State of Tamil Nadu and further analyses the greater ramification in the federal Constitutional structure, if the Order of the Supreme Court is not implemented by the disputing States.

The Role of Supreme Court in a Federation

The Federal Constitution being the supreme law of the land embodying the definite terms of agreement between the federating States resulting in the emergence of a National Government and State Governments with defined powers and functions. And yet, there is nothing to wonder at, if the various State Governments or the Federal Government very often pass laws which transgress upon each other's authority. Again, two neighbouring States of the federation might disagree on particular issues between themselves. Thus, the chances of conflict either between the Federal Government

5. Sec. 6(2) of ISWD (Amendment) Act of 2002: The decision of the Tribunal, after its publication in the Official Gazette by the Central Government under Sub-section (1), shall have the same force as an order of the Supreme Court.

and the State Governments on the one hand, and between the State Governments themselves on the other, are very great. In all such cases there must be a proper and independent agency to settle all these disputes and define the exact sphere of each Government and its respective authority and to uphold the Constitution [6]. This agency is the Federal Judiciary. In India, it is the Supreme Court [7]. In short, the Judiciary is the conscience-keeper, the balance wheel of the Federation [8].

The Constitution of India is of federal type. The federalism can be classified into different types according to its features and practise in a particular Constitution. One of the classifications is vertical federalism and horizontal federalism. The former is securing the cooperation of the States in the execution of the centre's plan and the latter is cooperation between and among the States. There are many councils and agencies set up to strengthen the relationship between the Centre and the State and among the States. However, it cannot be equated to the Supreme Court, because, the recommendations of these bodies are advisory in nature and non-compliance of these recommendations will make the thing worse and it affects the overall national economic growth and to the extent of national unity and integrity and pose a great threat to federal structure. Thus, the Supreme Court under Art. 131[9] of the Indian Constitution is an unavoidable institution to resolve any disputes that arise between the Centre and States or between the States.

Laws and Policies in resolving Inter-State River Water Disputes

The Constitutional provisions specifically related to water are contained in the Union List, State List of the Seventh Schedule and Article 262 of the Indian Constitution.

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6. Pylee M.V., The federal Court of India, 12, (Revised ed., New Delhi: Vikas Publishing house Pvt. Ltd., 1996).
7. The nomenclature of the organ 'federal judiciary' varies from federation to federation such as "Supreme Court" in U.S., Canada and India, "High Court" in Australia.
8. Supra note 6, at 14.
9. Art. 131: Original Jurisdiction of the Supreme Court.- Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other Court, have original jurisdiction in any dispute—
   (a) between the Govt. of India and one or more States; or
   (b) between the Govt. of India and any State or States on one side and one or more other States on the other; or
   (c) between two or more States,
   if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:
   Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.

Entry 17 of the State List: In Entry 17 of the State List of the Seventh Schedule runs Water, i.e. to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of List I.

Water is indeed in the State List but this is subject to the provisions of Entry 56 in the Union List, which runs as follows:

Entry 56 of the Union List: Regulation and development of inter-state rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the Public interest.

An examination of both the entries show that the State has competence to legislate with respect to all aspects of water including water flowing through inter-State rivers subject to certain limitations, viz., the control over the regulation and development of the inter-State river waters vests with the Union and secondly, the State cannot pass legislation with to affecting any aspect of the waters beyond its territory.

Besides, it is necessary to note the provisions of Article 262[10].

Origin of Art. 262 in Indian Constitution

The existing Constitutional and legal frame work in solving ISWD prove to be futile mainly because of ousting the exclusive jurisdiction of the Supreme Court. This provision is similar in the lines of the Government of India Act, 1935[11] . It is necessary to know 'why this bar has been retained in the Constitution by our founding fathers of the Constitution?' In the Constituent Assembly Debates concerning this Article, Art. 262 was brought as an amendment in the draft Constitution[12] . The corresponding Article in the Draft Constitution was Art. 242-A. When Dr. Ambedkar moved this Article, he made certain observations[13] and it was accepted by the Constituent assembly unanimously.

By the observation of Dr. Ambedkar, it seems that they concerned about the Corporations set up for the development of irrigation and power projects[14] for the benefits of two or more States. The Constitution makers anticipated that with the accent on development of irrigation and power resources, some ISWD would arise regarding sharing of river-waters. These disputes present complex, social, economic, technical, geographical, and other different factors. The various factors are not necessarily constant

10. Supra note 2.
11. Sec. 134 of the Act says that the jurisdiction of the Federal Court was excluded from all matters in respect of water rights.
12. Amendment No. 373.
13. Constituent Assembly Debates (Vol No. IX, p. 1189).
14. For example, Damodar valley Project and Bhakra Nangal project and etc.

but may present possibilities of future changes, thus making the task of finding solution to ISWD difficult. Further, each river system has its own peculiarities. The judicial process which is accustomed to applying a somewhat definite standard or a rule may not be of much help in the situation which is vague and fluid and where each case is a law unto itself. These reasons made the Constitutional drafters to oust the jurisdiction of Courts in ISWD. However, it is a false notion that judges deal with questions of law alone; the judiciary does indeed interpret the law but it also has another function, namely, the rendering of justice based on a thorough, fair and objective examination of both facts and the law by the help of experts [15].

This ouster clause was analyzed by the National Commission to Review the Working of the Constitution (NCRWC) in detail [16] and they recommended that ISWD should be made within the original jurisdiction of the Supreme Court and also it is not necessary to repeal Art. 262 of the Indian Constitution. Unfortunately, the Government has not taken any steps to implement the recommendations of NCRWC.

Statutes concerning Inter-State River Water Disputes in India

In accordance with the provisions of the Constitution of India, Parliament has enacted the Inter-State Water Disputes Act, 1956 and the River Boards Act [17]. The former was enacted pursuant to the provisions of Article 262 of the Constitution specifically for the adjudication of the disputes between the riparian States regarding to the use, distribution or control of the waters of the Inter-State rivers or river valleys. Whereas, the latter Act was enacted under Entry 56 of List I for the regulation and development of Inter-State rivers and river valleys.

The scheme of the River Boards Act represents a co-operative approach towards 'resolving benefits' in respect of the development of I0 Inter-State rivers. On the other hand, the scheme of the ISWD Act comes into play when there is no co-operative approach among

15. All kinds of disputes which go to the Courts such as criminal cases, property cases, industrial disputes, environmental issues and question of medical ethics and many other kinds of cases may involve technical issues but the S.C. hears it through the help of experts and renders complete justice to parties.
16. The report of National Commission to review the working of the Constitution: Constitutional Mechanisms for settlement of inter-State Disputes, available at: http://lawmin.nic.in/ncrwc/finalreport/v2b2-2.htm, (visited on Dec. 06, 2013. (A consultative paper containing the gist of information regarding various mechanisms to solve inter-State disputes and analysed Art. 262 and 263 of the Indian Constitution. It also deals with the jurisdiction of Supreme Court in solving the inter-State disputes in comparative perspectives. Through this paper the NCRWC invites the views of the public through Structured Questionnaire).
17. Act No. 49 of 1956.

the States. The ISWD Act concerns with the adjudicating and settling the ISWD in a speedier way to avoid long delay. But, it did not serve the purpose as expected[18] .

The criticisms are about the enormous delay at every stage, for instance, delay in constituting the tribunal [19], delay in notification of the award[20] , non-enforcement of the award[21] and non-review of the decision of the Tribunal after a certain period of time[22] . In order to overcome the above lacuna, the ISWD was amended in 2002. But, still the problem persists[23] . Last year, the Ministry of Water Resources has proposed a standing Tribunal to adjudicate on ISWD because of too much expense incurred in the setting up of ad-hoc tribunals. In the proposed single tribunal, it will consist of about five judges with benches to resolve disputes. All ISWD from time to time could be referred to the standing tribunal. The move is expected to save the Ministry's time and effort in setting up separate tribunals as and when water disputes erupt between States. It will also ensure uniformity in awards, without inviting any political protests. The Ministry also has started inter-ministerial consultations about the amendments in the Act and further, the Government is also thinking to repeal the ISWD Act all together and ask States to directly approach the Supreme Court [24]. However, many States felt that common tribunal for all ISWD will, in all likelihood mix up issues of one dispute with the other. The accumulation of workload may make it difficult for the tribunal to give its order within the prescribed timeframe of three years, or five in the event of extension [25].

18. Iyer R. Ramaswamy, Water: Perspectives, Issues, Concerns, 23 (New Delhi: Sage Publications, 2003).
19. In July, 2002, the State of Goa made a request for constitution of the Tribunal for the dispute relating to Mandovi River. The Cabinet considered only on 10.12.2009 and constituted Mahadayi Tribunal, available at: http://mowr.gov.in/index3.asp?subsublinkid=737&langid=1&sslid=731 (Visited on Nov. 06, 2013)
20 Special Correspondent, "Notification of Cauvery Water Disputes Tribunal final award sought", available at: http://www.thehindu.com/news/states/tamil-nadu/article2104770.ece, (visited on Dec. 14, 2013).
21. There are no provisions to ensure that an award once given is duly implemented.
22. The Statute does not have any provision for any review of the decision or award of the Tribunal after the lapse of a reasonable item in the light of any substantial change in circumstances. This is possible in the wake of new Governmental policies towards agriculture or establishment of new cities where usage of water may increase.
23. For instance, The State of Orissa in February 2006 sent a complaint to the Central Government under ISWD Act, 1956 regarding water disputes between the Government of Orissa and Government of Andhra Pradesh pertaining to inter-State river Vansadhara for constitution of an Inter-State Water Disputes Tribunal for adjudication. The Central Government took nearly 4 years to constitute a Tribunal to decide the dispute that too after the direction from the S.C. to constitute a tribunal on Feb 06, 2009, available at: http://mowr.gov.in/ index3.asp?sslid=732&subsublinkid=738&langid=1 (Visited on Nov. 26, 2013).
24. PTI, "Govt plans one tribunal for inter-state water-sharing disputes", available at: http://www.deccanherald. com/ content/ 133524/govt-plans-one-tribunal-inter.html (Visited on Dec. 01, 2013).
25. Ramakrishnan T., "State not for a permanent water disputes tribunal", available at: http://www.thehindu.com/todays-paper/tp-miscellaneous/tp-others/article3499236.ece?css=print (Visited on Dec. 14, 2013).

Thus, the idea of common tribunal was dropped in the Draft Water Policy of 2012. The single permanent tribunal and constitution of benches thereto, to adjudicate the ISWD will not serve the purpose as expected because the disputing States will move the Supreme Court now and then either to delay the process of adjudication or to seek immediate justice and this will aggravate the dispute between the States.

National Water Policies

In the context of the above analysis, it is important to discuss the institutions promoting national water resources. The National Water Development Agency (NWDA) deserves a mention here. It is not a body with any statutory backing. Furthermore, its scope is technical, and separate from the institutional realities of water allocation. In 1983, the National Water Resources Council (NWRC) was created by Central Government resolution. It was a prestigious body set up at the instance of the National Development Council (NDC), with a composition similar to that of the NDC. It adopted a National Water Policy in 1987. But, the document was silent in regard to the question of the sharing of Inter-State river waters and the resolution of disputes of the sharing. The reason was, if an attempt had been made to formulate a set of principles on this matter, the entire policy document on those principles would have got bogged down in that controversy[26] .

In April 2002, the amendments proposed to the National Water Policy (NWP) 1987 were approved, and a new NWP 2002 came into being. It deals with distribution of water amongst the States. One of the recommendations is relating to water sharing amongst the States [27]. This was difficult to accept and implement due to lack of consensus among states. The Union Government unveiled a draft of new National Water Policy by January 2012 and it has been revised thrice and adopted on December 28, 2012[28] despite opposition from the States because the policy is encroaching upon the Constitutionally guaranteed right of the States in water management. The Prime Minister made assurance that the policy will undergo modifications and decided to hold wider consultations with the opposing States in a follow up action. This policy concerns with the regulatory authority to fix water tariffs and laws on

26. Supra note 18, at 54.
27. The water sharing or distribution amongst the states should be guided by a national perspective with due regard to water resources availability and needs within the river basin. Necessary guidelines, including for water short States even outside the basin, need to be evolved for facilitating future agreements amongst the basin areas.
28. Gargi Parsai, "PM's assurance on water policy cuts no ice with States", The Hindu (Madurai), Dec. 29, 2013, at 12.

ground water, water allocation and privatisation of services. There is nothing notable dealing with ISWD.

Agencies of Co-ordination and Co-operation

It is pertinent to note the functions of Co-ordinating agencies in ISWD because many politicians and legal experts view that ISWD should not be adjudicated and it should be solved between the States through process of bargaining. The Constitution itself provides for certain agencies for Inter-State co-operation and settlement of disputes between them. The President under Art.263[29] is empowered to establish an Inter - State Council if at any time it appears to him that public interests would be served thereby.

Over and above these three duties, the President may impose other duties to be performed by the Council. It appears from the above that the Council is envisaged to be an advisory body having no authority to give a binding decision. Not much use has been made of Art. 263 so far and only a few bodies of minor importance have been created under it[30] . Apart from these minor bodies no other Councils have been set up and activated for considering subjects of common interest and national importance until 1990. Finally, an inter-State Council was established in 1990, it met for the first time in 1996 [31]. There is also separate council called 'Inter-State Water Councils', which are Constitutional bodies set up under Art. 263 as a fractional bodies but these are not yet activated[32] .

Many Commissions and eminent persons like Justice V.R. Krishna Iyer[33] and Justice D.D. Basu [34] opined that the Inter-State Council must have binding authority rather than advisory body. But, the Inter-State Council does not play any prominent role

29. Art. 263:- Provisions with respect to an inter-State Council._ If at any time it appears to the President that the Public interests would be served by the establishment of a Council charged with the duty of - (a) Inquiring into and advising upon disputes which may have arisen between States; (b) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest; or (c) making recommendations upon any subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject, it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure.
30. A central Council of Health, a Central Council of Local Self-Government and four Regional Councils for Sales Tax for the Northern, Eastern, Western and Southern Zones were accordingly established by the President in the years 1952, 1954 and 1968 for considering certain matters of common interest regarding health, local self-government and sales tax respectively.
31. Report of NCRWC: Union-State Relations (Chapter VIII), para 8.12.2, available at: http://lawmin.nic.in/ncrwc/finalreport/v1ch8.htm, (Visited on Dec. 08, 2013).
32. Special Correspondent, "Call to activate inter-State water councils", The Hindu (Chennai), Nov. 24, 2007, at 10.
33. Iyer Krishna V.R., Constitutional Miscellany, 86-100 (2nd ed., Lucknow: Eastern Book Co., 2003).
34. Basu D.D., Justice, Comparative federalism, 551-555 (New Delhi: Prentice-Hall of India Pvt. Ltd., 1987). [In Chapter XIV, he deals with agencies of Cooperation and Coordination in which he discussed about Art. 263 and its importance and also recommends setting up an all comprehensive body instead of fractional inter-State Councils].

in settling the ISWD. This is because of its structure, scope and jurisdiction. It can give only advice to the States. Although, the Inter-State Council becomes active in future, it is doubtful whether it will handle the ISWD or it will leave it as such under the ISWD Act'?

There are number of extra-constitutional bodies, such as the Planning Commission, the National Development Council (NDC), and the Zonal Councils which take up informal co-operation between the States. The Zonal Councils have not yet been fully utilized on matters of serious controversy without depending upon the intervention of the Union or litigation, this includes the settlement of ISWD also.

The working of Co-operative agencies set up under the Constitution and other informal Co-operative agencies in solving the Inter-State disputes particularly, the river water disputes are not satisfactory because the decisions of these agencies are advisory in nature and could not be implemented.

Supreme Court and its Jurisdiction in Inter-State River water Disputes

There are varieties of mechanisms available under the Constitution of India for the settlement of Inter-State River water disputes. But, regarding the ISWD, our Constitutional framers did not confer the power to resolve the dispute to the Supreme Court and expressly barred it from exercising its jurisdiction. Although, the jurisdiction was barred, several ISWD have cropped up before the Supreme Court in connection with variety of issues. The Supreme Court hears certain cases and rejects others by interpreting Sec. 2(c) of ISWD Act, 1956 [35]. The most important cases are as follows:

In *State of Karnataka v. State of Andhra Pradesh* [36], The Supreme Court has amply represented the true meaning and purport of Art. 131 vis-à-vis Art. 262 of the Indian Constitution and observed as "Art. 262(2) of Indian Constituion and Sec.11 of ISWD Act by its unequivocal language expressly provides for a total ouster of jurisdiction of Courts including the Supreme Court in respect of ISWD and it is noted that Art. 131 relate to conferment of jurisdiction on to the S.C. and it is in this context, the effect of Art. 262 will also

35. Sec. 2(c) defines "water dispute" thus: 'water dispute' means any dispute or difference between two or more State Governments with respect to –

(i) the use, distribution or control of the waters of, or in any inter-State river or river valley; or

(ii) the interpretation of the terms of any agreement relating to the use, distribution or control of such waters or the implementation of such agreement; or

(iii) the levy of any water rate in contravention of the prohibition contained in Sec. 7.

36. (2000) 9 SCC 572.

have to be appreciated vis-à-vis Art. 131 of the Constitution" [37].

The scope and ambit of Art. 142 [38] vis-à-vis Art. 131 of the Constitution are also discussed in this case. In this regard, the Supreme Court held that power under Art. 142, however wide, cannot be used to grant relief on a question not falling within jurisdiction of the Supreme Court[39] .

In *State of Haryana v. State of Punjab* [40], there was an agreement between the States of Punjab and Haryana to share the waters of River Sutlej. The Punjab Government was to construct the Sutlej-Yamuna Link (SYL) Canal to carry this water to the State of Haryana but it defaulted in doing so. The State of Haryana filed a suit against the State of Punjab under Art. 131 of the Constitution. The Punjab Government objected to the suit pleading that it was barred by the ISWD Act. The Supreme Court negatived the contention arguing that there was no water dispute between the States as they had already agreed to share the water and the dispute relates to the digging of SYL Canal [41] .

In *Mullaperiyar Environmental Protection Forum v. Union of India and others*[42] , The three Judge Bench[43] observed concerning the bar of jurisdiction of Supreme Court under Art. 262 of the Constitution read with Sec. 11 of ISWD Act, 1956 as 'the present case is not related to 'water dispute' between Tamil Nadu and Kerala. The issue is about the safety of the dam on increase of the water level to 142 ft. To determine this issue, neither Art. 262 of the Constitution nor the provisions of the ISWD Act have any applicability[44] .

The ISWD (Amendment) Act of 2002 provides that the decision of the Tribunal, after its publication in the Official Gazette by the Central Government under Sec. 6(1), shall have the same force as an Order or Decree of the Supreme Court. The new sub-section seems

37. Ibid., at para. 106.
38. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.__
(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in this behalf is so made, in such manner as the President may by order prescribe.
(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.
39. Supra note 36, at p. 648, para. 60.
40. (2002) 2 SCC 507.
41. Ibid., at 520.
42. (2006) 3 SCC 643.
43. Y.K. Sabharwal, C.J.I.(former), C.K. Thakker J., and P.K. Balasubramanyan J.
44. Supra note 42 at 653, para 23.

either to bar the appellate jurisdiction of Supreme Court under Art. 136[45] or to give more effect to the award made by the Tribunal.

In this respect, the powers of Supreme Court of India under Art. 136 are wider than the prerogative of the Crown exercised through the Judicial Committee of the Privy Council to grant Special Leave to Appeal from Tribunals within the territories to which the jurisdiction of the Judicial Committee extends. For, the prerogative of the Crown can be taken away or curtailed by express legislation or by necessary implication[46] , but the power of Supreme Court of India under Art. 136 cannot, in anyway, be affected by ordinary legislation, even by express words, e.g., that the decision of a tribunal shall be final[47] .

Thus, in each of the above mentioned cases before the Supreme Court, it was not the water-sharing issue, which had been adjudicated or was under adjudication by a Tribunal, but some other relating to legal or constitutional issue. Further, the amendment in 2002 will not be a bar to hear the SLP's filed by the aggrieved States against the final award of the Cauvery Water Disputes Tribunal.

Politicisation of Water:

Inter-State river water disputes are in fact the most visible manifestation of water politics[48] . The fact here is that the implications of the disputes for party politics are of enormous importance at both the State and Central levels. The politicians are making attempt to get votes by saying that they will get water from the disputing State[49] .

In recent times, the ISWD are phrased as 'political issue' and thereby an additional bar was imposed upon the Supreme Court. A century ago, French observer Alexis de Tacqueville observed the functioning of Judiciary in the United States and said: "Scarcely any political question arises in the United States that is not resolved,

45. Special leave to appeal by the Supreme Court.— (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory of India.
(2) Nothing in clause(1) shall apply to any judgment, determination, sentence or order passed or made by any Court or Tribunal constituted by or under any law relating to the Armed Forces.
46. Theberge v. Landry, (1876-77) 2 A.C. 102.
47. I.G. Navigation v. Workmen, A.I.R. 1960 S.C. 220 at 224.
48. The instances are Cauvery, Ravi-Beas Disputes and Alamatti dam dispute between Andhra Pradesh and Karnataka, and the grievances that Kerala has over the old agreements with Tamil Nadu on the Mullapperiyar and Parambikulam Aliyar Projects.
49. During the election campaign in Goa, Congress President Sonia Gandhi had categorically said at a Congress rally in South Goa that the party would not allow diversion of Mahadayi waters by Karnataka. This statement evoked protests in Karnataka. Venkatesan J., "Goa Seeks inter-State water disputes tribunal" available at http://www.thehindu.com/2007/06/22/stories/2007062255030300.htm, (Visited on Nov. 11, 2013).

sooner or later, into a judicial question" [50]. For the Indian Supreme Court, this has been proved vividly true. Therefore Constitutional issues may have other overtones and facets, including political; yet that is no dissuasion for the Court to extend its jurisdiction. Further, the Constitution is a Political Document and when the Supreme Court sits to interpret the Constitution, it's a Political event and in that event, the Supreme Court is not a Court of Law but a political Court. There was no doubt that the Supreme Court is acting as a Political jurist notwithstanding the criticism of overstepping that the Court is often subjected to, it has actually performed its duty as a sentinel on qui vine; it has taken up the role of a saviour when the Constitutional values are endangered during the fall of Democratic institutions, Constitutional functionaries and Political standards[51]. Even if it overcomes to the need of the time and decides any disputes and pass orders, which alone is not going to obtain a solution for this problem unless the Order puts into action.

Versatility of Supreme Court in solving Inter-State river water disputes

At present, the issue of ISWD became more political than technical in character and the arguments were against the adjudication made by the Judiciary that the Supreme Court should not entertain any matter (whether Legal or Constitutional) relating to ISWD because it is a political issue and not a legal one. This inclined the Supreme Court towards judicial restraint and to act as a conciliator in ISWD. The instances are as follows:

In Mullaiperiyar issue, a three- Judge Bench[52] was hearing a suit[53] filed by Tamil Nadu to direct Kerala to permit it to raise the water level as per Supreme Court directions[54]. The Bench observed that "Unless and until this approach [to resolve disputes through mutual talks] is there, you cannot solve such problems. These types of issues should be sorted out and Courts should intervene only as a last resort"[55] .

50. Alexis de Tacqueville, Democracy in America, (Volume 1) (edited by Phillips Bradley) (Newyork: Random House Inc., 1945), p. 280., available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi? article=1063& context=fac_pubs, (Visited on Nov. 22, 2013).
51. Srivastav V.P., Justice for Judges-The Bitter Experiences, 141, (New Delhi: Manas Publications, 1996).
52. Chief Justice Y.K. Sabharwal, Justice C.K. Thakker and Justice R.V. Raveendran.
53. In the suit, Tamil Nadu maintained that the Kerala Irrigation and Water Conservation (Amendment) Act, 2006, applicable to the Mullaperiyar dam, was unconstitutional, null and void as it was beyond the legislative competence of the Kerala Legislative Assembly. It sought interim stay of the operation of the law in so far as it pertained to Mullaperiyar dam. The hearing was going on and yet no decision was made by the Supreme Court.
54. (2006) 3 SCC 643.
55. Venkatesan J., "Supreme Court asks Tamil Nadu, Kerala to sort out Mullaperiyar issue", The Hindu (Chennai), September 26, 2006, at 1.

In an another instance there was a writ petition filed by the Cauvery Water Users Association of Bangalore, challenging the Cauvery final award in so far as it questioned the meager allocation of drinking water to Bangalore. The Bench[56] said "Nowadays water has become a political issue. If we say something in favour of Karnataka, there will be problems in Tamil Nadu. Similarly, if we say in favour of Tamil Nadu, there will be problems in Karnataka" and added "we are not here to please anybody. We decide matters on the basis of law" and the Bench asked the counsel, "Can't you advise the Chief Ministers and Chief Secretaries to meet and sort out the issue"[57] .

Judicial Shepherding in Cauvery Dispute

The Supreme Court has pushed many processes[58] time and again in the Cauvery row for the last two decades and it was engulfed again in the latter half of 2012 because of failure of monsoons. The Supreme Court shows multi-faceted approaches in resolving the dispute between State of Karnataka and State of Tamil Nadu in sharing of Cauvery waters.

Supreme Court directs when necessary:

The Supreme Court acts with iron hand when the Centre shows casual attitude in convening the CRA meeting[59] and after the pull up by the Supreme Court, the Union Government convened it on September 19 to discuss the issue of sharing of Cauvery waters among the riparian States. This meeting has taken place after the period of nine long years[60] . The CRA headed by Prime Minister was convened and it directed the State of Karnataka to release 9,000 cusecs of Cauvery water daily to Tamil Nadu from September 20 to October 15, 2012. However, both the States aggrieved by the direction of the CRA and State of Tamil Nadu moved the Supreme Court for further release of water, meanwhile, the State of Karnataka failed to comply even the interim direction of CRA. This has been brought to the notice of the Supreme Court by the State of

56. A Bench of Justice S.B. Sinha and Justice Markandey Katju heard this petition under Art. 32 of the Indian Constitution because 'right to drinking water is a fundamental right and since the award has not protected the right, so, the petitioner could challenge the violation of this right'
57. Venkatesan J., "Court advice to Chief Ministers", The Hindu (Chennai), April 24, 2007, at 7.
58. For instance, Constitution of Cauvery Water Disputes Tribunal, Direction to Tribunal to entertain petition for providing interim relief and etc.
59. Venkatesan J., "Is PMO aware of our orders on Cauvery, asks Supreme Court", available at: http://www.the hindu.com /news/national/article3854227.ece (Visited on Dec. 05, 2013).
60. Gargi Parsai, "T.N., Karnataka reject PM's ruling on Cauvery issue as unacceptable", available at: http:// www.thehindu.com/todays-paper/tn-karnataka-reject-pms-ruling-on-cauvery-issue-as-unacceptable/article 3916555.ece (Visited on Dec. 13, 2013).

Tamil Nadu. The Supreme Court told the counsel,V.N. Raghupathy, appearing for Karnataka: "This is an order passed by the Prime Minister. But you don't want to comply… It is really unfortunate that nobody is prepared to listen to the Prime Minister, who is the highest executive authority. Have we reached that stage when you say to the Prime Minister, 'you pass an order, we will not comply with it'? We are sorry for the kind of respect you have for the Prime Minister"[61] .

The Court further said: "What you should have done is, you should have first complied with the Prime Minister's order. If you had faced any difficulty, you should have approached the CRA or us. You can't say you will not comply with the Prime Minister's order. When the Prime Minister, after considering all aspects, asks you to release 9,000 cusecs… you are not implementing it. This is really an unfortunate situation. Now, we will give you [a] direction to comply with the Prime Minister's order"[62] .

Similarly, in another occasion, the Supreme Court came down heavily against the Union Government for not responding positively in notifying the final award rendered by Cauvery Water Disputes Tribunal[63]. The Chairman of the Cauvery Monitoring Committee (CMC) and Water Resources Secretary D.V. Singh told the committee members that the Union Government will notify the final award of the Cauvery Water Disputes Tribunal by the end of the December 2012 [64] and they extended the deadline to January 31, 2013.

The Supreme Court on February 4, 2013 slammed the Union Government stating 'you flouted the law for the last five years and this is the mandate of the Parliament'. The Court fixed a deadline to publish final award dated February 5, 2007 as earlier as possible, but not later than February 20, 2013 [65]. The Union Government finally notified it on the deadline date[66]. Then, the Supreme Court

61. Venkatesan J., "Supreme Court comes down on Karnataka", available at: http:// www.thehindu.com/ news/national/supreme-court-comes-down-on-karnataka/ article3945744.ece (Visited on Dec. 02, 2013).
62. Ibid.
63. Venkatesan J., "Release 10,000 cusecs till Sunday, Supreme Court tells Karnataka", available at: http:// www.thehindu.com/news/national/release-10000-cusecs-till-sunday-supreme-court-tells-karnataka/article 4167212.ece (Visited on Dec. 16, 2013).
64. Gargi Parsai, "CMC asks Karnataka to ensure Tamil Nadu receives 12 tmcft in December", available at: http://www.thehindu.com/news/states/tamil-nadu/cmc-asks-karnataka-to-ensure-tamil-nadu-receives-12-tmcft-in-december/article4174738.ece (Visited on Dec. 14, 2013).
65. Venkatesan J., "Notify Cauvery final award before Feb. 20, SC tells Centre", available at: http://www.the hindu.com /news/national/notify-cauvery-final-award-before-feb-20-sc-tells-centre/article4378506.ece (Visited on Dec. 02, 2013).
66. Gargi Parsai, "Centre notifies Cauvery Tribunal final award", available at: http:// www.thehindu.com/news/ national/centre-notifies-cauvery-tribunal-final-award/ article4434853.ece (Visited on Dec. 14, 2013).

on May 10, 2013 provided a big relief to the State of Tamil Nadu by directing the Centre to constitute a Supervisory Committee as a pro tem measure with the Secretary, Union Ministry of Water Resources as Chairman and the Chief Secretaries of the States of Tamil Nadu, Karnataka, Kerala and Union Territory of Puducherry as Members to effectively implement the final order of the Cauvery Tribunal during the ensuing irrigation season commencing on June 1, 2013 until the constitution of Cauvery Management Board[67] .

Supreme Court respects expert body like CRA or CMC:

While hearing the case, on September 09, 2012, the Supreme Court directs the State to approach the expert body i.e. Cauvery River Authority (CRA). The Supreme Court said the CRA should explore the solution and it should not be left for the Court to take a decision on the controversial issue. Further said, "We expect and hope that the meeting of CRA takes place and some amicable solution to the problem is found". The Court, however, clarified that it is only an interim arrangement till September 20 and the State Governments can take appropriate steps if no solution for the problem comes out of the CRA meeting[68]. Similarly, in another instance, when a review petition is filed before the Prime Minister, Fali Nariman, who is appearing for the State of Karnataka apprehends that September 28th Order[69] shall be an impediment to the chairperson of CRA (Prime Minister) in taking a decision. The Court through Justice Jain told: "In a way, we have incorporated the CRA's order [into] … our order. When a review petition is before the CRA, we can't tell the PM you don't have the power. What all we say is let the PM take a decision either way"[70] .

In one occasion, the Supreme Court directed the Cauvery Monitoring Committee (CMC), to examine all questions as may be raised on behalf of the States of Tamil Nadu and Karnataka and make appropriate recommendations. The Court also recorded an undertaking from senior counsel Fali Nariman, appearing for Karnataka that Karnataka would comply with the recommendations which might be made by the CMC in letter and spirit[71].

67. Venkatesan J., "Set up panel to supervise Cauvery water release: SC", available at: http://www.thehindu.com/news/national/tamil-nadu/set-up-panel-to-supervise-cauvery-water-release-sc/article4703086.ece (Visited on Dec. 02, 2013).
68. PTI, "Karnataka agrees to release 10,000 cusecs of Cauvery water to T.N.", available at:http://www.thehindu.com/news/states/karnataka/article3881365.ece (Visited on Dec. 15, 2013).
69. The Supreme Court directed Karnataka to comply with CRA's Order by releasing 9,000 cusecs from September 20 to October 15.
70. Venkatesan J., "CRA can decide: Supreme Court", available at: http://www.thehindu.com/news/national/cra-can-decide-supreme-court/article3977897.ece (Visited on Dec. 15, 2013).
71. Venkatesan J., "Bench asks Cauvery panel to study issues raised by TN, Karnataka", available at: http://www.thehindu.com/news/national/bench-asks-cauvery-panel-to-study-issues-raised-by-tn-karnataka/ article4047686.ece (Visited on Dec. 08, 2013).

On Dec. 5, Senior counsel Fali Nariman and Anil Divan, appearing for Karnataka, urged the Court not to pass any ad hoc order and insisted that the Cauvery Monitoring Committee (CMC), being the expert body, should decide the issue. Accordingly, the Court directed the CMC to hold its next meeting either on Dec. 6 or Dec. 7 to decide the quantum of water required by both States for the month of December, keeping in view the standing crops[72] . The CMC, which met on the direction of the Supreme Court on Dec. 07 asked Karnataka to provide Tamil Nadu with 12 TMC of Cauvery water during December[73] . This has been challenged by the State of Tamil Nadu contending that the report is factually wrong and the Court should interfere in the matter to direct Karnataka to release more water. The Supreme Court on Dec. 10 made it clear that it will not interfere with the CMC's Order because the members of CMC are experts and we should not comment on it. The Court held that it seems that both sides are not satisfied by the direction issued by the CMC and held "We leave it for the parties to work out in accordance with law"[74] .

Supreme Court acts as a facilitator for conciliation:

In one occasion, the Supreme Court suggested that the Chief Ministers of Tamil Nadu and Karnataka meet to find a political solution to the Cauvery dispute in the interests of farmers. In a lighter vein, Justice Jain[75] said: "The moment any one of them blinks, it might be a problem [in arriving at an amicable solution]. We want you to meet in a congenial manner and discuss the issue in the larger interest of farmers from both States. Try to find out a solution through [a] give and take [approach]. The Chief Ministers should not meet just for coffee but they should meet along with their experts to find a solution"[76] The Chief Ministers of both States

72. Venkatesan J., "State blames Centre for CMC's indecision", available at: http://www.thehindu.com/news/ states/ tamil-nadu/state-blames-centre-for-cmcs-indecision/article4161330.ece (visited on Dec. 08, 2013).

73. Gargi Parsai, "CMC asks Karnataka to ensure Tamil Nadu receives 12 tmcft in December", available at: http://www.thehindu.com/news/states/tamil-nadu/cmc-asks-karnataka-to-ensure-tamil-nadu-receives-12-tmcft-in-december/article4174738.ece (Visited on Dec. 17, 2013).

74. PTI, "Cauvery issue: SC not to interfere with CMC award", available at: http://www.thehindu.com/news/national/cauvery-issue-sc-not-to-interfere-with-cmc-award/article4184776.ece (Visited on Dec. 17, 2013).

75. The Bench consists of two Justices, Justice D.K. Jain and Justice Madan B. Lokur.

76. Venkatesan J, "Why can't the two CMs sit and sort it out?", available at: http://www.thehindu.com/news/ states/karnataka/why-cant-the-two-cms-sit-and-sort-it-out/article4136307.ece (Visited on Dec. 18, 2013).

met but failed to break the dead-lock over water sharing[77] and again approached the Supreme Court.[78]

Supreme Court frowns for incessant litigation:

The notification of final award of the Cauvery Water Disputes Tribunal in the Government Gazette and the setting up of a pro tem supervisory committee by the Orders of the Supreme Court did not end the Cauvery crisis. The State of Tamil Nadu approached the Supreme Court on June 26, 2013 contending that the setting up of a supervisory committee had become a futile exercise because the supervisory committee neglected the plea of State of Tamil Nadu for directions to Karnataka for release of Cauvery waters as per the award of the CWDT[79] . Again, on November 12, 2013, the State of Tamil Nadu approached the Supreme Court to direct the Union Government to constitute the Cauvery Management Board to ensure strict implementation of the award[80] .

The Supreme Court while hearing the petition on Dec. 3, 2013 made displeasure remarks and asked Tamil Nadu, "Is Karnataka depriving you of your share of water? Are these irrigation schemes operational? Could they be implemented overnight? Whatever they (Karnataka) do in their territory, your (TN's) anxiety gets heightened. You should be worried if they are depriving you of your share of water. You should not worry if they use surplus water. You should be concerned about your entitlement."

The Court issued notice to the Centre and Karnataka on Tamil Nadu's application for making CMB functional, the bench said, "State is not an ordinary litigant in a water dispute. You are not Ram or Shyam to fight over something all the time." It said it would hear the application along with the main suits in January 2014 while asking the Centre and Karnataka to file reply to Tamil Nadu's application in four weeks[81] .

77. Rajendran S, "Karnataka-Tamil Nadu talks on Cauvery fail", available at: http://www.thehindu.com/todays-paper/tp-national/karnatakatamil-nadu-talks-on-cauvery-fail/article4148996.ece (Visited on Dec. 17, 2013).
78. Venkatesan J, "Direct Karnataka to release 30 tmcft to save samba crop, Tamil Nadu asks court", available at:http://www.thehindu.com/news/national/direct-karnataka-to-release-30-tmcft-to-save-samba-crop-tamil-nadu-asks-court/article4154292.ece (Visited on Dec. 16, 2013).
79. Gargi Parsai, "Cauvery panel finds T.N. demand for water not feasible", available at: http://www.thehindu.com/news/national/cauvery-panel-finds-tn-demand-for-water-not-feasible/ article4807564.ece (Visited on Dec. 17, 2013).
80. Venkatesan J, "TN moves SC for constitution of Cauvery Management Board", available at: http://www.thehindu.com/news/ states/karnataka/why-cant-the-two-cms-sit-and-sort-it-out/article4136307.ece (Visited on Dec. 18, 2013).
81. TNN, "SC frowns at Tamil Nadu's incessant litigation on Cauvery water", available at: http://articles. timesofindia.indiatimes.com/2013-12-04/india/44755863_1_sc-frowns-karnataka-government-tamil-nadu (Visited on Dec. 18, 2013).

Thus, the above instances show the multifaceted approach of the Supreme Court in solving ISWD. But, the Cauvery row did not end till now. The Supreme Court posted the matter for further hearing in January, 2014. However, overall, the Supreme Court with its Constitutional power, authority, activism, restraint, rebuke, persuasion and with the help of Union Government, CRA, CMC helped the State of Tamil Nadu in receiving some water from the State of Karnataka, who neglects to release a drop of water to the lower riparian States. It cannot be said that the State of Tamil Nadu received complete justice as contemplated under Article 142(1)[82] of the Indian Constitution but able to receive justice to a certain degree to the needs of the time that too only through the Supreme Court of India.

Conclusion

Thus, from the above analysis it is clear that the failure of coordinating agencies, setback in Tribunals, weak and partial Union Government forces the Supreme Court to adjudicate the ISWD either directly or indirectly and the Supreme Court also knowing the present intricacies in ISWD changes its colour like a chameleon to obtain justice to the aggrieved States rather in dictating unenforceable Orders. Thus, it is the need of the hour to confer original jurisdiction to the Supreme Court in solving ISWD by ousting the ouster clause in Art. 262. Further, the Supreme Court is the only organ, which can balance the horizontal federalism in India and strengthens national unity and integrity. It is in the interest of every man in every State who wishes the federal Constitution to be observed, that the judgment of the Supreme Court should be respected. The nation requires a collective national outlook and a stronger political will respecting the Constitutional results pronounced by the highest judiciary of the democratic and republican State.

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82. Supra note 38.