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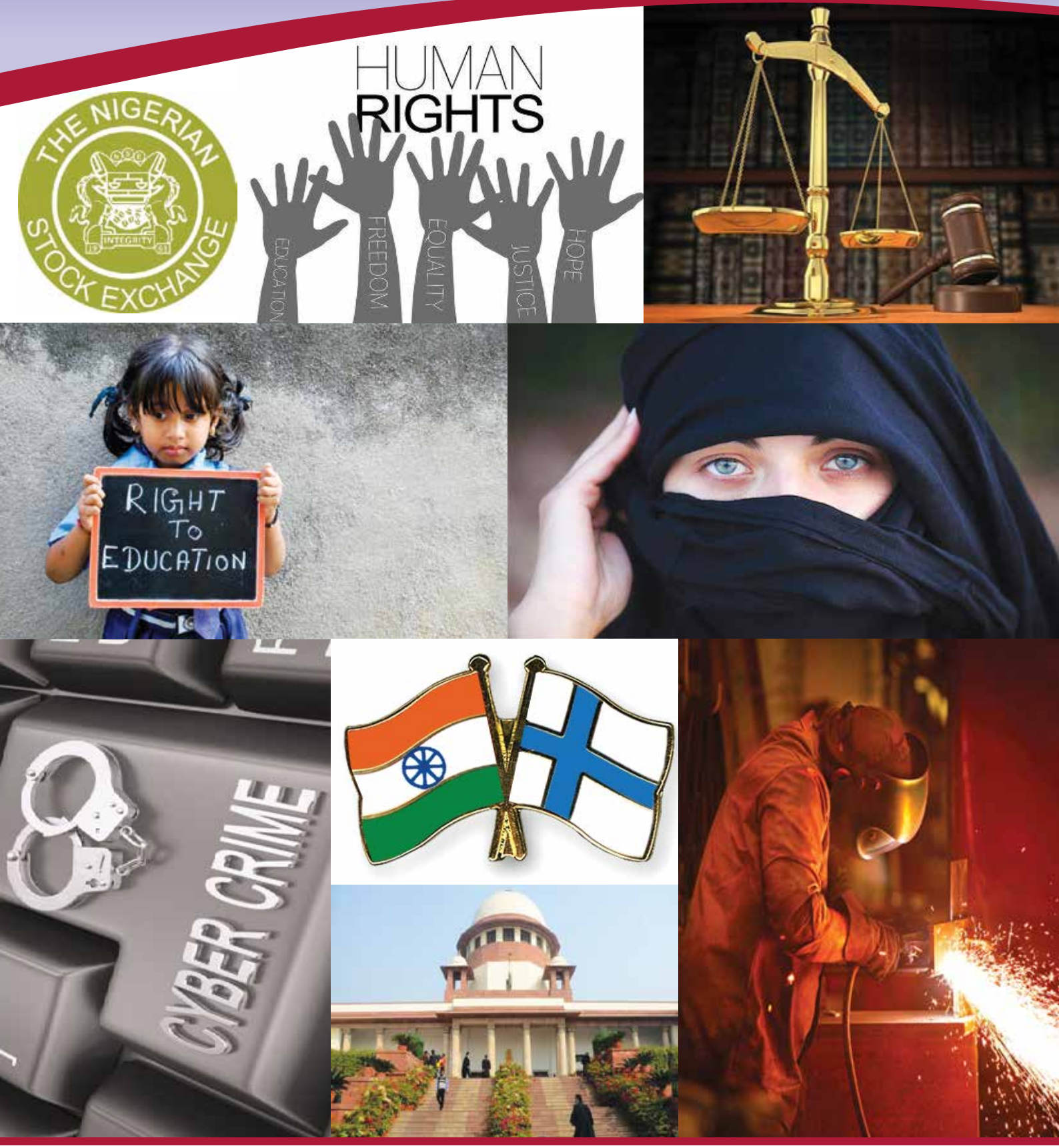

VISION: Leader in continuing legal education to enhance professional competence and public spiritedness [of scholars] and promote highest levels of academic excellence.

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Release of book 'Contracts, Agreements and Public Policy in India (Sairam Bhat, ed) by the Hon. Chief Justice of India H.L. Dattu at the Annual Convocation of NLSIU on 30th August 2015.

EDITORIAL

Distant News In Law Magazine

Prof.(Dr.) R.Venkata Rao
Patron-in-Chief

Prof. (Dr.) O.V. Nandimath
Patron

Dr. Sairam Bhat
Associate Professor & Chief Editor

I am extremely happy to note that the Fourth Edition of the Distant News, consisting of an "ENSEMBLE" of diverse and varied topics and their emerging contours, is being released.

The depth and range of the topics covered, to say the least, is very impressive. The Coordinator of Distance Education Department and his team deserve to be congratulated for placing before the Distance Education fraternity such a holistic output, making the highly complex legal issues very lucid and intelligible to lawman and layman alike which is the forte of this latest version of the Distant News.

I once again congratulate Dr. Sairam Bhat and his team for this commendable effort.

Prof.(Dr.) R.Venkata Rao
Patron-in-Chief

Inside This Issue

MESSAGE

It gives me immense delight to publish the fourth edition of IN LAW magazine, all of which have been released in the last one year. This edition has eight articles of interest, and three interviews of prominent legal personalities, followed by Case comments and other related information. This significant increase in the contributions received displays the widening reach of our publications. Our recently published book, titled 'Contracts, Agreements and Public Policy in India', was released by the Honourable CJI on August 30th 2015 during our annual Convocation. A qualitative and quantitative leap has resulted in the publication of revised material on Law and Legal systems, two Monographs on Industrial relations, and a case book on Environmental Law. We hope these new and additional improvements in the study material will enhance the learning experience of our students and the rest of the scholar community.

In the last one year, we have organised five Certificate training courses, in Competition Law; Arbitration; Medical Law; Environment, Health and Safety; and Contract Law and Management. I thank all the participants for their overwhelming response in making each of these courses a grand success.

This edition is entirely the outcome of the dedicated and untiring work of Ms. Anita Yadav and Ms. Ashwini Arun in reviewing and editing the articles. I also thank Mr. Pratham Guthi, and the entire DED team for their help and assistance in bringing out this edition. I also thank all the authors, without whose contribution this publication would not have been realised.

Once again, we are deeply grateful to our Vice Chancellor Prof. (Dr.) R. Venkata Rao and Registrar Prof. (Dr.) O.V. Nandimath for graciously extending their cooperation in all our activities and endeavours, and without whose guidance our efforts would not bear fruit.

As always, we welcome the feedback of our readers and look forward to hearing from you.

Dr. Sairam Bhat
Associate Professor & Chief Editor

1. You are considered amongst the leading academicians in the country, with extensive research and teaching experience. As our role model, what would be your advice to the young and upcoming teachers/researchers in law Universities, who intend to groom their career in the right direction?

My humble suggestion is that for both research and teaching what is required is: exhaustively reading the primary and secondary materials, comprehensive collection of data, developing clarity of thought about the concepts through planned efforts, preparing tentative notes (without making it a stagnant and permanent teaching resource), and thinking with asking questions with a possibility of saying anything new. Each subject has a philosophy or core concept of its own. The moral vision, political background and socio-economic justification for the legal principle should be properly grappled. Analysis of the law becomes easier with that. Tracing the historical development and understanding the social implications, both present and future, helps in critiquing the legal development. Never hesitate to enter into new area as it might be providing you unforeseen opportunities of traversing virgin areas of research. Do not have obsession about specialization. Diversity helps in overarching the ideas.

2. Your work in the area of 'third sector' has got you international recognition and you have published several articles in this area. In your assessment, what if any, is the role of third sector organizations in protection of human rights in India?

Due to my involvement in an inter-disciplinary and multi-nation based research carried at University of Mysore under Ford Foundation project whose team leader was Prof Yashvanta Dongre I developed interest in this subject. Initially I had some wrong impression that the law governing TSO or Non Profit Voluntary organizations is more procedural and formal without much substantial concepts. Soon I realized that TSO/NPVO law has sound jurisprudential basis and great social purpose. Since their economic participation and reach upon social service sector are also considerable, they are rightly called social capital. TSOs/NPVOs include organizations like registered societies, cooperatives, non-profit companies and funding arrangements like charities, public trusts, endowments, waqfs, and foundations. They manage wide varieties of bodies like educational institutions, hospitals, destitute homes for women and children, institutions for disabled, religious and cultural institutions of all varieties, social advocacy groups, NGOs, organisations for protection of consumers, environment, human rights, and all classes of vulnerable sections. Their good governance is vital for human rights. Further, there are Human Rights NGOs – both national and international – who spread human rights awareness, defend human rights against deprivation in specific cases by inquiry, complaint, media publicity, court proceeding, and approaching human rights commissions or other specialised bodies like Commissions for Women, Children, and Minorities. Protection of refugees, and persons displaced due to wars, internal conflicts and development projects is also a task shouldered by them. International Conventions, Declarations and domestic laws provide space for their role. Norm creating function as done by Red Cross, vigilance as done by Amnesty International, litigation as done by PIL bodies are some of the human rights defences. Human Right Defenders' rights have been listed in one of the human rights instruments. NPO law is taught in western universities. In spite of the importance of the subject and dearth of specialists in the field, in law schools or traditional universities it has not become taught course nor the legal research in this sphere wide spread.

3. How has the Indian Constitution and Indian Judiciary responded to 25 years of economic liberalization?

The Indian Constitution's commitment to welfare ideologies, social justice and human rights principles is quite strong and has defied the effort of altering this identity. The observation of justice Sudershan Reddy J in Indian Medical Association case can be referred: "The argument that the policies of liberalization, privatization and globalization (LPG) have now cut off that power of the State (to bring welfare even by interfering with private rights) is both specious, and fallacious. Such policies are only instances of the broader powers of the State to craft policies that it deems to serve broader public interests. One cannot, and ought not to deem that the ideologies of LPG have now stained the entire Constitutional fabric itself, thereby altering its very identity." No doubt, there have been peripheral intrusions into the spheres of financial management of public sectors as in BALCO case. There is also adverse impact of WTO upon agriculture, IPR regime and service sector. But even within the limited space of TRIPs how the third world countries' interests in access to life saving drugs shall be protected is recognised to some extent in Novartis judgment. In cases relating to closure of industries or other job losses judiciary has responded with a sense of humanism and more influenced by the Directive Principles. Continuance of watchdog function of SEBI on investment matters, RBI on banking activities, and CCI in dealing with the anti-competitive agreements and

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adverse effects of dominations has shown that privatization is an uncontrolled race. The policies of rural employment guarantee, food security, national health policy, pension schemes suggest about continued adherence to the welfare principles. While economic liberalization has dispensed with stringent regulation of license and quota regime, eliminated subsidies and artificial supports, pro-distributive justice approach on the part of judiciary and legislature have provided for a balanced approach.

4. The Supreme Court in the Pramati Educational and Cultural Trust case seems to be inclined towards giving prominence to Art 30: right of minorities to establish and administer educational institutions over Art 21-A-Right to Education. What would be the impact of this on Fundamental rights in India?

Interrelationship theory of fundamental rights contemplates mutuality of relations not only in assistance but also in balancing. This arises from the proposition that all rights because of mutual dependence have equal importance unless the Constitution by explicit provision prefers some right at the cost of other rights or subordinates specific right to other rights. It is true that in a multicultural society denigrating a minority right would alter the basic feature of the Constitution. In good number of cases presence of sprinkling population of non-minority children in minority school is regarded not only as permissible but also desirable in the interest of composite culture. When the minority institution is aided by the state it is a constitutional imperative to accommodate the non-minority students because of Article 29 (2). Although in TMA Pai case the extent was made flexible deviating from rigid formula of 50: 50 in St Stephens, it is still regarded as valid obligation on the part of minority institution. Pramati case involved validity of central law which provided for accommodation of disadvantaged children in the neighbourhood of both aided and unaided schools, in addition to basic structure scrutiny of amendments that incorporated articles 15 (5) and 21-A. In Ashok Kumar Thakur the Court had abstained from ruling Article 15 (5)'s validity vis-a-vis unaided institutions and one of the judges expressed his view about its violation of Article 19 (1) (g). Agreeing that occupational right shall facilitate primary education right, the larger question about use of compelling state interest doctrine in the matter of reservation based on Article 15 (5) which was employed in M Nagaraj and post Nagaraj decisions in other reservation cases was not raised or addressed in Pramati. The language of Article 15 (5) which excludes the obligation on the part of minority institutions whether they are aided or unaided cannot justifiably govern the operation of a law under Article 21-A. Further even about the relationship between Article 15 (5) and 29 (2) the rule of balancing has to suggest for compromise formula based on harmonious construction. More importantly it is anomalous to find that even the aided minority institutions are made immune from neighbourhood obligation or exempted from participation in the task of social justice without discussing about implications of Article 29 (2). Leaving aside the question of modus operandi, if we look to the consequence the position becomes disturbing in the system of interrelationship of fundamental rights that minority schools have no compulsion of helping the cause of social justice and help to the disadvantaged in the neighbourhood in spite of the fact that their coffers are filled by public revenue. The damaging effect of deviating from interrelationship which is done in some spheres of minority right in the past has no justification in reversing the trend of sprinkling of non-minority children amidst the younger minds in a learning atmosphere. Creation of ghetto in the name of special right of minority would not augur well for social health. Hope that future development will restore the balancing process.

5. In your experience, has the teaching of 'Research Methodology in Law' undergone transformation and should it undergo further changes?

Methodology of legal research has attained greater attention in curriculum because of the requirement of course work at Ph D and M Phil programs and prescription of compulsory paper for LL. M. Because of availability of western literature on the subject there can be lesser reliance on social science books on RM. On the way of conducting comparative and empirical research in law collection of articles (Oxford series) based on hands on experience of the researchers can be consulted. Unlike in the past, there need not be exclusive reliance on social science books on RM. On method of conducting quantitative and qualitative research in law good literature is available. But a good text book on legal research methodology from the Indian perspective is need of the hour. Sound knowledge of Research Methodology is a lifetime equipment and a good capacity building. Since it is a practice oriented programme, the focus shall be on training rather than teaching. But research is also extension of jurisprudential thinking, as Dworkin argues. Hence, teaching cannot be dispensed but class instruction shall be on the basis of examples. Regarding application of empirical tools class exercise or home work assignments help. How a teacher plans legal research methodology instruction counts a lot for a big change. My experience of teaching this course during last 15 years is that some prominent changes could be introduced. But much depends upon the students to use the tools. Learning the subject only for the sake of examination will not serve the purpose. Involving the students in field study has provided them exciting experience. One happy by-product of my assignment is a set of articles on the subject, which I hope to convert into a book.

6. In the recent past, which book in law has impressed you the most and why?

The book on Transformative Constitutionalism, an anthology of articles edited by Prof Upendra Baxi and others and published by NLU Delhi and others involving comparative study of the constitutions of Brazil, India and South Africa has impressed me because of its attractive theme, important findings and competence, difficulties and readiness on the part of constitutions of developing democracies to use the supreme law as an instrument of social transformation.

Human Rights Courts in Karnataka

Prof. (Dr.) Chidananda Reddy S. Patil*

I. Introduction:

Organisation of liberty within the Constitution is one of the important requirements of a good Constitution. For an entrenched Bill of Rights, the chapter on Fundamental Rights in the Constitution of India has the effect of insulating the primordial, basic and inviolable rights from the onslaught of power. In a parliamentary system, certain basic values should be beyond the reach of tyranny of numbers. Drawing from the experience world over and that of freedom struggle, the Constitutional forefathers secured these basic rights to the people of India under the banner of Fundamental Rights.

The *Protection of Human Rights Act, 1993,*[1] herein after referred to as the Act, was enacted, with the objectives, *inter alia,* of better protection of human rights and matters connected therewith or incidental thereto. For a right to be meaningful, it must be effective both in terms of its exercise and remedy for its violation. It is the remedy that makes the right effective. If the rights guaranteed cannot be enforced, if individuals cannot be vindicated by saddling the violators with liability, they will remain only pious hopes. In order to achieve these objectives, the Act provides for the constitution of the National[2] and State Human Rights[3] Commissions with vast functions and powers,[4] as also Human Rights Courts for the speedy trial of offences involving violation of human rights.[5] However, it is unfortunate to note that nothing much has happened in the country under the provisions relating to Human Rights Courts.

II. Provision for establishment of Human Rights Courts:

The Parliamentarians were well aware of the fact that one human rights commission at the national level and another at the state level may not be in a position to respond to the needs of protection and vindication of human rights. The victims of violations of human rights from nooks and corners of the nation or state, as the case may be, may not be in a position to reach the commission for veritable reasons. Further, their powers are limited to making recommendations and approaching the court wherever necessary. That is why the Act provides for a judicial remedy locally, by providing for the establishment of Human Rights Courts under Section 30. It reads as under:

> "Section 30. For the purpose of providing speedy trial of offences arising out of violation of human rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Session to be a Human Rights Court to try the said offences.
>
> Provided that nothing in this section shall apply if-
>
> (a) a Court of Session is already specified as a special court, or
>
> (b) a special court is already constituted, for such offences under any law for the time being in force."

The Act has not defined the 'offences arising out of violation of human rights.' Probably that is the bottleneck in states taking initiative to establish human rights courts, because, it is not categorically clear as to what are those offences that are to be tried by these human rights courts. There are two requirements here. First, there should be an offence. Second, it should have arisen out of a violation of human rights.[6] Thus the necessary implication is that the act involving violation of human rights should also constitute an offence under any of the existing criminal laws. However, this provision is perceived to not be clear enough to enable the state governments to establish human rights courts. It is to be noted that the National Human Rights Commission has made certain recommendations for amending several provisions of the Act including Sec. 30.[7] It has recommended substitution of a new Sec 30 in the place of existing Sec 30. The reason for proposed amendment adduced by the Commission is as under:

> "To have a better focus to this laudable provision to have easy access to justice at the District level itself in case

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1. Act No.10 of 1994; received the assent of the President on Jan.8, 1994 and published in the Gazette of India, Ex.PartII, Section 1, dated 10th Jan.1994, pp.1-16, Sl.No.10.
2. Sec 3, *The Protection of Human Rights Act,* 1993.
3. Sec 21, *Ibid.*
4. Sec 12, *Ibid.*
5. Sec 30, *Ibid.*
6. Sec 2(d) of the *Protection of Human Rights Act, 1993* defines 'human rights' to mean 'the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India'.
7. See Annexure-I: Recommendations of the NHRC for Amendments to the Protection of Human Rights Act, 1993 appended to *Annual Report of NHRC,* 2001-01, pp.238-66.

of human rights violations which however in its present form is lacking in clarity, the provision is amplified and clarified."[8]

It is unfortunate that the proposed amendment has not been carried out till today. It is beyond mere academic exercise to consider the text of the new Sec 30, because it manifests how it will be conducive to the enforcement of human rights. The following is the text of new Sec 30.

"Section.30. Human Rights Courts:

(1) Where an offence under any law for the time being in force also involves the violation of human rights, the State Government may, for the purpose of providing speedy trial of the offence involving human rights as specified by notification issued in that behalf by the appropriate government, and with the concurrence of the Chief justice of High Court by notification, constitute one or more Human Rights Courts to try the offence.

(2) A Human Rights Court shall be presided over by a person who is, or has been a Sessions Judge who shall take cognizance and try the offence, as nearly as may be in accordance with the procedure specified in the Code of Criminal procedure, 1973.

Provided that a Human Rights Court shall, as far as possible, dispose of any case referred to it within a period of three months from the date of framing the charge.

(3) It shall be competent for the Human Rights Court to award such sentence as may be authorised by law and the power to decide the violation of human rights shall, without prejudice to any penalty that may be awarded, include the power to award compensation, relief, both interim and final, to the person or members of the family, affected and to recommend necessary action against persons found guilty of the violation.

(4) An appeal against the orders of the Human Rights Courts shall lie to the High court in the same manner and subject to same conditions in which an appeal shall lie to the High Court from a Court of Session.

(5) Nothing in this section shall apply if-

(a) a Court of Session is already specified as a special court; or

(b) a special court is already constituted for such offences under any other law for the time being in force."[9]

This view of the NHRC supports the view that already there is power with the State Governments to take appropriate steps and provide machinery for the enforcement of human rights. However, another view that there is no power with the State Governments, as Section 41 which delegates power, does not categorically empower the states to constitute human rights courts and empower them to try offences involving human rights, is also possible. Probably this is another bottle neck. This view is unacceptable because the generality of clause (1) of Section 41 takes care of the situation.[10]

III. Human Rights Courts in Karnataka:

There is no information available about any experiment that has gone on in any of the states under these provisions except the State of Karnataka.[11] When all others were watching, the Government of Karnataka boldly marched forward taking the cudgels of the victims of violation of human rights into its own hands. It not only specified the Principal Sessions/ Sessions Courts in the districts as Human Rights Courts[12] but also notified the *Karnataka State Human Rights Courts Rules, 2006.*[13] These rules have come into force from 25th January 2006. These rules are reproduced at the end in the form of an Appendix.

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8. *Ibid.,* p.257-8
9. *Ibid.,* p.257-9. It is unfortunate to note that Act 43 of 2006 through which many amendments were brought to the Act did not touch Sec.30.
10. Section 41. Power of State Government to make rules.-
    (1) The State Government may, by notification make rules to carry out the provisions of this Act.
    (2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:
        (a) the salaries and allowances and other terms and conditions of service of the Members under Section 26;
        (b) the conditions subject to which other administrative, technical and scientific staff may be appointed by the State Commission and the salaries and allowances of officers and other staff under sub-section (3) of Section 27;
        (c) the form in which the annual statement of accounts is to be prepared under sub-section (1) of Section 35.
    (3) Every rule made by the State government under this section shall be laid, as soon as may be after it is made, before each house of the State Legislature where it consists of two Houses, or where such legislature consists of one House, before that House.
11. In June 2011the Delhi government informed a Division Bench of Chief Justice Dipak Mishra and Justice Sanjeev Khanna that the authorities will either set up Human Rights Courts or designate them within six weeks. The Delhi High Court was hearing a public interest litigation wherein it was stated that "Non-establishment of human rights courts is a blatant violation of all rules of justice, equity and good conscience as the proposed courts are supposed to try specific offences of human rights violations by persons whose primary responsibility is to ensure the safety and security of citizens." http://www.expressindia.com/ visited on 3-11-2011. The West Bengal government set up human rights courts in all the 19 districts of the state to ensure speedy disposal of cases concerning human rights in September 2011 and the state Law Minister Moloy Ghatak claimed that the theirs is the first state in the country to set up such courts. http://www..indianexpress.com/news/human-rights-courts-set-up-in-all-districts/843844/ visited on 5-8-2015. In Maharastra, the human rights activists have demanded establishing of special courts for human rights at district levvel. http://timesofindia.indiatimes.com/city/pune/Activists-demand-special-courts-for-human-rights-cases-at-district-level/articleshow/17564931.cms accessed on 5-8-2015.
12. Government Notification No: LAW 20 LAG 2004, dated 16th April 2005.
13. Notified in *Karnataka State Gazette,* Part-IV A, dated 25th January 2006.

The salient features of *Karnataka State Human Rights Courts Rules* are given below.

1. **Where to file a complaint:** Complaints of offences involving violation of human rights are to be filed before the Human Rights Courts within whose local jurisdiction the offence is committed. These courts are available at the district level and therefore are highly accessible to the affected.
2. **Who can file a complaint:** The victim, his legal representative, or a registered Non-Governmental Organisation or a public person may file a complaint. The Non-Governmental Organisation or public person can do so only after obtaining the consent of the victim on an affidavit. This is a well thought of provision which will prevent abuse of law by busybodies.
3. **Against whom a complaint can be filed:** Complaint can be filed against a public servant who has committed or abetted the commission of an offence of violation of human rights, while acting under the colour of his office.
4. **Procedure after complaint:**
   a. On receipt of complaint the court may conduct its own inquiry according to the procedure provided under Criminal procedure Code for dealing with private complaints.
   b. Alternatively the court may order an investigation into the offence by a police officer not below the rank of Superintendent of Police.
   c. The Superintendent of Police has to complete the investigation within 15 days. If not possible, he has to report the progress made in investigation to the court with diaries and seek extension of time and complete investigation within that extended time.
   d. If the Police officer reports after investigation that no offence is committed, the court has to issue a notice to the complainant along with a copy of the report and ask him if there are grounds to proceed with the case.
   e. When there is sufficient material on record to proceed against the accused, the court has to forward a copy of the complaint, along with the material evidence, to the competent authority requesting the grant of sanction for prosecution. The competent authority has to dispose off the request within a period of 30 days.
   f. The trial before the human rights court has to be conducted in accordance with the provisions of the Criminal Procedure Code applicable to sessions trial.
   g. The trial has to be conducted day by day. The court may adjourn the case for more than a day only for special reasons to be recorded.
   h. If the accused is facing several trials before different courts, the trial before human rights court will have precedence over trials in other courts. The accused has to be produced before the human rights court on priority.

The rules framed by the Government of Karnataka lay down procedure that cannot be easily circumvented by the violators. There is a greater responsibility of vindication of the human rights of millions on the human rights courts. Care should always be taken to see that they remain special courts and will not suffer the ills of regular criminal courts. In the absence of lack of awareness amongst the public about the existence of these courts, not many complaints are filed under these provisions. At this juncture, it is the responsibility of the lawyers and law students along with the Legal Services Authorities institutions to disseminate information about the human rights courts and the remedy available against offences involving violation of human rights. However, it is pleasurable to note that at least one state in the country has ventured to set up human rights courts, even if it is after more than a decade of the enacting of the Act. The Karnataka Government has successfully navigated through the cobweb of interpretations and created elbowroom for itself for the cause of human rights.

The first case:

Principal Sessions Judge/ Human Rights Court, Bijapur, presided over by Sri S.M. Patil delivered probably the first judgment under these rules on 24th June 2014 in the case of *N. Ramachandran v A.H. Makandar and others.*

The complainant, a Safety Counsellor working with the South Western Railway filed a complaint under rule 6 of the *Karnataka State Human Rights Courts Rules, 2006* against accused- 1 to 9 of whom three are Inspectors, Assistant Commandant, one assistant commandant, one sub-inspector and two constables of Railway Protection force. The same was registered in PC No.1/2010 and the same was referred u/s 156(3) Cr.P.C. to the Superintendent of Police Railways, SPC Railway Station, Bangalore for investigation.

The complainant at the material time was working as a Senior Section Engineer in Permanent way Department in South Western Railway, Bijapur during 2006. Following a report of theft of CST 9 plates in Bijapur-Bagalkot section, the complainant was arrested on 30-3-2006 by the first accused Inspector and his team and was kept in the lock-up for a day. During the said period, he was made to sit on the floor of the lock-up with only undergarment to cover him. Unspeakable and uncivilised atrocities were inflicted on him to extract confession and money. As the complainant did not yield, he was put to most cruel and inhuman treatment. Next day, around 12-30 pm the accused paraded the complainant on the railway station Bijapur in almost naked condition on bare feet. He was handcuffed at the relevant time with one end of a long chain

securing the handcuffs and dragged him like a dog. He was first taken to the office of the Section Engineer and later he was made to walk towards his residence in the adjoining railway colony. The horrible scene was witnessed by the residents of the colony. The request of the accused for drinking water was turned down. He had developed blood blisters in the feet due to walking on splinter stones in hot summer. His wife fell unconscious having witnessed the atrocity committed against her husband. Subsequently she filed a complaint with the RPF and also the National Human Rights Commission, New Delhi. The department ordered an enquiry which resulted in a report that the human rights of the complainant were violated. However, the department slept over the report. Further, an independent fact-finding enquiry was ordered on the basis of a complaint lodged by the Karnataka State Human Rights Council, Bangalore on behalf of the complainant which again found that the complainant was paraded bare top and barefoot in handcuffs. Despite these findings no action was taken by the department against the violators.

After completion of enquiry the Superintendent of Police Railways, SPC Railway Station, Bangalore submitted a report that only accused 1 and 2 have committed acts which were prima facie in violation of human rights of the complainant as defined u/s 2(d) of the *Protection of Human Rights Act, 1993.* The complainant filed a protest memo to the said report praying the Human Rights Court to reject the same and to conduct its own enquiry and as such the matter was posted for recording of the sworn statements of the complainant and witnesses.

Thereafter the court proceeded with recording of examination of the prosecution witnesses and got the documents marked and passed an order taking cognizance of the offences punishable under Sections 355, 357, 342, 348 of the Indian Penal Code against accused 1 to 7 in relatin to the violation of human rights while acting under the colour of their office as public servants, by exercising the power under Rule 6(6) of the *Karnataka State Human Rights Courts Rules, 2006* and accordingly summons were issued. The court proceeded with the examination of witnesses and recorded the statements of the accused. After hearing the arguments of the learned counsels appearing for the complainant and accused and perusing the oral and documentary evidence adduced, the court framed the following points for consideration:

> "1. Whether the complainant has proved that on 31-3-2006 at 12-30 pm the accused 1 to 7 have taken him barefoot from RPF police station to Railway Platform, Bijapur by putting handcuffs with leading chain without shirt and dishonoured him in violation of the human rights as specified u/s 2 (d) of the Act and thereby committed an offence punishable u/s.335 I.P.C.?
>
> 2. What order?"

On the first point the court found A-1 to 5 guilty of the offence punishable u/s. 335 I.P.C. holding that "the act of the accused has affected the complainant's right to live with human dignity." The other two accused were acquitted. On point two the court observed as under:

> "Considering the submission of the learned counsel for the accused 1 to 5 and having regard to the mental and physical torture meted out to the complainant by them, the accused-1 to 5 are not deserving too leniency to impose the punishment on them. Hence, considering the facts and circumstances of the case, I propose to impose the following sentence on the accused 1 to 5, which would meet the ends of justice and I pass the following order.
>
> Accused/convicts-1 to 5 are hereby convicted for the offence punishable u/s. 335 I.P.C. and sentenced to undergo simple imprisonment for three months and also to pay fine of Rs.10,000/- each. In default of payment of fine, they shall undergo Simple Imprisonment for two months each.
>
> Out of the fine amount deposited by the accused 1 to 5, a sum of Rs.25,000/- shall be paid to the complainant/ PW-1 as compensation u/s.357 of Cr.P.C."

Being the first decision in the field, it is hoped that it will become a trend setter in the field and the locally available remedy for vindicating human rights will become an effective tool to control the public servants from abusing their power.

IV. Conclusion:

It is a great and responsible venture on the part of Karnataka Government to designate the Human Rights Courts at the district levels. By notifying *Karnataka State Human Rights Courts Rules, 2006,* it has proved to the world that it is not paying mere lip service to the human rights and it means serious business. The first decision under the rules manifests that, it is possible to not only to hold the violators of human rights accountable at the local level but also compensation may be awarded to the victims.

Some critiques may allege that the power of investigation and judging are combined in the Human Rights Courts. Such criticisms cannot be accepted in view of the fact that the power is vested in the Human Rights Courts and not in any petty administrative official. More than that, it is only the power of supervising the investigation that is vested in these courts. In our legal system there is nothing new about court supervised investigations and the process is well accepted and in fact hailed as an instrument of impartial investigation.

To make this remedy effective, it is desirable that the provisions should further provide for the following.

1. Complaints by NGO with the consent of the legal representatives of the victim on affidavit are permitted in cases of death.
2. If the competent authority fails to dispose off the request of the court within 30 days, it should be deemed to have accorded sanction.
3. If the competent authority refuses to accord sanction, in appropriate cases, there should be a provision wherein the court may require it to reconsider its decision.

4. The human rights courts should be expressly vested with power to award compensation to the victim or the legal representatives of the victim. Those people who are already aggrieved cannot be expected to fight a prolonged civil litigation to recover compensation.
5. The provision for appeal to the High court against the decision of the human rights court should be expressly provided.
6. Under Sec.31 for every Human Rights Court, the State Government has to specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a Special Public Prosecutor for the purpose of conducting cases in that Court.

Appendix

Karnataka State Human Rights Courts Rules, 2006*

In exercise of the powers conferred by sub-section (1) of section 41 of the Protection of Human rights Act, 1993 (Central Act 10 of 1994), Government of Karnataka makes the following rules namely:

Chapter-I

1. Title and Commencement.-

(1) These rules may be called the Karnataka State Human rights Courts rules, 2006.

(2) They shall come into force from the date of their publication in the official gazette.

2. Definitions.-

(1) In these rules, unless the context otherwise requires.-

(a) "Act" means the Protection of Human Rights Act, 1993 (Central Act 10 of 1994);

(b) "Code" means the Code of Criminal Procedure, 1973 (Central Act 2 of 1974);

(c) "Court" means a Court of Sessions designated as Human rights Court by the State Government with the concurrence of Chief Justice of the High Court to try an offence of violation of human rights;

(d) "Section" means section of the Act;

(2) Words and expressions used herein and not defined but defined in the Act shall have the meanings respectively assigned to them in the Act.

Chapter-II

3. Powers of the Court.- All offences of violation of human rights shall be tried by the Court.

4. Powers of the Court with respect to other offences.- The Court, while trying an offence of violation of human rights may charge and try the accused for any other offence which may have been committed by the accused in the course of the same transaction in one trial for every such offence.

5. Jurisdiction. - Any offence of violation of human rights shall ordinarily be tried by the Court within whose local jurisdiction it was committed.

6. Procedure and powers of Court.-

(1) A victim of an offence arising out of violation of human rights, his legal representative, or a registered Non-Governmental organisation or a public person may file a complaint against a public servant who has committed or abetted the commission of an offence of violation of human rights, while acting under the colour of his as a public servant;

Provided a complaint on behalf of the victim may be filed by a Non-Governmental Organisation or a public person only with prior authorisation on affidavit by the victim.

(2) The Court on receipt of such complaint, shall either order an investigation into the offence by a police officer not below the rank of Superintendent of Police or it may proceed to conduct its own inquiry into the complaint in accordance with the procedure for dealing with private complaints in the code.

Provided that the Superintendent of Police shall complete such investigation as far as possible within fifteen days, failing which he shall report the progress of the investigation to the Court concerned with the case diaries and seek extension of time for further investigation and complete the investigation within the stipulated time.

(3) If after the investigation, the investigating officer report to the court that no offence is made out, the court shall serve the complainant with a notice for the purpose of deciding whether or not there is sufficient ground for proceeding.

(4) If on the basis of police report or the evidence collected during preliminary inquiry, the court is of the view that there is sufficient material on record to proceed against the accused in appropriate cases, the court shall forward a copy of the complaint along with the material evidence collected during investigation or inquiry, as the case maybe, to the competent authority for its perusal for the purpose of grant of sanction for the prosecution of the accused.

(5) The competent authority shall dispose off the request for sanction within a period of thirty days from the date of receipt of communication from the court.

(6) The trial before the court shall be conducted in accordance with the provisions regarding sessions trial prescribed under the code.

(7) The court shall try the offence in day to day basis.

7. Special procedure for speedy trial.-

(1) The trial once commenced shall be held on day to day basis provided it may be adjourned for more than a day, only for special reasons to be recorded in writing.

(2) Such trial shall have precedence over any other trial pending against the same accused or accused persons in any other court (not being Human Rights court).

* Notified in *Karnataka State Gazette,* Part-IV A, dated 25th January 2006.

The Implications of Ratifying An International Covenant: South Africa, India and the ICESCR

Prof. (Dr.) Avinash Govindjee*

South Africa is well-known for its relatively peaceful transition from apartheid-state to constitutional democracy, under the guidance of the iconic leader, Nelson Mandela. The constitution that emerged following multi-party negotiations has been lauded as being one of the most progressive in the world. Indeed, the Constitution of the Republic of South Africa, 1996, contains a set of constitutional values and a justiciable Bill of Rights, which places socio-economic rights on an equal footing to civil and political rights. A proper separation of powers is also envisaged, together with a judiciary that is able to consider the rights in the Bill of Rights when interpreting any law, and which is mandated to develop the Roman-Dutch-based common law in line with constitutional principles.

Given this progress, particularly in respect of the enhanced status of socio-economic rights in the country, it has been anomalous that South Africa has been reticent in respect of ratifying a major international instrument pertaining to these rights. Nevertheless, South Africa's recent ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR)(following 20 years of democracy in the country) raises some interesting and important questions and should impact upon constitutional, legislative and jurisprudential developments in the country.

By way of example, the ICESCR standard of a state party taking steps *to the maximum of its available resources* in order to achieve progressive realisation of social, economic and cultural rights is a different standard to that in place in South Africa. South Africa's internal limitations to most socio-economic rights contains three dimensions:

- The taking of reasonable legislative and other measures
- Within its *available* resources (with no reference to "maximum")
- To achieve the progressive realisation of the right

Perhaps more significantly, the development of the concept of a "minimum core" obligation, as developed by the United Nations Committee on Economic, Social and Cultural Rights, has not found a footing in South Africa at all. In fact, the Constitutional Court, in landmark decisions that gave effect to persons' rights to housing and health care, but refused to acknowledge a minimum core obligation, has explicitly rejected the notion.This approach has arguably impacted negatively on the court's willingness to tackle the state in respect of, for example, policies that provide limited amounts of free water. *Mazibuko v City of Johannesburg and others*[1] concerned a project of the city of Johannesburg being implemented to address severe problems of water losses and non-payment for services in Soweto, a poor community situated in Johannesburg, South Africa. The project involved re-laying water pipes to improve water supply and installing pre-paid meters to charge for use of water in excess of the monthly free basic water allowance per household, which was fixed at six kiloliters. The applicants, who were residents of Phiri, Soweto, challenged the city's basic water supply together with the lawfulness of the installation of prepaid water meters in Phiri. The High Court held the installation of prepaid water meters was unlawful and unfair and that the city's free basic water policy was unreasonable. It ruled that the city should provide 50 litres of free basic water daily to Phiri residents and people in similar situations.

On appeal, the SCA held that 42 litres per day was 'sufficient water' in terms of the Constitution and directed the city to formulate policy in light of this finding. The installation of pre-paid water meters was held to be unconstitutional. The applicants appealed to the Constitutional Court and sough reinstatement of the more favourable High Court order.

The applicants, firstly, contended that the court should determine a quantified amount of water as 'sufficient water' within the meaning of S27 of the Constitution (which affords everyone the right to have access to sufficient food and water) and that this amount should be set at 50 litres of free water per person per day. The Constitutional Court refused the invitation to set a "minimum core" amount of free basic water, restricting its role to an assessment of the reasonableness of state conduct. The state, the Court held, was constitutionally obliged required to take reasonable legislative and other measures in order to progressively realize the achievement of the right of access to sufficient water, within its available resources.

The Court's judgment in *Mazibuko* reflects that, ordinarily, it is of the view that it would be institutionally inappropriate for a court to determine both what the content of a particular social economic right entails and the precise steps that government

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1. (2010 (4) SA 1 (CC))

should take to ensure progressive realization of the right. Courts should, in terms of this approach, only enforce the positive obligations imposed on government if government takes no steps or adopts measures that are unreasonable. The Court concluded, in the circumstances, that the 6 kilolitres of free water per household per month (which amount could be progressively increased over time) was not unreasonable. The argument that the introduction of a prepaid water system in Soweto discriminated unfairly against poor black South Africans also failed. This was on the basis that government had the authority to decide how to provide essential services, so long as the mechanisms chosen were reasonable, lawful and not unfairly discriminatory. The issue raised by this contribution is whether the Constitutional Court would be able to justify a similar approach and conclusion following the recent ratification of the ICESCR, given the CESCR's approach to this notion. There is, arguably, now a solid basis for the Constitutional Court to revisit the precedent it has created in cases such as Mazibuko.

A final consideration requires discussion. State parties to the ICESCR recognise the right to work, which has not yet been acknowledged in South Africa. South Africa's expansive list of constitutional rights, in other words, fails to include a right to work (although there are rights to fair labour practices and freedom of trade, occupation and profession). Given South Africa's chronic problem of unemployment, this is potentially the area in which the country's ratification holds the greatest promise. Whether there will be any push on the part of legislatures to amend the Constitution to include a right to work remains to be seen. Such a move would, at the very least, send a clear message about the country's commitment to tacking its most pressing issue, and would provide a constitutional basis for the development of legislation directed towards unemployment prevention and (re)integration into employment. It would also demonstrate South Africa's commitment to international law by potentially turning a signature on an international instrument into jobs for the unemployed.

What can India glean from these remarks? Despite ratifying the ICESCR over 30 years ago, India delayed for a period of 15 years before submitting its second to fifth periodic report to the CESCR and does not appear to have met the 2011 deadline for the subsequent report due (from the latest available information, apparently now being four years delayed in respect of the sixth periodic report). Disconcertingly, the comments offered by the CESCR to India (in 2008) are heavily critical in nature, raising serious questions regarding the seriousness with which India has pursued its obligations in terms of the Covenant. The CESCR expressed the view that India had within its power the ability to "immediately implement the rights in Part II of the Covenant as required, and to meet, at the least, its core obligations for the progressive realization of the rights in Part III of the Covenant". It requested the country to demonstrate compliance with the Covenant, through domestication of ICESCR principles and demonstration of the applicability of these principles in Indian courts. A range of recommendations pertaining to Indian labour and social security were also advanced. In the absence of regular reporting, it is difficult to assess a country's progress and commitment to international law ideals.

Countries such as South Africa and India, leaders in their respective regions (SADC and SAARC), should utilise the benefits of international law to advance their constitutional promises of achieving human dignity and equality for all. Instruments such as the ICESCR, and the subsequent commentaries which flow from bodies such as the CESCR contain valuable insights relating to international and comparative best practice experiences, which can aid countries in developing strategies for the betterment of their people. Both countries should grasp the nettle and demonstrate, through their practice, that they are truly embodying the ideals that their founding documents promise.

Call for Contribution to Distant News IN LAW Vol 2, Issue 3

Distant News IN LAW is a magazine published by the National Law School of India University, Bengaluru. Previous three editions of the magazine have been published and have received rare reviews as a novel attempt from a law school in India. The aim is to create a platform for law students, teachers, practitioners and researchers and the law school fraternity to exchange, collaborate and share knowledge in the field of law.

The Magazine invites contributions for the 5th edition of Distant News-IN Law Magazine. The following contributions are sought:

1. Lead article: 4,000 to 6,000 words
2. Short articles: 2,000 to 3,000 words
3. Book reviews
4. Case Comments
5. Review of documents, Committee reports and policy analysis.

Last date to receive contributions is **January 15th** 2016.

You may email your write up [in word doc] to bhatsairam@nls.ac.in or ded@nls.ac.in

Trends in the Nigerian Stock Exchange: Insider Trading in Prespective

Dr. Olong Matthew*

Introduction

The bedrock of any economy is the confidence that investors put their capital to work and their fortunes because they trust that the market place is honest. This can only be achieved if investors know that securities laws are free and fair, and provide adequate safeguards for their investment

The Nigerian Capital Market was jolted when the Securities and Exchange Commission (SEC)[1] announced that it was initiating a probe into alleged equity price manipulation in six companies.[2] SEC said it was initiating the probe to safeguard the market and protect investors from unscrupulous speculators.[3] The fears of share price manipulation became visible when Zenon Oil took over thirty percent stake in African Petroleum (AP). AP's share soon shot up from eighty naira to an all time high of three hundred naira.[4]

Some investors alleged that there are fundamentals to support the rapid rise. But capital market observers say that even with increase in the flow of capital to the market, the rising interest of new investors is not enough to drive the price of a stock without a deliberate manipulation by insiders.[5]

The above scenario forms the backdrop of the authors write-up as he examines the very nature of insider trading vis-à-vis the rising profile of shares as an investors hub-nub.

Nature of Insider Trading

Corporate figure such as directors, officers and controlling shareholders who have access to unpublished price sensitive information owe a duty to the company as a whole to disclose such information before trading or to abstain from trading on such information.[6] Allowing a corporate insider to take advantage of that information whilst knowing it to be unavailable to the investing public was considered unfair. Even in certain circumstances, outsiders have become subject to the same duty to disclose or abstain as insiders often called temporary insiders, by nature of their special relationship with the company.[7]

The information may be used by such category of persons, to buy securities at their current price before the information in question becomes public and causes the price to rise or to sell securities at their current price before their value falls upon the publication of the information.[8] Liability for trading on unpublished price sensitive information has recently been extended to non-insiders under a theory of misappropriating information from employers.[9]

1. The backbone of the Capital Market is the Securities and Exchange Commission. Securities regulation in Nigeria started informally in 1962 with the activities of a non-Statutory body then known as market commission. Increased awareness prompted the Federal Government to establish a body known as the Capital Issues Commission in 1963. The Capital Issues Commission later gave way to the Securities and Exchange Act of 1979. This Act established the Securities and Exchange Commission and vested it with the function amongst others of determining the price at which the securities of a company are to be sold to the public, the timing of any subsequent issues, registration of all securities proposal to be offered for sale to the public and generally maintaining a surveillance over the Securities Market. Cf. Nwankwo G.O. Money and Capital Market in Nigeria today (Lagos: University of Lagos Press, 1991) at p. 1, Oba Ekiran Basic Understanding of Capital Market Operators (Nigeria: IBN Press, 1999) at p. 1. Idornigie P. Insider Trading under Nigeria Company Law (Unpublished LL.B Project, Unijos, 1992) at p. 52 and Olong M.A. Insider Trading by Corporate Fiduciaries :An Analysis under Nigerian Company Law (Unpublished LL.M Thesis, Unijos 2004) at pp. 36-39.
2. The Companies are African Petroleum (AP) Quick Service Restranant and Confectionaries,Maker Big Treat, Chemical and Paints Maker IPWA, Afrioil, First Aluminium and Capital Oil.
3. See Musa Reef "Rumbles over share price Manipulation" in Sunday Trust, February 24, 2008 on p. 3.
4. Ibid.
5. Ibid.
6. See Idormgie P.O. "The Impact of Insider Trading on the Nigerian Business Environment" An Overview volume one, Number one Journal of Public and Private Law (1996) at p. 15. See also Agbadu – Fashim "Securities Trading and Dealings" Modern Practice Journal of Finance and Investment Law, Volume 6, No. 1-2, 2002. Onubia Fred 'Insider Trading Regulations in Nigeria: Some Major Shortcoming" Modern Practice Journal of Finance and Investment Law Quarterly Comparative Review of Law and Practice Vol. 3, No. 2 April 1999 and Vagba T.A." Securities Trading and Investor Protection in Nigeria" Ahmadu Bello University Law Journal Vols. 9-10, 1991-92.
7. The Modern Usage of the Term Insider would included bankers, brokers, underwriters, Legal advisers, accountants, relatives and friends of directors, others and tippees.
8. See Paul L.O. Gowers Principles of Modern Company Law 6th ed. (London: Sweet & Maxwell Ltd., 1997) at p. 443.
9. In United States v. Norman (2nd Cir.. 1981) 664 f 2d 12, The court held that a person with no fiduciary relationship to an issuer nonetheless may be liable under Rule 106-5 for trading in the Securities of an issuer whilst in possession of information obtained in violation of a relationship of trust and confidence. Newman, a Securities trader traded based on material non public information about corporate takeovers that he obtained from two investment bankers who had misappropriated the information from their employers.

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The first country to tackle insider trading effectively was the United States.[10] Thomas[11] remarked that an essential part of the United States regulation of the securities market is the rigorous enforcement of laws against insider trading, an enforcement programme that resonates profoundly among American investors. The enforcement programme includes both civil and criminal prosecution of insider trading cases.[12] In the United Kingdom, it was in the year 1989, that the European Community adopted a directive in the area and the British legislation consequently had to be revised, a task achieved by the 1993 Act. In Nigeria it was in the year 1999, via the promulgation of the 1999 Investment and Securities Act that a comprehensive all-embracing Act was enacted to tackle amongst others the turbulent issue of insider trading.[13]

In the United States, civil enforcement by the Security and Exchange Commission has proved to be an extremely powerful tool against insider trading. The Security and Exchange Commission has broad authority to investigate possible violations of the Federal Securities Law, including insider trading.

What exactly is Insider Trading?

Simply put, insider trading is trading in securities whilst in possession of price sensitive information which is not available to the person with whom one is contracting or to other participants in the Securities Market at the relevant time.

In the words of Thomas,[14] insider trading is a term subject to many definitions and connotations and it encompasses both legal and prohibited activity. Insider trading takes place legally every day when corporate insiders, officers, directors or employees, buy or sell stock in their own companies within the confines of company policy and the regulation governing the trading. It is illegal when the trading takes place only within those with privileged confidential information about important events as they use the special advantage of such a knowledge to reap profits or avoid losses on the stock market to the detriment of the source of the information.

The Nigerian Investment and Securities Act,[15] defines insider trading[16] to occur where a person or group of persons who are in possession of some confidential and price-sensitive information not generally available to the public utilises such information to buy or sell securities for the benefit of himself, itself or any person.

In *Samuel Osigwe v B.P.E and Ors*[17] by an originating application dated 10th November, 2003 and supported by a five paragraph statement of evidence, the applicant/respondent initiated this action before the Investment and Securities Tribunal pursuant to the Investment and Securities Tribunal Civil (Procedure) Rules, 2003, on his behalf and as a representative of the class of all persons other than the respondent /applicants to purchase shares in public companies under the privatization shares purchase loan scheme (PSPLS), praying, inter alia, for an order directing the respondent to suspend the share acquisition scheme as presently structured until the 1st respondent (BPE) complies with the recent provisions of the Investment and Securities Act and the rules/regulations promulgated thereunder.

Further to the claim, the applicant/respondent filed a statement of evidence wherein he contended, amongst others, that the respondents practised fraud on and deceived the applicant and his class by deliberately failing to disclose to the applicant the financial statements of the public enterprises whose shares are offered to the applicant.

According to Friedman,[18] the typical insider trading case involved advanced knowledge of dividend or earnings changes or undisclosed information about assets or operations of the issuer. However, with the rise of consulate cash tender offers made at large premiums over current market advance information about up-coming tenders offers became a prime source of insider profit.

Insider trading does not involve affirmation, misstatements or half-truths; rather, it involves market participants remaining totally silent about material information that is likely to affect the prices of securities.[19] It is apportunate to make reference here to the European Economic Community Directive of 1989. This directive was modeled after French and English Insider Trading prohibitions and went through a number of incarnations. In its final form the Directive had an appealing structural simplicity.

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10. Paul Op.cit at p. 444. Whereas countries like Germany and Italy have had troubles surmounting cultures which view insider trading as an acceptable practice.
11. Http:www.sec.gov(news)speech/speecharchieve1998spech22 htm.
12. As at September 30, 1997, the United States Securities and Exchange Commission had brought 57 Insider trading cases. Since 1980, the United Kingdom (UK) brought only 17 prosecutions for insider trading, 12 of which were successful. In Nigeria, there has been no single reported case of insider trading as at 2008.
13. Hitherto, the Companies and Allied Matters Act, 1990 Thus insider dealing prohibition made its debut in Nigeria under the Companies and Allied Matters Act. See Agom A. "Lessons from the Burst of Enron and the Challenges for Securities Regulation". Modern Practice Journal of Finance and Investment Law Vol. 10 Nos. 3-4 (July/October, 2006) at p. 363.
14. http: www.sec.gov/news Op. cit.
15. 1999.
16. See section 264, Ibid.
17. (2004) 15 LR p. 51.
18. See Friedman: Insider Trading and Securities Fraud Enforcement Act of 1988 North Carolina Law Review Vol. 68 March, 1990 at p. 467.
19. See Idormgie Op. cit at p. 3.

The European Economic Community Directive of 1989.

It is because of the directives appealing structural simplicity that the writer seeks to reproduce in sum its relevant parts to the Nigerian Terrain. In sum therefore:

- It defines insider information as information of a precise nature about security or issuer which has not been made public, would likely have a significant effect on the price of the security.[20]
- It prohibits insiders from taking advantage of inside information.[21]
- It prohibits insiders from tipping or using others to take advantage of insider information.[22]
- It applies its prohibition to tippes with full knowledge of the facts.[23]
- It requires each member to apply the prohibitions to actions taken within its territory with regard to securities traded on any members market.[24]
- It provides that members may enact laws more stringent that set out in the directive.[25]
- It requires issuers to inform the public as soon as possible of major events that may affect the price of the issuers securities.[26]
- It requires members to designate an enforcement authority, to give it approved powers and to bind it to professional standards of confidentiality.[27]
- It requires members to coorporate with each other in investigation efforts by exchanging information,[28] and
- It leaves it up to individual members to decide on penalties for insider trading.[29]

Who is an Insider Trader

We shall have recourse to the Investment and Securities Act's[30] definition of an insider as section 95 provides that:

> an individual is an insider of a company if he is or at any time in the preceding six months has been knowingly connected with the company[31]

An individual is connected with a company if he is a director of that company or a related company or he occupies a position as an officer, other than a director, or employee of that company or a related company or a position involving a professional or business relationship between himself or his employer of a company of which he is a director and the first company or a related company which in either case may reasonably be expected to give him access to information which in relation to securities of either company is unpublished price sensitive information, and which it would be reasonable to expect a person in his position not to disclose except for the proper performance of his functions.[32]

For an insider to come within the purview of section 95,[33] he must have a connection with the company whose shares are dealt with. He must also be in possession of unpublished price sensitive information in relation to the securities dealth with in which he holds because of his connection with the company.[34] Once the information is more than six months old there may be dealing on the basis of it.[35]

Rider,[36] commenting on the six months connection period affirmed that:

> the period of six months during which he will be regarded as being a primary insider of the company after he has ceased to be connected with it is

20. See Article 1.
21. See Article 2
22. See Article 3
23. See Article 4
24. See Article 5
25. See Article 6
26. See Article 7
27. See Article 8 and 9
28. See Article 10
29. See Article 13
30. 1999
31. Some learned writers like Fishim and Onuobia in their respective articles "Securities Trading and Dealings" and "Insider Trading Regulation in Nigeria: some major shortcomings at p. 248, both critised the limitation period of six months. They argued that the implication of the limitation period means that an insider who purchases securities and holds them for more than six months before selling is not liable no matter how much proof is adduced of unfair resort to non public information. Accordingly therefore transactions such as take overs owning to unavailability of records and accounts of the target company usually drag on for a considerable length of time before they are consummated. Such situations could be exploited by an unscrupulous insider with knowledge of the proposed take-over with ample opportunity to relinquish his insider status, wait for the six months period to elapse and then make huge gains by trading in the securities of the target company with the insider information.
32. Section 95 of the Investment and Securities Act 1999 provides that any reference to unpublished price sensitive information to any securities of a company is a reference to information which relates to specific matters relating or of concern directly or indirectly, to the company that is, is not of a general nature relating or of contain to that company and it is not generally known to those persons who are accustomed to or would be likely to deal in those securities but which would if it were generally known to them be likely materially to affect the price of those securities.
33. Investment and Securities Act 1999.
34. See Agbadu Fishim op. cit at p. 137.
35. Ibid.
36. Rider A.K. Insider Trading (Bristol: Jordans and Swaziland, 1983) at p. 15.

> arbitrary… in practice this is not likely to be a problem as essentially only dramatic development will be regarded as unpublished price – sensitive information.

Paul[37] sees an insider as a person in possession of inside information. According to him, the definition borders on the legislation,[38], an English provision that is similar to section 95[39] should fall on deciding what is inside the information and the definition of inside information should follow as a secondary consequence of this primary definition. Thus, there are insiders who are so considered because they obtained information though being a director, employee, or shareholder of an issuer of securities. Commenting further on the said English Act,[40] he identified a second category of insider as the individual with inside information through having access to the information by virtue of his employment, office or profession, whether or not the employment, relationship is with an issuer. Thus, an insider in this second category may be employed by a professional adviser to the company, an investment analyst, who has no business link with an issuer, a civil servant or an employee of one of the burgeoning regulatory bodies; a journalist or other employee of a newspaper or printing company.

There is another category of insiders known as tippees.[41] According to Smith and Keenan,[42] a tippee is a person who receives the tips from an insider knowing that he does not need to give it as part of his job if the tippee deals with the information, he is liable and so is the insider.[43]

Relationship between Corporate Governance and Insider Trading

Corporate governance is a relatively new term that describes a process that has been practised for as long as there have been corporate entities. This process seeks to ensure that the business and management of corporate entities is conducted in accordance with the highest standards of ethics and efficiency, assuming that this is the best way to safeguard and promote the interest of all corporate stakeholders.[44] Due to the size of many corporate entities today and the increasing complexities of the business environment, the needed agency and trust principles, which are ordinarily the founding concepts of corporate governance are proving inadequate to fully safeguard stakeholders interest.

Whilst globalization and financial market liberalization have opened up new international markets and the opportunities for enhanced profits, these changes have exposed companies to fierce competition and considerable capital fluctuation. Traditional sources of funding may no longer be available in some instances, so there is a growing need for companies to attract adequate capital both nationally and internationally from non-traditional sources. Also, crisscrossing the global business environment a series of corporate scandals ranging from Enron, World cross, Global Crossing, and here in Nigeria the revelation a few years ago that uniliver under-provided for liabilities of billions of naira in the audited accounts and the N25 billion of concealed liabilities in African Petroleum after privatization, then of recent African Petroleum (AP), Quick service restaurant and confectionaries, Maker Big Treat and chemical and Paints Maker IPWA Afroil, first Aluminium and Capital Oil has created substantial demand for good corporate governance globally to halt insider trading.

Corporate governance relates essentially to five major areas: rights and responsibility of shareholders; role of shareholders; equitable treatment of shareholders; disclosure and transparency and duties and responsibilities of the Board.[45] Corporate governance is the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibility of the directors include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The Board's actions are subject to laws, regulations and the shareholders in general meeting.[46]

Good corporate governance is thereby desirable not only because it represents sound values but equally allows companies to maximize wealth in a legitimate way. Applying this to insider trading, it destroys the very essence of corporate governance as shareholders can no longer be said to be treated equally and there would be disclosure and transparency which remain one of the tenets of corporate governance.

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37. Paul Op. cit at p. 464.
38. P. 91, The Laws on Insider Trading 1989 paragraph 224.
39 Investment and Securities Act, 1999.
40. D.T. Op. cit section 57 20(a).
41. Professor Louis Loss of Hervard Law School first used this expression as the Oxford English Dictionary has credited him with this fact.
42. Smith and Keenan's Company Law 7th ed. 1987 at p. 397.
43. See Steven M. A Practical Approach to Company Law 9th ed., 1987 at p. 40. In the case of Dirks v. SEC (463. U.S. 646), the United States Supreme Court reserved the SEC's censure of a securities analyst who told his clients about the alleged fraud of an issuer he had learned from the inside before he made the facts public. Dirks was significant because it addressed the issue of trading liability of tippees: Those who receive information from the insider tipper. Dirks held that tippees are liable if they knew or had reason to believe that the tippee had breached a fiduciary duty in disclosing the confidential information and the tippee received a direct or indirect personal benefit from the disclosure. Because the original tipper in Dirks disclosed the information for the purpose of exposing a fraud and not for personal gains his tippee escaped liability.
44. See Mahomed J.J and Syed B.S. "Corporate Governance issues in family – owned Enterprises" Zenith Economic Quarterly, Vol. 2, No. 10 April 2007 at p. 50.
45. See the Organization of Economic Corruption and Development (OECD) April 19, 1999. Also available at www.ifac.org.
46. See the Committee on the Financial Aspects of Corporate Governance, London Stock Exchange, Financial Aspects of Corporate Governance, December 1, 1992.

Rumbles in the Nigerian Capital Market?

The House of Representatives Standing Committee on Capital Market is probing the alleged manipulations in the stock sector.[47] According to Wadada:

> all the things that are manifesting today, all the ills that are manifesting today in the Nigerian Capital Market, had at one time or the other been mentioned to the public by the House Committee on the Capital Market. The purposed investigation into the activities of banks vis-à-vis other quoted companies in the Nigerian Stock Exchange, to undertake which the House has mandated the Joint Committee which comprises the House Committee on Capital Market and House Committee on Banking and Currency. There are serious manipulations and insider trading taking place at the Nigerian Stock Exchange.[48]

One of such reported manipulations is the case of Cadbury. Cadbury had been cooking its books for the past fifteen years but ironically it was not detected by any of the apex regulators rather the fraud was detected by Cadbury International when they came to look into their books.[49] African Petroleum continues to appropriate in the stock market. Questions are often asked whether African Petroleum has any oil block? Though known is the fact, that African Petroleum is not into a Joint Venture with any oil company that is into oil prospecting, for it is only selling petroleum products.

Since the announcement to the probe the share price scam by the six companies there has been reported panic sale in the shares of companies under probe.[50] Reports indicate panic sales in Afrioil and Capital Oil resulting in price losses. Afrioil was said to have lost N1.30 to close at N24.79 as investors offloaded 837, 406 shares in 126 deals. Investors equally offloaded 12.597 million units of First Aluminium causing a drop of N0.24 to close at N4.66. IPWA which is one of the companies being probed dropped N0.05 to N8.45 as investors dropped 1.3 million shares at the exchange.[51]

However, African Petroleum and Big treat and other companies being investigated finished strong with unfilled bids and a full five percent-surge in price. African Petroleum had recorded a low and high price of N46.20 per share in July 2007 and N155.57 per share in December, 2007. It could be recalled that the Securities and Exchange Commission had in the case of Bonkolans Investment ltd., through its administrative proceedings committee published some operators on the alleged scam over the sale of Nestle Foods Plc, Unilever Plc and Other Securities by some individuals through some stockbrokers houses.

The Way Out

The Investment and Securities Act brought equitable considerations are regards the effect of the contraventions of the provisions of section 88 or 89[52] by providing in section 92,[53] that no transaction shall be void or voidable by reason only that the said transaction contravened the provisions of the afore-mentioned sections.

Agbadu[54] sees thus, as a welcome development as it will surely avoid the harsh effect of totally nullifying such transaction so that innocent third parties who entered such transactions in good faith will not be adversely affected.

Section 93[55] provides for a civil liability to the effect that an insider who contravenes any provision of section 88 or any person who contravenes any provision of section 89 of this Act is guilty of an offence and liable on conviction to

(a) compensate any person for any direct loss suffered by that person as a result of the transaction unless the information was known or with the exercise of reasonable diligence would have been known to that person at the time of the transaction; and

(b) Be accountable to the company for the direct benefit or advantage received or receivable by the insider as a result of the transaction.

Subsection (2) of section 93 states that such an action may be commenced only within two years after the date of completion of the transaction, the subject matter of the suit. Section 97[56] further provides that a person who is liable under this part of the Act shall pay compensation at the order of the Commission or the Investment and Securities Tribunal as the case may be to any aggrieved person who, in a transaction for the purchase or sale of securities entered into with the first-mentioned person or with a person acting for or on his behalf suffers a loss by reason of the difference between the price at which the securities would have been dealt in such a transaction at the time the first mentioned transaction took place, if the contravention had not occurred.

Section 97[57] provides that the amount of compensation for which a person is liable as stated above is the amount of the

47. Sunday Trust op. cit at p. 3.
48. Ibid at p. 4.
49. Ibid. at p. 4.
50. Ibid. at p. 4.
51. Ibid. at p. 5.
52. Investment and Securities Act, 1999.
53. Ibid.
54. Agbadu op. cit at p. 144.
55. Investment and Securities Act, 1999.
56. Ibid.
57. Ibid.

loss sustained by the person claiming the compensation or any other amount as may be determined by the Commission or the Investment and Securities Tribunal.

Section 94[58] provides a criminal liability for contravention to the effect that an individual who contravenes the provisions of sections 88 or 89 of this Act commits an offence and is liable on conviction to a fine of N1,000.00 or to imprisonment for two years or to both.

In Nigeria, going by the aforementioned provisions of the Act[59] one could rightly infer that insider trading is a crime punishable by monetary penalties and imprisonment. Be that as it may, it is also a civil offence. Thus providing insider trading as civil as well as a criminal liability is vital to an effective insider trading programme. While it is possible to prove beyond reasonable doubt (the standard in a criminal case) the burden of proving a purely circumstantial case is less onerous in the civil suit context, where guilt needs be shown only by a preponderance of the evidence rather than beyond reasonable doubt and better still the use of presumption may shift the burden of proof to the defendant under certain circumstances.

Subject to any exceptions either at common law or in any particular statute the legal burden of proof is on the prosecution throughout the trial and the standard of proof is a high one.[60] Section 137 of the Evidence Act provides that if the commission of a crime by a party to any proceeding civil or criminal, it must be proved beyond reasonable doubt. The import of this provision especially in relation to proof beyond reasonable doubt was interpreted by Aguda[61] to mean no more than at the end of the hearing of evidence for the prosecution and the defence the court must discharge the accused if there is a reasonable doubt of the guilt of the accused no matter whether the doubt arises from the evidence given for the prosecution or from evidence given for the defence.

Conclusion

In insider trading cases, detection, investigation and prosecution are generally problematic as there seems no real evidence such as guns, cutlasses, stolen goods, clothes, and rings. In many cases especially those involving tippees, the only individuals who may have direct knowledge of the relevant communications and other significant events are the wrongdoers themselves and they may invariably not be willing to cooperate. Thus in most cases only indirect evidence that is received upon circumstantial evidence is important because it often leads to more direct evidence of the illegal conduct.

Apart from the problems involved in prosecution of offenders, what happens when people of other countries are involved? For example, assuming a Nigerian Company makes a public issue and a person or company in Ghana asks his bankers in South Africa to subscribe to such securities on his or her behalf while in possession of unpublished price sensitive information about such securities. This would require the cooperation of the Law Enforcement Agents in Nigeria and Ghana. The securities market should remain fair, honest and free at all times.

58. Ibid.
59. Ibid.
60. *See Ibeziakor v. Cop* (1963) ALL N.L.R 61.
61. Aguda T.A. The Law of Evidence 3rd ed.

E-Governance: A Step towards Good governance in Administration

Dr. G. Shaber Ali*

"Democracy, good governance and modernity cannot be imported or imposed from outside a country". -Emily Lahoud[1]

Introduction

India being a welfare state, numerous duties or responsibilities are imposed on the State for the welfare of the people. Those duties are incorporated under Part IV of the Indian Constitution. The Primary concern of the State towards its citizens is good governance. To perform the duties and to achieve the object of good governance, various administrative authorities have been established. Administrative authorities should follow certain basic principles like responsibility, accountability, transparency, and openness. The administrative system must be efficient, effective, economical, ethical and equitable in providing the benefits to the citizens as per Constitutional obligations.

Further, in a democratic country like India, the people are the most important stake holders. Involvement of the people and their satisfaction becomes very crucial when it comes to delivery through good governance. Today people expect openness and efficient governance, greater user-friendliness and more flexibility in the delivery mechanism. There is an urgent need to create an environment that is capable of recognizing and responding to the presence of individuals in a flawless and unobstructive way. The delay in government-to-government and government-to-citizen transactions is due to the opaque nature of environment with in which there transactions take place. To avoid this situation, a new concept of good governance has emerged in our society. We shall examine the concept of e-governance, its significance and the challenges in bringing good governance in our administration.

Concept of good governance

A Democratic state sustains its existence only when it functions for the common good. This is achieved through certain institutions of the State whose actions and decisions are accepted by the public. The purpose of such institutions is to perform the duties envisaged and fulfil the required obligations. It is the obligation of the State to motivate the people in the government to contribute optimally in serving their nation and the community.[2]

The term 'governance' has two interrelated aspects. The first aspect deals with the contents of policies and strategies that define the priorities for action. It also deals with various approaches to distributive justice. The second is the quality of the institutions of governance, and the rules and processes through which policies are framed and implemented. The main focus is related to the participation and voice of the governed, along with transparency and accountability of the institutions and offices of governance.[3]

The object of good governance is to create an environment in which public servants as well as politicians in the government are able to respond to the challenges of good governance. These challenges require a notion of duty, vocation, service to the public, and responsibility for their welfare. Good governance is nothing but providing public service.[4]

Administrative authorities appointed by the government play an important role in realizing the idea of good governance. Various functions of the government are fulfilled through administrative authorities. Basing on the mandate lay down under the constitution the main functions of the government are Regulatory,[5] Service Providers,[6] Developmental,[7] Supervision, and Resolution of conflicts.[8] Good governance is

1. www.brainyquotes.com/quotes/quotes/e/emilelahoul78562.html?src=t-good-governace visited on 1.8.15
2. Baghel Yogendra Kumar CL, Good Governance concept and Approaches, (Kanishka Publishers, Distributors, New Delhi, 2006) at. 40
3. Sinha Anup, Good Governance, "Market Friendly Globalization and the Changing Space of State Intervention:The case of India", in Munshi Surendra & Abraham Biju Pal, Good Governance Democratic Societies and Globalization, Ed.(Sage Publications, New Delhi, 2004) at. 111
4. Ibid
5. It is the function of the government to adopt sound fiscal and monetary policies for the welfare of the people
6. Government provides a variety of services to citizens ranging from social services like education and health to infrastructure services like power, road, transport and water etc. There is a need to shift the emphasis towards decentralisation, state department accountability to the local community and from employment guarantee to service guarantee
7. Government implements large number of welfare and development programmes for promoting the socio-economic upliftment of it s citizens.
8. Supervisory functions mainly to strengthen democratic practices and processes, ensuring equality to all citizens, setting up of conflict resolution mechanisms and fair governance etc.

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the performance of governmental functions to the satisfaction of the people. Administrative authorities have failed to satisfy the people though they are performing their duties sincerely, as they were not in a position to put it before the public properly. Now it is possible for the authorities to show their performance step by step through e-governance. It brings in SMART[9] governance.

Good Governance is making the Government more responsive and effective in fulfilling the directives imposed by the constitution for the benefit of all citizens. Good Governance can be achieved only through digitising all Government services and making them available to every citizen without corruption. In the year 2014, December 25th was celebrated as Good Governance day.[10]

Development of new technology like computers has brought a new era of e-governance in various field including government administration. The emergence of digital economy has affected both the roles and functions of the government and public institutes. Rapid advances in Information and Communication Technology (ICT) have made e-Governance the most important tool of Good Governance. To achieve this object there is a need to involve the public in government administration.[11]

Concept of E-Governance:

E-Governance means using of information and Communication Technology (ICT) to transform functioning of the Government. There is a difference between e-government and e-governance. Governance is wider than government. E-Government is the use of ICT to run or carry on the business of the Government of a country. Governance is an activity of governing/controlling a country by its Government with the application of ICT. E-Governance will bring efficiency, effectiveness, transparency and accountability of exchange of information and transactions between government and its citizens.[12]

The complete transformation of the process of governance using the implementation of ICT is called E-governance. It aims at bringing faster, more accountable and more transparent services to the public in government administration. It also deals with sharing of information and participation of people in the decision making and government process.[13]

Citizen-oriented governance is undoubtedly one of the most important considerations for the governments all over the world. As the awareness levels of the common people on the rise, citizens demand more access to government information and an effective and easy interface in their dealings with the government. A more informed citizen is in a better position to exercise his/her rights, and better able to carry out his/her responsibilities within the community. In the recent days more and more citizens are expected to be involved in the process of governance and to receive a higher standard of service and care from their Governments. In the digital age of today, the best answer to this need is the utilization of Information Technology (IT) as an effective tool for catalyzing activity. Application of Information Technology to the processes of Government functioning is known as Electronic Governance or simply E-Governance.[14]

E-Governance is a technology driven methodology aimed at harnessing the IT industry to the needs of the common people. The broad concept of electronic governance encompasses the whole gamut of Government functioning and the services it provides to the citizens. However it can be fruitfully utilized in the true sense only if the set-up at the back-end as well as the front-end is robust and in proper place. At the back-end lies the requisite infrastructure, a committed manpower set up and the required IT Applications in the Government offices, so that the interaction with the citizens over the Net, can be duly backed up with necessary and early action. In addition to all this, a vital pre requisite is strong initiative and encouragement from the top level so that thoughts can materialize into actions.[15]

Though there are various media through which efforts towards e-governance reach the common citizen, the most popular channel which forms the front-end foundation of e-governance is undoubtedly the enigmatic World Wide Web.[16]

Significance of e-Governance

Importance of e-governance in government administration can be discussed broadly under two heads basing upon the functions of government and its role in dealing with public in various welfare activities.[17] They are

1. Administrative Development and
2. Effective Service Delivery

First let us verify administrative development and e-governance.

9. S- simple, M- Moral, A-accountable, R-responsive, T- tranparent
10. It was a mark of respect to Shri Atal Bihari Vajpayee on his 90th birth day
11. http://negp.gov.in/index.php?option-com content&view-article&id=899&Itemid=717 visited on 03.05.2015
12. Joshi A. Abhijeet, E-Governance in India, http://indiaegovernance.blogspot.in visited on 2.05.2015
13. http://phblicadminstrationtheon.blogpot.in/2014/02/e-governance-concept significance.html, 2nd February 2014, visited on 24.04.2015
14. Verma Neeta, Sonal Kalra, Designing Effective Websites for e-governance, Technical Director, NIC, Ministry of Information Technology, neeta@hub.nic.in visited on 20.05.2015
15. Ibid
16. Ibid
17. Supra note. 14

1. Administrative Development

ICT will help in reforming administrative process to a great extent. ICT helps in the following manner.

a) **Automation of Administrative Process:** When the government departments are computerised and connected through network and use of software, it ensures efficiency in operations. Majority of the departments have launched their own individual websites carrying information of their respective departments enabling online operations and file movements, budgeting, accounting and data flow resulted in easy operation. Reduction in human intervention in administration and use of systematic ICT leads to effective and efficient and timely service to the citizens.

b) **Reduction in paper work:** Application of ICT in administration has helped in reduction in paper work. To a large extent data is available and stored in electronic form. Public can avail this data whenever they need. Files and mails (information) are transmitted over wires to small computers at each employee's desk and everything is computer managed. This resulted in reduction of physical movement and consumption, as well as the storage of huge piles of papers.

c) **Quality of Service:** ICT facilitates the government to deliver services to the citizens with greater accountability, responsibility and sensitivity, because people are able to get services efficiently, instantaneously and economically. Further, when grievances are redressed online, it ensures official accountability and also sensitises them. Video teleconferencing and monitoring has facilitated Central supervision and reporting, as face to face communication leads to better quality of services.

d) **Elimination of Hierarchy:** E-governance reduces procedural delay caused by hierarchical process in organisation. The public can send and receive information and data across various levels in an organisation immediately and they can help the government in decision making.

e) **Change in Administrative Culture:** With the development of e-governance, any sort of public action comes in scrutiny, thus inducing norms and values of accountability, openness, integrity, fairness, equality, responsibility and justice in the administrative culture. Thus, the administration is being freed from bureaucratic pathology and becoming efficient and responsive.

2. Effective Service Delivery:

E-governance improves administrative development further it becomes possible to ensure effective service delivery to the public in response to the following features of good governance

a) **Transparency:** Dissemination and publication of information on the government websites, that involves detailed public scrutiny making the service delivery efficient and accountable.

b) **Economic Development:** ICT reduces transaction cost making services cheaper. Lack of information in rural areas regarding markets, products, agriculture, health, education, weather etc. Once all this information is accessed online lead to better and more opportunity and prosperity in such areas.

c) **Social Development:** Access to information empowers citizens as they can participate and raise their voice that could be accommodated in programme or project formulation, implementation, monitoring and service delivery. Web information will counter the discriminatory factors affecting our societal behaviour.

d) **Strategic Information System:** Once the information is available to the public at every point, public functionaries are forced to perform their best ability and make strategic decisions effectively with the help of ICT.

Though e-governance is very important and benefits the citizens in achieving accountability, transparency and efficiency in administration, it faces certain challenges in its implementation. There are many difficulties in its implementation because majority of the citizens in rural areas are illiterate and unaware about the use of new technology.

Challenges in implementation of E-governance:

In order to implement and use the e-governance to the maximum extent there is a need to develop sufficient and adequate infrastructure, sufficient capital, easy and wider accessibility, skilful human resources, language, and changing the mindset of government functionaries and grievance redressal mechanism.

a. Most of the e-governance services are offered by state or central governments, and these programmes are not integrated. This can mainly be attributed to lack of communication between different departments.

b. Though there is no dearth of quality manpower but a gap exists between demand and supply in the IT manpower market. To bridge this gap we need to have more technical institutes to impart quality education and training to build a pool of human resources in the field.

c. Government functionaries need to be reminded that they are there to serve the people as per the policies and programmes. In order to implement these programmes efficient technology is a facilitator that solves the problems faced by the people. For this purpose the government authorities should undergo orientation and training programmes to become aware of the use technology for public benefit.

d. Taking into account Indian social conditions, unless we develop interface in vernacular language, it would remain out of reach of many people who are not well-versed in English. There is a need to develop multilingual programmes for the benefit of rural people.

e. Need to set up grievance redressal for various irregular and inefficient administrative functionaries. Central Vigilance Commission has provided platform for people to register their complaints against corrupt officials.

Indian government introduced e-governance by providing infrastructure in the form of software development, broadband connection, radio communication or fibre optics. To access information at rural areas, the government set up the National Informatics Centre (NIC). The NIC has developed comprehensive web-based software for panchayats raj and rural areas. The government has taken all possible steps to overcome the challenges faced by public in the administration of e-governance. Further the introduction of National e-Governance Plan (NeGP), takes a holistic view of e-Governance initiatives across the country, integrating them into a collective vision, a shared cause. Around this idea, a massive countrywide infrastructure reaching down to the remotest of villages is evolving, and large-scale digitization of records is taking place to enable easy, reliable access over the internet.[18]

Conclusions:

There is no doubt that the E-governance in government administration brings good governance. Administrative authorities should be proactive in providing all kinds the information available with them to the public. There may be a need to impose penalty on the authorities if they failed to achieve the object of accountability, responsibility, and transparency while performing their functions. Implementation of the penalty is necessary without any interference or political pressures, to control and to curb misuse of powers. The authorities must involve the public in decision making, to work towards citizen-centric governance. The public has every right to avail the information from any administrative authority. When they are utilising their rights they should also keep in mind their duties. The public should not harass the administrative authorities in obtaining information when it is available online. Public also has to take appropriate care, caution and verification before criticizing the administrative authorities. There is a need for cooperation and coordination among the administrative authorities and public, only then can we achieve citizen-centric good governance in our society.

18. htpps://negp.gov.in/index.php?option=com_content&view=article&id=77&Itemid=464 visited on 25.06.2015.

Right of Children to Free and Compulsory Education Act, 2009 – Positioning the Law within a Child Friendly Perspective

Dr. Anuja S.*

Sustainable development starts and ends with safe, healthy and well-educated children. Child-centric sustainable development ensures children live in safe, nourishing and healthy environments, with supportive and stable social and economic conditions that enhance the ability of all children and families to thrive in a rapidly changing world. Investment in children is a fundamental means to eradicate poverty, boost shared prosperity, and enhance inter-generational equity. The underpinning principles of the Right of Children to Free and Compulsory Education Act, 2009 are that education has to be child-centric and child-friendly. This paper outlines the child-friendly human rights debates in the context of Right of Children to Free and Compulsory Education Act, 2009 which gears up the significance of human development and thereby the broader contours of sustainable development.

By education, I mean an all round drawing out of the best in child and man- body, mind and spirit.

- Gandhiji.

This concept of education tends to remove the inadequacies of modern education. The words *'Shiksha'*(derived from the Sanskrit verbal root *"Shas"* meaning to discipline, to control, to instruct or to teach.) and *"Vidya"* (derived from Sanskrit verbal root *"Vid"* meaning to know) refers to Indian synonyms of education.[1] Therefore disciplining the mind and acquisition of knowledge has always been the dominant theme in Indian approach to understanding education. Education in its narrow sense is equivalent to instruction imparted in a school or college. Viewed from a broader spectrum, education is a life-long process through any agency of education be it a school, house, church, society, personal experiences etc. which starts with the conception and ends with death.[2]

The Legal framework

Free and compulsory education for all children had been debated even in pre-Independence years. The State's obligation to provide education, geared by the aim of welfare state in India, was recognized with the inclusion of a directive principle to this effect under Article 45 in the Constitution of India. With the 86th Amendment to the Constitution in 2002, the Right to Education metamorphosed into a Fundamental Right. The passing of the Right of Children to Free and Compulsory Education Act, 2009 marks a historic moment for the children of India. The Act envisages an avowed objective of providing free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such a manner as the State may, by law, determine. The simple understanding is that every child has a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards.[3] The National Commission for Protection of Child Rights has been mandated to monitor the implementation of this historic Right.

The understanding of 'Free education' is that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education. 'Compulsory education' casts an obligation on the appropriate Government and local authorities to provide and ensure admission, attendance and completion of elementary education by all children in the age group of 6–14 years. With this, India has taken a legislative leap forward to a rights-based framework that casts a legal obligation on the Central and State Governments to implement this fundamental child right as enshrined in the Article 21A of the Constitution, in accordance with the provisions of the RTE Act.

The Act is a welcome step as it provides a much needed social corrective in a society that has been historically been stratified and discriminated on class and caste lines as to access to education. The Act is perceived as a measure to bring more and more children from marginalized sections of the society to school. The Act fights against discrimination and inequality (the core rights enunciated in the Convention of Rights of Child). The RTE Act envisages making all kinds of private schools share the responsibility of educating poor children from the surrounding community. It currently requires participation of private schools by providing mandatory free and compulsory admission of children of the poor from the neighbourhood at Std 1st up to 25% of class strength.

The Act ensures a socio participatory process resulting in

1. O.P. Dhiman- Understanding Education – An Overview OF Education; Kalpaz Publications, Delhi, 2008.P.19.
2. See http://www.journalofphilosophyandhistoryofeducation.com/jophe46.pdf last visited on 12/8/2014.
3. http://mhrd.gov.in/rte last visited on 12/8/2014

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a de-centralised policy of approach in its implementation strategy. An inter linkage of duties and responsibilities of local authorities, parents, teachers and school management committee has been ensured for effective realization of the purpose of the Act.[4] This enables the input of a range of stakeholders– including parents, teachers, religious leaders, community groups and children – into the analysis and provides opportunities to feed back on its conclusions. Children's perspectives are indispensable. Responsibilities of the school authorities have been listed out in the Act.[5] The strict technical procedures of proof of age, to be adhered to at the time of admission of children to schools, have been wiped out.[6] A total ban on physical punishment upon children and their mental harassment has been ensured.[7] This confirms to the mandate provided under the Convention of the Rights of the Child. A clearly laid out procedure of effective working of schools has been ensured thought the establishment of school management committee[8] and the consequent School development plan.[9]

Curriculum and evaluation procedures[10] oriented towards promoting Indian ethos, values and child development have been envisaged. This process is envisaged under the Act to take into account the conformity with the values enshrined in the Constitution; all-round development of the child; building up child's knowledge, potential and talent; development of physical and mental abilities to the fullest extent; learning through activities, discovery and exploration in a child friendly and child-centered manner; medium of instructions to be in child's mother tongue; making the child free of fear, trauma and anxiety and helping the child to express views freely, thus doing away with an intimidating atmosphere in the classrooms; comprehensive and continuous evaluation of child's understanding of knowledge and his or her ability to apply the same.

Protection of rights of the child is ensured by setting up national and state commissions.[11] Advisory council in the national and state level is also envisaged under the Act.[12] Provision as to appoint such persons from amongst persons of expertise in the field of education and child development has been enunciated in the Act to suit the needs of children. The responsibility of identifying and notifying the local authority which shall perform the function of grievance redressal under section 32 of the RTE Act vests with the State Government. With the RTE coming into force, there is an expectation that this will finally be translated into provision of quality school education for all children.

Understanding the *Best Interests of the Child*

"...in serving the best interests of children, we serve the best interests of all humanity." – Carol Bellamy.

Education leads to individual freedom and empowerment, which yields significant societal development gains and makes an individual self-reliant. It is seen as the foundation of society, enabling economic wealth, social prosperity and political stability. Education is therefore increasingly being viewed as a fundamental right across the globe and essential for the exercise of all human rights.[13] Globally, right to education derives its legal basis from Article 26(1) of the Universal Declaration of Human Rights which states that "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory." The International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the United Nations in 1966, also recognizes everyone's right to education. Article 13(2) of ICESCR5 requires parties to the covenant to recognize that primary education will be compulsory and available free to all to achieve its realization.

The United Nations Convention on the Rights of the Child 1989 strengthens and broadens the concept of the right to education. The Convention on the Rights of the Child, 1989 is the first legally binding international instrument to incorporate the full range of human rights—civil, cultural, economic, political and social rights. The four core principles of the Convention are non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child.[14] Childhood is both the most vulnerable and the most formative period of life. Children need protection, support and encouragement and a safe and peaceful environment; areas of violent conflict, social unrest, high criminality or alienation cannot provide all these. The Convention on the Rights of the Child, 1989 clearly indicates this aspect.[15] The Convention which India ratified in 1992 guarantees the freedom from non-discrimination,[16] upholds the Best interests of the child,[17] right to life, survival and

4. Online edition of The Hindu, Sunday, March 28, 2010,p.2
5. See S.12 of the Act
6. Id., S.14
7. Id., S.17
8. Id.,S.21
9. Id., S.22(1) and (2)
10. Id., S.29(2)
11. Id., S.31(1) and (2)
12. Ss.33 and 34
13. http://indiainbusiness.nic.in/newdesign/upload/news/EY-Right-to-education.pdf last visited on 11/9/2015
14. See http://www.unicef.org/rightsite/237_202.htm last visited on 12/8/2014
15. Art.16(1) of the Convention of the Child,1989 reads as-"No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family home or correspondence, nor to unlawful attacks on his or her honour and reputation.
16. See id.Art.2
17. See id. Art.3

development,[18] right to protection, right to be heard and to participate,[19] right to health care,[20] and the right to education,[21] which makes all other rights realizable and meaningful. The Convention recognizes the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.[22]

State parties are mandated to take appropriate measures to assist parents and others responsible for the child to implement the above right and are directed to provide material assistance and support programmes particularly with regard to nutrition, clothing and housing.[23] Viewed in the backdrop of the rights guaranteed by the Convention on the Rights of the Child which is definitely an "ought" proposition, the understanding of law and its approach ought to be moulded in such fashion. Every right spelled out in the Convention is inherent to the human dignity and harmonious development of every child.

The human rights of a child guaranteed and protected by the international instruments bear testimony to the fact that overall development of a child is crucial to the development of a country. Emphasising more on the children's right to education from a developmental perspective it is held that "The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society."[24] The child shall be given an education which will promote his general culture and enable him on a basis of equal opportunity, to develop his abilities, his individual judgement and his sense of moral and social responsibility and to become a useful member of society. The right to education is to be achieved on the basis of equality of opportunity. Measures must be taken to encourage regular school attendance and reduce dropout. It is not sufficient just to provide formal education. It is also necessary to remove such barriers as poverty and discrimination and to provide education of sufficient quality, in a manner that ensures children can benefit from it. Discipline must be administered in a manner consistent both with the child's dignity and with the right to protection from all forms of violence, thus sustaining respect for the child in the educational environment.[25]

The aims of education are defined in terms of the potential of each child and the scope of the curriculum, clearly establishing that education should be a preparatory process for promoting and respecting human rights.[26] This approach is elaborated in the General Comment on the aims of education, in which the Committee on the Rights of the Child stresses that the development of education that is child centered, child friendly and empowering, and that education goes beyond formal schooling to embrace a broad range of life experiences through which positive development and learning occur.[27]

Contextualizing Judicial Efforts

Article 45 of the Directive Principles of State Policy ensures that "The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years". Supreme Court upheld the right to education as a fundamental right in *Mohini Jain v Union of India.*[28] It was observed in this judgment that:

> 'Right to life' is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavor to provide educational facility at all levels to its citizens.[29]

In the case of *J P Unnikrishnan v State of Andhra Pradesh,*[30] Supreme Court observed thus:

> The right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the Constitution. So far as the right to education is concerned, there are several articles in Part IV which expressly speak of it. Article 41 says that 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, sickens and disablement,

18. See id.Art.6
19. See id. Art.12
20. See id.Art.23
21. See id.Art.28
22. See The Convention of the Child,1989, Art.27(1)
23. See id. Art.27(3)
24. Principle 7.Declaration Of The Rights Of The Child [Proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959. This was the basis of the basis of the Convention of the Rights of the Child adopted by the UN General Assembly 30 years later on 20 November 1989. The Convention on the Rights of the Child was entered into force on 2 September 1990.
25. Seehttp://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf last visited on 1/5/2008.
26. Id.,
27. See Committee on the Rights of the Child, 'General Comment No.7:The aims of education, Article 29(1)(2001)',CRC/GC/2001/1,2001.
28. (1992) 3 SCC 666. para171
29. Id., para 12
30. 1993 SCC (1) 645

and in other cases of undeserved want". Article 45 says that "the State shall endeavor to provide, within a period of ten years from the commencement of this constitution, for free and compulsory education for all children until they complete the age of fourteen years". Article 46 commands that "the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation……. The three Articles 41, 45 and 46 are designed to achieve the said goal among others. It is in the light of these Articles that the content and parameters of the right to education have to be determined. Right to education, understood in the context of Articles 45 and 41, meant: (a) every child/ citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the state and its development.

Education is critical for economic and social development. It is crucial for building human capabilities and for opening opportunities. Alfred Marshall in the Principles of Economics observed as follows: "The wisdom of expending public and private funds on education in not to be measured by its direct fruits alone. It will be profitable as a mere investment, to give the masses of the people much greater opportunities, than they can generally avail themselves of. For by this means many, who would have died unknown, are able to get the start needed for bringing out their latent abilities. The most valuable of all capital is invested in human beings." In this regard, the performance of the Indian Judiciary stands out as a signal contribution to the implementation of human rights generally and that of right to education in particular.

Understanding a Child friendly approach

Quality in education can only be achieved through the development of child friendly learning environments that are dedicated to a holistic approach to children's development. This means addressing children's multiple rights, using strategies that build links between the school and the family and community. Child-friendly learning environments seek not only to equip children with basic learning skills but also to enable them to take control of their lives and to promote justice, democracy, peace and tolerance. The child-friendly learning concept promotes child-seeking, child-centered, gender-sensitive, inclusive, community-involved, protective, safe and healthy approaches to schooling and out-of-school education. These approaches are intended to increase the learning effectiveness, efficiency and reach of education systems and to enable all children to realize their right to learn. Child friendly schools have been applied in many settings around the world in formal and non-formal education, early child development and educational responses to emergencies.[31]

Schools should take measures to contribute towards children's health and well-being, taking into account the differing needs of children. This will necessitate measures to ensure that obstacles to health and safety are removed – for example, consideration as to the location of schools, travel to and from school, factors that might cause illness or accidents in the classroom or playgrounds, and appropriate facilities for girls. It also requires the proactive provision of facilities, services and policies to promote the health and safety of children and the active participation of the local community.

The right to education in the present context includes quality education for all. Quality is an integral part of the right to education. If the education process lacks quality, children are being denied their right. The Act lays down that the curriculum should provide for learning through activities, exploration and discovery. This places an obligation on us to change our perception of children as passive receivers of knowledge, and to move beyond the convention of using textbooks as the basis of examinations. The teaching-learning process must become stress-free, and a massive programme for curricular reform be initiated to provide for a child friendly learning system, that is at once relevant and empowering.[32] Teacher accountability systems and processes must ensure that children are learning, and that their right to learn in a child friendly environment is not violated. Testing and assessment systems require a total overhaul to ensure that these do not compel children to struggle between school and tuition centres, thereby bypassing childhood.

RTEA, 2009 vis-a-vis Child friendly Approach.

In the present era there has been a paradigm shift in the traditional model of schooling to a rights based or child friendly approaches in schooling. The stakeholders of education are the government, the parents and the child. The right to education thus involves these three principal players: the state, the parent and the child. There is a triangular relationship between them, and in the development of rights-based education it is important to bear in mind that their differing objectives need to be reconciled.[33] The areas recognized as premises of care and affection ought to start with family, then school, then society, community and then the larger universe sets in.

The concept of family to a child fulfils physical needs of human beings by providing security and shelter from factors hostile to life. Viewed from a psychological perspective, it fulfils psychological needs by providing a sense of personal space and privacy. Viewed from a sociological perspective, it fulfils social needs by providing a gathering area and communal

31. Education for Sustainability From Rio to Johannesburg: Lessons learnt from a decade of commitment See portal.unesco.org/en/files/5202/...learnt.doc/lessons_learnt.doc last visited 12/8/2014
32. http://www.thehindu.com/todays-paper/tp-opinion/joining-hands-in-the-interest-of children/article742230.ece last visited on 11/8/2015
33. Supra note 31

space for the human family i.e. the relationships of blood, consanguinity and marriage, the basic unit of society. Viewed from an economic perspective, it also fulfils economic needs by functioning as a center for commercial production. This system of living in a group under the set standards ensures the civil, political social, economic and cultural rights of human beings. The society or the community grows from the basic cell i.e. the family and its support structures. The society reflects a blend of other actors with a significant contribution and responsibility flowing from teachers, the local community, policymakers, the media, non-governmental associations and the private sector which in turn can be categorized as the larger universe.

It is in this context that the Right to free and compulsory Education Act, 2010 is to be analyzed whether sufficient space has been allotted in the Act for child friendly approach which in turn point towards the developmental aspect of the country. The Act attempts to address the historical problem of continuing illiteracy as well as lack of educational opportunities of the disadvantaged population even sixty years after adoption of the Indian Constitution. The goals envisaged by the Act can be outlined as: 1) bringing children of marginalized sections of our society into the ambit of school education[34] keeping in tune with the Millennium Development Goals; 2) ensuring that all schools and their teachers meet certain specified norms, and 3)ensuring that all children receive schooling of reasonable quality, free from any form of discrimination.[35]

Anomalies and Challenges

Different societies understand 'childhood' in different ways. This leads adults to see children through a set of pre-determined assumptions that inform both how they are treated and what they are deemed capable of achieving. The tendency is to judge children's competencies against a set of adult standards, rather than to value what children have to offer as children.[36]

There appears to be in existence too much anomalies that gets reflected in the context of International mandates and in-house realities when we try to enforce the Act as per the stipulations envisaged. The legislation fails to take into account the best interest of the children as far as the education needs of those who are below 6 years of age and who are above 15 up till 18 years of age thus demarcating the age barriers for accessibility to right to education. Childhood that is completely ignored by the legislation is considered to be the formative years in the child's upbringing. And India has signed the U.N. charter which states clearly that free education should be made compulsory to children of 0-18 years old. This in turn leads to underestimation of best interest of the child theory as envisaged under the Child Rights Convention.

Although the Act mandates that private schools set aside 25% of admissions for low-income, underprivileged and disabled students, implementation of this law has not been as smooth as its acceptance. In fact, it also gives credence to the growing disparity between the government and private school systems in India. Social integration in schools means creating an environment where children with special educational needs can work, play and live with children who do not have special educational needs.[37] Addressing issues of inclusion for children with disabilities through barrier free access poses a major task in the issue of social integration. The legislation of 1996 dealing with disabilities of persons is not in pari-materia with the Act under discussion as the object of both the Act is totally different. A child centric approach was not the true focus in the earlier legislation. By dealing with different vulnerabilities that are faced by the children a holistic understanding and solution can be brought in through legislations.

The irony is that India was the one of the first countries to ratify the UN Convention on Rights of Persons with Disabilities, in October 2007, which exhorted that "State parties shall ensure that persons with disabilities are not excluded from the general education system on the basis of disability and that children with disabilities are not excluded from free and compulsory primary education or from secondary education on the basis of disability."[38] The appropriate government through an affirmative action is empowered to notify such differently-abled children to be a part of this venture thus bringing in a blend of all categories of children from different streams.

The in-house challenges poses another threat to the smooth and conducive enforcement of the legislation. Teachers are envisaged as the core of implementation of RTE that seeks to work towards a heterogeneous and democratic classroom where all children participate as equal partners. The Child friendly approach envisaged in the Act is possible when the quality of teachers and the level of professionalism escalate to a desired level. Section 23(2) of the Act provides a time frame of five years to ensure that all the teachers in elementary schools are professionally trained. The National Council for Technical Education has laid down the minimum qualifications for teachers in schools in 2001 on the basis of the National Council for Teacher Education Act and the RTE Act, according to which teachers appointed by the government or employing authority should be trained and have minimum qualifications for different levels of school education.[39] Discrimination based

33. Id.,
34. See Millennium Declaration, Article 2: "As leaders we have a duty therefore to all the world's people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs."
35. http://toolkit.ineesite.org/toolkit/INEEcms/uploads/1101/Getting_it_Right.PDF last visited on 12/8/2013
36. http://www.unesco.org/education/pdf/281_74.pdf last visited on 11/9/2015
37. Article 24, UN Convention on Rights of Persons with Disabilities, in October 2007
39. http://indiainbusiness.nic.in/newdesign/upload/news/EY-Right-to-education.pdf last visited on 11/9/2015

on class, caste and gender factors which is deep rooted in the rural and backward regions of India poses a herculean challenge to overcome. Accessibility to education in the given context of attitudinal and environmental barriers dilutes the avowed objective of the legislation. Many unrecognized schools are also fulfilling the educational requirements of children in India. The proliferation of untrained teachers in the rural areas with less commitment and professionalism adds on to the plight. Within the five-year period, all teachers need to acquire the academic and professional qualifications prescribed by the academic authority under the RTE Act. This is a difficult task. The problem of uncontrolled mushroom growth of private schools has made it inevitable to put in place clear and transparent policies for the whole range of issues ranging from specific issues like the drop outs, 25% quota to larger issues of commercialization of education and regulation of school fees.[40]

The Act is deemed to be excessively input-focused rather than outcome-oriented. The Act proceeds on the noble mission that social inequalities will be better addressed by admitting children from disadvantaged sections of society into private schools. In today's world, where there is so much consumerism, this will put an additional burden on such children and their families. Therefore, making reservations will not help unless the larger issue of social inclusion is addressed.

Making sure that larger number of students reaches school is the main focus than augmenting the quality of education. A quantitative approach tends to dilute the noble mission intended and perceived. The lines of solutions implied from the Act are limited to requiring greater parent and local body representation in school managing committees and providing local authorities with the power and responsibility to ensure compliance of schools with specified norms. The present concerns as to schooling system is the existence of irrelevant curriculum which presents a glaring inequality with the needs and experiences of children. The text book centered teaching can be cited as one of the causation to this phenomenon. The presence of demotivated teachers who lack interest in teaching children with needs of diverse kinds adds to the plight.

The mechanisms of monitoring as envisaged under the Act rely heavily on inspections, assessments and punishments with very little support and nurturing of teachers. Unless we bring in significant changes in our current approach to both children's and teachers educational needs we will have more children going to school without the commensurate increase in either literacy or any other form of educational achievement. Again by making local authorities a supportive structure can call for trends of bureaucratic corruption in admission procedures of children. The much applauded services of the NGO's in the Indian educational scenario have been completely done away with in the Act. The necessary and inevitably help and support lent by them needs to be recognized while visualizing the purpose of the Act.

The question remains as to two contradicting issues. How far the concept of meaningful, continuing education enriched with quality can be pursued? And the other, how far the children brought to the mainstream of education are benefitted to the maximum through this Act? The involvement and ownership of communities in improving the state of education in schools is crucial. There are several ways in which they can be involved. However, to make use of the space provided to parents and other community members, a lot needs to happen to develop their capacities. The social assistance measure that is applaudable under the Act can be made real and pragmatic only if the children of the parents engaged in the unorganized work can be motivated to reap benefits out of this Act. Some of the barriers to supporting the rights of marginalized children and families might be technological, institutional or organizational, and could be overcome through technological innovation or improved management of existing services. In many cases, however, reaching out requires the exercise of specific political will and commitment, including financial commitment. This commitment is often absent for a variety of reasons: lack of awareness of the need, lack of political advantage associated with such investment, prejudice and hostility to the particular groups of children, ignorance as to the actions needed to overcome marginalization, fear of the associated costs and failure to acknowledge obligations associated with international human rights commitments.[41] This is perhaps the greatest challenge within the Indian context given the high instances of child labour, bonded labour and interstate migrant influx to the urban sectors.

The goals envisaged by the Act are really laudable but merely using the Act as a legal instrument to initiate action against institutions or individuals that are perceived as responsible for failure of implementation of the Act will not really address the issues of illiteracy and lack of educational opportunity. Through social auditing and social mapping, the challenge lies in addressing the entire gamut of social, economic, cultural, and indeed linguistic and pedagogic issues/factors that prevent children from weaker sections and disadvantaged groups, as also girls, from regularly attending and completing elementary education. The focus needs to be on the poorest and most vulnerable since these groups are the most disempowered and at the greatest risk of violation or denial of their right to education. The interests of children who are brought to the mainstream of education through this Act need to be specifically emphasized to prevent the law from being an illusion. The children of weaker sections need to be viewed as citizens with rights rather than objects of charity. Their interests must become the centre-piece and touchstone of policy. These policies must seek to address the root causes of children's problems, not just their superficial manifestations.

Conclusion

Every human being is or has a self, in a sense that includes an awareness of being a human individual, capable of making

40. http://www.rteforumindia.org/sites/default/files/40page.pdf last visited on 11/8/2015
41. http://www.unicef.org/ceecis/UNICEF_ROE_Roma_Position_Paper_Web.pdf last visited on 3/4/2014

choices that affects one's life and that of others. This inherent self has certain needs that are to be satisfied which forms the foundation of self-dignity. Needs may be a person's requirement for survival, health or basic liberties. To the extent these needs are inadequately met, mental or physical health is impaired. Thus, need refers to necessities not only for biological survival but also for health and development (physical and mental growth) of persons as human beings.[42]

A psychosocial understanding of the needs of the child and the strategic interventions must strike a balance among themselves. The Act needs to be viewed and enforced from the perspective of children. It mandates children's right to an education enriched with freedom from fear, stress and anxiety. The provisions in the Act, regarding prohibiting corporal punishment, detention and expulsion, compels us to revamp the conventional notions of disciplining and control. The accountability is huge which involves exploring and exposing ourselves and our culture to the so called uncomfortable alternative approaches to classroom management, including peer behaviour, teacher-child and teacher-parent relationships.

A concerted strategy is to be jotted down keeping in view the aim of inclusive education with quality, which demands vibrant partnerships with of Women and Child Development, the departments and non- governmental organizations concerned with children of the Scheduled Castes, the Scheduled Tribes and educationally backward minorities. Coordination of Panchayati Raj institutions with State governments is the need of the hour so that "local authorities" can discharge their functions under the RTE Act. The lack of sensitivity to the child friendly endeavours while promoting education for children augments the problems relating to learning and teaching.

A law is as good as its implementation is effective, despite lofty aspirations. The Act to be effective definitely requires higher level of commitment and dedication in addition to large funding and infrastructure. Merely emphasizing on the duties and responsibilities of duty bearers cannot bring out the true meaning of the purpose of the Act. A multidimensional approach to materialize the intention of the legislation is the need of the hour. The way knowledge is imparted, the atmosphere in which it gets disseminated to the minds of the child, the approach to the child and the quality is a sin qua non for a well-built, mentally and physically developed childhood.

There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace.

- Kofi Annan

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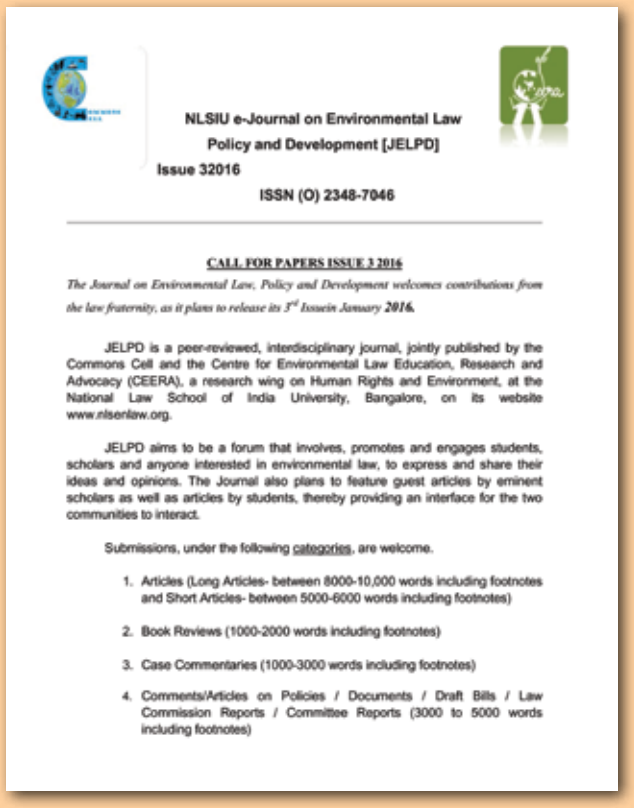

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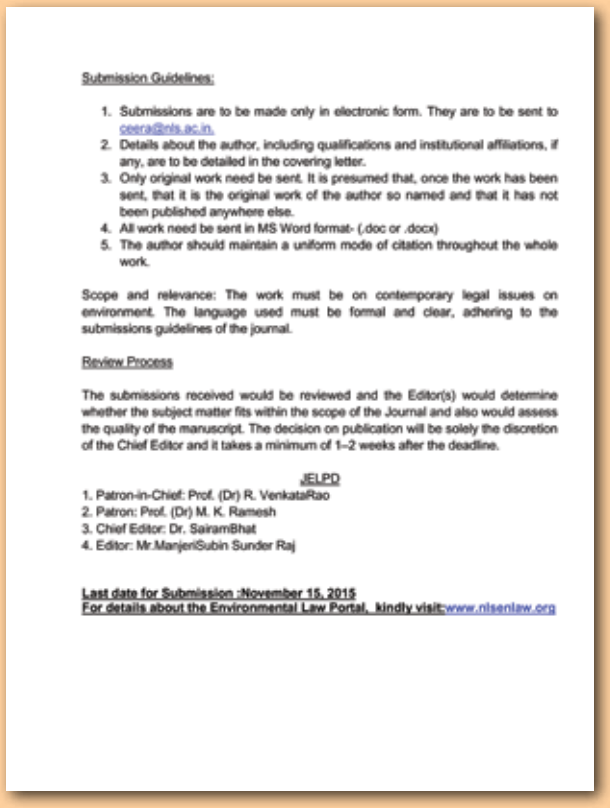

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42. Christian Bay, Self-Respect as a Human Right: Thoughts on the Dialectics of Wants and Needs in the struggle for Human Community. Human Rights Quarterly, 67 1982.

'Ascertainableness of the Legislative Intention'- a slippery phrase or a reality?

Mr. Vishnu Prasad R.*

"I am the parliamentary draftsman. I compose the country's laws. And of half of the litigation, I am undoubtedly the cause"[1]

Introduction

The Indian Constitution, *inter alia*, defines legislative competence and law-making procedure.[2] Laws govern all the activities of juristic and natural persons at every single stage of existence, until their end. All laws have a purposive existence.The purpose could vary from one law to another but it is believed that its form is correlative with the purpose of enactment. Thus, a law may be found in any one of the following forms such as statute, ordinance, rule, regulation, guideline, notification, circular, order, scheme, or a byelaw. Indeed, notwithstanding its form, every law is presumed to be just, valid, and in particular, as the true indicator of the legislative intent. This is because the lawmaker chooses the words wisely and cautiously to reflect his intention as well as to meet the purpose of enactment. On the contrary, in some cases, the words so chosen by the lawmaker when read in a particular context might turn out to be uncertain as to its meaning, purpose or application. In such a circumstance, the court applies its mind and selects the appropriate rules of interpretation to ascertain the true meaning of the words in the light of the legislative intention. This article attempts to highlight the arguments concerning ascertainableness of the legislative intention. In this direction, the article deals with the essentials, namely, the idea of interpretation, the 'when and how' aspects of interpretation, purposes of interpretation, meaning and objectives of legislative intention.

Idea of Interpretation

Interpretation is a method by which the actual meaning of a law or set of words used therein is understood by the court. It is relevant to understand'interpretation'as one of the stages in'the process of adjudication'.[3] Interestingly, no definition has elucidated the idea of 'interpretation' from this perspective. On the other hand and in general, many definitions deal with the meaning of interpretation, while a few of them not only address the meaning of interpretation but also its purpose and methods. Based on the latter standard, some of the definitions are selected here. However, it must be borne in mind that these are merely non-exhaustive elucidates of the idea.

Salmond, a well-known legal scholar, had defined interpretation as the process by which the courts seek to ascertain the meaning of the Legislature through the medium of authoritative forms in which the law stands expressed.[4] This definition emphasises interpretation as a 'process', yet it is submitted that this expression must not be taken to mean a mechanical process. As a result, it would refer to a series of methods by which the courts construe the laws in question.[5] Indeed, in the following definitions too the expression 'interpretation as a process' must be understood as a referent to the sequence of techniques by which the courts construe the law. Salmond has used the expression 'authoritative forms' to refer to the linguistic medium or the form in which a law is presented by the lawmaker. Similarly, Gray, an American scholar, had described interpretation as the process by which a judge or any person, searches for the meaning of a statue on an occasion and constructs such a meaning that he either believes to be that of the Legislature, or that he proposes to attribute to it.[6] Gray's definition calls interpretation an occasion to search for a meaning of a statute that could be utilised by the interpreter to expound the meaning of the statute, either as given by the Legislature or as the interpreter wishes to provide. Rubert Cross has defined interpretation as the process by which the courts determine the meaning of a statutory provision for applying it to the situation before them.[7] This definition has attempted to define the meaning of interpretation as the process whose purpose is to ascertain the meaning of a law by reading it in the context. Thomas M. Cooley, a former judge of the Michigan

1. An old English jingle cited in Shakuntala Sawhney v. Kaushalya Sawhney, (1980) 1 SCC 63.
2. The Constitution of India, 1950, Articles 245, 246, 107, 109, 117, 111, 196, 198, 207, 200, 201and VII Schedule.
3. The process of adjudication comprise of analysis of facts and circumstances, application of law,interpretation, construction, resolving dispute, giving reasons for decision and declaration of the law.
4. Glanville Williams, (ed.), Salmond on Jurisprudence, 11 edn., (London: Sweet & Maxwell, 1957), p. 152.
5. These methods consist of application of judicial mind, use of aids to interpretation, and selection of appropriate rule of interpretation to determine the meaning of the lawmaker.
6. John Chipman Gray, The Nature and Sources of the Law, 2ndedn., (New York: Cambridge University Press, 1921), p. 176.
7. John Bell and George Eagle, (eds.), Rubert Cross on Statutory Interpretation, 3rdedn., (London: Butterworths, 1995), p.34.

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Supreme Court, has opined that interpretation is done to find out the true sense of any form of words and it comprises of an act of making intelligible what was before, not understood or found ambiguous.[8] This definition clearly has attempted to highlight the significance of interpretation. The real significance of interpretation lies in making the words comprehensible and meaningful. From these definitions, it would be clear that interpretation is a systematic process that involves application of mind, rules and principles of construction to figure out the true meaning or intended meaning of the law.

'When and how' aspects of interpretation

Interpretation is not required when the words are clear as to their meaning. On the one side, it is generally presumed that laws are valid and just, and are not only certain but also indicate the intention of the makers.[9] On the other side, the courts must adjudicate a dispute in accordance with the law. However, if a law is unclear as to its meaning, application, scope, or purpose then the court cannot proceed with redressal of dispute without addressing those difficulties. Indeed, the definitions considered[10] also spell out when interpretation is required. Besides that, interpretation is required when the purpose and intent of a law is unclear or ambiguous, or when the meaning of the legislation is uncertain or capable of being understood in multiple ways. Similarly, interpretation would also be required when there is inconsistency between the laws dealing with a subject matter, or"when the words used in the statute are, on their own terms, ambivalent and do not manifest the intention of the legislature".[11]

It is said, "In the construction and interpretation of statutes, the intent of the Legislature is of supreme importance."[12] Indeed, "…the most fair and rational method for interpreting a statute is by exploring the intention of the Legislature through the most natural and probable signs which are either words, the contexts, the subject matter, the effects and consequences, or the spirit and reason of the law…"[13] Thus, the interpreter is required to determine and apply the legal meaning of an enactment that reflects legislative intention and for this purpose, the court has developed various rules and adopted the use of aids to interpretation. These are essentially the products of judicial process that has been in progress for many centuries. There are primary rules of interpretation and subsidiary rules of interpretation. Since these rules aid the courts to determine legislative intent or meaning of the statutes they would be succinctly dealt here. The primary rules of interpretation comprise of literal rule, golden rule, mischief rule and purposive rule. The literal rule calls for understanding of the words used in a statute in their plain or ordinary meaning, irrespective of the consequences. This rule helps the court in confining to plain or ordinary meaning. This is because, if the language of the statute is plain and unambiguous, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning that the legislature intended to convey. If the Legislature expresses its intention in clear and express words, then the courts cannot ascribe to it any alternative intention.The golden rule, as an improvisation of the former rule helps the court to deal with certain consequences such as absurdity that might emanate from the plain meaning of the words. Therefore, the goldenness of the golden rule lies in its capacity to cure such consequences. This rule emphasises on two things. First, the court must confine to plain or ordinary meaning and two, where the plain meaning of words results in absurdity the language could be twisted only to the extent required to cure such absurdity. The mischief rule advocates the idea of suppressing the mischief and advancing the remedy. The rule takes into consideration the purpose of the Act. The purposive interpretation ensures that words and provisions of the statutes are read by the courts in a manner that would further the purpose and object of the Act. The rule aims to give effect to purpose and object of the Act. Therefore, the courts interpret ambiguous or uncertain words in accordance with purpose and object of the Act, or in a manner, that gives effect to the ends of the Act. The subsidiary rules of interpretation comprise of the following rules: Same Word Same Meaning rule,[14] *Noscitur a Sociis,*[15] *Ejusdem Generis,*[16] *Reddendo Singula Singulis,*[17] *Expressum Facit Cessare Tacitum,*[18] *Expressio Unius Est Exclusio Ulterius,*[19] *Contemporanea*

8. Thomas M Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union, (Boston: Little Brown & Company, 1868), p.38.
9. These presumptions are not absolute.
10. Supra.
11. ITC Ltd. v. Commissioner of Central Excise, New Delhi, (2004) 7 SCC 591.
12. Earl T. Crawford, The Construction of Statutes,Reprint,(Lahore: Pakistan Law House, 1998), p. 245.
13. M.N. Rao and Amita Dhanda, (eds.), NS Bindra's Interpretation of Statutes, 10 edn., (Nagpur: Lexis Nexis Butterworths Wadhwa, 2007), p. 404.
14. It is a general linguistic canon used to consider the ordinary meaning of the words. Wherever a particular word repeatedly appears in a law, it is presumed to have the same meaning unless otherwise the context or the legislative intention calls for a different sense to be accorded to such words.
15. It is a contextual principle, according to which a word is not to be understood in isolation. This would mean that words are to be understood in the light of its surroundings. The idea emphasised by this rule is that what cannot be known in itself may be known from its associates.
16. It is a facet of Noscitur a Sociis. According to this rule, where words are capable of making wider references that are associated with words capable of making limited references, the former set of words must be restricted to the category of specific or narrow referents. Therefore, this rule can be applied only if the words sufficiently indicate a category that can be determined and when genus is not as wide as residuary.
17. This rule applies where sentence in a law has more than one reference. It involves the principle of 'render each to each' by which the provision could be read in a distributive manner. This helps in applying each object to its appropriate subject.
18. This rule envisages that statement of a thing expressly ends the possibility anything inconsistent by implication.
19. It is an aspect of the previous rule. This rule provides that to express one thing is to exclude another.

Expositio,[20] Mandatory and Directory rule,[21] Conjunctive and Disjunctive rule,[22] then number and gender rule.[23] The court determines the rule that is to be appliedin a case. However, both primary and subsidiary rules of interpretation play an important role in ascertaining the legislative intention.

Purposes of interpretation

The object of interpreting a statute is to ascertain the meaning and intention of the legislature enacting it.[24] Similarly, interpretation aims to provide certainty and clarity to law, which is an essential requirement for efficiency and reputation of the law. Interpretation aims to render functionality to a law where it is alternatively capable of being read as redundant or where its application and meaning is doubtful and because of which the law might be put to rest or disuse. This would in turn allow for smooth implementation of the law for future transactions. Interpretation also aims to avoid or cure certain difficulties such as anomaly, absurdity and ambiguity in law. Lastly, the objective of interpretation is to provide dynamic understanding of the provisions of law. Ultimately, interpretation ensures that the law meets the purpose and object of its enactment.

Meaning of Legislative Intention

The intention of the Legislature is manifested in the statute itself.[25] Every law provides legal meaning that is taken to be intended by the legislator. Therefore, the legal meaning parallels the legislative intention.[26] Legislative intention is synonymous with true meaning, legal meaning, *mens legis, sentential legis* or will of the legislature. Be that known by any of those expressions, essentially it is a reference to the meaning of words in a law used by the Legislature, which is objectively determined in accordance with the guides furnished by the Legislature or with the use of well-established principles and rules of interpretation developed and applied by the courts. Indeed, all rules must aim to expound the intention of the Legislature.[27] It is important to note that Legislature ceases its authority to interpret meaning of the contents in a law that it enacted.[28] Thus, it would be the domain of the Judiciary to ascertain such meaning in question taking into consideration of law in text, law in context, and law in action. Ascertaining legislative intention requires a judge to strike a balance between the letter and spirit of the statute without acknowledging that he in any way supplemented the statute.[29] It is said that "The intention the Legislature thus assimilates two aspects: In one aspect it carries the concept of 'meaning', i.e., what the words mean and in another aspect, it conveys the concept of 'purpose and object' or the 'reason and spirit' pervading through the statute…"[30] Francis Bennion has pointed out that legislative intention is distinct from purpose or motive of the Act.[31] According to him, legislative intention relates to the legal meaning of the enactment. Purpose or object of the enactment relates to the mischief and its remedy with which the enactment is associated. Motive relates to historical reasons and political reasons that paved the way for enactment.

Objectives of Legislative Intention

If the legislative intention is certain but the meaning of the words are uncertain then the former ensures that courts expound the words of the statutes as intended by the lawmaker. Most importantly, legislative intention aids the courts in resolving ambiguity, inconsistency and removal of absurdity. If legislative intent is ascertained then it would ensure that judges do not go beyond the purpose and object of the law while they attempt to address ambiguity, uncertainty, anomaly, absurdity, obscurity and conflicts in law which sometimes can be cured by the court by twisting the language used in a law. Similarly, if legislative intent is ascertained, then it would aid the courts in choosing the kind of interpretation (strict or liberal, beneficial or literal) that a provision requires. Sarkaria, J., in Commr. of Sales Tax case[32] has pointed out that a statute is thought to be

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20. The rule is subject to legislative intention and the context. The rule emphasises that contemporaneous exposition of law is the best and most powerful method of interpretation.
21. The mandatory or directory provisions in a law are to be ascertained through the language in which it is expressed. Usually, the Legislature uses certain cues to indicate its intention and to communicate that a provision is mandatory or directory. However, the contextual understanding of such words and the consequences of reading such words as directory/mandatory must be taken into consideration. Mandatory provisions are to be construed strictly. On the other hand, liberal interpretation would be used by the courts to interpret directory provisions that provide discretion to authorities.
22. The Legislature uses 'and' to connect one part of a sentence with another part and uses 'or' to place those parts of sentences as alternatives of each other. Where such words are clear as to their usage, the courts must not deviate from it. However, the language is not the conclusive indicia to understand the true intention of the Legislature. Therefore, the effect/consequence of reading provisions in conjunction or disjunction must be considered.
23. According to this rule, unless there is anything repugnant in the subject or context, words in the singular includes plural and vice versa. The General Clauses Act, 1897, Section 13 states that unless there is anything repugnant in the subject or context, words importing the masculine gender shall be taken to include female. General Clauses Act is subject to clear intention expressed in a statute.
24. Institute of Chartered Accountants of India v. Price Waterhouse, (1997)6SCC312; Prithi Pal Singh v. Union of India, AIR 1982 SC 1413; Keshavji Ravji & Co. v. Commr. Of Income Tax, AIR 1991 SC 1806;Bharat Singh v. Management of Tuberculosis Centre, New Delhi, AIR 1986 SC 842.
25. M.N. Rao and Amita Dhanda, Supra note 13, at p. 406.
26. FAR Bennion and Barrister (eds.), Bennion on Statutory Interpretation, First Indian Reprint, (Nagpur: Lexis Nexis Butterworths Wadhwa, 2010), p.469.
27. P. St. J. Langan (ed.), Maxwell on The Interpretation of Statutes, 12thedn., (Nagpur: Lexis Nexis Butterworths Wadhwa, 1969), p.28.
28. It is said thatafter enacting a law the Legislature becomes functus officio. See G.P. Singh, Principles of Statutory Interpretation, 13 edn., (Nagpur: Lexis Nexis Butterworths Wadhwa, 2012), p. 4.
29. Union of India v. Elphinstone Spinning and Weaving Co. Ltd., AIR 2001 SC 724, at p. 739.
30. G.P. Singh, supra note 28, at p. 12.
31. See FAR Bennion and Barrister,supra note 26, at pp.483-84.
32. Commissioner of Salex Tax, Uttar Pradesh v. Mangal Sen and Shyam Lal, 1975 ALL LR 289 (SC).

an authoritative repository of the legislative will and the courts have an obligation to interpret law in accordance with it. This would ensure giving effect to law and its purpose.

Legislative Intention - not ascertainable

It is said, "a'real' or 'true' legislative intention means an intention formed or adopted by a legislator, while participating in the law-making process, as to the meaning, application or purpose of the proposed law or any specific part or parts of it. Only some intentions prevail in the law-making process. Those that do, whether real or fictional, will be referred to as intentions 'recognised by the law'…"[33] Thinkers like Dias, Corry, Jamieson, and others argue that 'legislative intention cannot be ascertained. Dias is of the view that reference to intention seems to be superfluous.[34] Corry opined that legislative intention is a myth[35] and Jamieson called it fiction.[36] These thinkers believed that legislative intention is a slippery phrase that cannot be ascertained for the following reasons. Firstly, the words may be chosen by the Legislature cautiously but such words could have multiple meanings or multiple referents that cannot be avoided at all in any language. Therefore, the idea that words chosen by the Legislature reflect its intention is not sustainable. Secondly, there is nothing called as the intention of the legislator as it does not have a mind of its own.[37] The Legislature does end up in passing the laws more out of a compromise than by mode of consensus.[38] The actual bill undergoes a significant number of changes and takes a different shape than the House that introduced had earlier provided. The legislative houses debate, deliberate and it is the majority that brings the law into force but that majorityview may not be the true conviction of the entire Legislature.[39] Thirdly, the meaning of the words employed in a Statue varies with varying context and times. This would mean that legislative intention also varies with context and times as they are truly reflected by words found in a law. This cannot be accepted, as intention of the Legislature must be certain. Lastly, one of the humorous ways of questioning the objective standards of ascertaining legislative intent is "a million monkeys dancing for a million years on a million typewriters might at random reproduce the plays of Shakespeare"[40]- but is that a work of Shakespeare? Well, the intention behind using this jargon is not to compare the legislative intention found by the judges to the random version of Shakespeare that is referred to above. The author uses it to convey that laws are not shaped randomly. However, the argument would indicate that the so-called legislative intent is what a judge ultimately pronounces. This would mean that if interpretations of judges vary then the meaning of the Legislature varies according to their exposition. Is it possible to accept such varying versions or multiple versions of legislative intention supplied by the courts? Alternatively, if intention of the Legislature is not always consistent then it would be uncertain. Therefore, the advocates of this view argue that legislative intention is a slippery phrase and it cannot be truly ascertained.

Legislative intent - ascertainable

Thinkers of the stature of Francis Bennion and Craies have asserted that courts can ascertain legislative intention. Firstly, inter alia, they believe that the Legislature makes the law with the help of certain committees such as Drafting Committee or Standing Committee, which comprise of expert drafters and subject specialists who select the words and phrases in law to meet its purpose and object. Laws are not just words; they are words with particular, intended meanings.[41] Thus, there is no word selected randomly and this upholds the statement of "animus hominis est anima scriptii."[42] Secondly, the form and substance of a law prepared by the appropriate committee in the Legislature would be tabled before the legislative members for their considerations and deliberations, after which the law would be passed, based on majority of votes. Therefore, it is sufficient to believe that legislative process re-verifies whether the draft enactment meets its intent and purpose.[43] Thirdly, the Legislature supplies the required language and internal aids by which the interpreter can ascertain the will of the maker. Fourthly, it is said, "Context does much to fix the extension of a general word, but even the fullest consideration of context generally leaves an uncertain fringe of meaning… (even) if every member of the legislature voting for the bill reflected at length on the extension of the particular general word, for reflectionwould not necessarily entail agreement…"[44] Reading of law in the context is a standard rule of interpretation and this would mean that the meaning of law might vary with changing circumstances and legislative intent necessarily could be understood differently. However, selection of static meaning to

33. Jim South, Are Legislative Intentions Real?Monash University Law Review (Vol 40, No 3), pp. 853-54, available at http://www.austlii.edu.au/au/journals/MonashULawRw/2014/33.pdf
34. Reginald Walter Michael Dias, Jurisprudence, 5thedn., (London : Butterworths, 1985), p. 166.
35. J.A. Corry, The Interpretation of Statutes (1935) reprinted in E. Driedger, the Construction of Statutes, 3rd edn., (Canada: Butterworths, 1994), p. 203.
36. Jamieson, Towards a Systematic Statute Law, (1976), Otago LR 568.
37. E. Driedger, supra note 35, at p.82.
38. Ibid.
39. Jim South, supra note 33, at p.867.
40. Geoffrey Darnton, Is Bennion enough?Doc. No. 2009.006 .NFB, available at http://www.francisbennion.com/pdfs/non-fb/2009/2009-006-nfb-si-amazon-review.pdf, last visited on 23 July 2015.
41. Jim South, supra note 33, at p. 871.
42. It means that intention of the man is the soul of what he writes.
43. Jeremy Waldron, Law and Disagreement (Oxford: Oxford University Press, 1999) Chapter 6 in Jim South, supra note 33, at p. 874.
44. Payne, The Intention of the Legislature in the Interpretation of Statutes, 9 Current Legal Problems 96, (1956), at p.98.

words in a statute or non-dynamic understanding of legislative intent would prevent development of law, which in turn would make the law redundant. On the other hand, if circumstances of the case or the context in which a law stands applied happens to be the same then legislative intent remains unaltered. Fifthly, the courts have developed and adopted required principles and rules of interpretation which ensure that the judicial attempt to discover legislative intent is fruitful instead of being ineffective. The courts do spend time to discover neither a fiction nor a slippery phrase. Judges are mindful of their efforts and they follow systematic method of interpretation and make extensive use of internal and external aid to ascertain legislative intention that is discoverable. Sixthly, the speculation that judges ascertain legislative intention in a subjective manner must end. This is because, as an institution, the Judiciary is primarily responsible for adjudication and interpretation of law and has developed an objective, coherent and systematic manner of ascertaining legislative intention. Judges are legal experts and they help in administration of the system by rendering necessary expositions of law. Lastly, if statute is read in the context and optimum use is made of all the parts of the statute and legislative guides/internal aids then intentia legis is ascertainable.

Conclusion

Both sides of arguments advanced by the thinkers concerning the ascertainableness of the legislative intention are rational and strong. However, the fact that courts have spent an umpteen number of years and several cases dedicated to dealing (directly and indirectly) with the technique of discovering legislative intention[45] supports the proposition that legislative intention is ascertainable. The intention must be sought first in the language of the statute itself. For that, it must be presumed that the means employed by the Legislature to express its will are adequate and it has expressed that will correctly. The techniques used to ascertain legislative intention comprise of reading the entire statute in the context, reading of all relevant parts of the statute, consulting statutes in pari materia, and the use of presumptions, precedents and other appropriate external aids to construction. These techniques are objective, systematic and efficient. The techniques also have proximate nexus with common sense approach. Thus, it may be known as coherent and reasonable. The Courts must consult purpose and object of the Act in the process of determination of meaning or intention of the Legislature. Statements made by the introducer of the Bill or speeches made by the members of the Legislature on a law cannot be solely consulted by the courts to discover the true intention of the lawmaker. If the language of the statute is ambiguous, lacks precision, or is susceptible of two or more interpretations, the intended meaning of it must be sought by the aid of all pertinent and admissible considerations. But here, as before, the object of the search is the meaning and intention of the legislature, and the court is not at liberty, merely because it has a choice between two constructions, to substitute for the will of the legislature its own ideas as to the justice, expediency, or policy of the law. In the process of ascertaining legislative intention, the courts must take into consideration the cues provided by declaratory statutes, subsequent legislations, amending Acts, and Acts introduced to codify or consolidate law. In addition, it is essential to take into account the nature of legislation. Lastly, in ascertaining the intent of the lawmaker concerning a subordinate legislation, the interpreter must read it along with the parent Act.

45. For instance, see Venkataswami Naidu R v. Narasram Naraindas, AIR 1966 SC 361, at p. 363; District Mining officer v. TISCO, AIR 2001 SC 3134, at p. 3152; State of Himachal Pradesh v. Kailash Chand Mahajan, AIR 1992 SC 1277; Ameer Trading Corporation Ltd., v. Shapoorj DataProcessing Ltd., AIR 2004 SC 355; Ruma Aggarwal v. Anupam, (2004) 3 SCC 199; National Insurance Co. Ltd. v. Laxmi Narain Dhut, AIR 2007 SC 1563.

Active Citizenship for Good Democratic Governance

Ms. Aswathy G. Krishnan*

Introduction

> *In the happiness of his subjects lies his happiness, in their welfare his welfare; whatever pleases him (personally), he shall not consider good, but whatever makes his subjects happy, he shall consider good.*

These words from Arthashastra, describe how governance should be, and reveal that the thrust of good governance lies in the happiness and welfare of the citizens. Governance is not what the governments do, but it is about the process and system of decision making which mobilize and utilize public resources for common good.[1] The test of good governance is the extent, to which it delivers, protects and ensures human rights – civil, political, economic, cultural & social.[2] Thus from a common man's perspective, good governance guarantees basic rights of heath, adequate living, quality education etc. to the citizens. So the key to good governance are the citizens, as they are its beneficiaries. But their role does not end there; they also are the agents of it, as evidenced from the two broad models of contemporary citizenship.[3] On one hand is the active participation of citizens in public affairs[4] and on the other hand is their passive enjoyment of rights and entitlements.

Role of citizenry in a democracy

To be a citizen is to be a member of a more or less self-contained political unit such as a modern state.[5] And this condition of being a citizen denotes citizenship. The form of citizenship is always tripartite, comprising a person, the institutional matrix of his/her political community and the terms of that relationship. The substance of those terms are the citizenships affective, political and legal dimensions arising construals of the citizen as member of an affective community (involving important senses of belonging and communal identity), as a contributing participant in the collective decision making process of the polity and as the holder of legal personality and bearer of publicity enforceable rights & duties subject to the jurisdiction of the polity.[6] There must be co presence of all these three aspects of citizenship.

Citizenship is the criteria as well as the precondition for democracy. The idea of citizenship has a long history in western political philosophy, beginning with the city state of Greece.[7] The beginnings of citizenship are located in the shift from warrior societies to agricultural and commercial societies in the ancient Greece and the development of the communal decision making spaces of the city state. All the citizenship was reserved to the minority of the population and it permitted and expected active and direct participation by that citizenry.[8] Example: Socrates was tried by the whole citizenry rather than some subset of it. This established for the first time the idea of an active commitment to the common good of the community as the politically dominant form of allegiance. Within this historical frame work citizenship has been thought of as both a status and a practice.

As status, it entails formal relationship between the individual and the state including rights (like voting, free speech, freedom of expression etc.) with a few responsibilities. As practice,

1. Common good refers to a comprehensive set of goods in which the entire civil society participates; YVES R SIMON, PHILOSOPHY OF DEMOCRATIC GOVERNMENT 22 1993.
2. SEE WESTHOLM A, J.R.MONTERO & J.W VAN DETH, INTRODUCTION: CITIZENSHIP, INVOLVEMENT AND DEMOCRACY IN EUROPE 1-32 (ROUTLEDGE 2007).
3. ENCYCLOPEDIA OF DEMOCRATIC THOUGHT, Paul Barry Clarke and Joe Fowerakeredt. 52 – 57 (Routledge, 2001).
4. Republication conception of citizenship with the source ultimately to Aristotelianism.
5. Supra note 4 at 52.
6. ENCYCLOPEDIA OF GOVERNANCE I, Mark Benir Editor SAGE Publications (2007).
7. Greek Polis Athens venerated the idea of active, participatory citizen. In this system of self-government those who were assigned to be governors were at the same time governed. Direct participation to the assembly was integral to the life of the ancient Greek Polis. See MichealMarinetto, Who wants to be an active citizen? The politics and Practice of community involvement Vol 37 No 1 SOCIOLOGY 103-120 February 2003.
8. Supra note 7.

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citizenship entails obligation, i.e. the responsibilities and activities that make up the essence of political life such as the participation in governance and the duty to consider the general good.

Thus there are three key characteristics of citizenship: role and responsibility in making the rules of the community, role and responsibility in the common life and values of the community, and the ability and act of engaging with others in the common task of importance to the community. Therefore citizenship is that which make us participative, pro-active and responsible towards society. And the core value of citizenship includes democracy, social justice, equality, peace and respect. Thus what we aim at is participatory democracy.[9]

First, one needs to inculcate the consciousness in people that democracy is a continuous process and not confined to voting during election times. The safety and reality of a democracy depends on the training of the average citizen to feel a moral responsibility for the results of the political process. Therefore democracy is not merely voting once in five years and complaining in between. This is only procedural democracy. What is aimed is more democracy, good democracy that is participatory democracy through active citizenship. Thus it is crucial to the development and preservation of a civil society.

Active citizenship

Active Citizenship associates with an active citizenry having the authority to engage in flexible decision making as characterised from influential citizen participation which contain activities like voting, joining public hearings, being part of citizen boards and participating in public opinion analysis.[10] Taking an active part in the life of the community and in the affairs of the nation is called active citizenship. The notion of active citizenship transpired in the latter half of the 20th century.[11] By combining the conservative emphasis upon duty with the liberal emphasis on individualism, we get the neo liberal thought. This new right thinking remodelled citizenship by downplaying rights and emphasizing on obligation. This version of citizenship is based on certain assumptions or presumptions that too much of intervention by the state undermines individual liberty. So lack of state intervention will encourage individuals to be self-sufficient which benefits both state and individual. This way of citizenship promotes dignity and self-respect. Here the main focus is on obligation and this creates a healthy civil society.

At the individual level, active citizenship means self-confidence and overcoming the insidious way in which the condition of being relatively powerless can become internalized. In relation to other people, active citizenship means developing the ability to negotiate and influence decisions.[12] When empowered individuals work together it means involvement in collective actions, be at the neighbourhood level or more broadly. Although active citizenship is specified in the individual level in terms of actions and values, the emphasis in this concept is not on the benefit to the individual, but on what these individual actions and values contribute to the wider society in terms of ensuring the continuation of democracy, good governance and social cohesion.[13]

Active citizenship strategy calls for the individual citizen to recognize their moral responsibilities to care and provide for the needy neighbours, and meet their obligation to give their talents and skills in the management of public and welfare services. A healthy civil society having active citizenship is necessary for good governance and a necessity for good democracy and vice versa.

Viewing this approach to public policy across a number of policy areas, the state can be seen to be implementing an active citizenship strategy. This places greater emphasis on the relationship between state and individuals and on the interface between political arrangement and social structure. This is what Smith offered as state-civil society framework, which is a more established concept in Western societies. Groundwork for establishing the notion of active citizenship as a level of government policy in Britain was laid down by Prime Minister Margaret Thatcher in her address to the General Assembly of the Church of Scotland in May 1988.[14]

There are two dimensions to the concept: services oriented perspective which aims primarily to improve the efficiency and economy of services, and Citizen oriented view which would seek to make people better democrats and fuller members of their political communities, and to enhance their personal development by involving them in all levels of public service from policy to performance.[15] This shows that active citizenship should be shown to have social as well as individualistic benefits. Some common good or purpose must be defined to which active citizenship contributes. This will inculcate a desire for participation among citizens.

The concept of active citizenship brings together three domains of development theory and practice.[16]

9. Participatory democracy favours the development of a sustainable and more ethically balanced relationship between human kind and nature. It implies direct citizen participation in decision-making in forums where debate approximates the norms of deliberative conceptions of democracy. See Green, Democratic Thought in ENCYCLOPEDIA OF DEMOCRATIC THOUGHT, Paul Barry Clarke and Joe Fowerakeredt. 52 - 57 (Routledge, 2001).
10. Seyedali Ahrani, Jamailah Othman, Bahaman Abu Samah, Jefferey Lawrence D'silva and Salleh Hassan, Active Citizenship by active learning 14(20) JOURNAL OF APPLIED SCIENCE 2450-2459 2014.
11. Supra note 7.
12. See Clarke M and B.Missingham,Active Citizenship and social AccountabilityVol 19 No 8 DEVELOPMENT IN PRACTICE 955-963 2009.
13. Hoskins B,Monitoring Active citizenship in the European Union: The Process, the results and initial Explanations 11(1) CADMO 1-16 2009.
14. See Adrian J Kearns, Active Citizenship and Urban Governance Vol 17 No 1TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 20-34 1992, for the political development and objectives of active citizenship strategy, its prospects and limitations in Britain.
15. MichealMarinetto, Supra note 8.
16. Clarke M and B.Missingham, Supra note 13.

One is participatory development. This ensures bottom to up participation in the domain of civil society.[17] This will help to focus on incorporating community members into the decision-making process. With the passage of time this participation has increased from a passive attendance at consultative meetings to an active engagement and ownership of the development intervention itself. This will create a relationship between community members and the intervening agencies like NGOs. The poor, who are struggling for daily living, are the least involved in participation. Intervening agencies should promote their participation at suitable times, and in favourable locations and situations. This participatory development was reframed in terms of active citizenship in the recent years.

Another is right based development. Active citizenship invokes the idea that individual and groups are members of national political communities with legally and morally enforceable rights in relation to the state. State in this view has a moral responsibility to protect the same. This right based approach to development is also closely linked to good governance.[18] Good Governance can be considered as an amalgamation of certain elements like participation, Accessibility, Transparency, Responsiveness and efficient government are based on rule of law. Good democratic governance must be participatory and inclusive of all citizens, to defend citizens' rights and also to affirm the legitimacy of the diversity of the citizens' opinions and views. Citizen's voices and interest shall be heard in public policy choices and allocating resources and in the monitoring of public service delivery and public spending. There also exists a relationship between the state and the individual which comprises of a series of rights and responsibilities. It is predominantly linked to the notion of rights, which can be both negative and positive.[19] Negative means those are restrictive rights and positive means those are permissive rights.

Thus active citizenship draws together the idea of participation, right based development and good governance.

Youth Active Citizenships

The role of young people as active citizens and leaders of social change must be recognized. Latin American and Caribbean regions have a long tradition in this regard. South east Asian countries have demonstrated new initiatives that support youth in positive roles in their community.[20] USA President Barack Obama has cited youth civic engagement as one of the priorities in his address to a joint session of Congress in February 2008. An important landmark is the World Bank's World Development Report, 2007, which focused on youth and youth services. In its wake in 2008, the International Association For National Youth Service involved participants from 42 countries in a conference in Paris to talk about youth active citizenship and the need to strengthen a growing global network of practitioners, policy -makers and researchers and youth service.

It is important to invest in youth active citizenship as young people are key to changing people's attitude on a range of issues. And to organise youth means to achieve attitudinal change. The power of the youth needs to be recognised as they have the ability, power and bargaining capacity for making the necessary contributions.[21] A realisation of this can be seen in bringing young people in the mainstream in governance. Youth wings are now represented in the mainstream of politics.

Conclusion

To have a democratic good governance, greater participation in good governance, developmental policy and planning at the local levels must be encouraged. Meaningful consultations between local government and citizens, that is citizens engagement with local structures of governance is a good measure. This is possible through local popular council, citizen advisory board to public institutions etc.The political space for citizens must be expanded to engage in associational life and collective civic action in public policy, planning, public service delivery, monitoring of effectiveness of public institutions.

The three broad areas of active citizenship can be giving poor communities a real voice in shaping their development priorities, monitoring the effective delivery of public services and development projects at the grass root level and enhancing local participation in government process, beyond just taking part in elections. Citizens must hold to account the decision makers and make them responsible for their decisions and if the citizens deem that these decisions were inappropriate, they must seek redress. And this factor largely determines the degree to which active citizens successfully engage in their community.

One of the greatest way of envisaging democracy within an elected constituency is the formation of citizen's action group. Cross section of citizens will be able to identify common problems and they should express their determination to vote only if those are resolved. And if this becomes successful in a constituency it spreads throughout the country. Thus active citizenship by encouraging participation can ensures common good which is the object of good governance and can transforms our mere procedural democracy to a participatory democracy.

17. COOKE B and U. KOTHARI, PARTICIPATION: THE NEW TYRANNY 9 (2001).
18. Clarke M and B.Missingham, Supra note 13.
19. Supra note 7.
20. NURTURING YOUTH ATIVE CITIZENSHIP IN INDIA, Report on a Stakeholder Consultation, New Delhi 4 March 2009.
21. See Lisa Schultz, Jose Roberto Guevara, Samantha Ratnam, AniWierenga, Johanna Wyn and Charlotte Sowerby, Global Connections: A Tool for Active citizenshipVol 19 No 8 DEVELOPMENT IN PRACTICE 1023-1034 November 2009 for reflections on how young people can be engaged as active citizens within both a developing country and a developed country.

Cybercrime: The New Corporate Crime

Ms. Savitha Kesav Jagadeesan*

Business houses are trying to establish their presence on the internet and through the internet. Now the idea is to show technology is being used to create business and is considered a cornerstone to business growth and change. In fact the B2B market is predicted to exceed USD 5 trillion in the early 21st century.[1] However this rush to exploit the medium is regardless of security preparedness of the business community. Data exchange information sharing is happening many a times without security of the internet being checked. In this scenario, the vulnerability of the internet is being exploited by criminals, due to which cybercrime has shown an exponential rise and has clearly become an existential threat for businesses.[2] India was ranked among the top five countries to be affected by cyber crime as per the Internet Security Threat Report 2014 by Symantec. In the report titled "India Risk Survey 2015', released by the Federation of Indian Chambers of Commerce and Industry (FICCI),[3] Information and Cyber Insecurity' was listed as one of the top risks to the government and business establishments alike, at times even ahead of traditional risks such as Terrorism and Natural Hazards. The cost of cybercrime to the global economy[4] in 2015 has risen from the 2012 figure of USD 110 billion dollars[5] to USD 400 billion, nearly 4 times, in a span of 3 years. In 2015, 315 million was the number of increased malware, 5291 new Cybercrime vulnerabilities were discovered, with 40% increased attacks on mobile operating systems, potentially so as nearly 30% of the populations seeks to use mobile applications making this a vulnerable target for cybercriminals. Businesses continue to be sweet targets, with 41% of targeted attacks aimed at businesses. The foregoing figures should have had a deterrent effect, but on the contrary businesses have embraced computer/internet technology to do business in some form or the other. The increased use of this phenomenon has seen cybercriminals exploiting the situation and coming up with new tools and vulnerabilities to hit at targets such as business houses that can be held to ransom and made to pay big monies. Needless to state that the characteristic features of cybercrime such as transnational character that makes geographical boundaries insignificant, scattered regulation, and irregular prosecution all makes this type of crime very attractive.

The other extremely lucrative aspect of cybercrime is the low risk and low cost to the cybercriminal. However the opposite is true for the victims. Responses to cybercrime by the corporate community are a business decision. Therefore the quantum of risk involved, as against the cost to correct or defend the risk is the decision that reflects on the complacency of the companies and their willingness to be realistic on their vulnerability to cybercrime and losses incurred. Thus the implications of cybercrime on business are far-reaching. It speaks of serious consequences such as business disruption and loss of sensitive information, including intellectual property and trade secrets. This is followed by loss of reputation and brand name as also monetary loss caused due to equipment damages. The primary goal for cybercriminals is financial fraud and/or access to the company's financial records with very little percentage of attacks is motivated by political or ideological agendas.[6] Despite the alarming nature of the potential of exploitation, internet security has not become a boardroom priority in many organizations. Many would rate cyber attacks risk low. Relatively few organizations have recognized the cybercrime threat and even fewer have addressed it. In the Symantec 2013 report many surveyed businesses especially small

1. Kratchman, Stan, J. Smith, and L.M. Smith. 2008. Perpetration and Prevention of Cyber Crimes. Internal Auditing. Vol. 23, No. 2 (March-April): 3-12. Also see: Smith, Katherine; Case Studies Of Cybercrime And Their Impact On Marketing Activity And Shareholder Value at: http://www.readperiodicals.com/201107/2439608891.html#ixzz2UQ80wNnLhttp://www.readperiodicals.com/201107/2439608891.html#ixzz2UQ7nqGlK; See Dr. Zeinab Mohamed El Gawady,' The Impact of E-commerce on Developed and Developing Countries Case Study: Egypt and United States at http://www.must.edu.eg/Publications/Businees_Res5.pdf last visited on 26 May 2013.
2. Economic Times Corporate Dossier, Page 1, July 03-09, 2015.
3. See Report at http://ficci.com/SEDocument/20328/India-Risk-Survey-2015.pdf last visited at 05 July 2015.
4. Eric H. Holder, Jr., Deputy Attorney Gen., Remarks at the High-tech Crime Summit (Jan. 12, 2000), available at http://www.Cyber crime.gov/dag0112.htm. In 2005, "computer-based crimes caused $14.2 billion in damage to businesses around the globe according to Computer Economics, an Irvine, California research firm."
5. Norton Cyber crime Report 2012. Norton by Symantec in its annual Norton Cyber crime Report, which is based on self-reported experiences of more than 13,000 adults across 24 countries, calculates the direct costs1 associated with global consumer Cyber crime at US $110 billion2 in the last one year.
6. Ponemon institute; The Impact of Cyber crime on Business-Studies of IT practitioners in the United States, United Kingdom, Germany, Hong Kong and Brazil; http://www.ponemon.org/local/upload/file/Impact_of_Cybercrime_on_Business_FINAL.pdf (2012) last visited on 23 May 2013.

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businesses did not have a well-defined security plan in place.[7] Many do not apportion amounts towards internet security or the segment in the budget is marginally low compared to the risk. Of course higher spending does not necessarily yield greater security. Organizations may allocate significant resources to technological security measures, but neglect simple, inexpensive measures such as patch management, log analysis, privilege restrictions, password expiration, and termination of former employees' access through a robust de-provisioning process.[8] Thus the failure to recognize cybercrimes in their IT environments and misallocating limited resources to lesser threats; example, organizations focus heavily on foiling hackers and blocking pornography leaving major cyber crimes undetected and unaddressed; has generated significant risk exposure, including exposure to financial losses, regulatory issues, data breach liabilities, damage to brand, and loss of client and public confidence.[9]

Some aspects of cybercrime to today's business environment are enumerated below:[10]

- New risks require new measures.
- scaled international business activity expands the scale and scope of risks.
- Increased use of Technology tools mean spread of cyber vulnerabilities such as viruses, system compromise, potentially affecting interconnected parties.
- Cybercriminals devising new techniques not proportionate to cyber defenders responses to the new vulnerabilities.
- unique problems related to digital information, intellectual property not considered.[11]
- Reporting continues to be inadequate as are responses.

Deloitte[12] analyzing the 'clear and present danger of cybercrime in their white paper have indicated the ability of cybercriminals to target organizations and individuals with malware and anonymization techniques so as to evade current security controls. These security controls such as perimeter-intrusion detection, signature-based malware, and anti-virus solutions are providing little defense and are rapidly becoming obsolete especially with cyber criminals exploiting encryption technology to avoid detection. Thus cyber criminals are leveraging innovation at a pace that the target organizations and security vendors cannot possibly match. They continue to exploit this innovative technology to operate undetected within the very "walls" erected to keep hackers out. They have abilities to exploit technologies to include rogue devices plugged into corporate networks, polymorphic malware and key-loggers that capture credentials and give them privileged access while evading detection. These technologies keep detection at minimal until there is a significant exposure.[13] Therefore even if effective deterrents to cybercrime are known, they are not readily available, or accessible to many practitioners. Added to this problem is also the nature of practitioners to underestimate the scope and severity of the problem.[14] Let us take the example of a Russian group that attacked one of the best known US banks in New York via data networks in 1994. Operating from St. Petersburg, the group succeeded in causing the American bank to transfer over US$ 10 million to foreign accounts.[15] Though some of the perpetrators were caught what was interesting was the fact that some of the arrested perpetrators possessed false Greek and Israeli passports which were forged in a quality which could be produced in Russia only by members of the former Russian secret service KGB. The other example is of the theft on a fuel distribution firm in North Carolina. This firm lost more than $800,000 in a cyber-heist. Had the victim company or its bank detected the unauthorized activity sooner, the loss would have been far less. But both parties failed to notice the attackers coming and going for five days. The cyber thieves began siphoning cash in sub-$5,000 and sub-$10,000 chunks to about a dozen "money mules," people hired through work-at-home job scams to help the crooks launder the stolen money.[16]

The foregoing is a clear reflection of how the effects of cybercrime are far reaching and its costs insurmountable.

7. See CIO report http://www.cio.co.ke/news/top-stories/Cyber crime,-still-a-priority; Also see Highlights from 2013 Internet Security Threat Report, Volume 18, Symantec Report at http://www.symantec.com/about/news/release/article.jsp?prid=20120905_02; last visited on 26 May 2013.
8. Deloitte; Cyber crime: a clear and present danger Combating the fastest growing cyber security threat; 5 http://www.deloitte.com/assets/dcom-unitedstates/local%20assets/documents/aers/us_aers_deloitte%20cyber%20crime%20pov%20jan252010.pdf last visited 23 May 2013.
9. Deloitte; Cyber crime: a clear and present danger Combating the fastest growing cyber security threat; 5 http://www.deloitte.com/assets/dcom-unitedstates/local%20assets/documents/aers/us_aers_deloitte%20cyber%20crime%20pov%20jan252010.pdf last visited 23 May 2013.
10. Smith, Katherine; Case Studies Of Cybercrime And Their Impact On Marketing Activity And Shareholder Value: http://www.readperiodicals.com/201107/2439608891.html#ixzz2T9HwlSoW
11. Smith, Katherine; Case Studies Of Cybercrime And Their Impact On Marketing Activity And Shareholder Value: http://www.readperiodicals.com/201107/2439608891.html#ixzz2T9HwlSoW
12. Deloitte; Cyber crime: a clear and present danger Combating the fastest growing cyber security threat; 5 http://www.deloitte.com/assets/dcom-unitedstates/local%20assets/documents/aers/us_aers_deloitte%20cyber%20crime%20pov%20jan252010.pdf last visited 23 May 2013.
13. Deloitte; Cyber crime: a clear and present danger Combating the fastest growing cyber security threat; 5 http://www.deloitte.com/assets/dcom-unitedstates/local%20assets/documents/aers/us_aers_deloitte%20cyber%20crime%20pov%20jan252010.pdf last visited 23 May 2013.
14. Deloitte; Cyber crime: a clear and present danger Combating the fastest growing cyber security threat; 5 http://www.deloitte.com/assets/dcom-unitedstates/local%20assets/documents/aers/us_aers_deloitte%20cyber%20crime%20pov%20jan252010.pdf last visited 23 May 2013.
15. Datenschutz-Berater, Volume 10, p. 23. Also see Williams,Phil; Organized Crime and Cyber-Crime: Implications for Business; CERT Coordination Centre; 2002.
16. Krebs on Security; http://krebsonsecurity.com/category/smallbizvictims/last visited on 27 May 2013.

Therefore it is imperative that businesses recognise this and account for cybercrime in their business risks and margins, as organized crime has always selected particular industries as targets for infiltration.

Another reason that makes Cybercrime a potentially welcome area for criminals is also because it operates out of safe havens. The transnational nature of the internet perfectly fits the modus operandi for cybercriminals who have no borders to worry about. The borderless nature of this crime means that it equally makes policing problematic; large scale investigations slow and tedious at best, and impossible at worst.[17] This was one of the lessons learnt in the Love Bug virus case. Although the virus spread worldwide and cost business billions of dollars, when FBI agents succeeded in identifying the perpetrator, a student in the Philippines, they also found that there were no laws under which he could be prosecuted. Today more and more countries are passing legislations to combat Cybercrime, yet there exist jurisdictional voids from which criminals and intruders continue to operate with impunity.[18]

This suggests that there is a need for major changes in thinking about cyber-security and in planning and implementing security measures. These are particularly important if e-commerce is to reach its full potential and if individual companies are to avoid significant losses as a result of criminal activities. Perhaps the most important change required is in our thinking. Security has to be understood in broad rather than narrow terms, and security can no longer be an after-thought, but needs to be part of intelligence, planning, and business strategy. Businesses must understand the implications of Cybercrime to their businesses and address the situation in house before it is too late. The need of the hour is for companies to factor cybercrime into their business risk margins and take abundant precaution to fight against these vulnerabilities.[19] Further the fight is not only through creating security measures through the medium itself but also to seek to provide for measures in the legal sphere to address the situation, as any form of crime is socially harmful.

17. Williams,Phil; Organized Crime and Cyber-Crime: Implications for Business; CERT Coordination Centre; 2002.
18. Williams,Phil; Organized Crime and Cyber-Crime: Implications for Business; CERT Coordination Centre; 2002.
19. Williams,Phil; Organized Crime and Cyber-Crime: Implications for Business; CERT Coordination Centre; 2002.

Corporate Social Responsibility: Finland and India

Ms. Mari Tuokko*

Introduction

The world has faced a rise of global problems such as climate change, pollution, poverty, and population growth with a degree that has never been experienced before. At the same time, there has been a quick emergence of multinationals in the cheap labor markets and developing countries. Human rights are being continuously violated by Multi-National Enterprises (MNEs) and there have been severe environmental disasters around the world. These and many other changes have raised a serious need for multinational enterprises to take more responsibility towards the communities and environments that they operate in. For these and many other reasons Corporate Social Responsibility (CSR) has set its foot on the international business agenda during the past two decades. Most of the development of the CSR has taken place during the recent years.

Globalization has increased the complexity of business operations and made it more difficult to monitor them. The regulation of CSR heavily lies on international recommendations, but there are no universally accepted standards of CSR. Slowly, the governments have begun to understand the growing need in the promotion and monitoring of different guidelines in CSR. The objective of this essay is to present an overview of the current situation of CSR in Finland and in India. I will start by defining the concept of Corporate Social Responsibility and giving a short introduction of its conceptual development. Then I will introduce the main international initiatives and declarations guiding CSR regulation around the world. In the third and the fourth chapter, I will focus in describing the CSR policies in Finland and in India. In the end I will discuss about the current situation, and the latest research and topics of interest considering CSR in Finland and in India. I will conclude with a brief summary and a comparison of the current situations in both of the countries.

Corporate Social Responsibility: a brief history of the conceptual development and the definition

Corporate Social responsibility is not a new concept; it is as old as civilization. It is originally built on an idea that industry leaders have to manage their wealth so that it also benefits the common people. However, the concept has been theorized in literature for the first time in the 20th century. Most scholars consider Howard Bowen's Social Responsibilities of the Businessman as the first proper effort to theorize the relationship between enterprises and society as late as in 1953 (eg.Carroll, 1979; Lee, 2008). Gradually after the publication of the book, the idea of CSR gained more visibility and became rather popular in the 1960s. In the 1960s and 1970s, the activities of multinational enterprises triggered passionate discussions that resulted in efforts to draw up international instruments for regulating their operations. However, during the early 1970s CSR was still mostly seen as a cost with highly uncertain outcomes and there was significant resistance from corporations in implementing CSR. Slowly break throughs in conceptual development of CSR followed. In the end of 1970s Carroll (1979) introduced a three-dimensional conceptual model of corporate social performance, which gained acceptance widely and was developed further. Few years later, Edward Freeman (1984) gathered together different ideas on the stakeholder approach and introduced the stakeholder theory which argues that socially responsible activities helped business in building strong relationships with stakeholders such as employees, governments and customers. Due to its emphasis on relationships, the stakeholder theory had strong implications to the development of CSR. (Lee, 2008.)

During the 1990s, already a significant percent of firms embraced CSR as an essential element in their organizational goal, and were actively promoting their CSR activities in yearly reports(Lee, 2008).In the end of the 1990s, John Elkington (1998) introduced the broadly recognizedconcept of "Triple Bottom Line", which stresses that a company's performance is best measured by the economic, social and environmental impact of its activities (Elkington, 1998). The concept gained a lot of attention and is still widely used in defining CSR. Echoing all these and many other ideas, the concept of "corporate social responsibility" was slowly developing and evolving. By the late 1990s, the concept of CSR had become globally acknowledged by all parts of the society from governments and corporations to non-governmental organizations and individual citizens. At this time also a majority of the key international organizations such as the United Nations, World Bank, Organization of Economic Co-operation and Development and International Labor Organization had already established guidelines and separate units to research and promote CSR. (Lee, 2008.)

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Throughout the past decades, different organizations, states, researchers and institutions have formed different definitions of CSR. The concept has been steadily evolving ever since it was introduced half a century ago (Lee, 2008).One of the most recent and widely used definitions nowadays is the one by the European Union. European Commission defines Corporate Social responsibility as "the responsibility of enterprises for their impacts on society". As an elaboration to this definition, the European Commission argues that enterprises "should have in place a process to integrate social, environmental, ethical human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders". (European Commission, 2015a).The Commission also emphasizes the voluntary nature of CSR: "CSR refers to companies voluntarily going beyond what the law requires to achieve social and environmental objectives during the course of their daily business activities"(European Commission, 2015b). World Business Council for Sustainable Development defines CSR as "the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large"(World Business Council for Sustainable Development, 1999).United Nations Industrial Development Organisation (2015) defines CSR as "a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders".

These are only a few examples on how CSR can be defined. There is no general definition of CSR; however, one can find a great common ground between them. Even though some definition go slightly further than others in proposing how far companies should go beyond managing their own impact and making a contribution to the accomplishment of greater societal goals, most of the definitions of CSR agree it focuses on the impacts of how one's business is being managed.All the definitions also emphasize the voluntary nature of CSR. According to Dahlsrud (2008) many of theCSR definitions mostly describe the phenomenon, but often fail to present any guidance on how to manage the challenges within this phenomenon. At one end of the range, CSR can be seen as a combination of good citizenship activities; at the other end, it can be seen as a way of conducting business that results in a long-term sustainability. The concept of CSR is closely related to concepts such as corporate citizenship, shared value, corporate sustainability and business responsibility.

International Guidelines for CSR

There are no universally accepted standards of Corporate Social Responsibility. However, over the past decade, the international community has made lots of progress in creating different guidelines for CSR. Companies, industry bodies, NGOs, inter-governmental bodies and multi-stakeholder groups have developed great amount of voluntary initiatives.These initiatives include for example voluntary guidelines and codes of conduct, and different kinds of monitoring and reporting procedures. Under such initiatives, hundreds of corporations and governments worldwide have publicly committed to uphold specific CSR standards.

Even though there is a variety of different CSR initiatives, the core challenges of CSR are often considered to be the same around the world: human rights, labor laws and the right of organization, environmental issues, and transparency and corruption (Royal Norwegian Embassy, 2013). Some prominent examples of international standards and initiatives regarding CSR in include United Nations Global Compact, United Nations Guiding Principles on Business and Human Rights, ISO 26000 Guidance Standard on Social Responsibility, International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises on Social Policy, ILO Declaration on Fundamental Principles and Rights at Work, and OECD Guidelines for Multinational Enterprises. None of these Guidelines is legally binding. I will shortly introduce these initiatives next.

The UN Guiding Principles on Business and Human Rights (1976)

The UN Guiding Principles on Business and Human Rights were created in 1976, but the latest update was done in 2011. The principles define what companies should do to avoid and address possible negative human rights impacts by corporations. The UN encourages all governments to develop a national action plan on business and human rights to implement the UN Guiding Principles. There are three main pillars to the UN Guiding Principles on Business and Human Rights. These are 1) The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication, 2) The corporate responsibility to respect human rights, that is, to act with due diligence to avoid infringing on the rights of others and address adverse impacts with which they are involved, and 3) The need for greater access by victims to effective remedy, both judicial and non-judicial. (UNHCR, 2015.)

As one of the first EU Member States, Finland launched a national action plan based on the UN *Guiding Principles on Business and Human Rights* in October 2014. The objectives of Finland's *National Action Plan* are to initiate procedures that will help businesses improve the way they take the human rights impacts of their activities into account. Main goals of the plan in Finland are legislative report, definition of the due diligence obligation, application of social criteria in public procurement and increasing dialogue between businesses and civil society. (Riivari & Piirto, 2014.)

ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977)

The International Labor Organization (ILO) is a United Nations agency dealing with human and labor rights, social justice, and work prospects. Its key aims are to promote rights at work, encourage employment opportunities and to enhance social

protection. ILO does not impose sanctions, but it registers complaints against entities that are violating international rule. It also uses conventions and recommendations to set international standards. (ILO, 2015.) The ILO "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" was established in 1977, when labor-related and social policy issues received more visibility among the public. ILO reacted by creating the Declaration and it has been updated several times since. The latest update was done in 2006. The Declaration offers guidance and advice to MNEs, governments, and employers' and workers' unions on how to uphold high standards of employment, training, work conditions, and industrial relations.Its guidelines are strengthened by certain international labor Conventions and Recommendations. The MNE Declaration has been serving as one of the central universal foundations upon which many other international labor conventions and recommendations have been developed afterwards. Following the adoption of this declaration, the ILO adopted a "Declaration on Fundamental Principles and Rights at Work." (ILO, 2014.) Finland and India are both members of ILO: India was on of the founding members and Finland joined ILO in 1920.

ILO Declaration on Fundamental Principles and Rights at Work (1998)

In 1998, ILO approved the Declaration on Fundamental Principles and Rights at Work. This Declaration covers four fundamental policies at work: (1) the freedom of association and the right to collective bargaining, (2) the elimination of forced and compulsory labor, (3) the abolition of child labor, and (4) the end of discrimination among employees. The Declaration emphasizes that the rights and principles are universal including all people in all countries, regardless of the level of economic development. (ILO Declaration on Fundamental Principles and Rights at Work, 1998.) The ILO declares that its member States have a responsibility to work towards entirely respecting the principles presented in the ILO Conventions, and the ILO Declaration on Fundamental Principles and Rights at Work has been ratified by most of the member states. According to the Ministry of Employment and Economy, Finland is committed to follow the ILO Declaration.

The commitment towards the ILO Declaration is being followed with different kind of procedures. Member States that have not ratified the primary Conventions are requested every year to report on the status of the relevant rights and areas where support may be needed. There are also three different ways to help the countries both that have and haven't ratified the Declaration. Firstly, an Annual Review from countries that have not yet ratified the Declaration offers Governments a chance to declare what measures they have taken and also gives labor associations an opportunity to express their views on the progress.Secondly, a yearly Global Report provides an overview of the current situation globally and attempts to highlight the areas that demand greater attention. Thirdly, technical cooperation projects are designed to strengthen local capacities to implement the principles into practice.(ILO, 2015)

UN: Global Compact (2000)

The UN Global Compact is the worlds biggest and first major corporate sustainability initiative that lays down universal principles on human rights, labour, environment and anti-corruption. The initiative includes ten principles in the areas of human rights, labour, the environment and anti-corruption. The principles considering human rights say that businesses should support and respect the protection of internationally proclaimed human rights, and that businesses should make sure that they are not complicit in human rights abuses.(United Nations Global Compact, 2015.)

Global Compact has its own network in India. The Global Compact Network India was formed in New Delhi in 2003. It is a platform for businesses, private sector organizations, civil society organizations, public sector and institutions. The Global Compact Network India helps stakeholders' practices to reach the universally accepted principles of United Nations Global Compact. The main objective of the Network is to provide a forum to Indian companies and organizations to build networks and to promote more entitiesto become members of the network. The Global Compact Network India currently has local chapters in 5 major Indian cities, which include Mumbai, Hyderabad, Chennai, Kolkata and Bangalore. (Global Compact Network India, 2015.) Finland supports the Global Compact efforts through development co-operation funds. Enterprises and other organizations in Finland can commit themselves directly to compliance with the Global Compact principles. (Ministry of Employment and Economy, 2013)

ISO 26000:2010 Guidance on social responsibility(2010)

The International Organization for Standardization (ISO) launched an International Standard providing guidelines for social responsibility in 2010. ISO 26000:2010 provides guidance to all types of organizations, regardless of their size or location. It's purpose is to assist organizations in contributing to sustainable development and it can be used as part of public policy activities. ISO 26000:2010 is not a management system standard; neither is it intended for certification purposes or regulatory or contractual use. It's purpose is to encourage organizations to go beyond legal compliance: it is planned to promote common understanding in the field of social responsibility, and to complement other initiatives for social responsibility, but not to replace them. ISO 26000:2010 is also not meant to prevent the development of national standards that are more specific, more demanding, or of a different type. In applying ISO 26000:2010, it is recommendable that an organization takes into consideration societal, environmental, legal, cultural, political and organizational diversity while being consistent with international norms of behavior.(ISO, 2010)

OECD Guidelines for Multinational Enterprises (2011)

The Organization for Economic Co-operation and Development (OECD), an international organization aiming to support economic progress and world trade, created the "OECD Guidelines for Multinational Enterprises" in order for them

to operate more sustainably. The Guidelines are one of four instruments of the 1976 OECD Declaration on International Investment and Multinational Enterprises. They have been updated five times since 1976 and the most recent update was adopted in May 2011. The Guidelines are created by the memberstates and they offer voluntary principles for responsible business conduct in areas such as employment, human rights, environment, bribery, consumer interests, and taxation. The organization includes 34 countries around the world; Finland is a member country of OECD, but India is not. (OECD, 2015.)

In Finland, the national contact point for the OECD Guidelines for Multinational Enterprisesis the Committee on Corporate Social Responsibility, which monitors the implementation of the OECD Guidelines in Finnish multinationals.The Finnish Government published the latest Corporate Social Responsibility action plan in November 2012.In addition, the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones helps enterprises establish themselves in countries where the conditions to operate do not support responsibility to the scale as preferred. (Ministry of Employment and Economy in Finland, 2013.)

Corporate Social Responsibility in Finland

Corporate Social Responsibility has long traditions in Finland dating back to the beginnings of industrialism and, through the development of the welfare state,social responsibility has become almost self-evident across society generally (Juholin, 2004).The long evolution of Finnish companies since the 18th century created fruitful ground for social responsibility.Already in the 1930s the business life in Finland acknowledged that there is philosophy of some kind of social responsibility. After this, another big leap in social responsibility discussion took place during the 1980's when more practical issues such as responsibility for employees, working safety and security were discussed. (Takala,1987; Takala, 1996). However, the environmental themes were left in the background for a long time in the CSR history, and concerns about preserving nature have remarkably increased during the last twenty years in all the Scandinavian countries including Finland. Reasons for this have been many environmental catastrophes and environmental hazards. Also firm's reputation and Finland joining the EU had an influence on this. (Takala, 1996.) However, despite the long tradition of CSR in Finland, the first initiative in the post-modern context was taken by The Finnish Confederation of Industry and Employers, which declared that "taking care of the values concerning the welfare of the environment and people is a prerequisite for the success of the company as well as for long-term profitability''. This was a start for another big wave of CSR discussion and development in Finland (Juholin, 2004).

Today, the Corporate Social Responsibility policy in Finland is governed by the Ministry of Employment and the Economy. In addition to this,many CSR-related issues are also governed by other ministries. For example issues related to sustainable development are dealt with in the Ministry of the Environment; issues related to development, human rights, and trade policies are dealt with in the Ministry of Foreign Affairs and State's ownership policy is dealt with in the Prime Minister's Office. However, the main responsibility is on the Ministry of Employment and the Economy, which acts as the body for internal coordination. In Finland there is also a Committee on Corporate Social Responsibility, which works under the Ministry of Employment and the Economy. The Committee is a consultative body that supports administrative decision-making. Members of the Committee represent authorities, trade and industry, and labor market and civic organizations. The Committee also acts as the Finnish National Contact point for the implementation of the OECD Guidelines with the Ministry of Employment and the Economy. (Ministry of Employment and Economy in Finland, 2013.)

Finland has ratified several international treaties on development, human rights, labor rights and the environment. The Finnish government is committed to compliance with corporate social responsibility by supporting the implementation of international codes of conduct guiding the operations of multinational enterprises. These recommendations and frameworks considering Corporate Social Responsibility are aligned with the CSR strategy of the European Union.The CSR strategy of the European Commission is built upon the following Guidelines and Principles: United Nations Global Compact, United Nations Guiding Principles on Business and Human Rights, ISO 26000 Guidance Standard on Social Responsibility, International Labor Organization Tripartite Declaration of Principles concerning Multinational Enterprises on Social Policy and OECD Guidelines for Multinational Enterprises. (European Commission, 2015a.) Being a member State, these principles are also guiding the CSR policy of the Finnish government. In addition to these, the Finnish government is also committed to follow the ILO Declaration on Fundamental Principles and Rights at Work (1998). As Finland is committed to support these guidelines, the government attempts to influence domestic companies so that they operate in a sustainable and responsible way in Finland and abroad. (Ministry of Employment and Economy, 2013.)However, it is important to note that implementing these guidelines is completely voluntary for enterprises.

Corporate Social Responsibility hasn't established itself as a political concept in Finland, but instead it has been used as to describe the self-regulation of companies and the recommendations related to it (Malmelin, 2011). The Finnish government emphasizes the voluntary aspect of CSR in its public policy. Key pieces of legislation related to employment, accounting, social security and environmental protection form the baseline for corporate social responsibility in Finland (Kourula, 201). However, even though CSR activities are voluntary in Finland, the responsibility-related legislation is highly developed in the country. Like in many countries, also in Finland, national legislation includes many laws that are also addressed by corporate responsibility. It is also important to note that the laws are followed with extreme care, which is an essential feature of Finnish society. The development of the

welfare society has basically changed the status of companies in Finland: companies still have a significant role in providing employee health services and other benefits, but they also have an obligation to participate in the maintenance of society by paying taxes (Juholin, 2004). Also labor unions have an important role in Finland as in the other Nordic societies, and they form the basis for the so-called agreement society. Union density is high in Finland, with almost 80% of employees in unions (Lehto & Sutela, 2009).

In 2011, Corporate Social Responsibility was for the first time integrated into Finland's central government program, with the key entry emphasizing the ambition for Finnish companies to be forerunners in the field of CSR. (Ministry of Employment and the Economy in Finland, 2015.) The current CSR policy is based on national plans and strong stakeholder engagement. The most recent CSR plan was adopted in 2012 featuring close engagement both from the private and public sector. Among the priorities of the policy are the promotion of socially responsible public procurement, and ensuring social responsibility among state owned companies. In order to realize this, the fully state-owned companies and companies with a majority shareholding by the state are required to hand in a clearly distinguishable CSR report as part of their annual reports. The government is also currently working on an implementation plan for the UN Guiding Principles on Business and Human Rights.(Ministry of Employment and the Economy, 2013.)

Besides the companies and the government, there are also many other organizations and bodies in Finland influencing on CSR issues. Confederation of Finnish Industries (EK) is the leading business organization in Finland and it has a central role in the CSR issues. The EK was formed in the beginning of 2005 and it is centrally involved in labor markets with its member associations. The organization has a central status in the Finnish policy making and it also has a significant negotiating power in Finland as the country has universal validity of collective labor agreements. (Confederation of Finnish Industries, 2015.)There are also many other active non-governmental organizations in Finland concern about CSR issues, which are very active in attracting public interest to CSR issues. Finnish Business & Society (FiBS) is an organization that encourages and helps Finnish companies to incorporate CSR in their strategic planning and day-to-day management. It is a business driven network which is partly funded from the Ministry of Employment and the Economy(Ministry of Employment and the Economy, 2013). Another one is Finnwatch, which monitors the impacts in developing countries of the operations of Finnish companies, and companies that are strongly linked to Finland.Finnwatch is a member of the Ministry of Employment and the Economy's Committee on Corporate Social Responsibility.

Corporate Social Responsibility in India

Since the mid-1990s, numerous key CSR initiatives have been launched in India. One of the first ones was "Desirable Corporate Governance: A Code", a voluntary code published by the Confederation of Indian Industry in 1998. This has been followed by several other initiatives, guidelines and even legislation during the past years.(Royal Norwegian Embassy, 2013.) One of the biggest guidelines in the 21st Century in India were "Voluntary Guidelines for Corporate Social Responsibility" introduced by the Ministry of Corporate Affairs in India in 2009. This was followed by "the National Voluntary Guidelines" on Social, Environmental & Economic Responsibilities of Business" (ESG Guidelines) introduced by the Ministry of Corporate Affairsin 2011. However, theESG Guidelines didn't really reach attention and there have been several initiatives to enforce these guidelines. (Afsharipour & Rana, 2014, 5)

A big change in the Indian landscape of CSR took place few years ago as the Companies Act, 2013 was passed, and as the Act's CSR rules became effective in 2014. India is now one of the few countries in the world to impose CSR requirements by law. (Afsharipour & Rana, 2014; Ministry of Law and Justice in India, 2013). In addition to the guidelines applicable to private sector, the Indian government has created CSR requirements also for state-controlled bodies. The latest set of requirements is "Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises" established in 2013. These guidelines consider CSR as a core component of the work of public sector enterprises and also command every Central Public Sector Enterprise to start at least one major project for development of a backward district(Afsharipour & Rana, 2014).The CSR Policy of India is governed under the Ministry of Corporate Affairs. The Ministry is primarily concerned with administration of the Companies Act 2013, the Companies Act 1956, and other associated Acts, rules and regulations for regulating the functioning of the corporate sector in India.(Ministry Of Corporate Affairs, 2015.)

Being the seventh-largest country by area and the second-most populous country in the world, India is facing great challenges in regards of CSR. One of the biggest problems of implementing CSR in India is that roughly only 10% of the labor works in the formal sector under regulations; the rest 90 % of the work force works in the informal, unorganized sector. (Royal Norwegian Embassy, 2013.)Therefore it is hard to supervise the CSR activities of many companies. However, there are several national initiatives and codes guiding – or attempting to guide - the CSR operations in Indian companies. Next I will briefly introduce some of the key guidelines and legislation considering CSR in India. These are the CSR Voluntary Guidelines (2009), National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business (2011) and The Companies Act (2013).In addition to this, India´s government is committed to promote some international guidelines such asUnited Nations Global Compact. However, India has not started the process of developing a national action plan yet for United Nations Guiding Principles on Business and Human Rights. India is not committed to promoting OECD Guidelines for Multinational Enterprises either.

CSR Voluntary Guidelines (2009)

The Ministry of Corporate Affairs in India made its first formal CSR-related effort when it introduced the Voluntary Guidelines for Corporate Social Responsibility (CSR Guidelines) in 2009. The purpose of National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business have been laid down by the Ministry of Corporate Affairs is to provide companies with guidance for CSR while working closely within the framework of national policies. These voluntary guidelines create a common standard for how companies can improve their CSR efforts and their purpose is also to create a public pressure for companies that are failing to comply. The nine principles of National Voluntary Guidelines are: (1) Businesses should conduct and govern themselves with ethics, transparency and accountability, (2) Businesses should provide goods and services that are safe and contribute to sustainability throughout their life cycle, (3) Businesses should promote the wellbeing of all employees, (4) Businesses should respect the interests of, and be responsive toward all stakeholders, especially those who are disadvantaged, vulnerable and marginalized, (5) Businesses should respect and promote human rights, (6) Business should respect, protect, and make efforts to restore the environment, (7) Businesses, when engaged in influencing in public and regulatory policy, should do so in a responsible manner, (8) Businesses should support inclusive growth and equitable development and (8) Businesses should engage with and provide value to their customers and consumers in a responsible manner.(Ministry of Corporate Affairs in India, 2009)

National Voluntary Guidelines (2011)

The Ministry of Corporate Affairsissued the National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business (ESG Guidelines) in July 2011. They establish concrete measures that may be voluntarily adopted by companies and they present nine core principles: (1) Businesses should conduct and govern themselves with ethics, transparency and accountability, (2) Businesses should provide goods and services that are safe and contribute to sustainability throughout their life cycle, (3) Businesses should promote the well-being of all employees, (4) Businesses should respect the interests of, and be responsive towards all stakeholders, especially those who are disadvantaged, vulnerable and marginalized, (5) Businesses should respect and promote human rights, (6) Business should respect, protect, and make efforts to restore the environment, (7) Businesses, when engaged in influencing public and regulatory policy, should do so in a responsible manner, (8) Businesses should support inclusive growth and equitable development, and (9) Businesses should engage with and provide value to their customers and consumers in a responsible manner. (Ministry of Corporate Affairs in India, 2011).

The Companies Act, 2013 (2012)

CSR, which has largely been voluntary contribution, was included in the law in India in 2013. Companies Act, 2013 is an Act of the Parliament of India. It was passed in 2012 and by the 1st of April 2014 the sections regarding CSR came into force.The act defines CSR as activities that promote poverty reduction, education, health, environmental sustainability, gender equality, and vocational skills development. (Ministry of Law and Justice in India, 2013.) The Companies Act introduces several requirements considering CSR. One of the key requirements is that the act requires companies to set up a CSR board committee. Duties of the Corporate Social Responsibility Committee are to formulate and recommend a CSR Policy to the Board, which shall indicate the activities to be undertaken by the company; to recommend the amount of expenditure to be incurred on the activities referred to in clause; and to monitor the Corporate Social Responsibility Policy of the company from timeto time.(Ministry of Law and Justice in India, 2013.)

Duties of the Board are (1) to approve the Corporate Social Responsibility Policy for the company after taking into account the recommendations made by the Corporate Social Responsibility Committee, and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed and (2) to ensure that the activities that are included in the CSR Policy of the company are undertaken by the company. The Board shall also ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy: Provided that the company shall give preference to the local area and areas around itwhere it operates, for spending the amount earmarked for CSR activities: Provided further that if the company fails to spend such amount, the Board shall specify the reasons for notspending the amount. (Ministry of Law and Justice in India, 2013.)

The requirements of the Companies Act, 2013, apply to all Indian and non-Indian companies in India which has a turnover of INR 10 billion or more, net worth of INR 5 billion or more, or a net profit of INR 50 million or more during any of the three prior financial years (Ministry of Law and Justice in India, 2013).Companies that don't belong to this scope, are not required to follow the Act. The initiative to corporate CSR into the law is good; however it is rather controversial as at the moment there is no punishment for the companies that do not follow this law. (Ministry of Law and Justice in India, 2013) (Ministry of Law and Justice in India, 2013)

Current Discussion on CSR

In this chapter, I will briefly describe the current research focusing on Corporate Social Responsibility in India and in Finland. The literature review of recent research is based on selected research articles during the past years.

Finland

According to a Study published in 2004, the status of CSR seemed to exist more on the theoretical than the practical

level before the millennium. Even though Finnish companies were progressively managing CSR, problems such as lack of information and structured management system, different views on community involvement, supply chain issues, overlap of CSR and environmental issues were some of the major causes to lead some companies to manage their CSR in a disorganized manner. (Panapanaan, Linnanen, Karvonen, & Phan, 2003.) According to a wide national survey in 2009, many Finnish listed companies define corporate social responsibility based on Elkington's triple bottom line model (Kotonen, 2009). However, lots of progress has taken place in the last years,as Finnish companies have become to understand the role of CSR as a potential competitive advantage. Priority issues in the recent years have been e.g. employment practices, ethical consumption, the environment and climate change, competitiveness and cultural adaptation for Finnish companies operating abroad. (Kourula, 2010.)

The culture and country specific aspects have a strong understanding of CSR in each country: Finland being a welfare society has an impact on the understanding and implementing ofCSR.In Finland, the labor unions play a dominating role in the society and monitor the interest of the employees in multiple dimensions. For this reason, the working conditions and employee participation are largely considered as self-evident. Hence the issues concerning employees are not really connected to the concept of CSR in Finland. Instead, environmental issues have been the most important theme of CSR for a long time already (Mäkelä, 2014). In addition, the organization of the Finnish society allows companies to take a stance on CSR in a way that it is being perceived as a custom and an obligation instead of CSR activities.Companies consider fulfilling their obligations to this already by paying taxes to the government that has taken the responsibility and role of contributing to social issues. (Juholin, 2004.)

The orientation of state-owned companies towards CSR according is still in a minor role in Finland (Gjølberg 2010). In many developed countries, like Finland, consumers have been placing importance on the responsibility of companies when making purchase decisions for a long time already (Mohr, Webb, & Harris, 2001). Most of the CSR initiatives in Finland come from big privately owned companies, which are searching for ways to stand out of the crowd and to gain competitive advantage. However, this wrongly creates an impression that CSR is just associated and perceived as an issue for big companies to address which is not the case. (Juholin, 2004.) A recent study looking at how the 100 largest companies in Finland communicate about CSR and use different CSR instruments and initiatives, indicates that most of the companies' CSR communication is focused on environmental and social issues, whereas issues related to financial responsibility are rarely mentioned. The study also found the variety of different privately developed CSR instruments to be especially high within the 100 largest companies. (Honkanen, 2012.) However, nowadays almost all Finnish public and other big companies have principles, practices, and reporting systems of CSR; it would be exceptional if such a company in Finland did not have CSR activities.

India

Corporate Social Responsibility has received a great amount of attention in India during recent years. Since the Companies Act was passed in 2013 and implemented in 2014, a great amount of research has focused on the activities that have followed the Act. Even though the Companies Act, 2013 came into force only last year there has been an increase in CSR expenditure by firms during the last couple of years. This could be seen as the desire of companies to present themselves as socially responsible. However until now, donations by firms have been driven by their own will; in some cases they have been very small in comparison to the size of the firms. A recent research reveals that in most cases, companies haven't even spent 1% of their profits after taxes on CSR, which means that the new Act will more than double the companies CSR budgets (Ramesh & Mendes, 2015). With the new law and the part of population that has been left behind in the development process may gain tremendously from this. (Bansal & Rai, 2014).

An article exploring the CSR activities amongst private sector companies before the Companies Act was passed showed that the most preferred CSR activities were education, health, environment, rural upliftment and others. Drinking water and sanitation and urban upliftment were the least preferred activities. (Ghosh, 2015.) Shin, Jung, Khoe, & Chae (2015) looked at whether government involvement in CSR activity is desirable or counterproductive from the viewpoint of the companies. The results indicate that most CSR activities of the companies under study were in compliance with the regulated activities of the Indian Companies Act, 2013. Therefore, government involvement in CSR by regulation is not likely to have much negative effect on companies but can create positive developmental environments for communities.

Research findings reveal that in a market-led economy, the Indian society holds both positive and skeptic view of CSR activities: the public expects a responsible and ethical behavior from enterprises and the integration of the society and the business should be reinforced in order to strengthen the confidence in the society (Narwal & Sharma, 2009). Also despite the efforts to impose CSR standards on state-controlled bodies, evidence suggests that much work still remains. For example, in 2013 the Parliamentary Standing Committee on Industry noticed that many Central Public Sector Enterprises (CPSEs) had not been using their CSR funds. Also another report by the Comptroller and Auditor General of India indicated that many CPSEs spent much less than required on CSR activities.(Afsharipour & Rana, 2014.)

Even though implementing CSR is often a struggle, many of the companies in India have become to understand that CSR can also have positive effects for the corporations themselves. Several researches suggests that responsible business practices towards primary stakeholders can be very profitable and beneficial to Indian firms (eg. Mishra & Damodar, 2010).

Corporate Social Responsibility have been found to benefit Indian companies for example in terms of better corporate image, long-term customer relationships and customer loyalty (Dhingra, Sarin, & Gill, 2015). However, extension of CSR activities to all private sector companies – even though they would not fill the requirements of the Companies Act, 2013 – would be important, as it would further strengthen the change towards social responsibility of business. (Dhingra et al., 2015.)The better implementation of CSR in Indian companies would benefit both: the business and the society.

Conclusion

Corporate Social Responsibility is a concept that every company recognizes in the 21st century. It has travelled a long way form a marketing tool to an evitable necessity. When multinational enterprises have become global superpowers, active promotion, regulation, and implementation of CSR has become a concern of every state.The aim of this paper was to present an overview of the current situation and policies considering CSR in Finland and in India.In Finland, the CSR policy is in line with the CSR policy of the European Union. The policy is based on several voluntary guidelines that the government has committed to promote among Finnish companies. Lately, concerns towards societies responsibility in keeping corporations accountable have been raised increasingly; as corporations have become indispensable members of our society, there has been a growing number of voices stating that CSR should be incorporated to the society also legally (Lee, 2008). In India, there are several national initiatives and codes guiding the CSR operations of the companies, and India was also one of the first countries in the world to integrate CSR into legislation in 2012.

The recent discussion considering CSR in Finland has focused on looking at how CSR activities fit the Finnish culture and the existing structures of a welfare state. In Finland, the welfare state is being considered to take a good care of the basic needs of the society, but on the other hand many consumers are placing importance on the responsibility of companies when making purchasing decision – this is a great driver for the CSR conducting and reporting of many companies in Finland. In India, the current discussion considering CSR focuses on the aftermath of the Companies Act, 2013. Since the Act is so new, there are not many results yet. The research community is interested to see whether the Act will have a negative or a positive result - or results at all – considering the CSR activities of companies.

It is very challenging to compare the current state of CSR in these two countries as the countries are in a completely different state of social, economical and environmental situations. Finland is a rather homogenous developed welfare state with a population of 5.4 million people, whereas India is a huge developing country witha population of 1.2 billion and with significant diversity from region to region. Even though India is in the frontline of the development of CSR policies in the world, the country is still facing enormous challenges and difficulties in implementing the principles into action. On the contrary, in Finland the responsibility-related legislation is highly developed and the laws are also strictly implemented and followed, which is a central feature of the society. However, even though the Finnish government took a big step forward in 2011 by integrating CSR into the central government program, Finland could learn from India in a theoretical level by integrating the CSR into the national legislation.

Human Rights and Women's Rights in Islamic Law

Mr. Majid Shunnag*

Islamic Law and Islamic Theology are united. Islamic law is a social science which shall develop with time in order to render Islam relevant at all times. The main object of the Islamic Law is to increase the happiness of the people. Muslims have strayed away from Islamic teachings and laws due to external factors as well as due to adopting new rituals, norms, and cultures which have no basis in Islam.

Before embarking on summarizing women's rights, we have to summarize the general Human Rights in Islamic law to all people, be it women or men. Islamic law considers mankind as God's vicegerent on earth. Therefore, mankind is dignified by God. Protection of human rights is the fundamental purpose of the Islamic law. Man is granted viceroyalty on earth. He is given freedom in the pursuit of his duties before God. According to his awareness, man is free to establish legislative jurisdiction which will attend to his advancing needs and society development. That is why the Islamic law calls for all kinds of rights to render dignity to mankind. Among others, they are:

- Right to Life; Islamic law prevents killing of any person unless he has killed another person. Even in wars, Islamic law forbids initiating the fight, and even forbids preventing enemy army from availing themselves from water under control of Muslim army simply because water is instrumental for life.
- Right to Freedom. Islamic law requires man to think, and therefore, placed the mind of man on a high degree. Man is free in all forms of freedom to choose any religion, thought, ideology, political, economical, association to groups, and cultural.
- Right to Equality. As revealed explicitly in The Qur'an: (People, We created you all from a single man and a single woman, and made you into races and tribes so that you should recognize one another. In God's eyes, the most honored of you are the ones most mindful of Him. God is all knowing, all aware).[1]

Also, the Prophet said several Hadeeths to this effect such as:

(No one can be a good believer until he loves for his human brother all that he loves for himself);[2]

Following his prayers, the Prophet used to say: (I am a witness that all people are brothers)

In his farewell speech to the pilgrims before his death, the Prophet Mohammad addressed all Muslims in simple words stressing the fundamental principles of Islam saying:

(O mankind, your God is one and your father, Adam, is one, there is no favouring for any Arab over non-Arab nor for non-Arab over Arab, nor for black over red except in God's piety. O mankind, God Has declared inviolable to you each other's blood, money and honor, therefore your blood, money and honor is inviolable to you till the day you meet Him. O Mankind, take my advice and you shall be happy, don't aggrieve, don't treat unjustly. O mankind, the money of one is not lawful for another except with his own will and full satisfaction).

Also from the same speech: (People are equal like the teeth of a comb);

In light of the above premises, Islamic law requires treatment of all people the same, regardless of their religion, race, color, and gender. All people are the children of God. Those who do good to His children are the closest to Him. One can easily notice the equality tenet between Muslims during their practicing of praying in parallel lines regardless of their race, class, color, and the same in pilgrimage where all of them are dressing same white simple unstitched robes.

- Right to Dignity [We have honored the children of Adam and carried them by land and sea; We have provided good sustenance for them and favored them specially above many of those We have created].[3]
- Right to Security and freedom from fear. The Qur'an states: (He did this to make Quraysh feel secure, secure in their winter and summer journeys. So let them worship the Lord of this House: Who provides them with food to ward offhunger, safety to ward off fear).[4]
- Freedom from Slavery. It is revealed in the Qur'an, as an explicit order:

(Alms are meant only for the poor, the needy, those who administer them, those whose hearts need to winning over,

1. Qur'an, Sourat Al- Hujurat – verse 13
2. The Hadeeth stated in Bukhari manuscript under number 13
3. Qur'an, Sourat Al Israa-verse 70
4. Qur'an, Sourat Quraysh

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to free slaves and help those in debt, for God's cause, and for travelers in need. This is ordained by God; God is all knowing and Wise).[5]

This is an order by God which does not distinguish between people who are poor or in need regardless of their religion, race, color, or gender. It is the total responsibility of the state to liberate the slaves no matter what is their religion or race. Alemam Ali said: Adam did not give birth to slaves.All people are free.[6]

- Right to oppose the Ruler peacefully if injustice is perpetrated. Obedience to the ruler is required as long as he is heeding justice.
- Right NOT to be punished for contemplation of committing a crime. (Avoidance of punishment by suspicious). Punishment is not inflected on a suspect until he has committed the crime. Islamic law determines confession, witnesses, and evidences as instruments for the establishment of a committed crime. The person who attacked Alemam Ali to kill him by stabbing him with a poisonous dagger was protected by Alemam when he said: I do not kill who did not kill me. If I die you have the right to kill him with one single strike.[7]
- Right to Justice and fair trial. Islamic law does not only grants such right but compels man to protest against injustice visited any other person let alone if injustice has visited himself.
- Right to Mercy. Suffice to reiterate a sparkling verse in the Qur'an:

(When those who believe in our revelations come to you Prophet, say, Peace be upon you. Your Lord has taken it on Himself to be merciful: If any of you has foolishly done a bad deed, and afterwards repented and mended his ways, God is most forgiving and most merciful).[8]

- Right to have independent judges which is a must to have Fair Trials. Islamic law requires even the ruler, whether he is a claimant or defendant, to stand in a court of law conducted in the judge house or office and not in the ruler court.
- Right to protection from torture. To this effect, the Prophet enunciated the famous Hadeeth, authored by Mohammad bin Mohammad Elselabi, regarding trials of the accused: "No punishment if confession is obtained after injury (physiological or psychological".[9]
- Right to Privacy, Honor, and Reputation. Islamic law obliges the ruler to provide protection of the privacy of its citizens, and forbids him from spying on citizens for any reason whatsoever. The Qur'an has explicitly dealt with these rights sufficiently in Sourat Al-Hujurat:

(Believers, avoid making too many assumptions – some assumptions are sinful- and do not spy on one another or speak ill of people behind their backs: would any of you like to eat the flesh of your dead brother? No, you would hate it. So be mindful of God. God is ever relenting, most Merciful).[10]

Also, it is of prudence to recall here the stringent conditions in the case of accusations of fornication where it is required to bring in fourcredible witnesses who watched and witnessed the intercourse process by their naked eyes. Otherwise, they will be punished severely. This is intended to keep the Honor and Reputation of the people intact.

- Right to Education. The Qur'an declared: (Read! In the name of your Lord who created: He created man from a clinging form. Read! Your Lord is the Most Bountiful One who taught by the pen, who taught man what he did not know).[11] So education is a divine order.
- Right to freedom of movement and residence. Again, this is a divine order to seek dignity and security anywhere on earth. Security includes that of food and safety.
- Right to immigration and Asylum. Islamic law obliges its followers to immigrate if they face persecution or oppression. Islamic law encourages them to immigrate to a land of non-Muslims if justice is exercised rather than to live in an Islamic country where justice is denied.
- Right to participate in public affairs and advocates Public Interests. Islamic law orders a divine rule that Muslims have to make consultations regarding their affairs. Congregations is the place to voice out the suggestions to solve the problems and to protest against any injustice
- Right to Social Security and welfare. All citizens, regardless of their religion or race, in a Muslim country have the right to be helped from the Muslim Wealth Home (known today as, Ministry of finance) if they are suffering from want of food and clothing.
- Right to Think. This is not only a right, it is rather an obligation. The Qur'an revealed: (By His command He has made the night and day, the sun, moon, and stars all of benefit to you. There truly are signs in this for those who use their reason).[12]

5. Qur'an, Sourat Al-Altawba-verse 60
6. Alemam Ali and Human Rights (21)
7. Alemam Ali and Human Rights (14)
8. Qur'an, Sourat Al-An'am, verse 54
9. The Alemam Ali Biography, page 192
10. Qur'an, Sourat Al-Hujurat –verse 12
11. Qur'an, Sourat Al-Alaq –verses 1-5
12. Qur'an, Sourat Al-Nahl-verse 12

- Right to tell the Truth. This is more than a right, it is a divine order, mentioned in the Qur'an tens of times: (Do not mix truth with falsehood, or hide the truth whenyou know it).[13] Also, an explicit injunction by Alemam Ali for Muslims to tell the truth. He said: He who tells the truth when it is to his detriment rather than telling lies when it is to his benefit is a true believer

Women's rights in Islamic law emerged as part of the general theological code of conduct in Islam which requires people to be mindful of the Creator in all their deeds. There is no place for potentates people in Islam as it calls for an egalitarian society; one which protects the weak against the powerful. The fundamental values of Islam are: justice, equality, mercy, freedom, dignity, morals, and logic. The holy Qur'an reveals [People, be mindful of your Creator, who created you from a single soul, and from it created its mate, and from the pair of them spread countless men and women far and wide].[14] Such revelations place great emphasis on the equality of all people regardless of their gender, race, color, and religion. All mankind must be treated equally because they are all of the same source.

Also, the other revelations related to women and men were highlighted in the Qur'an [Another of His signs is that He created spouses from among yourselves for you to live with in tranquility: He ordained love and kindness (amity & mercy) between you. There truly are signs in this for those who reflect].[15] By this, the Creator expressed the legitimacy and need of marriage between woman and man so they can live in tranquility and peace. Love is not the only emotion in a marriage but mercy, care, and amity are also integral parts. Such traits are clear to those who are mindful of God. The main purpose of marriage is the procreation of mankind yet in a pleasurable manner. A good husband and a good wife are the nucleus of a healthy society. From what is said above, it must be concluded that the Creator wants His children on earth to live a balanced life governed by love, mercy, care, and amity. It shall be impossible to attain that if any of its components are imbalanced or corrupted.

The prophet Mohammad teaches his followers that: (All people are the children of God and he who does benevolence to humanity is the most beloved by God).[16] This is clear exhortation to all people of all walks of life regardless of their gender, race, color, and religion to be good human beings in order to serve benevolence to the society.

When studying the women's rights in Islamic law one must not lose the sight of the major code of conduct between the people, which is the ethical element. The revelation of God sets the doctrine of who has more appropriation in the eyes of God. (Oh mankind, we have created you from male and female, and have made you nations and tribes that ye may know one another. In God's eyes, the most honored of you are the most mindful of him and best in conduct: God in all knowing, all aware).[17]

Islam believes that Justice Right can be crucial in attaining all other Rights which humans aspire to achieve. That is why the Qur'an manifested Justice in a very striking way hundreds of times. As evidenced above, Justice is commanded by God in the Qur'an frequently due to its vital importance in civilizing any society. It is the main drive behind all virtues such as equality, mercy, freedom, and dignity. With Justice nothing can go wrong, without it nothing can be right.

In addition to the general Human Rights, women have additional Rights due to their special needs. These Rights are:-

- Woman is independent of her husband financially;
- Woman has the Right to specify any condition she deems appropriatein the marriage contract such as her right to divorce her husband without a cause, any amount of indemnification for the divorce or maintenance after divorce;
- Woman has the Right not to breastfeed her babies;
- Woman has the Right not to wash, or clean her husbands clothes or cook for him;
- Woman has the Right to ask for a domestic helper if her husband can afford it;
- Woman has the automatic Right for custody of children if divorced till they attain majority.

However, we can't overlook the fact that women are mistreated in the Muslim and Arabic world due to the dominance of males over females caused by ignorance of both but mainly of women, and due to the influence of the hijacked Islam which calls for mistreatment of women in the following areas:

- Women must wear the Hijab;
- Women must accept polygamy;
- Women must not lead a family or a nation;
- Women must not lead a prayer;
- Women must be circumcised;
- Women must not marry non Muslims;

In addition to the above wrong Islamic Law perceptions committed against women, the hijackers of Islam expanded their wrong doings to include the following harsh punishmentsagainst both genders:

- Beheading Muslims who renounce Islam;
- Stoning the adulterers;

13. Qur'an, SouratBaqaraa verse number 42
14. Qur'an, SouratALNesaa - verse 1
15. Qur'an, Sourat Al-Room-verse 21
16. Al TabaraniHadeeth manuscript under number 10,033
17. Qur'an, Sourat Al- Hujurat – verse 9

- Cutting off the hands of thieves (it requires a society with justice& equality served 100% not 99%)

According to the Qur'an, Islamic Law is totally against all of the abovemistreatment and harsh punishments. Hence, I challenge any Islamic scholar to bring Qur'anic evidence to the contrary herein. Also, one must not forget that the main aim of punishment in accordance with Islamic Law is to re-establish the Moral Balance which was put out of order by the committed crime and to serve Public Interests.In order to render Islamic legislation relevant at all times, the Qur'an encourages Muslim jurists and scholars to contribute in enacting laws corresponding to their society needs and to meet the requirements of new challenges which did not exist before, as long as it is not in contradiction of the Qur'an and Sunna. Remember, the main aim of the Islamic Law is to increase the happiness of the people. To this effect, we find the revelation: (You people can ask those who have knowledge if you do not know).[18] Also, it was revealed that: (Conduct their affairs by mutual consultation).[19]

In the light of the above revelations, the Qur'an has opened the door widely to enable jurists and scholars to do the needful. To help them achieve their objective, the Qur'an has mentioned the name of God as the Merciful, Most Forgiving, the Lord of Mercy, many hundred times. Another animated and sparkling verse which is capable of giving the jurists and scholars the greatest comfort in drawing laws:

(When those who believe in our revelations come to you Prophet, say, Peace be upon you. Your Lord has taken it on Himself to be merciful: if any of you has foolishly done a bad deed, and afterwards repented and mended his ways, God is most forgiving and most merciful).[20]

Hence, It is of vital importance to notice the undertaking given by God to be merciful. One has to think seriously, if God has given such an unqualified undertaking is it not for all scholars and jurists to follow suit and draw Islamic laws which can meet the needs of their societies at any time to render Islam relevant at all times. Automatically, this will override all harsh laws which are not based on mercy, justice, and morals.

The Islamic law covers all aspects of human affairs from embryo to death justly and with mercy to create a healthy society promoting and furthering morals all over theworld. Regarding Islamic human rights in general, the inviolability of the Islamic code of Human Rights obliges Muslims to support and defend the oppressed anywhere in the world. The Qur'an has enunciated not only moral norms for the individual, and rules and regulation for family and social life, but also a number of civil, commercial, criminal, constitutional, and international laws and principles of judicial conduct, calling on Muslims to stand against injustice exercised any where in the world. The Qur'an: (Do not rely on those who do evil, or the Fire may touch you, and then you will have no one to protect you from God, nor will you be helped).[21] Also, the Prophet stated: (Those who are not voicing their opinion to serve justice are dumb devils).[22] The onus is on Muslims to support the oppressed any where in the world regardless of their gender, race, and religion. It is a great sin to set idle and watch injustice exercised on humans or animals. Alemam Ali said: The person who perpetuate injustice, the person who help him, and the person who do not protest are partners of crime.

According to Islamic law, the interests of the individual as well as the public are of importance without reducing any of them at the expense of the other. The adoption of the Public Interest by Muslim scholars was based on the ground of the compassionate aim of Islamic legislators, taking into account the progressive public welfare of the community.

No religion has been subject to maligns, tarnishing, and desecration by imperialist powers since the beginning of the 18th century like Islam. The Imperialist, scholars and their think tanks are well aware of Islam's contribution to man's civilization from its appearance in the 7th century. But they believe Islam constitutes hindrance to their ills and greed to steal the wealth of the land of Islam. I am not here singling out only the land of Islam as wanted by imperialist but it is rather a common practice by powerful nations to colonize other nations to steal their wealth. This is what was explained in deep details by Leo Huberman in his manuscript Man's Worldly Goods published in 1936.

Starting from the 7th century, Islam arose as a sociological revolution against a society immersed in perversion, the least of which was slavery, and murdering baby girls. Islam expanded exponentially due to promoting its virtues such as rights to life, liberty, justice, equality, and dignity.

A quick look at a recent statement made during the seventies of last century by a contemporary European thinker in philosophy and social science, and founder of the Frankfurt School,Ernst Bloch, in his manuscript, Natural Law & Human Dignity, concluded that:It cannot be accepted that man is free and equal by birth. There are no innate human rights; they are all obtained or have to be obtained by struggle.One has to be fair and compare the above Ernst statement of Bloch with that said by Khalifah Omar, the second Khalifah to the Prophet, early 7th century, who said to the ruler of Egypt state: When did you take people as slaves whilst their mothers gave them birth as free people?

18. Qur'an, Sourat Al-Nahl- verse43
19. Qur'an, Sourat Al-Shura – verse 38
20. Qur'an, Sourat Al-An'am verse number 54
21. Qur'an, SouratHud- verse 113
22. Al Gushairi Epistle- page 62

Role of Environmental Impact Assessment in Natural Resource Management in Multi-Purpose River Valley Projects in India

Ms. Raagya Zadu*

Development is the need of the hour and environment is the need for human sustenance. Ever since the evolution of man, the graph of development has only gone up and it is still soaring upscale. The reason for worry is that for the creation of wealth, which proves the theory of development, natural resources are used and exploited. Adam Smith, the eminent economist was also of the view that wealth is created from the bosom of the Earth. Slowly and gradually, man is using up all the resources of the Earth and polluting the environment which is not giving enough time and opportunity for the Earth to replenish the lost resources. When this issue became a grave concern, the United Nations convened an international conference in 1972 in Stockholm, to address the growing concerns of the environment and develop certain norms for the conservation, protection and improvement of the environment. This conference laid the corner stone for the development of International Environment Law and also brought the issue of Natural Resource Management to thought. Further, in 1992, another international conference was held in Rio de Janerio which endorsed the views expressed in Stockholm and focused its concentration on Environment and Development. In this conference, the concept of Sustainable Development and Natural Resource Management were given due importance and all the nations were called upon to develop these principles and incorporate the same in their countries.

This article discusses and studies the concept of Sustainable Development, and the tools required to be developed to achieve the same. It has further turned out that Environment Impact Assessment is a very important tool for the purpose of Natural Resource Management and for ensuring that the development carried out is sustainable in nature. It is to focus attention and scope to the development of Multi-Purpose River Valley Projects and the Environment Impact Assessment which is required to be carried out specifically to grant environmental clearance to these mega-developmental projects.

Since time immemorial, there has been incessant tussle between the Right to Development and the Right to maintain the environment and its resources. This debate has given rise to the concept of Sustainable Development. This concept was first spoken about in the United Nations Convention on Human Environment or the Stockholm Conference held in 1974 and it further gave rise to the setting up of the Bruntland Commission which specifically defined Sustainable Development. Environment Impact Assessment is considered as an Enviro-Legal Tool, to achieve Sustainable Development. Natural Resource Management gained importance globally after the world community gathered together to express their concerns on the fast depleting non-renewable resources of the Earth. Development of a State hugely depends upon the increasing economic progress and a major factor contributing to it is the production of electricity, the backbone to every industrial activity. Multi-Purpose River Valley Projects are huge projects which harness and utilise water resources to produce electricity and for various other purposes like providing irrigation and supplying potable water to the citizens and to the industries. The construction of large dams and reservoirs in India, as elsewhere, has entailed massive infringements onto the natural ecosystems and human settlements. Due to the construction of these mega-dam projects, there is widescale destruction of wildlife, depletion of natural resources and destruction of the environment. Thousands of people are displaced from their areas of habitation and are rendered homeless or asked to relocate. These people are mostly the indigenous and local people. Dam proponents affirm that appropriate steps to mitigate the adverse effects of the construction of Multi-purpose River Valley Projects, shall be taken. The right to development which is considered as an inherent human right has mostly not been in consonance with environmental norms resulting in the depletion of natural resources and the destruction of fragile ecosystems. Despite tools like Environment Impact Assessment and principles of Sustainable Development, there is large scale exploitation of natural resources. The main problem of today's times is that under the garb of development, a disbalance of natural resources is being facilitated and loss of ecosystem is following.

Environment Impact Assessment

Environment Impact Assessment or E.I.A. can be defined as the study to predict the effect of a proposed activity/project on the environment. A decision making tool, E.I.A. compares various alternatives for a project and seeks to identify the one which represents the best combination of economic and environmental costs and benefits. E.I.A. systematically examines both beneficial and adverse consequences of the project and ensures that these effects are taken into account during project design. It helps to identify possible environmental effects of the proposed project, proposes measures to mitigate adverse effects and predicts whether there will be significant adverse environmental effects, even after the mitigation is

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implemented. By considering the environmental effects of the project and their mitigation early in the project planning cycle, environmental assessment has many benefits, such as protection of environment, optimum utilization of resources and saving of time and cost of the project. Properly conducted E.I.A. also lessens conflicts by promoting community participation, informing decision makers, and helping lay the base for environmentally sound projects. Benefits of integrating E.I.A. have been observed in all stages of a project, from exploration and planning, through construction, operations, decommissioning, and beyond site closure.[1] E.I.A. helps the decision makers to identify the likely effects at an early stage and to improve the quality of project planning and decision making. It is a process used to predict the environmental consequences of proposed major development projects, to identify and plan for appropriate measures to reduce adverse impacts. The Council on European Economic Committee, in their directive to the member states, highlights the objectives of E.I.A. in the following words:[2]

The effects of a project on the environment must be assessed in order to take account of the concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource of life.[3]

In India, E.I.A. was tried to be introduced in 1976-1977 to examine the river valley projects from environmental angle. But during that time it lacked legislative support. The institutionalization of impact assessment in India took place in the early eighties.[4] It had its origin in the 'necessary and expedient'[5] clause under E.P.A. On 27th of January 1994, E.I.A. notification [under the Environmental (Protection) Act (1986)] was issued by which E.I.A. process became "statutory requirement" rather than an "administrative requirement" for a number of projects/activities likely to have significant environmental impacts and health implications. Since then, the E.I.A. notification has undergone several amendments incorporating provisions for "Public Hearing" and bringing in several important projects/activities into the purview of E.I.A., requiring "Environmental Clearance" by Ministry of Environment and Forest (MoEF), Govt of India. To further improve the E.I.A. procedure in India, E.I.A. notification was revised on September 14th, 2006. According to the notification, different projects/developmental activities have been divided into 8 major heads requiring "Environmental Clearance" (EC) either from Central Government, i.e. MoEF (Category 'A') or at State Level from State Environmental Impact Assessment Authority (SE.I.A.A) (Category 'B'). The category 'B' has been further divided into category 'B1' (project requires to submit E.I.A. report) and 'B2' project activities which don't require E.I.A. report). All categories 'A' and 'B1' projects necessarily have to carry out E.I.A. studies along with the "public Hearing" as per the procedure stipulated in the notification. In the draft notification (January 19th 2009), revised "threshold criteria" have been introduced for different project categories. Further, an effort has also been made to make E.I.A. procedure more transparent and to provide societal vigil of projects affecting the environment through "Public Hearing/Consultation" by moving the environment protection agenda into public domain. E.I.A. became a mandatory requirement under the E.I.A. Notification of 1994, which specified the requirement of follow-up by stating that the project authorities "shall submit a half yearly report to the Impact Assessment Agency". These documents were required to report on the compliance of the recommendations and conditions stipulated by MoEF, while according the Environment Clearance to the specific development proposal. However, these were seldom available to the public and were submitted to the regulatory body.

The Environment Impact Assessment Notification which was notified on 14th September, 2006 supersedes the 1994 E.I.A. Notification. The purpose of the notification is to impose certain restrictions and prohibitions on new projects and activities, or on the expansion or modernization of existing projects and activities based on their potential environmental impacts. A prior environmental clearance must be obtained either from the Central Government or the State (or Union Territory) Level Environment Impact Assessment Authority, constituted by the Central Government under the Environment Protection Act, 1986.[6]

Importance of Environment Impact Assessment for Multi-purpose River Valley Projects; Tool for Natural Resource Management

It is now of importance to understand what we mean by the term, Multi-Purpose River Valley Projects. In layman language, they are mega-development projects which not only generate hydroelectricity, but also provide for the irrigation of fields, providing of potable water and control floods of the surrounding areas.

Multi-purpose River Valley Projects

These projects aim to integrate agricultural development with the local economy through rapid industrialization and growth. The goals include soil conservation, flood control and the development of the area's industries, transportation and irrigation facilities. Multipurpose river valley projects revolve

1. http://www.cseindia.org/node/383 (accessed on 18.6.15)
2. P. Leelakrishnan; *Environmental Law in India;* p.315, LexisNexis Butterworths Wadhwa, Nagpur. 3rd Edn 2008
3. EEC Directives 85/337/EEC dated 27th June 1985; OJL 175/40 dated 5th July 1985
4. *Supra.* see 5
5. Environment Protection Act, 1986, s3(1)
6. Ashok Kumar, *Environment Impact Assessment in India;* http://www.sciencebeing.com/2012/10/E.I.A.-notification-and-its-implementation-in-india/ (accessed on 18.6.15)

around developing irrigation for agriculture and electricity for industries through the construction of dams. In addition to impounding river water, the dams provide water for irrigation to towns, improve navigation, create habitats for fish and wildlife and generate hydroelectric power for industrial purposes.

Initially, dams were built only for storing rain water to prevent flooding. However, several positive side effects arose including the development of transportation facilities, the possibility of planting new forests and the creation of hydroelectric power. The projects are essential for villages or small towns to attain economic self-sufficiency and improve the standard of living for citizens.

Although these projects yield an assortment of environmental and economic benefits, the constructions of massive dams also pose numerous problems for small towns and villages. Problems include the displacement of villagers from fertile land, the destruction of natural habitats and disputes concerning the costs and benefits of the projects.

Multipurpose river valley projects in India were started with the basic aim of meeting the critical requirements of irrigation for agriculture, electricity for industries and flood control. The importance of the dams at that time can be inferred from the fact that dams were regarded as "the temples of modern India" by J.L Nehru. Accordingly, dam construction was given such a high priority in India's economic plans. Till now irrigation and hydro-power have been the major objectives of the water resources development in India.[7] Water resources engineering is developing enormously today. Dams have the most important role in utilizing water resources. They were constructed long before gaining present information about hydrology and hydro mechanics. Throughout the history of the world, dams have been used successfully in collecting, storing and managing water needed to sustain civilization. Dams have a great deal of positive and negative effects on the environment. Their benefits include controlling stream regime, consequently preventing floods, obtaining domestic and irrigation water from stored water and generating energy from hydro power. While dams provide significant benefit to our society, their impact on the surroundings includes resettlement and relocation, socioeconomic impact, environmental concerns, sedimentation issue, safety aspects etc. In addition to their very important social and environmental benefits, it is important to minimize the negative effects of the dam on the environment.[8]

Multi-purpose River Valley Projects; A boon or a Bane

One of the fundamental requirements for socio economic development in the world is the availability of adequate quantity of water with the appropriate quantity. The world wide per capita water demand was about 750 liters per day in the year 2000, when the world population was just over 6 billion. Properly planned, designed, constructed and maintained dams contribute significantly toward fulfilling our water supply requirement. The primary source of fresh water supply is from precipitation. Of the total precipitation, only 1/3 remains for runoff our rivers, the rest is lost to infiltration and evaporation. Only 36% of this runoff is available for use. To accommodate variation in the hydrologic cycle, dams and reservoirs are needed to store water and then provide consistent yearly supply.[9] These Multi-purpose River Valley Projects or M.R.V.P.s are a boon for the farmers who have agricultural fields in arid regions and otherwise have to rely only on monsoons for the irrigation of their crops. It is through these M.R.V.P.s that they get provided with around the year water for irrigation by means of canals which are created by these M.R.V.P.s. Another major advantage of the M.R.V.P.s is flood control. Dams and reservoirs can be effectively used to regulate river level and flooding downstream of the dam by temporarily storing the flood volume and releasing it later. The most effectively method of flood control is accomplished by a number of multipurpose dams strategically located in river basin. The dams are operated by a specific water control plan for rooting floods through the basin without damage. Last but not the least, the production of hydropower is the biggest positive of constructing M.R.V.P.s. Hydropower if harnessed properly, is clean energy as it does not use any non-renewable resource and does not emit any effluents in the air, water or land. Water is a renewable resource which is available in the inlands in the form of rivers in the mountainous regions of the country. In non-technical terms, generation of electricity from water is done by storing waters from a river in a reservoir and then letting it fall on a turbine which rotates and produces electricity. The river is then allowed to flow in its natural course. The technically most advanced and economical source of energy is hydro power. Less than 20% of the world's estimated feasible hydro power potential has been developed. The greatest amount of potential remains to be developed in Asia, South America and Africa. Hydropower projects produce energy with a high rate of efficiency and without burdening future generation with pollution or waste.

However, there are certain environmental norms and parameters involved in the construction of M.R.V.P.s which must be adhered to while construction of the dams. Also, the construction of dams has certain negative impacts on the surrounding environment. First and foremost, when a dam is proposed to be constructed, there is the issue of Land Acquisition. Large projects require large tracts of land and to acquire them, the State resorts to the Land Acquisition Act 1894 which empowers the Union and State Governments

7. Vipin Khokad; *Multipurpose River Valley Projects: Retrospection is Needed;* published on August 15 2014.
8. Vijay Kumar Dwivedia, Sanjeev Kumar Guptab, S. N. Pandey; *A Study of Environmental Impact Due to Construction and Operation of Dam;* National Conference on Eco friendly Manufacturing for Sustainable Development. 2010.
9. ibid

to take land for public purposes and for companies. This exercise of Eminent Domain operates harshly on the persons displaced, dishoused and uprooted. Worst affected are the people or the indigenous people who have lived in a particular area for centuries and due to the setting up of a dam, they are forced to leave their original place of livelihood and shift to an unknown place, away from their original habitat. It not only causes them discomfort but also becomes the matter of violation of human rights as their livelihood and place of living both get disturbed. An avid example of this case would be the stir which was caused when the Tehri Dam on the Bhagirathi river in Uttrakhand was proposed in the early 1970s. An estimated 80,000 people were displaced from the town of Tehri, Uttrakhand. There were protests on a large scale mostly due to the large number of people who were to be displaced. Second is the issue of Environmental Degradation. The construction of any dam starts with disturbing the natural course of any river. The river is obstructed to create a reservoir and is made to pass through tunnels in order to facilitate the construction which takes years to finish. This causes the water quality to deteriorate and the force of the water flowing in the river decreases. Water releases from reservoir usually contains very little suspended sediments, and this in turn can lead to scouring of river beds and loss of river banks. This has a direct negative effect on the aquatic ecosystem of the river causing the fishes to lose their natural gravelly ground for reproduction and for the migratory fishes which are unable to get past the dam. Major portions of forest land need to be cleared to set up the dam. The forest is either cut down or submerged if it comes in the way for the reservoir construction. This amounts to loss of hundreds or thousands of hectares of forest land. Along with the forest, the wildlife, flora and fauna of that place is destroyed. Ill-constructed dams when struck by a natural calamity like earthquakes carry a risk of flooding areas in the downstream which is a threat to life and property. A few scientific studies have shown that building of dams and M.R.V.P.s on high seismic zones can result in the pressure on the earth's crust leading to an increased risk of earthquakes. There also are risks of deposits of silt in the catchment area which affect the river's course and level of water. The effect of changes in water quality, eutrophication, weed growth and the increase in areas of stagnant water on the proliferation of insects or other vectors of water-related human and livestock diseases.[10]

Adopting a Precautionary Approach in granting Environmental Clearance to M.R.V.P.

The negative effects of the dam on the environment can be minimized or eliminated by careful planning and design that incorporate the public involvement and input in the early stage of this process. When the appropriate mitigation measure are identified early in the planning and design process for a dam and reservoir, they can be effectively and efficiently incorporated into the design, construction and operation of the project. All direct and indirect impact of the project must be identified. The following are considered as the few main important points which must be carried out and kept in consideration while giving sustainable clearance to a mega damn project.

i. Working closely with technical planners and engineers to avoid and reduce impacts wherever possible.

ii. Full mitigation of all unavoidable impacts through compensation, replacement, resettlement and relocation programs.

iii. The design of a thorough monitoring system with clear targets for full restoration of all households to be relocated or resettled.

iv. Implementation of social programs in close cooperation with project affected people and government organizations through consultations, disclosure or entitlements and reporting to all stakeholders.

v. Implementation of environmental programs to protect the local environment and enhance conservation and reforestation programs to offset and construction and operation impacts.[11]

In India, there are a few critical components in the process of giving environmental clearance to new mega-developmental projects where the following criteria are considered.[12]

1. **Site Planning:** Site planning is a vital component of any type of building activity and is the first step. With growing urban development and environmental degradation it has become imperative to determine landscape design parameters, and also provide rules, regulations, controls and procedures for the protection, preservation and modification of surrounding environment. Sustainable site planning section of the manual covers two aspects: first site selection process, which brings upfront all elements that would affect future development of the project. The second part is site analysis, which brings upfront all those elements and natural resources that would get affected by the project.
2. **Site Selection:** The process of site selection for sustainable development involves identifying and weighing the appropriateness of the site with respect to sustainable building design criteria. This step is the first step and needs to be done long before the project's design phase commences. Appropriate site selection procedure reduces the negative impacts and requirement for mitigation measures for large

10. Guidance Manual for Environment Impact Assessment and Clearance of River Valley Projects; Ministry of Environment and Forests; published 2013.
11. http://www.water-energy-food.org/en/practice/view__585/building-the-sustainable-dam-the-challenges-of-meeting-energy-and-livelihoods-objectives-at-the-same-time.html (accessed on 21.6.15).
12. Manual On Norms And Standards For Environment Clearance Of Large Construction Projects; MoEF.

construction projects. Site selection and analysis should be carried out to create living spaces for people in harmony with the local environment. The development of a project should not cause damage to the natural surroundings of the site but in fact should try to improve it by restoring its balance. Development of new construction projects should not have a negative impact on the existing bio diversity and ecosystem of the site. Development of the project on the located site should not disturb sites with heritage and cultural values such as protected monuments. Constructed projects on selected sites should not disturb aesthetics and scenic beauty of a location. Though, in the construction of dams or M.R.V.P.s, there is inevitable harm caused to the surrounding environment and ecosystems, but, the view of the regulatory authority while granting clearance is that there must be minimal amount of harm caused. For example, the number of trees cut down must be compensated by planting those many trees in an adjoining area or in a deforested area. Areas with very rich biodiversity or areas which are biological 'hotspots' must not be disturbed. It was brought into public attention in the 'Silent Valley Project' where the proposed dam was said to cause a huge amount of damage to the present biological diverse species of flora and fauna. The project was immediately abandoned. Currently, the environmental clearance given to the 'Dibang Dam' in India, which is said to be one of the largest dams in India is under the scrutiny of environmentalists due to the fragile ecosystem of the Dibang Village.

3. **Site Analysis:** The site analysis evaluates all the environmental determinants, which include (soil, air, water, solar access, noise), that could get affected due to development on the proposed site. All the concerns and mitigation options for the concerns at site level are covered in this section. Impact of development of the project on ecology and available resources on site, existing wind patterns on the site, impact on soil erosion, existing vegetation, habitat protection, water and air pollution and waste handling should be assessed and mitigation options to reduce the negative impact on the resources should be carried out.[13]

Only after all these criteria yield satisfactory responses from the project proponent, the environmental clearance is given by the Ministry of Environment and Forests. In a broader overlook, this procedure follows the norms of Sustainable Development and takes a Precautionary Approach towards the developmental activities. The basic idea of adopting a precautionary approach as enshrined and recognized by Principle 18 of the Rio Declaration is to ensure that any kind of environmental disbalance is averted. When all the precautions are taken well in advance of starting of any project, it would automatically and on its own bring down the negative effects on the environment by manifolds.

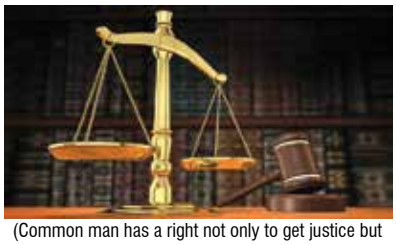
According to a report of the National Register of Large Dams of India[14] there are a total of 5,198 large and small dams in the country out of which 341 are under construction. Under the International Commission on Large Dams (I.C.O.L.D.), a large dam is classified as one with a maximum height of more than 15 meters from its deepest foundation to the crest. Dams of National Importance are those with a height of more than 100 meters and above or gross storage capacity of 1 billion cubic meters and above. As per N.R.L.D, there are 59 completed and 10 under construction dams in India which are classified under the dams of national importance. Harnessing hydropower to generate electricity has been recognized as Clean Energy as it does not lead to any harmful emissions or release of noxious effluents into the environment. It is considered a part of the 'Clean Development Mechanism' as proposed by the Kyoto Protocol on Climate Change. However, the main hurdle is in the way of the initial stages when the dam is to be constructed. The maximum of environmental concerns sprout up only in the beginning as the construction of the structure of the dam is what causes harm to the environment. A long and tedious process of E.I.A. is carried out where through the medium of 'Public Hearing' or participation, and the concerns of the local people and the affected parties are heard. India has witnessed a lot of protests and revolt against the construction of dams, mostly by the local people who get dislocated or displaced and by the environmentalists who bring forth the issues of the destruction of natural resources like submerging of ecologically sensitive land and the cutting down of thousands of hectares of forests. At times, it has also seen as a religious issue as was seen during the proposal of the Tehri Dam in Uttrakhand where the sacred river Ganges or Ganga was to be 'Damned'.

In comprehensive development projects such as a 'dam', to take the project up seriously, to provide participation of both parties who are affected and inform them at every stage is quite important. Furthermore, ensuring that the life qualities of social stratus are unaffected after dam projects is crucial on the sustainability of the projects. In other words, for comprehensive development projects such as dams, the application of the mentality of "development from bottom to up" will make it easier for local communities to accept the dam as a reality with all its all socioeconomic costs. Being informed before and after the dam project and to be given the have right to select their new residential places, are some examples of the ways to provide their participation. In spite of many benefits of dams, at the end of 1970's and the beginning of 1980's, when the sustainable development started to be discussed in the public and the care for environment rose, generally the negative effects of dams were pointed out during discussions. These

13. *ibid*
14. National Register of Large Dams; Central Water Commission

negative effects can be grouped as "effects on environment" and "effects on people", which include, respectively, losing of the ecological systems on the regions on which dam lakes appear and the re-settling of people, who are forced to leave their homes, because of the dam lake. "Involuntary settlement" is one of the most important factors of development, which is seen throughout history and is practiced by developing as well as developed countries. Producing electricity or building irrigation systems requires many people to be involuntarily dislocated. It is important to note that, it would be inaccurate to oppose resettlement policies by referring to above mentioned explanation which partially includes the problems of these policies. Developing countries may be in need of hydroelectric power and big irrigation projects, and great dams are many times seen as an answer to these needs. So, resettlement may be seen as inescapable during the process of development. The main problem at this point is to find out the ways by which, resettlement can be planned best, the problems caused by it decreased to minimum and the needs of the people who are dislocated met at a maximum level. To achieve these aims, all the problems that are caused by the project with their possible solutions should be clarified in the planning phase of the project, with the participation of the local communities that will be affected.

Water is the vital resource to support all form life on earth. Unfortunately it is not evenly distributed over the world by season or location. Throughout the history of the world dams and reservoirs have been constructed in order to prevent floods, to supply drinking and domestic water, to generate energy and for irrigation purpose. Dam projects, which are useful in meeting the demand for water in desired times and in regulating stream regime, have undertaken an important function in the development of civilization. Even today, water remains essential for the survival of mankind and the future development of the world's cities, industries and, agriculture. Today there is a significant demand on the world's water. As the world pollution continues to grow at the rate of over 100 million people each year, so does the demand for water. At the same time, there is a careless use of our natural resources. One of the most efficient ways to manage water resources for human needs is by the construction of dam that creates reservoirs for the storage and future distribution. Dams and reservoirs can and should be compatible with the social and natural environment of the region. The challenge for the future will be the utilization of dams and reservoirs for the wise management of the world's water resources as a part of each nation's social and economic development goal. The negative effects of the dam on the environment can be minimized or eliminated by careful planning and design that incorporate the public involvement and input in the early stage of this process. When the appropriate mitigation measure are identified early in the planning and design process for a dam and reservoir, they can be effectively and efficiently incorporated into the design, construction and operation of the project. The question of future is whether the dams will be useful or detrimental, whether the dam will improve environment or not. Now the management of water resources is an extremely important sector of environmental management. The demand of both water and power is increasing progressively with increasing population. Dams like large scale projects may solve the crisis of water and power besides moderation of floods but these will leave adverse impacts on the environment. The dilemma could be solved locally by small scale projects with involvement of public participation. Those who need more dams at the same time are concerned about adverse impacts of the dam face two formidable challenges i.e. first to inform the public about beneficial effects of dams and second to mitigate or nullify the negative impacts of such water resources developments projects to make it sustainable.



(Common man has a right not only to get justice but also to participate in the appointment of the judges to higher Judiciary under the Constitution.)

An Analysis on the New Method of Judicial Appointment in India

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One of the pre-conditions to ensure freedom of justice and maintaining transparency in the same, is free and fair judicial system which is committed towards a smooth functioning of the administration of justice. It is Judiciary, where people keep faith as a last resort. To ensure independence of Judiciary, it is crucial to have a check, firstly, on the appointment and secondly, removal of judges of the higher Judiciary. If judges are not independent, they may lose the objectivity in their approach. In addition to that, when their appointment is based on favouritism, this not only affects the functioning of the whole legal system but also the society at large. So the appointment in the higher Judiciary must be proper, fair and should be entrusted to an independent body. Wide range of selection process reflects that there is no universally accepted best practice which may guarantee independence of the Judiciary and corruption free system. Corruption is more dangerous in Judiciary than in any other institution, as it shakes the belief of the people who are already victimised. There should be diversity in the representation of the Judiciary so that monopoly of any single group can be avoided. Consequently there would not be a single dominant system rather a decentralised system of representation for the benefit of each section of society.

Indian Constitution ensures not only the eligibility of the respective position but also of the appointing authority. The procedure to appoint the judges of the Supreme Court and High Court is regulated by Article 124[1] of the Constitution. In the original text of the Constitution they were appointed by the President on the recommendation made by Chief Justice of India.[2] With the emergence of judicial activism[3], Article 124 has been interpreted in several ways. From the Shakal Chand[4] and first judges transfer case[5] to the presidential reference case[6] the word "consultation" used in Article 124 was interpreted as "with the consent". Then Collegium system[7] came out in Judges Transfer case II.[8] Judicial appointment became a matter of discussion again after Anna Hazare's movement[9] on Lokpal bill.[10] A demand was made that judiciary should also be included in the ambit of Lokpal Bill. After a long discussion and debate on judicial appointment a bill[11] was introduced and now it became an Act[12] which is effective from 13th July 2015. Since the proposal for judicial appointment commission is proposed there are lots of petitions[13] filed to the Supreme Court to challenge the Act.

In the present article an attempt has been made to analyse the importance of the judicial independence in the context of the new Act. Before going through the provisions of the new Act, we will have discussion on the concept of judicial independence and accountability.

Concept of Judicial Independence

Separation of power[14] is a fundamental principle of good governance. Lord Acton once said *"Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men".*[15] If power is vested in one organ then that is bound to corrupt. Montesquieu, in his book "The Spirit of the Laws" wrote:

"There is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."[16]

If we apply this doctrine in the context of judicial independence its mean that judiciary should be separate from the executive so that it can perform their function without any interference and pressure. If executive does any wrong then judiciary can declare it null and void. If the members of the judiciary are appointed and removed by the executive not on the merit or performance but on the basis of favouritism then judiciary is bound to become corrupt. This will hamper the judicial independence and accountability. To prevent abuse of power by the executive it should be kept out of the judiciary. This is possible only when executive have no role in the appointment of the judges to the higher court. In our county a recommendation of a name for the appointment to the higher judiciary and their suitability is decided by the executive and CJI through consultation between them on the basis of merit not on the choice of the executive. Even if judges are appointed by the executive their function is to administer the law as per the constitution and declare any function of the executive unconstitutional if that is against the constitution. Term and condition of the office of judges are regulated by law as per the Constitution. Removal of the judges can be done only through a resolution to that affects passed by parliament and it is a tough task to remove a judge of higher court. Since Independence there is only one instance when a resolution was proposed to remove a judge from his office.[17]

The concept of the Independence of judiciary denotes that there should not be any interference in the functioning of the

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judiciary by the executive. This independence is very much required so that judges while delivering a judgement should be free and fair. Judicial Independence can be ensured by providing the rule and regulation which deal with terms and condition of the services of judges in the constitution itself. If we apply this on our system it can be concluded that our constitutional makers have made all provisions which ensure judicial independence. Article 50 of the Constitution clearly says that judiciary should be kept away from the executive to ensure judicial independence. Article 124(2) says that they cannot be removed unless there has been a resolution passed by parliament to remove on the basis of proved misbehaviour and incapacity.[18] Their salary and allowances are not subject to legislature rather it is fixed and it cannot be changed which is disadvantageous to them.[19] Parliament has no power to curtail the power of the Supreme Court which is fixed by constitution.[20] Supreme Court and high court have power to punish for any contempt.[21] There cannot be any discussion in the parliament regarding the conduct of the judges of the higher judiciary.[22] All these provisions ensures that we have an independent judiciary under the Constitution.

Past practice

According to Article 124[23] of the Constitution the President acts on the advice given by the prime ministers after consulting cabinet of ministers. Actually executive power is exercised by the cabinet ministers. Clause 2[24] of Article 124 use the word "consultation" and says that president shall make appointments after consultation with such judges as he thinks fit. It implies that president is not bound to consult. The other important point is that president may consult with any judges of the Supreme Court or High Court which he thinks necessary. There was no such provision that Chief Justice of India must be consulted instead it says any judges of the High Court or Supreme Court may be consulted.[25] Since independence the practice which were evolved over a period of time for the appointment of judges to the higher judiciary was that in case of any vacancy occurred a recommendation was made by the Chief Justice of India to the ministry of law and justice thereafter the suitability of the name was considered by him and then president appoint that person as per his advice. Ministry of law and justice can have raise objection on the name proposed by CJI and could suggest any other name after consultation with CJI.

In Shakal Chand[26] case Supreme Court first time considered the word "consultation" used in Article 124 and said that "consultation" does not mean "concurrence" and President is not bound by the advice given by chief justice. But in all possible situation his advice should be accepted. On the appointment of judges to the higher judiciary and their transfer from one high court to other High Court S.P. Gupta case[27] (which is also called first judges transfer case) is considered a remarkable case which opened the door for discussion on this point at higher level. Supreme Court in this case interpreted Article 124 and said the executive is not bound to accept the recommendation made by the CJI. In this case a seven judge Constitutional bench rendered the decision that executive was not bound to consult with the Chief Justice on the matter of appointment and transfer. Further it said that President is under no obligation to give the supremacy to the opinion given by Chief Justice.[28] This decision favours executive's ruling on the appointment and transfer over judiciary. The role of judiciary in the appointment and transfer got weakened. This case changed the practice followed since independence on the appointment of judges. This matter again came to the Supreme Court in Supreme Court advocate-on-record association case (which is called 2nd judges' case) and collegium system was introduced and a debate and discussion on the collegium v. judicial commission was started. Supreme Court said that it is very dangerous to shift the power of appointment in the hand of executive. Supreme Court said **"protecting the integrity and guarding the independence of the judiciary"** it is very mush important to give importance to the opinion of chief justice in making recommendation. Supreme Court ruled out that in case of making a recommendation by the chief justice he is required to make consultation with the two most senior judge of the Supreme Court.[29] In the President referential case Supreme Court said that there shall be four member in a collegium with the CJI and recommendation shall be made on the basis of majority.

An Analysis of the provisions of the 99th Amendment Act, 2014

The 99th Constitutional Amendment Act, 2014 which inserted Articles 124A, 124B, and 124C in the Constitution to transfer the function of appointment of judges to the higher judiciary has become a matter of great discussion and debate. The first question arise is whether we really needed an institution like National Judicial Commission. It was blamed by the executive that it will lead the corruption in judiciary as there is no check and balance. Under collegium system CJI's role and his opinion was important and had a primacy over executive in the appointment. After the introduction of NJAC mechanism CJI's role is diminished and now judiciary have no more primacy and it have to share an equal responsibility with the executive. Some has raised doubts that provisions of the National Judicial Appointment Commission Act, 2014 and the composition of the commission provided under the new inserted article is against the principle of Judicial Independence.[30]

Article 124A[31] of the Constitution says that there shall be a commission which shall comprise six members. Three from the judiciary including the Chief Justice of India with two senior most judges of the Supreme Court. Apart from the judiciary minister of law and justice shall also be a member of the commission to represent the executive in the examination of a name and suitability for the appointment to the higher judiciary. The problem lies with "the two eminent persons" who will be selected by a panel consisting of Prime minister, leader of opposition, the Chief Justice and two other senior most judges to ensure participation of executive on equal basis in the selection process. There is no provision whether these two

persons should have legal background or not. It has not been discussed whether these persons should be from the judiciary or executive, and in which fields they should be eminent. This is the main lacuna of this Act. There is another provision under section 6(6) which provides for veto power. Its say if any two members of the commission have any objection on the name of any person then that name shall not be recommended by the commission.[32] It creates a risk of judiciary's voice and opinion being sidelined by other members. This is a fatal flaw and is almost a blatant indifference towards the views of the judges in the selection process. The nominees representing the government may favour the government's decision, thus going against the principle of independence of the judiciary.[33]

Article 124B(c) says that it shall be the duty of the commission to ensure that the person appointed is of "ability & integrity".[34] Here question is who will decide that the person is of ability and integrity. This gives huge discretionary power to the commission and because of equal sharing by executive and judiciary in the commission and provisions for veto power there is full possibility to abuse these power by the member of the commission in their interest. Even equal participation is not to be possible in practice in the proposed Commission. The new Act also provides for election of chief justice on the basis of "ability and integrity".[35]

Since Constitution has come into force the past practices was that the Chief Justice of India was appointed on the basis of seniority. This practice was interrupted when Indira Gandhi appointed Justice A.N. Ray bypassing four senior judges who resigned afterwards. Appointment of CJI only on seniority basis cannot be supported, but problem lies in deciding the maximum ability and integrity among judges who all are presumed to be persons of ability and integrity as they are the members of the Apex court of India. What may be those criteria to decide best eligible from eligible? Seniority rule ease this task and violating the seniority rule can create a problem. Deciding a member's ability and integrity is purely a subjective consideration. This rule can be followed if objective criteria are evolved.[36] Still, it is not possible to completely avoid subjective decisions. Solution is to give such criteria which is acceptable to majority and can avoid the conflict of interest.[37]

There is a possibility that members of judiciary will always try to please executive by favouring their decision to ensure there tenure. As there is a provision in the Constitution that no judge of the Supreme Court will practice in any court of India. This is basically to ensure independence of judiciary. But they can be made members of tribunals and other commissions like Human Rights Commission. These members are appointed by executive only. Here problem is that the member who wants to be a member of these bodies after retirement they will never go against the executive members in the commission and then that NJAC will be dominated by the executive only. There is no solution of this problem. Mostly, the cases which go to the Supreme Court involve the executive body of the government. The executive is becoming a permanent litigant in the higher judiciary. In these situations it is ethically wrong to send 3 members to the NJAC from the executive. NJAC mechanism is not wrong but it should be an independent body.

Dr B.R. Ambedkar objected to this amendment in following words:

"...It is quite possible that the Minister-in-charge of a certain portfolio may influence a member of the Public Service Commission by promising something else after retirement if he were to recommend a certain candidate in whom the Minister was interested. Between the Federal Public Service Commission and the Executive the relation is very close and integral one. In other words, if I may say so, the Public Service Commission is at all times is engaged in deciding upon matters in which the Executive is vitally interested. The judiciary decides cases in which the Government has, if at all, the remotest interest, in fact no interest at all. The Judiciary is engaged in deciding the issue between citizens and very rarely between citizens and the Government. Consequently the chances of influencing the conduct of a member of the judiciary by the Government are very remote, and my personal view, therefore, is that the provisions which are applied to the Federal Public services Commission have no place so far as the judiciary is concerned."[38]

But it is not true in the context of higher judiciary. Cases before the higher judiciary involve disputes between citizens and the government. Most of the cases before higher judiciary involve the interpretation of statutes passed by parliament, or rules and regulations passed by the executive. Thus, in the present situations, the statement made by Ambedkar loses relevance.

If the Government sincerely wanted an independent body for the appointment to the higher judiciary with honesty of purpose, they could have set up a truly independent judicial appointment commission under the Constitution. There is no doubt that a body was needed for the judicial appointment but the composition seems defective. The government could have based it on the UPSC which an independent body and it could also be entrusted with the task of creating the All India Judicial Service as envisaged in Article 312 still waiting to be implemented. But the chairman and members of the UPSC are appointed by the president. Executive interference cannot be avoided as our Constitution does not adopt the doctrine of separation of power in its strict sense. It is not necessary that Chief Justice and law ministers be a member of such Commission. They occupy the busiest and highest constitutional offices. NAJC should be a permanent body and its member should not be eligible for further appointment. Members of the commission should have legal background. They may be selected not only from judiciary but from academics and Bar as well. This will definitely ensure independence of the judiciary and better functioning of the judicial appointment commission. The criteria to define eligibility should be well defined and there should not be any scope for misinterpretation. Members should be from the different regions and states to ensure participation of all sections of India. This provision automatically ensures impartiality of the decision taken by the commission.[39]

One of the main basic structure[40] of our Constitution is independence of judiciary from the legislative and executive control. Thus an amendment made to the Constitution against the doctrine of judicial independence is unconstitutional. If one examines the performance of judiciary in India then it can be concluded that our judiciary has played an active role in the administration of justice. The trend of judgments passed by the Apex court reflects that till 1970 the judiciary was not very active and its attitude was in favour of the government's actions. But this did not continue for long, and a new trend came when judiciary became active in the sense that not only it was examining the policy decisions of the executive and legislative but it also started providing guidelines to the legislature to enact laws on issues coming before it. Due to the government's inaction over burning issues, there was encroachment by the judiciary over the legislative and executive organs by making laws in the form of judgment and guidelines, and directions and orders given to executive bodies to ensure execution of these guidelines. The outcome of this trend was that many rights became fundamental rights thought not expressly included in Part III of the Constitution.[42] is a mechanism which is evolved specially to protect public interest at large. Role of Judiciary has been appreciable in the recent past but over activism started destroying the power distribution under our Constitution. Judges of the Apex court started interfering in the majority of matters involving the government. A better example by which it can be proved is that when it was demanded under the anti-corruption movement that judges should also be included in the ambit of RTI Act[43] but this could not happen as they were not ready to be included and this shows that a restriction is needed on the power of judiciary also so that it cannot become a supreme govt.

Conclusion

Our Constitution does not strictly follow separation of power and the principle of judicial independence. Some amount of control has been given to each of the three organs to ensure checks and balances over the power of other organs. When the judiciary examines the constitutionality of parliamentary Acts it becomes superior to the parliament as it is entrusted with ensuring consistency of each enactment with the Constitution. When the executive appoints judges to the higher judiciary it performs a judicial function and it also compromises with the principle of judicial independence. NJAC is a welcome step as there is equal participation of the judiciary and executive in the appointment of the Judges to the higher judiciary. But to ensure that there is no politicization of the appointment to the higher judiciary some clarification is needed to the new Act. Some has raised doubt that NJAC will limit the power of judiciary to scrutinize the executive malafide actions its overreach. But we have to wait to see the outcome of the new Act before reaching any conclusion. It is crucial for the Commission to ensure objectivity in the procedure of appointment. Objectivity means that there must be some set norms to ensure transparency in the nominations, to fix the criteria for assessing the suitability of the candidate and also to fix some criteria to examine a meritorious candidate. If all of these can be ensured then there is no doubt that NJAC will be a revolutionary step in the reform of judicial process. Otherwise it will drag us to a situation where we will be bound to arrive at a decision on quid pro quo basis exposing the Apex Court to intellectual dishonesty and creating thereby a totally "subservient judiciary", instead of an "independent judiciary", contrary to the letter and spirit of the Constitution. Instead of increasing the confidence of the people, it is likely to cause loss of confidence of the people.

Endnotes

1 124. Establishment and constitution of Supreme Court (before 99th amendment Act, 2014)

(1) There shall be a Supreme Court of India constituting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted:

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office in the manner provided in clause (4)

2 Eightieth Law commission report on the Method of Appointment of Judges (1979) p-16

3 Judicial activism means as innovative, dynamic and law making role of the Court with a forward looking attitude discarding reliance on old cases, and also mechanical, conservative and static views. Vipin Kumar, "The Role of Judicial Activism in the Implementation and Promotion of Constitutional Laws and Influence of Judicial Overactivism",Feb-2014,Vol. 19, Journal Of Humanities and Social Science

4 Union Of India v. Sankal Chand Himatlal Sheth And others1978 SCR (1) 423

5 S.P. Gupta v. President Of India And Others AIR 1982 SC 149

6 In Re: Presidential Reference, AIR 1999 SC 1: (1998)

7 Collegium means a forum of judges including chief justice with four other judges available on Journal.lawmantra.co.in last visited 12/07/15

8 Supreme Court Advocates-on-Record Association and another V. Union of India AIR 1994 SC268,

9 Anna hazare's anti-corruption movement was supported by all class of the people of India to draft a Lokpal Bill

10 Lokpal Bill, 2011 which could not be passed

11 Judicial appointment commission Bill, 2014

12 NJAC Act, 2014

13 The Act was challenges on the basis that it is against the basic structure of the Constitution

14 Sam J. Ervin, "Separation of powers: judicial independence", available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3279&context=lcp last visited on 21/07.15

15 Read Lord Acton available at http://www.yale.edu/yup/pdf/079567_front_1.pdf last visited on 21/07/15

16 "Spirite of Law", available at http://www.thefederalistpapers.org/wp-content/uploads/2013/01/The-Spirit-of-The-Laws.pdf last visited on 29/06/15

17 "A loss of innocence?: judicial independence and the separation of powers", available at http://ojls.oxfordjournals.org/content/19/3/365.full.pdf last visited on 25/07/15

18 Article 124 (4) says A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority

of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

19 Article 125 (2) says (2) Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule: Provided that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment

20 Article 138

21 Article 129 and 142 of the constitution

22 Article 121 says No discussions shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties expect upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided

23 Article 124 of the Constitution

24 Clause 2 of article 124 of the constitution

25 Article124 (2) says Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted

26 Supra N. 4

27 Supra N.5

28 Ibid

29 Supra N.8

30 Tarr. G., "Without Fear & Favor: Judicial Independence & Judicial Accountability in the State", 2012, Standford University Press, New york

31 New inserted Article 124 (A) says (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:—

(a) the Chief Justice of India, Chairperson, ex officio;

(b) two other senior Judges of the Supreme Court next to the Chief Justice of India —Members, ex officio;

(c) the Union Minister in charge of Law and Justice—Member, ex officio;

(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People — Members: Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women: Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination

(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

32 Provided further that the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation(Section 5 (2) proviso 2 of the NJAC Act, 2014)

33 Kozloweski &Mark R. Lewis, "Myth of the Impartial Judiciary: Why the Right is wrong about the courts", 2003, New York University Press

34 Newly inserted Article 124(B) says It shall be the duty of the National Judicial Appointments Commission to— (a) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts; (b) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and (c) ensure that the person recommended is of ability and integrity.

35 Soeharno & Jonathan, "Integrity of the Judges", 2009, Ashgate Publishing Group, London

36 Ibid

37 Eisgruber & Christopfer L., "Next Justice: Reparing the Supreme Court Appointments process", 2007, Princiton University Press, New Jersey

38 Constituent Assembly debates Vol.8 p.258

39 Supra N. 33

40 Concept of basis structure implies that there are some elements in the Constitution which are constituting factor without which Constitution cannot be and if there is any amendment in the constitution which are destroying these factors then that will be unconstitutional. See Hasan, Z., Sridharan, E., & Sudarshan, R., "India's living constitution: Ideas, practices, controversies", (2002).Permanent Black, Delhi

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42 According to Black's Law Dictionary- "Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected." Ibid

43 RTI Act, 2005

Good people do not need laws to tell tham to act responsibly, while bad people will find a way around the laws.

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Justice is justly represented blind, because she sees no difference in the parties concerned. She has but one scale and weight, for rich and poor, great and small.

The Sugarcane Conundrum

Some Policy Recommendations to Avert the Crisis

Sony Pellissery, Preeti Manocha, Shreoshee Mukherjee, TVS Sasidhar, Nalini Kaushik

Introduction

The recent spate in farmer suicides in the Karnataka's sugarcane belt in 2015 is symptomatic of larger agrarian crisis and specific conditions prevailing in the sugarcane industry. According to the National Crime Records Bureau Report, 2014, around 207,373 farmers in India have committed suicide since 2000 with Karnataka recording the second highest number of cases. However, various reports suggest that Karnataka had no history of farmers committing suicide when crops or market failed, although there were agitations of farmers in the past. The first incidence of farmers' suicide, which attracted considerable attention of media and public, was reported on 12 December 1997. However, since then such cases have been rampant. Further, in Karnataka, the victims are largely those farmers whose farm sizes are about 1-3 acres.

Consequently, different Commissions appointed by different state governments have arrived at a common conclusion that debt is the key explaining factor for this human tragedy. Therefore, appropriate planning and interventions could reverse the scenario. This paper looks into these possibilities. At one end of the spectrum are the sugarcane-growing farmers, who despite increasing the area under sugarcane cultivation, remain dependent on the government policies due to increased input costs and low support prices that are below cost of production. At the other end is the sugarcane industry, especially mill owners and cooperatives, which claim a loss situation due to mismatch in demand and supply. Further, unlike many countries that use varied sources for sugar production such as sugarcane, sugar beet, sorghum etc., India fulfils its sugar demands only from sugarcane. Therefore, any mismatch between demand and supply of sugar in the country assumes significance at the national level and influences the economics of sugarcane cultivation to a great extent (Murthy, 2010).

Sugarcane and sugar production in India

The state of Karnataka assumes a very significant place with respect to its sugar industry. It is the third largest sugar producing state in the country. Yet, a comparative picture of Karanataka's scenario with other states in India can reveal the roots of the crisis. As the Table 1 below shows, among the top five sugar producing states, Tamil Nadu is the only state that has no efficiency gap in sugar production. Tamil Nadu's yield is much higher compared to all other states. As compared to Tamil Nadu, Karnataka's efficiency gap is 15.6%. This measure of yield is important to understand the competitiveness of production. Globally, Colombia's sugarcane yield is the highest with a yield of 109.4 Tn/Ha. Only Tamil Nadu comes closer to this benchmark. The efficiency gap of India is 36.8%, which suggests that the yield of sugarcane in India is substantially lower when compared globally.

Lower yield makes India's sugar industry uncompetitive at the international level which plays a role in reduced monetary remuneration to the farmers. Current plight of sugarcane farmers in Karnataka is a scenario of being squeezed between political quagmire on one-hand and sugarcane industry owners on the other. The Karnataka State Sugarcane Growers' Association claims that 4,300 crores of Rupees to be lying in the sugar factories, possibly due to government's inattention towards the farmers. This has led to a serious agrarian crisis in the state pushing farmers further into debt and poverty. Other important reasons cited for farmer suicides range from mono cropping pattern, political influence over sugar industry ownership and glut in production.

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Table 1: Area of Sugarcane Cultivation, Yield and Sugar Production in top sugar producing states in India

Table 1: Area, Yield and Production of Sugar				
State	**2004-05**	**2007-08**	**2010-11**	**2013-14**
Uttar Pradesh				
Area: '000 hectares	1955	2179	2125	2228
Yield: kg per hectare	60733	57212	56727	60453
Sugar Production: Lakh tonnes	49	73.2	57.6	66.1
Maharashtra				
Area: '000 hectares	324	1093	965	937
Yield: kg per hectare	63194	80912	84866	80453
Sugar Production: Lakh tonnes	21.9	90.8	90.7	75.9
Karnataka				
Area: '000 hectares	178	306	423	420
Yield: kg per hectare	80202	85752	93752	85500
Sugar Production: Lakh tonnes	10.8	28.4	36.4	41
Tamil Nadu				
Area: '000 hectares	232	354	316	333
Yield: kg per hectare	100845	107484	108392	96989
Sugar Production: Lakh tonnes	14	21.4	18.4	11.5
Andhra Pradesh				
Area: '000 hectares	210	247	192	192
Yield: kg per hectare	74948	82170	77938	79000
Sugar Production: Lakh tonnes	11.5	13.4	10.1	9.6

Source: Adapted by authors from Directorate of Sugar, DFPD

Sugarcane Pricing Policy

Sugarcane being a perishable crop has to be crushed within three to four days post-harvest to extract sugar out of it at the specific recovery rate as required by the state, which in case of Karnataka is 10.3% on an average (CACP, 2014). The statutory status given to the crop mandates the millers to procure the crop directly from the farmers at the fixed price declared by the central government, known as the Fixed and Remunerative Pricing (FRP). Some major cane producing states such as Uttar Pradesh follow a system of State Advisory Price (SAP) which is usually way above the FRP fixed by the Central Government. While Karnataka set a price of Rs 2,500 per metric ton of sugarcane in 2013-14 against the FRP of Rs 2,200 a ton, it stuck to the Centre-determined rate of Rs. 2,200 per ton the next year. Other states like Uttar Pradesh, Uttarakhand, Punjab, Haryana and Tamil Nadu have announced SAP above the benchmark price fixed by the Centre.

Glut in the Sugar Market

Sugar is the primary raw material which is produced from the sucrose content of sugarcane, besides other by products like molasses, bagasse, pressmud etc. The cyclicality[1] of sugarcane production has been an issue in the sector since many years. Off late, Karnataka has observed a substantial rise in the production of sugarcane in the year 2009-10 post which the production remained in the bracket above 35 lakh tonnes. The gross production of sugar has reached 279.57 lakh tonnes as compared to 240.49 lakh tonnes last year, mostly from Uttar Pradesh, Maharashtra and Karnataka (DFPD, 2014).This has led to a glut in market with excess stock of sugar that has distorted the prices. The ex-mill prices of sugar have fallen to a new low in the last few years and it won't improve unless the surplus stock is liquidated. Such an excess stock of raw sugar has dissuaded mills to produce more and hence they have started refusing the purchase of sugarcane from the farmers. The possibility of exporting the surplus sugar is low unless the government supports the mills with export subsidies to compete with the global sugar prices. As shown in Figure 1, it is clearly evident that domestic prices are higher than the international prices for refined sugar.

Figure 1: Comparison of Domestic and International Sugar Prices

Source: Agmarknet (for domestic prices); London International Financial Futures Exchange (LIFFE) (for international prices)

1. The sugarcane production cycle is such that every three-four years the sugarcane yields increases, thereby increasing the area under cultivation. The high production of sugarcane is directly linked to the sugar prices in the market. During the years of high production of sugar, the prices of sugar in the market are low. Resultantly, sugar mill owners delay payment to farmers for the sugarcane supplied which leads to accumulation of "cane arrears". Thus, arrears payable are higher in the years of higher production. Accumulation of cane arrears prompts sugarcane farmers to switch cultivation to alternate crops, thereby reducing the area under sugarcane cultivation. In addition, sugarcane farmers may supply to the alternate industry of gur and khandsari where payments are made immediately and in cash. Diversion of sugarcane to gur and khandsari decreases during the years of abundant availability of sugarcane and increases during the years if shortfall in production. As the production starts falling, due to decline in the availability of raw material for the sugar, the sugar prices go up. Due to higher revenues, mills are then able to liquidate part of the cane arrears. This signal to the farmers makes them shift back to the cane cultivation. Over a period of time, there is overproduction and the prices fall again. This, the infamous 'Indian Sugar cycle' is set in motion again.

The Political Economy of the Sugar Mills

The onus has therefore fallen upon the mill owners who refuse to buy the crop from the farmers so as to sustain themselves in the market. Many of the mills are also owned by politicians belonging to national parties like BJP and Congress, who have been defaulting on the cane arrears and getting away without making payments to the farmers (Shrivastava 2015). As a consequence, the farmers end up taking a loan from private money lenders who charge an interest as high as 24 per cent. While sugar mills have been provided with interest free loans by the government, they owe farmers approximately Rs 930 crores as cane arrears, only in Karnataka. Most of these millers claim to be in tremendous loss due to the rising gap between FRP and SAP and their inability to cope up with the cane pricing, since the cost of production is high and the price of sugar is crashing in the domestic as well as the global market. However, the paradox is that almost forty new companies have registered to enter the sugar industry by signing the Industry Entrepreneurship Memorandum in Karnataka, while many more seem interested in entering the market. This hints towards the external influences in the sugar mill industry wherein political patronage could be playing a major role.

POLICY RECOMMENDATIONS

Encourage Farmers to Grow Alternative Crops

The demand and supply gap in the sugar market signals that the farmers could also move to grow crops which are more remunerative than sugarcane. Currently, the prices of pulses and edible oils are on an upward trend. In June, inflation for pulses rose to 22.22 per cent, according to the Consumer Price Index, from 16.62 per cent in the previous month. This signals that there is a demand for the crop in the market and can help the farmers realize better prices. Moreover, the soil and climatic conditions in the Karnataka state are favourable to grow pulses. The state agricultural departments should focus the extension services and regulate the mutli cropping as per requirements of the market. State's regulatory role in cropping will play a vital role in such scenarios. In European countries, the state regulation determines what crop should be sown and for how much area. Without such regulatory practices, the prices would fluctuate according to the unpredictable changes in the market. Such kind of regulation is hard to implement in Indian context because the land holdings are small and number of farmers are very high. This single cropping problem can be avoided only through extensions services and creation of market for other crops.

Deregulation of the Sugar Industry

The Government, both at the Central and State levels, have imposed several regulatory restrictions because of which the sugar industry is unable to exploit the maximum market potential. At the Central level, the government has prescribed a minimum radial distance of 15 kms between any two sugar mills. Every designated mill is obligated to purchase from the farmers within the area and vice-versa. This restriction was placed to ensure the minimum availability of sugarcane for all the mills. However, the problem that has emerged with such a restriction is that it has given a virtual monopoly to the mill owners over farmers in a large area. Further, it restricts competition by placing entry barriers in the market. It also reduces the bargaining power of the farmer when he is forced to sell cane to the mill which has not even cleared the previous arrears, particularly in the context of the fact that sugar mills are owned and operated by the political interests who tend to exploit the farmers.

Hence, in order to ensure competition and free market access to the farmers, the government must allow the farmers to forge individual contracts and decide which mill they want to sell their produce to. At the State level, the Karnataka Government has placed restrictions on the production of ethanol through sugarcane by-products such as molasses as well as its direct conversion from sugarcane. In the present stage when there is a glut in the sugar market due to the excessive production, ethanol production can act as a remunerative alternative. The issue has been discussed in detail in the following section:

Move towards Ethanol Production

The sugar production in India follows a five year cycle wherein during the first two years there will be spike in the production which results in fall of prices and then decline in production resulting in lack of availability of sugarcane for ethanol production. The current phase is the highest point in the spike wherein the production is more than the market requirement. This is largely due to mismanagement on the part of the government and other stakeholders in the value chain including farmers and mill owners. The alternative that can address the current problem is to permit mill owners to produce ethanol directly from sugarcane. Currently, the mill owners need to produce ethanol from molasses which is the by product of sugar production. It has to be understood that the by-products of sugar production have a high commercial value when compared to direct sale of sugar. The ethanol from molasses and power from bagasse contribute to the country's energy requirements and therefore the mill owners have to be allowed to capitalize on by-products which will also support their cash flow. The mill owners must be given freedom to either crystallise the juice extracted or ferment it to ethanol depending on the demand in the market.

This will boost the domestic biofuels industry and has the potential to accelerate the rural development. The majority of India's labour force is housed in agriculture sector and there is a potential for this industry to accommodate the workforce and raise the incomes of the rural households. The increase in biofuel production may have a negative social impact as well as environmental impact. One evident potential problem is that cultivating greater sizes of fuel crops for biofuel purposes may generate a competition with food crops for land, water and other agricultural inputs. This might prove particularly challenging for the government because of shortages of food and rising food prices which may result. But this can be addressed by effective regulation mechanisms.

In the year 2002, Government of India through notification made it compulsory to use petrol that is blended with 5% ethanol in 9 major sugar producing states. By 2007, the government has made it compulsory to use 5% ethanol blended petrol across the country. The Government of India, considering the importance of biofuels, has come up with the bio fuel policy in 2009 that aims at blending the ethanol with petrol up to 20%. This was a very ambitious move that could not be realised. India has imported 61,368.20 kilo litres of ethanol in the year 2013 -2014 and 114,506.22 kilo litres of ethanol in the year 2014 -2015 (Ministry of Commerce, 2015). The growth in imports is 86.59% which is an indicator of lack of availability of ethanol in the domestic market.

Last year, the Oil Marketing Companies (OMCs) had placed a bid to secure 97 crore litres of ethanol but claim unmet demand from the domestic sources due to the regulatory restrictions in place since only two states – Maharashtra and UP – allow ethanol produced from sugarcane to be sold to the OMCs. Karnataka restricts the ethanol sale to the OMCs which limits the industry from exploiting its market potential. Moreover, in order to make ethanol production more economically viable for the domestic sugar industry, the OMCs have fixed the ethanol procurement price at Rs. 48.5-49.5 per litre based on distance (revised from Rs. 27 per litre earlier this year). Hence, allowing ethanol production for OMCs is one way out to make the sugar industry more remunerative for the farmers.

Conclusion

Amongst all the agro-based industries across the world, government intervention through policy regulations is highest in the Sugar industry. The problem with the interventions that are in place in India are that these are largely in pricing, radial distance between the mills, trade policies and even sale of by-products which are causing market distortions. The argument put forth against ethanol production is a possible shift of land use from food production to industrial production. This poses a wider challenge to have coordinated policies for various sectors as the India is experiencing shifts in its production patterns. This was the rationale behind government's policy of not allowing sugarcane for direct production of ethanol. But it has to be understood that, on the present day the sugar stocks are surplus in the country and any additional production of sugar will further worsen the domestic price of sugar. Therefore, the government should allow for ethanol production till the present stocks are used which will act as a short term solution to the crisis and in long term a comprehensive policy has to be evolved that will address the caveats of this approach by capping the sugarcane production in particular mill area, by encouraging contract farming models so that the mills can sign contracts with the farmers as per the market requirement that will discourage the shift to sugarcane production and the other important policy intervention is to provide extension services that will encourage multi cropping agriculture.

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Do and then Order. Learn and then teach. Follow and then lead. Listen and then speak. Everything starts from you.

Release of Monographs on
"Industrial Relations Law" - 12th September, 2015

Realising Children's Right to Food by using National Food Security Act Exploring Delegated Legislation/Rule Making

Dr. Neetu Sharma*

Right to food for children was reduced to provisions for meals and take home ration to children under the age of six, those in schools unto standards VIII or 14 years, and pregnant and lactating mothers by the National Food Security Act (NFSA) 2013. The state governments have been conferred most of the responsibilities relating to implementation of the Act, and comprehensive Rule-making powers, which need to be leveraged by civil society, especially by child rights organisations.

Trends in Rule making

After missing atleast three deadlines for the implementation of the Act, most of the state governments have still not notified state rules under NFSA 2013. Added to this, is the fact that implementation of the Act is being seen only as identification of eligible households under PDS (Public Distribution System). In most of the states, this process has remained confined to the executive and that too with the department of food and civil supplies, with no coordination with other concerned departments. Consequently, issues relating to children's rights have been marginalised in the process of rule making. Negligible space for the involvement of civil society in the process has resulted in the framing of rules that inadequately addresses or entirely does not deal with the concerns of children.

Need for civil society to engage

Participation of NGOs, academic institutions and other grassroots organisations in the Rule-making process under NFSA 2013 is required for a variety of reasons, including:

- Ensuring that the concerns of children (from all age groups and backgrounds – in schools, out of schools, in residential institutions, and those on streets), lactating mothers and pregnant women are addressed;
- Ensuring that the process remains participatory and represents the broader worldview and not only the government's position;
- Ensuring coordination among various states departments that have a role in the implementation of the Act; and
- Making sure that the entitlements are protected, and expanded within the scope of the law

What needs to be done

Following are the major areas of Rulemaking under the NFSA that need to be pursued by the civil society organisations:

Participatory process

1. Seek information on the status of State Rules in their respective states and initiate discussions with the Food departments.
2. Offer to be part of the Rule drafting process and facilitate consultative meetings.
3. Ensure participation of organisations working on issues related to children and women.
4. Influence the rule making process based on their rich ground level experience.

Specific recommendations

- Protect existing entitlements available in the state through state schemes and programmes.
- Protect legal entitlements already available through interim orders of Supreme Court order.
- Provisions as included in Schedule III of the Act should be explicitly included in the State Rules.
- Internal Grievance Redressal Mechanism to be strengthened within the concerned department and publicized.
- DGROs to be appointed by the State independent of state control and should be provided with necessary financial and staffing support.
- Independent State Food Commission should be appointed and should have the mandate to look at the violations pertaining to women's and children's right to food also.
- Monitoring Mechanisms must have representation of the functionaries/experts/ workers of AWCs and MDMS in addition to TPDS.
- Transparency mechanisms as included in the NFSA should also be applicable to the other schemes and programmes having entitlements pertaining to women and children.
- Social audits should be conducted for all the entitlements made available through NFSA and state rules.
- Specialised agencies (for eg National Institute for Nutrition) should be engaged in setting the nutrition standards of food being provided through schemes.
- A specialised independent agency should be involved in facilitating the social audit and state governments must provide all the requisite information and resources.

1. Fellow, Programme Head, Right to Food, Centre for Child and the Law (CCL), National Law School of India University (NLSIU).

- Rules must also include provisions for awareness generation among beneficiaries regarding the available entitlements, means to access them and process to approach grievance redressal mechanisms in cases of any violations.
- Periodic capacity building and refreshers for all the functionaries involved in the implementation of the Act must form part of the State Rules.
- Provisions for allocation of adequate resources must be included in the State Rules
- Rules must upheld with 'no downward revision' in the norms.
- Quality of the food made available should comply with the Food Safety and Standards Act, 2006.

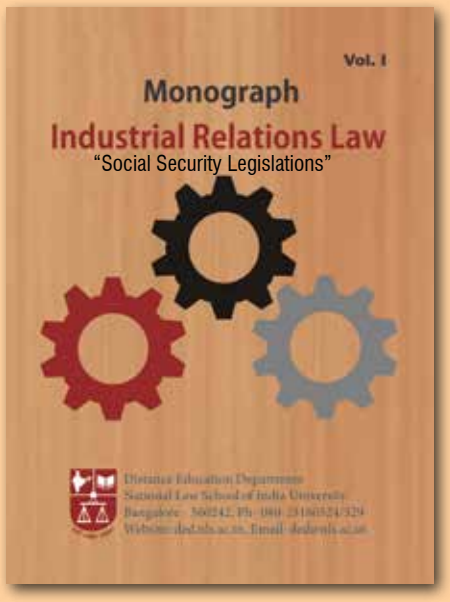
Children in Schools

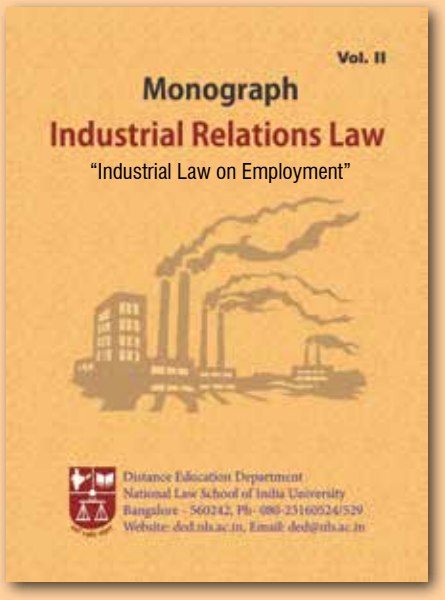
- Cover all children upto 10th/12th standard, in all government and government aid schools and education centres;
- Provision of infrastructure-cooking and dining facilities and safe drinking water;
- MDMS menu to be age appropriate, diverse and nutritious;
- Local women's groups to be involved in provision of food;
- SDMCs to be strengthened to monitor the provision of food as well.

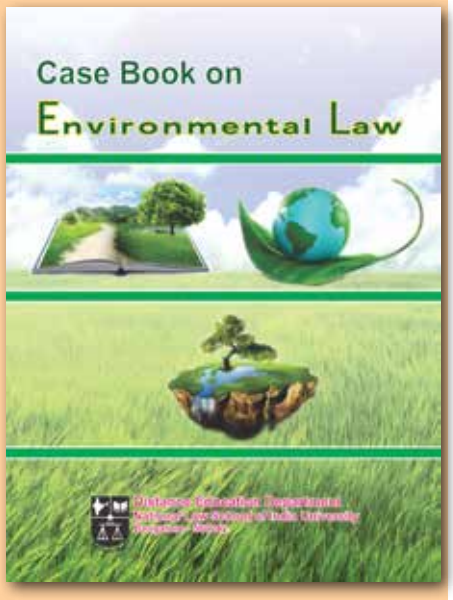
Children under Six

- Anganwadi centre to established wherever there are 40 or more children under the age of six;
- Dalit, tribal areas and difficult terrains to be prioritised in setting up these Anganwadi centres;
- Anganwadis to have all the necessary infrastructure;
- Village Health Sanitation and Nutrition Committees to monitor the functioning of provisions made available through Anganwadi centres;
- No anganwadi to turn away children on the pretext of lack of documents;
- Rules to include roles and responsibility of all the functionaries involved in service provisions for children under six, pregnant women and lactating mothers;
- Rules to specify process for identification of malnourished children;
- Support to be provided for exclusive breastfeeding which should include counseling and other maternity benefits;
- In addition to supplementary nutrition, immunization, health check ups, referral services, growth monitoring and promotion and pre school education.

New Publications at Distance Education Department, NLSIU







Legal Education Corner

Dr. Shashikala Gurpur*

Dr. Gurpur is a Member of the Legal Education Committee, Bar Council of India, and a Former Member of the Law Commission of India. Her Teaching experience of 21 years includes Post Graduate Teaching and Research and guiding Master's and Ph.D. students.

1. ***You have been teaching Law for more than 20 years. In your vast experience how would you say the field of Legal Education has changed? And what changes do you foresee in the future?***

   Legal education in India has undergone sea changes ever since the emergence of 5 year program and more significant, the national law school movement. aside from the academic rigour, professionalism and discipline, Indian law schools are competing with the best of peers across the world. The then NLS was rightly addressing this in multiple ways under the senior leadership of Dr Menon, Dr Mitra, Dr Jaygovind and Dr Vijaykumar.The gap between those law schools in developed minority countries and the Majority rest is narrowing. This is a good sign. When I returned from Ireland in 1998, I experienced how far behind we were, in academic process, faculty development, pedagogy and in cascading clinical legal skills across the student body. As I was learning these ideas, I could also see how any low quality education can deny best opportunities in life and it breeds injustice.I learnt from many Gurus (as the sacred Guru spoke of how he learnt from many Gurus). It became a change agent inspiring far-flung law colleges, linking with statutory or regulatory bodies, networking with best international peers. in addition to such influences, My own stint in NGO leadership, Media studies and corporate managerial role helped me to shape my leadership traits and talents when I got the SLS opportunity. Today, Indian approach is enriched by the human interest in students, urge to perfect and excel beyond its limits and the Indian models. I watched how research and publication galloped in NALSAR and NUJS. I watched how medical school's mandate on interdisciplinary modules and housemanship were missing in law schools. Our law schools have to assume institutional social responsibility to be inclusive of many a 'nation'. at once, these must cater to the India of the vernacular as well as villages and not just metropolitan; at once there will be students from many nationalities learning in India. I foresee that the future law schools will be absorbing the spirit of best practices from all disciplines, will be nodal points for all stakeholders, will shape leaders and governance milieu, will support innovation and human development in a more meaningful way. I see a future where Indian Law schools will have more diversity of nationalities and Indian legal minds will shape the judicial and political discourse of the world while they discover their own idiom of law as well as justice and then reconnect to bridge the hiatus of the colonial past.

2. ***Having served as a member of the Law Commission of India, and being a member in the Legal Education Committee of the BCI, where in legal education have we been doing well and where could we improve?***

   As stated already, we are doing well in preparing students for a range of careers. But it might spread too thin. We need to work more on designing talents in keeping with the emerging needs. It requires scientific, psychometric approach and not overload of information. We have a rich menu of ideas and literature on clinical training, professional training, which we have not assimilated effectively. Law schools must connect silos of judicial training and lawyers' training. They must engage with community. So, BCI must mandate community service apprenticeship or pro-bono equivalent hours which SLS mandates as service learning. We could improve our pedagogy with law labs connecting real world. We could improve communication and team behaviour skills moderating the highly competitive and individualistic tendency in students. We could enrich ethical content and ethics learning. We could have unified approach at regional and provincial level to create student-sentinels of justice. In our minimum requirements for law schools, we could add some safety guidelines and sensitivity to gender and other perceived disadvantages. Our language and rhetoric use require rethinking. Law reform and policy engagement must become part of the curriculum and assessment process. Research needs to be center-staged and infused into the learning climate. WE need to train lawyers to prevent and handle disputes than thrive on them.

3. ***In your message to prospective students you say "The ultimate touchstone of quality legal education is the quality culture pervading the Institution." What has***

* Prof. [Dr.] Shashikata Gurpur, Dean and Director- Symbiosis University Law School, Pune.

been your institute's policy regarding the same?

Quality culture is a hyphenated word, where the hyphen is subtle: it conveys quality of culture and quality as culture. The quality of culture is combination of values such as democracy, rule of law, ethics whereas the quality as culture will put merit and objectivity at the highest virtues. Governance will run in a smooth manner with pre-determined processes, key result areas and compliance. Reviews are minimum and the urge to better oneself as well as continuous improvement will be the trait. Our institution's policy is to continually improve, to take things with unanimity, with openness, with mutual respect based on a strict code of conduct for all. It is about keeping a framework and about pushing boundaries of self-limiting beliefs and traits. Such synchronized energies move the mountain, attracts best talents and sustains excellence.

4. ***What do you feel is the role played by Law Schools in shaping the future of Law in India?***

Significant. As we know, history testifies to law's nexus with nation-state, lawyer's role in nation-building. Law schools are stewards of such talents and leaders, meeting points of leaders and test labs for models of justice and advocacy. Law schools must move their walls to engage with other disciplines and events in order to use law as a tool facilitating and shaping the nation as well as the world. Law has to keep pace with both innovation and subversive perversion as the guardian of rights and the bulwark of justice. So, law schools create, nourish and protect law.

5. ***You have been a staunch advocate of quality legal publications. What do you reckon are the benefits of law magazines like In-Law, published by NLSIU?***

Benefits of your publications are immense. They promote research, provide a platform to showcase new talents, guide variety of legal writing. They present otherwise drab law matters in an interesting manner. They have a huge academic value in moving the boundaries of knowledge. Under able young leaders from among faculty and students, In-law will bridge the current gap for such a mechanism. It will provoke many to organise such a publication, for 'imitation is the best form of appreciation'. Keep up the good work.

- Interviewed by:
Mr. Pratham Guthi
Research Fellow, CEERA, NLSIU.

Practitioner's Corner

Mr. Promod Nair*

Mr. Promod Nair currently heads Arista Chambers, his independent arbitration practice. He is currently appointed as a Member of the LCIA (London Court of International Arbitration). He is also a Vice-President of the Indian Arbitration Forum and a member of the IBA Asia Pacific Arbitration Group (APAG) Working Group on Harmonizing Arbitration Laws in the Asia Pacific Region.

1. ***To what extent is India considered an arbitration-friendly destination, and why?***

India has often been described as an arbitration-unfriendly jurisdiction, although recent judicial decisions have changed this perception to some extent. The main factor for this perception to exist is the level of intervention by the Indian courts at all stages of the process. Whilst the Arbitration and Conciliation Act 1996 limited judicial intervention to a few well-defined instances, the Indian courts have found means to broaden the scope for judicial intervention.

Excessive judicial intervention (coupled with the propensity of the courts to rewrite the statute and reverse their own decisions at frequent intervals) have increased the uncertainty factor and substantially diluted the efficiency of arbitration in India. Decisions in this vein have eroded the principle of respecting the disputing parties' decision to resolve their disputes by arbitration rather than in a national court. Such judicial decisions have had the effect of damaging India's claim to be an arbitration-friendly jurisdiction. It is hoped that the recent trend of pro-arbitration decisions emanating from the Supreme Court as well as the proposed amendments to the Arbitration and Conciliation Act 1996 will pave the way for an image

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correction and enable arbitration to be an effective method of resolving disputes in India.

2. *How would you analyse the decision of the Delhi High Court in Vikram Bakshi v McDonalds India, and its possible implications on foreign franchises?*

The decision in this case is surprising and I would venture to say, quite clearly wrong as a matter of law. The court's conclusion that arbitration is a forum non conveniens despite the parties agreeing (in their contract) to submit their disputes to institutional arbitration is flawed and runs counter to the letter and spirit of India's arbitration law.

The court also failed to recognise that there exists no power for an Indian court to issue an anti-arbitration injunction. Section 5 of the Arbitration and Conciliation Act 1996 limits the powers of courts to those expressly provided in the Act itself and no such power has been conferred on the Indian courts.

The decision is capable of serious misuse and I would hope that it is quickly corrected by the Supreme Court.

3. *What reforms do you expect to be brought in the system of arbitration in India?*

A number of recommendations contained in the 246th report of the Law Commission, if accepted by Parliament, will bring in much-needed legislative reform. However, reforms by legislative intervention will not alone be sufficient. It is equally important to improve and transform the culture of arbitration in India. This will require a steadfast commitment to improving the standards of arbitration amongst the key stakeholders—the bar, the bench, the arbitrators, arbitral institutions and the users of arbitration. The pool of arbitrators and specialised counsel has to be deepened and the arbitration bar has much to learn from best practices in jurisdictions which have a more developed culture of arbitration. Happily, there are positive signs of all this happening in India today.

4. *What are the challenges to the enforcement of arbitral awards (domestic and foreign) in India, and how can they be overcome?*

The greatest challenge to the enforcement of arbitral awards (both domestic as well as foreign) is the time taken for enforcement. In respect of domestic awards, once an application for challenging the award is filed, it effectively freezes the enforcement of an arbitral award. Delay in enforcing a foreign award resulted in India being held liable for breach of its international law obligations to a foreign investor under a Bilateral Investment Treaty.

The problem of delay could be tackled if a strict timeline is prescribed (and mandatorily adhered to) for deciding applications for enforcement of awards.

The second aspect could be remedied by a legislative change (i) clarifying that the filing of a challenge to an arbitral award would not render the award automatically unenforceable, and (ii) expressly empowering the courts to require the deposit of the (whole or a part of the) sum awarded by the arbitrators as a pre-condition to grant a stay on enforcement pending the consideration of the challenge to the arbitral award.

5. *How do you envision the future of alternative dispute resolution, particularly arbitration, in India?*

Despite its challenges, the potential for alternative dispute resolution in India is exciting. The vast majority of commercial contracts contain arbitration clauses and the acceptability (and effectiveness) of mediation is also growing both of which augur well for the growth of ADR in India.

6. *How would you advice law students on bridging the gap between theory and practice for a career in arbitration?*

The best bridge would be internships with arbitrators, specialist arbitration counsel and arbitral institutions. There is also a growing number of domestic and international arbitration moots, judged by expert practitioners in the field, and participation in these could give law students a real flavour of arbitration law in practice.

- Interviewed by:
Ms. Ashwini Arun
Research Assistant, DED, NLSIU

ABC... Appellant
Versus The State (NCT of Delhi)... Respondent

Mr. C.N. Manjappa*

IN THE SUPRME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. …….. OF 2015

[Arising out of SLP (Civil) No. 28367 of 2011]

(Before Vikramajit Sen and Abhay Manohar Sapre, JJ.)
Date of Judgment: July 06, 2015

Judgment of the Court Delivered By

VIKRAMAJIT SEN, J.

Prelude

Man is manned by a man. He could man a man when he possesses an authority. One does get this authority when he/she is responsible for the birth of a babe. The child gets a footing in a legal system only on establishing its pedigree, no matter whether it is born to legally wedded mother or unwed mother. The element of lineage would facilitate the child to attain socio-economic and political status in the society. The question is how to establish its bloodline for the purposes of securing domicile, citizenship, nationality and familial rights. A link with biological or adoptive parents will take to the root. Indian legal system, generally around the world, anticipates that the bond shall be confirmed through paternity although maternity is a fact. Situation may warrant the mother to lend her name to trace the ancestry of the child and hold the office of guardian when the father is uncaring. The judgment of the Supreme Court on ABC Versus THE STATE (NCT of Delhi), (CIVIL APPEAL NO. …….. OF 2015, [Arising out of SLP (Civil) No. 28367 of 2011] Date of Judgment: July 06, 2015) would illustrate it.

Facts of the case

ABC, the appellant, is a Christian, well educated, gainfully employed and financially secure. She gave birth to her son in 2010, and has subsequently raised him without any assistance from or involvement of his putative father. Desirous of making her son her nominee in all her savings and other insurance policies, she took steps in this direction, but was informed that she must either declare the name of the father or get a guardianship/adoption certificate from the Court. She thereupon filed an application under Section 7 of the Guardians and Wards Act, 1890 (the Act) before the Guardian Court for declaring her the sole guardian of her son. Section 11 of the Act requires a notice to be sent to the parents of the child before a guardian is appointed. The Appellant has published a notice of the petition in a daily newspaper, namely Vir Arjun, Delhi Edition but is strongly averse to naming the father. She has filed an affidavit stating that if at any time in the future the father of her son raises any objections regarding his guardianship, the same may be revoked or altered as the situation may require. However, the Guardian Court directed her to reveal the name and whereabouts of the father and consequent to her refusal to do so, dismissed her guardianship application on 19.4.2011. The Appellant's appeal before the High Court was dismissed in limine, on the reasoning that her allegation that she is a single mother could only be decided after notice is issued to the father; that a natural father could have an interest in the welfare and custody of his child even if there is no marriage; and that no case can be decided in the absence of a necessary party. Being aggrieved of this order she has preferred Special Leave Petition before the Supreme Court of India.

Issues

The points for consideration are as under –

- Is it imperative for an unwed mother to specifically notify the putative father of the child whom she has given birth to of her petition for appointment as the guardian of her child?
- Does an unwed mother require disclosing the name and address of the father of her child to entertain application for guardianship?
- Can the Court exercise *parens patriae* jurisdiction when custody or guardianship of a child is in dispute?

Averments

No one shall let the future of the child down, its welfare is imperative and needs to be duly secured. Personal differences

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and animosity, if any, between the wranglers shall take back seat. When a child is born to an unwed mother she is not required to disclose the particulars of putative father. Any insistence to reveal either her identity or his whereabouts may erode her privacy, ruin the prospect of a child and correspondingly it spoils marital life of putative father if at all he had entered into. Thus, the Court shall not hesitate to exercise *paren patrae* jurisdiction, without asking unwed mother either to disclose her identity or to notify the putative father, to guard the interest of the child under the care and custody of its mother for better tomorrows.

Ruling of the Court

The Supreme Court held as under –

1. Civil and common law across the globe including varied legislations prevailing in India bestow guardianship and related rights to the unwed mother. In these days women are increasingly choosing to raise their children singularly. No purpose would be achieved by crowning the putative father with guardianship when he is indifferent. Thus, it is not prudent to prioritize his rights over those of the mother or her child.
2. The Guardian Court shall not make the mother to publically notify the particulars of the father. Such an insistence would defy her fundamental right of privacy.
3. Furthermore, Christian unwed mothers in India are disadvantaged when compared to their Hindu counterparts, who are the natural guardians of their illegitimate children by virtue of their maternity alone, without the requirement of any notice to the putative fathers. It would be apposite to underscore that our Directive Principles envision the existence of a uniform civil code, but this remains an unaddressed constitutional expectation.
4. Neither the interest of the child nor its welfare would be undermined in the event of non-disclosure father's identity. Instead, it will properly safeguard the child from social stigma and needless controversy. However, the right of the child to know the identity of his parents is not vitiated, undermined, compromised or jeopardised.
5. The mother can act as natural guardian of the minor and all her actions would be valid even during the life time of the father, who would be deemed to be "absent", when he is, temporarily or otherwise, apathetic towards the child owing to his inability or ailment or otherwise.
6. Guardianship or custody orders never attain permanence or finality and can be questioned at any time, by any person genuinely concerned for the minor child, if the child's welfare is in peril. Thus, the aggrieved may approach the Guardian Court to quash, vary or modify its orders if the best interests of the child.
7. Where a single parent/unwed mother applies for the issuance of a Birth Certificate for a child born from her womb, the Authorities concerned may only require her to furnish an affidavit to this effect, and must thereupon issue the Birth Certificate, unless there is a Court direction to the contrary. It is improper to infer that the success of guardianship petition do have bearing on the Birth Certificate of the child. However, it is the duty of the State to take requisite steps for recording every birth of every citizen albeit the parents fail or neglect to register the birth.
8. The Guardian Court is invested with parens patriae jurisdiction. It shall not abdicate from exercising such jurisdiction on learning that the future and welfare of a child is at stake. Thus, a mere dismissal of the petition without considering all the problems, complexities and complications concerning the child brought within its portals would amount to dereliction.

The judgment and order of the Supreme Court enjoins the Guardian Court to attach prime significance to guardianship petition when it learns the interest of the child is in jeopardy. Further, it ordains to consider the guardianship petition when a single parent/unwed mother in the best interest of the child.

Statutes & cases referred

a) Constitution of India
b) Guardians and Wards Act, 1890
c) Hindu Minority and Guardianship Act, 1956
d) Indian Succession Act, 1925
e) Universal Declaration of Human Rights 1948.
f) Convention on the Rights of the Child, 1992
g) Children Act 1989 of United Kingdom
h) Guardianship of Infants Act, 1964 Ireland
i) Family Code of the Philippines
j) Care of Children Act, 2004 of New Zealand
k) Children's Act No. 38 of 2005 of South Africa

Cases referred

l) Joey D. Briones vs. Maricel P. Miguel et al, G.R. No. 156343 Supreme Court of the Philippines.
m) Githa Hariharan v. Reserve Bank of India (1999) 2 SCC 228
n) Laxmi Kant Pandey vs. Union of India 1985 (Supp) SCC 701

Food Safety Case - by Mr. Deva Prasad*

Uday Foundation v Union of India[1]

The pertinent issue of food safety and junk food was brought before the Delhi High Court in this case. The petition under Article 226 of the Constitution of India was filed in public interest flagging the issue of easy availability of "junk food" and "carbonated drinks" to children, and its harmful effects. The petition sought for a ban on "junk food" and "carbonated drinks" in schools and initiation of measures to develop a comprehensive school canteen policy with emphasis on health and nutrition. The lack of definition for the junk food and absence of pertinent guidelines on this issue was highlighted by the Delhi High Court. After considering the pertinent need to regulate the junk food in schools across the country, the Delhi High Court asked the FSSAI to come up with strong regulation, and to consider banning the sale of junk food in schools. The Court also asked CBSE to consider the need to ban junk foods in all its affiliated schools.

Environmental Law Cases

Vardhaman Kaushik v Union of India[2]

National Green Tribunal in a strongly worded order emphasized the need to curb motor vehicle pollution in NCT, Delhi. The following pertinent directions were given by the NGT to curb the high intensity air pollution:

- "All vehicles, diesel or petrol, which are more than 15 years old shall not be permitted to ply on the roads and wherever such vehicles of this age are noticed, the concerned authorities shall take appropriate steps in accordance with law including seizure of the vehicles in accordance with the provisions of the Motor Vehicle Act, 1988.
- The vehicles which are more than 15 years old will not be permitted to be parked in any public area and they shall be towed away and challenged by the police in accordance with law. This direction would be applicable to all vehicles without exception i.e two wheelers, three wheelers, four wheelers, light vehicles and heavy vehicles irrespective of whether commercial or otherwise.
- No person shall be permitted to burn plastic or any other material in the open. If any person is found to be burning plastic or any other material including tree leaves in the open, he would be liable to be proceeded against in accordance with law and the Police, DPCC and NCT, Delhi shall take immediate steps to ensure that such activity is stopped forthwith. Any person would have the right to approach this Tribunal, the Police station, the DPCC and/or any other competent authority to make a grievance in regard to such unauthorized and illegal burning resulting in air pollution.
- RTO shall not issue/renew registration of the vehicles or fitness certificate to any vehicle, which is more than 15 years old".

Ramdas J Koli v Ministry of Environment and Forest[3]

The main reason for the matter to be brought before the National Green Tribunal was the project of widening and deepening of the sea for additional berth at port of Jawaharlal Nehru Port Trust (JNPT). As a result of the same, inter-tidal seawater exchanges and flow of the seawater in Nhava creek will be substantially affected. Destruction of mangroves alongside beaches, as a result of the impugned project activity would cause loss to spawning and breeding grounds of fishes. Hence, stock of grown fishery will be unavailable for earning livelihood. It was further alleged that JNPT has now further gone ahead to narrow down the mouth of the creek, which previously was of larger width, allowing free egress and ingress of traditional boats in the seawater with free tidal currents. As a result, their traditional boats are unable to navigate freely as usual within the area of seawater around proposed project. This project activity has been contested to affect the livelihood and allied human rights of the fisherman.

After hearing both the sides, NGT came to the conclusion that the JNPT has failed to ensure free flow of tidal water with adequate ingression for existence of Mangroves and free movement of boats of local fishermen. The NGT observed that the economy of fishermen folk has nexus with their right to enter the seawater, collect fishes by using traditional boats, using net/mesh, as per the norms of State Govt and to do business for daily earnings. They cannot be deprived of bread and butter for no fault on their part.

The NGT also emphasized on sustainable development concept, polluter pays principle and precautionary principle while adjudicating upon this matter. The NGT further added that the fishermen need to be compensated in tune of Rs. Ninety Five Crores Nineteen Lakhs and Twenty Thousand, which need to be distributed equally to one thousand six hundred and thirty affected and identified fishermen's families. Further the NGT also ordered that cost for the environmental restoration is upon the respondents in this case.

1. Delhi High Court, decided on 25th February, 2015.
2. National Green Tribunal Principal Bench, 2014 SCC OnLine NGT 6817
3. National Green Tribunal Western Zone Bench, Pune 2015 SCC OnLine NGT 4

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Constitutional Law/Writ Jurisdiction

Board of Control for Cricket in India and Others v Cricket Association of Bihar and Others[4]

The present case arose out of two successive writ petitions filed in public interest by the Cricket Association of Bihar before the High Court of Bombay for several reliefs including a writ in the nature of mandamus directing BCCI to recall its order constituting a probe panel comprising two retired Judges of Madras High Court to enquire into the allegations of betting and spot fixing in the Indian Premier League (IPL) made among others against one Gurunath Meiyappan. In this particular case the pertinent questions that came before the Supreme Court were:

- Whether the Board of Cricket Control of India (henceforth referred to as BCCI/Board) is 'State' within the meaning of Article 12?
- Whether the writ jurisdiction of the High Court under Article 226 of the Constitution of India is applicable to the BCCI?

Regarding the first question the Supreme Court observed that:

The Union of India has not chosen the Board to perform its duties nor has it legally authorized the Board to carry out these functions under any law or agreement. It has chosen to leave the activities of cricket to be controlled by private bodies out of such body's own volition. In the absence of any authorization, if a private body chooses to discharge any such function, which is not prohibited by law, then it would be incorrect to hold that such action of the body would make it an instrumentality of the State.

Regarding the second question the Supreme Court observed that:

The BCCI is amenable to the writ jurisdiction of the High Court under Article 226 even when it is not 'State' within the meaning of Article 12. The rationale underlying that view lies in the "nature of duties and functions" which the BCCI performs. BCCI has a complete sway over the game of cricket in India. It regulates and controls the game to the exclusion of all others. It formulates rules, Regulations norms and standards covering all aspect of the game. It enjoys the power of choosing the members of the national team and the umpires. It exercises the power of disqualifying players which may at times put an end to the sporting career of a person. It spends crores of rupees on building and maintaining infrastructure like stadia, running of cricket academies and Supporting State Associations. It frames pension schemes and incurs expenditure on coaches, trainers etc. It sells broadcast and telecast rights and collects admission fee to venues where the matches are played. All these activities are undertaken with the tacit concurrence of the State Government and the Government of India who are not only fully aware but supportive of the activities of the Board. The State has not chosen to bring any law or taken any other step that would either deprive or dilute the Board's monopoly in the field of cricket. On the contrary, the Government of India has allowed the Board to select the national team.

Any organization or entity that has such pervasive control over the game and its affairs and such powers cannot be said to be undertaking any private activity. The functions of the Board are clearly public functions, which, till such time the State intervenes to take over the same, remain in the nature of public functions, no matter discharged by a society registered under the Registration of Societies Act. Hence BCCI may not be State under Article 12 of the Constitution but is certainly amenable to writ jurisdiction Under Article 226 of the Constitution of India.

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Common Cause v Union of India[5] - by Mr. Pratham Guthi*

A Petition was filed by Common Cause and Centre for Public Interest Litigation to restrain Union of India and all State Governments from using public funds on Government advertisements which were primarily intended to project individual functionaries of Government or political parties.

Petitioners while conceding the beneficial effect of government advertisements which convey necessary information to the citizens with regard to various welfare and progressive measures as also their rights and entitlements, however, contended that in the garb of communicating with the people, in many instances, undue political advantage and mileage is sought to be achieved by personifying individuals and crediting such individuals or political leaders (who are either from a political party or government functionaries) as being responsible for various government achievements and progressive plans. According to the Petitioners such practice becomes rampant on the eve of the elections. Such advertisements not only result in gross wastage of public funds but constitute misuse of government powers besides derogating the fundamental rights of a large section of the citizens as guaranteed by Article 14 and 21 of the Constitution of India.

The Court acknowledged that the dividing line between permissible advertisements that are a part of government messaging and advertisements that are "politically motivated" may at times gets blurred and to resolve the same, felt the necessity of constituting a Committee to go into the matter and submit a report to the Court. The committee consisted of the following:

4. Supreme Court of India (2015) 3 SCC 251
5. MANU/SC/0604/2015

* Research Fellow, CEERA, NLSIU

(1) Prof. (Dr.) N.R. Madhava Menon, former Director, National Judicial Academy, Bhopal;

(2) Mr. T.K. Viswanathan, former Secretary General, Lok Sabha; and

(3) Mr. Ranjit Kumar, Senior Advocate.

The Committee principally spelt out five principles to regulate the contents of advertisements, namely, that

(i) advertising campaigns are to be related to government responsibilities,

(ii) materials should be presented in an objective, fair and accessible manner and designed to meet objectives of the campaign,

(iii) not directed at promoting political interests of a Party,

(iv) campaigns must be justified and undertaken in an efficient and cost-effective manner and

(v) advertisements must comply with legal requirements and financial Regulations and procedures.

The five broad Content Regulations contained in the draft guidelines framed by the Committee are similar to the provisions found in the Australian guidelines, but embody what would be good practices in the Indian context. The applicability of these Guidelines is to all Government advertisements other than classifieds and in all mediums of communication, thereby including internet advertising. While under the first head the requirement of conformity of Government advertisements with dissemination of information relating to Government's constitutional and legal obligations and the corresponding rights and entitlements of citizens is being stressed upon, under the second head objective presentation of the materials contained in an advertisement bearing in mind the target audience has been emphasised.

Under the third head, the Guidelines state that advertisement materials must not:

(a) mention the party in government by its name,

(b) attack the views or actions of other parties in opposition,

(c) include any party symbol or logo,

(d) aim to influence public support for a political party or a candidate for election or

(e) refer or link to the websites of political parties or politicians.

It is also stated in the Guidelines that photographs of leaders should be avoided and only the photographs of the President/Prime Minister or Governor/Chief Minister shall be used for effective government messaging. The fourth head deals with cost effectiveness of an advertisement campaign and measures to cut down avoidable expenses. A somewhat restricted range of advertising activity on the eve of the elections is also recommended. Appointment of an Ombudsman to hear complaints of violation of the norms and to suggest amendments thereto from time to time beside special performance audit by the concerned Ministries is also recommended.

On the question of whether use of public funds on Government advertisements was liable to be restricted, the Supreme Court held that the award of advertisements, naturally, brings financial benefit to particular media house/newspaper group and hence, patronisation of any particular media house(s) must be avoided and award of advertisements must be on equal basis to all newspapers who may, however, be categorised depending upon their circulation. The Apex Court also said that legitimate and permissible object of advertisement could always be achieved without publication of photograph of any particular functionary either in State of political party. There should be exception only in case of President, Prime Minister and Chief Justice of country who may themselves decide question for publication of photographs. On the question of an Ombudsman, the Union government should constitute a three member body consisting of persons with unimpeachable neutrality and impartiality and who have excelled in their respective fields. As far as performance/special audit is concerned, the Court did not feel the necessity of any such special audit inasmuch as the machinery available is adequate to ensure due performance as well as accountability and proper utilisation of public money.

Ram Singh & Others v Union of India[6]

The challenge in the present group of writ petitions is directed at the inclusion of the Jat community in the Central List of OBC in the States of Bihar, Gujarat, Haryana, Himachal Pradesh, Bharatpur and Dholpur districts of Rajasthan, Uttar Pradesh and Uttarakhand through the Government Order dated 04/03/2014. The issue that the petition raised was whether the Jat Community in the aforementioned 9 states fulfilled the criteria for being a "backward class" with respect to the social, economic and educational characteristics as laid down in Indra Sawhney vs. Union of India.

This challenge was supplemented with the reference to the National Commission for Backward Classes (NCBC) and its advice to the Government to exclude the Jat community from the Central List of OBC. The NCBC based this advisement on the Report prepared by the Indian Council of Social Science Research (ICSSR) who conducted a full-fledged survey in the States of Uttar Pradesh, Haryana, Madhya Pradesh, Rajasthan, Himachal Pradesh and Gujarat to ascertain the socio-economic status of the Jat Community.

Though caste may be a prominent and distinguishing factor for easy determination of backwardness of a social group, the Court has discouraged the identification of a group as backward solely on the basis of caste. The Court observed that Article 16(4) and also Article 15(4) lay the foundation for affirmative action by the State to reach out the most deserving and hence, social groups who would be most deserving must necessarily be a matter of continuous evolution. New practices, methods and yardsticks have to be continuously evolved moving away from caste-centric definition of backwardness.

The Court set aside and quashed the GO granting the Jat community inclusion in the Central List of OBC in the said nine States.

6. Writ Petition (Civil) No. 274 of 2014, Decided on March 17, 2015 by Supreme Court of India.

US SUPREME COURT Cases – by Mrs. Srividya R. Sastry[7]

Equal Employment Opportunity Commission v Abercrombie and Fitch Stores (Abercrombie), INC., an Ohio corporation, d/b/a Abercrombie Kids

BRIEF FACTS OF THE CASE:

In the year 2008, the employee (Samanth Elauf) applied for the job of sales associate at Abercrombie & Fitch Kids Store in Oklahoma. She was a woman practicing Muslim religion, who wore a Hijab or headscarf. She wore the same to her interview where the employer after being impressed by her recommended that she be hired for the job. But there was no discussion with regard to the hijab she wore during the interview. Later, she got to know from another employee that she was not selected because she wore a Hijab and that the employer could not make accommodation for it in the look policy of the corporation as it would result in undue hardship. Hence, she filed a religious discrimination case against corporation in the district court of Oklahoma.

QUESTION OF LAW:

Whether this prohibition applies only where an applicant has informed the employer of his need for an accommodation?

JUDGEMENT:

The district court passed the judgment in favour of EEOC representing her. But an appeal was filed by Abercrombie and Fitch Stores (Abercrombie), INC., an ohio corporation, d/b/a Abercrombie Kids before the United States Courts of Appeals Tenth Circuit against the summary judgment passed in favour of Equal Employment Opportunity Commission (EEOC) by the United States District Court for the Northern District of Oklahoma. The applee in the present case had filed the appeal alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C, Sections 2000e to 2000e-17 which prohibits employment discrimination based on race, color, religion, sex and national origin, for the religious accommodation on the grounds that the appellant refused to employ a employee because it failed to accommodate the religious beliefs of the employee by making an exception to the Look Policy of the corporation.

The Appellate 10th Circuit Court held that Abercrombie is entitled to Summary Judgment as matter of law since there existed no dispute of the material fact that the employee never informed the corporation that she wore a Hijab or headscarf for religious purposes and that the employee would be needing an accommodation for the practice prior to its hiring decision that it would conflict with the Look Policy of the corporation.

In holding so the Appellate court held that reasonable-accommodation principle under Title VII would come into the picture only if there existed conflict between an employee's religious practice and the employer's policy. The Honourable Court applied the McDonnell Douglas Burden–shifting approach which required the EEOC to satisfy the three elements in order to establish prima facie religious discrimination case under Title VII of the Civil rights Act. The 3 elements were as follows:

1. The employee has a bonafide religious belief that conflicts with the employment requirement;
2. The employee informed the employer of this belief; and
3. The employee was fired or not hired for failure to comply with the conflicting employment requirement.

When the employee establishes a prima facie case the burden is shifted over the employer to deny the elements of the prima facie case or show that it made provision for reasonable accommodation or prove that it was impossible for it accommodate the employee's religious needs without undue privation.

The Circuit court by applying this approach held that in the present case employee failed to comply with notice requirement which is the initiation process of the religious discrimination cases. The employee failed to provide the "actual knowledge" to Abercrombie prior to its hiring decision that she engaged in the conflicting practice of wearing hijab for religious reasons and that she needed an accommodation for it.[8] Hence, the case was sent back to the District Court for reconsideration.

But considering the negative impact of the decision of the circuit court, EEOC appealed to the Honourable U S Supreme Court. The U S Supreme Court reversed and remanded decision of the Circuit court and held that the employee is required to show only to the extent that his/her need for accommodation was a "motivation factor" in the employer's decision and there is as such no necessity that the employer should have "Actual Knowledge" about the need for the religious accommodation.

Obergefell Et Al. v Hodges, Director, Ohio Department Of Health, Et Al.

Writ of Certiorari To The U.S. Court Of Appeals For The Sixth Circuit. Decided on June 26, 2015

This landmark judgment was passed by the U S Supreme Court where the petition was filed by 14 same sex couples and two men whose same sex partners were deceased.

The petitioners alleged that the Respondents (State Official) failed to recoginse their rights under Fourteenth Amendment by denying them the right to marry or to have their marriages lawfully performed in another state given full recognition. Thus, they filed suits alleging violations of the same in the U S Districts Courts of their home states. The district courts ruled in

7. LL.M (Constitutional and Administrative Law), Previous employment: Research Officer, Commons Cell, MHUPA Chair on Urban Poor and the Law.
8. Equal Employment Opportunity Commission v. Abercrombie and Fitch Stores (Abercrombie), INC., an Ohio corporation, d/b/a Abercrombie Kids, 29, U. S. A Court of Appeals (10th cir. 2013)

favour of them. Hence, the respondents filed an appeal against the decision in the U S Court of Appeals for the Sixth Circuit. The Court of appeals reversed the judgments of the district court in these cases consolidatedly holding that a state has no constitutional obligation to license same sex marriages or to recognize same sex marriages conducted out of state. Thus, the petitioners sought Writ of Certiorari feeling violated of their fundamental right guaranteed under Fourteenth Amendment of the American Constitution which guarantees equal protection of laws except without due process of law.

LAW INVOLVED:

FOURTEENTH AMENDMENT OF THE U.S CONSTITUTION:

SECTION 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION OF LAWS:

1. Whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex?
2. Whether the Fourteenth Amendment requires a State to recognise a Same Sex marriage licensed and performed out of State?

JUDGEMENT:

The US Supreme Court addressing the above issues passed this Landmark Judgment legalising same sex marriage in all the States of USA.

Answering the first question of Law It held that Right to marry from a long has been recognised and protected by the constitution under Fourteenth Amendment of the American Constitution. Further the court identified the Four Principles and traditions in the court's Due process precedents that compel the conclusion that Homosexual marriages are to be recognised equally as that of opposite sex marriage under the Constitution, which are:[9]

1. Right to personal choice regarding marriage is inherent in the concept of individual autonomy.
2. Right to marry is fundamental because it supports a two-person union like any other in its importance to the committed individuals.
3. Protecting the right to marry is the basis for safeguarding children and families and thus drawing meaning from related rights of childrearing, procreation and education. But precedents do protect the rights of married couple who cannot or do not procreate making the right to marry not a condition on the capacity or commitment to procreate.
4. Right to marry is the keystone of the Nation's social order.

The Honourable Court held that right to marry is dynamic one. It referred to Loving[10] case in which the court removed the prohibition on interracial marriage under both Equal Protection Clause and the Due Process Clause in which it held that such prohibition would offend the central aspect of liberty guaranteed under constitution. In Lawrence[11] the court acknowledged the interrelation of these Constitutional safeguards in the context of legal treatment of gays and lesbians. Applying the same above principles in this case the court held that marriage laws enforced by the respondents denied the same couples the benefits available to the opposite sex couples and resulted in infringement of the fundamental right to marry.

Having considered these parameters the court concluded that right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and the liberty. The Court thus held that same-sex couples may exercise the fundamental right to marry[12].

Answering the second question of law the Honourable Court held that homosexual couples can exercise their right to marry as a fundamental right in all the states and there exists no lawful basis for a state to refuse recognition to a lawful homosexual marriage performed in another state on the ground of its same sex character.[13]

9. Obergefell Et Al. v. Hodges, Director, Ohio Department Of Health, Et Al. Decided June 26, 2015. At Pg. 3
10. Loving v. Virginia, 388 U. S. 1, 12 (1967)
11. Lawrence v. Texas 539 U.S. 575 (2003)
12. Supra note 1 at 27
13. Supra note 1 at 33

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