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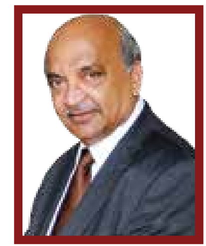
EDITORIAL

Distant News In Law Magazine



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Dr. Sairam Bhat
Associate Professor & Chief Editor

Vice - Chancellor's Message

It is a matter of immense pride and satisfaction that, sustaining its excellent work, the Distance Education Department is releasing its fifth number of "In Law Magazine", judiciously juxtaposing the diverse and varied contours of law. Dr.Sairam Bhat and his team deserve to be congratulated for the focus on quality and excellence.

I am sure this latest number will live to the ever increasing expectations of the stakeholders.

Prof.(Dr.) R.Venkata Rao
Vice-Chancellor

Chief Editor's Message

The IN LAW magazine is marching towards becoming the premier destination for research publications as the Editorial Team had received an overwhelming number of articles for this edition. The magazine caters to short and precise articles and contributions on emerging and contemporary areas of legal research. It provides a platform for researchers to meet and engage in influential and impacting discussions. We hope that our readers will have a pleasurable experience with the 5th edition of the IN LAW Magazine wherein the best of the intellectual contributions have been selected after deep and pervasive scrutiny. In Spotlight is an interview with Prof. Ranbir Singh, Vice Chancellor of NLU-Delhi. In the Practitioners Corner we have an interview of Mr. Lalit Bhasin, President Society of Indain Law Firms. This issue we have articles ranging from issues of Land acquisition, PPP in the real estate sector, real estate regulatory challenges, need for special adjudication of Constitutional matters, MTP bill 2014, Locus standi of third parties in criminal cases, Arbitrability of Fraud, JJ Amendment Act 2015, Extended Manufacturer's Responsibility, IP v/s Environment, accountability under RTI to the Role of media in good governance and few case comments. There are plenty of legal issues to look forward to in the current year; like the GST bill, the euthanasia bill, the IPR policy, privacy and confidentiality issues, cyber security, issues with the banking sector reforms, labour reforms and others which will be the focus of our publication.

The editors encourage contributions from students, researchers, teachers, policy makers and others to contribute to the forth coming issues. We continue to be thankful to our Vice Chancellor Prof. [Dr.] Venkata Rao who recently has been listed amongst the 100 most powerful legal luminaries in India by Lexis Nexis. We heartily congratulate him for this stupendous achievement, which once again reiterates his outstanding contribution to legal education. This year we have several publications amongst them are; the book on Energy Law and Policy in India, RTI and Good Governance and the Journal of Law and Public Policy 2016. I thank Ms. Ashwini Arun, for her dedicated review and editorial assistance; Mr. Ujval Mohan for his assistance in proof reading, Susheela Suresh for her efficient and sincere coordination of every task of the publication process and Lingraj for his creativity in design, layout and final printing.

Dr. Sairam Bhat, Associate Professor of Law & Chief Editor

Prof. (Dr.) Ranbir Singh is the founder Vice-Chancellor of National Law University, Delhi established by the Delhi Government in 2008. He is President of the Association of India Universities (AIU). He is a Council Member of the Association of Commonwealth Universities, UK. He is Vice-President & EXCO Member of SAARCLAW India. He isMember of the Eminent Persons Advisory Group (EPAG) of Competition Commission of India. He was the founder Vice-Chancellor of NALSAR, University of Law, established by the Andhra Pradesh Government in 1998. He has been there for ten years as the Vice-Chancellor of the well-known premier institution for legal education and research in the country which was rated as one of the Best University in the Country in the year 2008 in 'India Today'. He has been a Vice-Chancellor for over 18 years now.

Q. 1 : The emergence of NLU, Delhi as one of the country's foremost Universities has got a lot to do with you. What, in your vast experience, goes into taking that jump into the next level, for a university?

Ans.: NLU Delhi was established in 2008 as the 13th National Law University in India. It is testament to the many things we have done right that in a very short span of 8 years we are currently amongst the top 3 choices for those aspiring to study in India's law schools.

I had experience of being at National Law School of India University (NLSIU), Bangalore where I taught during the years 1996-97 and then I joined as Founder Vice-Chancellor, National Academy of Legal Studies and Research (NALSAR), Hyderabad where I stayed from 1998-2008.

These two institutions opened me to the concept of the Law Schools and also the challenges to be faced in establishing law school. So when I came to establish NLUD, ample experience was with me to create a different generation of law school, in terms of good teaching and research.

Q. 2: Sir, you have represented India at various foreign Universities and forums, including the UNHRC. What are the lessons that the legal community, in general, and the law universities, in particular, learn from your interactions with the international legal fraternity?

Ans.: Being with the law school for a sufficiently long period of time gave me enough exposure and opportunity to be a part of many prestigious institutions in the country and abroad. I became the Vice-President and then President of Shastri Indo-Canadian Institute (SICI) which provided me enough opportunity to work for higher education and strengthen academic linkages between Canada and India. Because of these institutions I got an opportunity to visit best of Universities and Law School in Canada, this also provided me very rich experience of good quality of legal education in this country.

Now as President of Association of Indian Universities (AIU) and also Council Member of Association of Commonwealth Universities along with the Membership of International Association of Universities (IAU) provided me lot of opportunity to interact with the Vice-Chancellor's across the globe and share the best practices in other Universities. All these experiences equipped me with a very clear roadmap for creating NLU, Delhi.

I was a Member in Committee for Consultations on the Situation in Andhra Pradesh (CCSAP), constituted by the Ministry of Home Affairs, Govt. of India, to look into the Telengana Affairs;

I was also invited by the Govt. of USA when I was in NALSAR for a Visitors Scholars programme to visit various 'ivy league' law schools in USA like Harvard University, Yale University, New York University, Fordham University, Cornell University, Washington Law School and also University of Pennsylvania.

During these visits I learned a lot about all those best of law school which helped me in implementing some reforms in India. In the year of 2008 I was also given an opportunity by the Ministry of External Affairs (MEA) to prepare India's report on Human Right to submitted to the United Nations Human Rights Council (UNHRC) under UPR-I. In the year 2012 I was also part of the delegation to visit UNHRC, Geneva and present the report on Human Rights under UPR-II. In 2016 I am again preparing the India's Report on Human Rights to be presented to the UNHRC in the year 2016-17 under UPR-III.

Apart from this I became member of number of National & International bodies/expert committees/ associations, which gave me lot of experience to restructure legal education.

Q. 3: The teacher of today, not only essays the role of a lecturer, but also of an administrator, mentor, counsellor and friend. In your long and illustrious years in legal education, what has been the most essential role that you have played, and what is the one that you are looking forward to play?

Ans.: In all the teaching institutions the head of the institution is very important and it's a leadership ability of the Vice-Chancellor which determines the speed of the institution with which it progresses. The Head of Institutions has to be very forward looking and a

visionary and he should be very innovative and open to new ideas of excellence in legal education.

The most essential role is to motivate the Faculty and Students by providing them best of infrastructure and facilities to engage in good teaching and research. The next generation reforms in legal education should concentrate on best quality research at all levels.

My very active involvement during my tenure as the Vice-Chancellor with the Law Commission of India, National Human Rights Commission, National Commission of Women, Competition Commission of India being a member of the Eminent Persons Advisory Group (EPAG), National Commission for Protection of Child Rights and other institutions helped me to shape the law school better.

Q. 4 : You have, to your credit, research publications on various areas of Jurisprudence, Human Rights & Legal Education. What do you reckon are the areas of law you would like to see more research taking place, and why?

Ans. : In a country like India Universities have to be Centre of innovation. India faces many challenges of inequality and poverty. The Universities have to engage with the communities and be the agents of change and make qualitative change in the lives of citizens of the country.

The areas of research should have a special focus on areas of national as well as international importance. In the globalized world one cannot ignore the interface between law and economics.

Q. 5 : Sir, Apart from Students of Law School opting for Career Opportunities in Litigation and Law Firms ,What are the other alternate Career Opportunities that students must look out for?

Ans. : Apart from career options for law students joining corporate law firms there are multiple carrier options for law students in present times, for example many students are going for higher studies. Recently students from law schools have been joining judiciary and also civil services, apart from being a litigation lawyer. One can also join UN Administrative services and also national and international NGOs as well.

So after legal education you have many choices before you. By the time you complete your studies, one can decide what one would like to go for.

Q. 6 : In the backdrop of the Incident that happened at JNU what according to you is the Extent of Freedom of Speech and Expression that is essential for students on Campus?

Ans. : Freedom of Speech and Expression is important in the country, but even the Constitution of India provided reasonable restriction on Fundamental Rights of Freedom including Freedom of Speech. Absolutes do not harmonise with the living processes of life. It may be freedom, it may be anything. Nothing is absolute, you know, everything is qualified. Maybe freedom of speech and expression is very important, but you cannot stretch it beyond certain limit. The basic responsibility of the students is to study seriously and research. It is not that they cannot discuss the national problems, democracy itself means discussion, dialogue and dissent. But then it has to be done with responsibility. Gandhiji has said that 'our first right is to do our duty sincerely'. So we must understand as a student, what are our duties towards the nation, and towards the system. So we cannot stretch things beyond a point where as a student one gets disturbed, one lose focus on studies. I am not saying that one should not discuss these things, these things should be discussed but probably not stretched to that level of disruption in studies.

Q. 7: As a Founder, Academician and an Administrator and various other roles that you have also undertaken, what is the vision that we must have to impart Quality Legal Education?

Ans. : When we shifted from 3-year law course to 5-year law course, the idea was that we would be serious about legal education, meaning that we would impart quality legal education. We were not very happy with the quality of the three year law colleges, but unfortunately things have not changed. Now we see that if earlier there was mushrooming of the 3-year law colleges, now there is a mushrooming of the 5-year law colleges. So today in the country we have 1600 (law) colleges and about 250 law faculties and also 20 National Law Schools/ Universities (NLU's) and there are very few institutions out of these which can be termed as good. Most of the legal education institutions suffer from lack of faculty, infrastructure facilities and libraries etc. There is hardly any programme which go into the making of good Lawyers like legal aid, mooting, internship etc. The kind of opportunities which are there with the law students in the law schools are not in the colleges. I am not saying that all faculties and colleges are the same, but majority of the faculties and colleges are not serious about legal education at all. What is very unfortunate is that many institutions are marketing legal education and have become market places with no serious focus on legal education.

In one of the Commonwealth conference of Vice-Chancellors I said:

"Institutions are not market places; neither education is a commodity traded on demand and supply. Institutions are knowledge spaces and education is a value in itself to distinguish between fair and unfair, just and unjust. It has to inculcate values like sacrifice, sensitivity to suffering's, courage to fight for justice and fairness, to stand up for the dispossessed and marginalized the determination to stand against the odds for the sake of justice".

Contemporary Issues and Challenges of Land Acquisition Law in India: A Critical Analysis

Dr. Sairam Bhat* and Dr.Y R Rajeev Babu**

Introduction

The power of *eminent domain*[1] of the State has been endorsed in the Constitution of India[2] and the power of *eminent domain* in India found its statutory expression first in the Land Acquisition Act, 1894 (now repealed)[3]. This colonial Act of 1894 and the case laws that were decided under it, made the power of *eminent domain* a matter solely for the executive determination, and therefore were non-justiciable. This Act had consisted of serious shortcomings and loopholes therein; for example, the expression 'public purpose' was ambiguous, there was no requirement of consent of the people, no concern for Rehabilitation and Resettlement (R&R) and so on. The crucial need of the time was and has been to recognize that land acquisition on the one hand and rehabilitation and resettlement of the displaced people on the other are integral part of each other and that they are the two sides of the same coin. With the intent of defeating the limitations in the prevailing legislations and policies, and making a basic law on acquisition of land in India consistent with the NRRP-2007,[4] the Parliament repealed the Land Acquisition Act 1894 and a new law, namely the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013[5] (new Act of 2013) was enacted and it came into force from 1.1.2014.

Constitutional, Statutory and Policy Framework: Exploring a new law

There are progressive provisions in the new Act of 2013, which are an improved version of the repealed Land Acquisition Act, 1894 (old Act). However, there are some serious loopholes as well in the new Act which got further worsened by the Ordinance[6] of 2015. The new Act of 2013 has stressed for the transparency and participatory approach at all the stages of the land acquisition, rehabilitation and resettlement processes. Option of the lease of the land may also be explored under the scheme of the Act. The Act has set up a dedicated authority for disposal of disputes.

Social Impact Assessment (SIA) and Expert Group

Sections 4 to 9 of the new Act have envisaged the Social Impact Assessment and studies related to SIA. The SIA has evolved to assess the impact of the projects on the society. The SIA and the appraisal of the SIA Report by the Expert Group under the new Act take place and conclude before the publication of the preliminary notification. Such a holistic and meticulous evaluation of social aspect and social impact of land acquisition was conspicuously absent in the old Act.

Sec. 8 provides that only a minimum area of land required for the project is to be acquired. The SIA has to be carried out within six months in consultation with the local bodies. If the SIA Report foresees any adverse impact of the acquisition of land, the Social Impact Management Plan (SIMP) has to suggest ameliorative measures to address such adverse impacts. The Expert Group critically evaluates *inter alia* the Social Impact Management Plan, the reasons for opposition from the people to a project, if any, and also suggests ways for the restoration of sustainable livelihood of affected families. The recommendation of the Expert Group is not binding on the Government. The appropriate Government may proceed with acquisition of the lands by assigning reasons for doing so in writing in spite of the recommendations of the Expert Group.[7] It is submitted that the utility of having the Expert Group and the recommendation thereof is limited only to elicit public opinion which the Government is not under the obligation to take into consideration. The summary of SIA Report needs to be issued mandatorily along with preliminary notification issued u/s. 11. However, the SIA study is exempted in case of acquiring land u/s. 40 (urgency clause) of the new Act.[8]

Public Purpose and Public interest

Sec. 2(1) r/w. Sec. 3(za) of the new Act provides for the land acquisition for public purpose, Government or Public Sector Undertaking use. It includes strategic purposes relating to *inter*

1. The power of *eminent domain* is the power of the sovereign to take property for public use without the owner's consent, *see,* State of Bihar vs. Kameshwar Singh, (1952) 1SCR 889.
2. Article 300A and Entry 42, List III, Schedule VIII COI.
3. Repealed by The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, No.30 of 2013.
4. National Rehabilitation and Resettlement Policy, 2007.
5. *available at* http://www.rlarrdc.org.in/images/ORDINANCE_ON_RFCT_LARR_2013.pdf.
6. The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Second Ordinance, 2015(Promulgated on 30/05/2015).
7. Sec. 7(4) of the new Act.
8. *Ibid,* Sec. 9.

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alia defence, police, safety of the people and infrastructure projects and also includes projects for industrial corridors, mining activities, national investment and manufacturing zone.

In *State of West Bengal v. Bella Banerjee (Bella Banerjee's case*)[9] the Supreme Court ruled that existence of public purpose must be established objectively and in *State of Bihar v. Kameshwar Singh (Darbhanga Case)*[10] the Court ruled that the phrase 'public purpose' has to be construed according to the spirit of the times and that 'public purpose' was a prerequisite of eminent domain. It has been held that Public interest has been always considered to be an essential ingredient of public purpose.[11] Although the power to determine what constitutes 'public purpose' is primarily that of the Government, the Courts have powers to reconsider such decisions. The condition of existence of public purpose is inherent in exercising the power of 'acquisition and requisitioning of property' under Entry 42, List III.[12]

Though the Article 300 A imposes only one limitation on the power of acquisition i.e., authority of Law. The Supreme Court, taking the cue from its earlier decisions delivered prior to the deletion of Articles 31 and 19(1) (f) of the Constitution of India, has consistently been holding, for example in *Jilubhai's Case*[13] and in *K.T. Plantation's Case*,[14] that taking away the property without payment of compensation, or not for the public purpose amounts to deprivation u/Article 300A. Jurist H.M.Seervai has observed that Article 300A and Entry 42 contain the power of *eminent domain*, and the requirement of public purpose must be read into that power.[15] In *Noida Land Acquisition Case* (2011)[16] the Supreme Court held that the right to property continues to be an important constitutional right and in terms of Article 300 A and no person can be deprived of his property except by authority of law. The Supreme Court, on July 10, 2013, in an appeal challenging the quashing of The Singur Land Rehabilitation & Development Act, 2011, ruled that the Tatas should give back their land to the agriculturists. Earlier, a Single bench of the Calcutta High Court had upheld the constitutionality of this Act of 2011, and had held that the returning of land to the farmers was in public purpose.[17] As to acquisition of land for private persons, the Supreme Court in *Patasi Devi's Case*[18] has held that the acquisition was vitiated due to colourable exercise of power and the real object of the acquisition was to benefit a private colonizer.

The new Act of 2013, *vide* ss. 9 r/w. 40 (4), does not require SIA study in the case of acquisition of land under the urgency provisions. In 2013, the Supreme Court held that the power of urgency can only be exercised by the state Government for such public purpose of real urgency,[19] and that Government has to first decide that the land is urgently needed for public purpose and that there is a need for immediate possession of the land for carrying out urgent work.[20] It may be stated that the new Act of 2013 has not succeeded in framing the provisions relating to the SIA process and determination of public purpose in true spirit of the above decisions of the Supreme Court. In this context, it is appropriate to recall the observation of Justice S.U. Khan who said '*land acquisition is no longer a holy cow but a fallen ox. Everyone is a butcher when the axe falls*'.[21]

Preliminary Notification and Publication of Declaration

The notification as envisaged in the new Act under Sec. 11(1) includes necessary information on various aspects of the land acquisition, rehabilitation and resettlement including SIA Report. The rehabilitation and resettlement process has been contemplated in the new Act at the preliminary stage of the process of acquisition of land. This notification is valid for 12 months, however, the appropriate Government may extend this period on justifiable circumstances. There is a scope for abuse of this power by the Government because there is no maximum period prescribed under the Act beyond which the Government shall not extend the period of the notification. In pursuance of the Sec. 19(1) of the new Act Government shall, after considering the report, if any, made u/s. 15(2),[22] publish the declaration along with the summary of the R&R Scheme. This declaration is conclusive evidence that the land is required for a public purpose and it shall not be published unless an amount has been deposited toward the cost of acquisition of land.

Computation and Determination of Compensation

Sec. 26 of the new Act provides for the definition of Market Value. It declares that market value is the higher among:

9. (1954) S.C.R 558.
10. AIR 1952 SC 252.
11. Chairman, IV Pradhikaran v. Pure Industrial Coke & C ltd., (2007) 8 SCC 705.
12. Prof. P.K.Tripathi, 'Right to property after 44th Amendment'-Better protected than ever before. AIR 1980 Jour. p 49.
13. AIR 1995 SC 142.
14. (2011) 9 SCC 1 (Five Judge Bench).
15. Constitutional Law of India, H.M. Seervai, Vol. II, 4th ed., Re printed in 2004, p. 1394.
16. Radhy Shyam v. State of U.P, (2011) 5 SCC 553.
17. Tata Motors Ltd v. State Of West Bengal, MANU/WB/0777/2011.
18. *Available at* http://judis.nic.in/supremecourt/imgs1.aspx?filename=39524 (2012) 9SCC S03.
19. Laxman Lal (Dead) Through Legal Representatives and Another v. State of Rajasthan and Others, *available at* http://www.stpl-india.in/SCJFiles/2013_STPL%28Web%29_167_SC.pdf (2013) 3 SCC 764.
20. Ram Dhari Jindal Memorial Trust v. Union of India and Others, *available at* http://judis.nic.in/supremecourt/imgs1.aspx?filename=39181 (2012) IISCC 370.
21. Gajraj and Ors v. State of U.P. and Ors, Writ-C No. 37443 of 2011. *See,* 'Land Acquisition no longer a holy cow', Times of India, October 22, 2011.
22. This report is prepared by the Collector and it includes *inter alia* the recommendation on the objections filed by the concerned persons to the acquisition of land, approximate costs of the acquisition of land and number effected families to be resettled.

(a) minimum land value as per Indian Stamp Act, 1899 (b) average sale price for similar type of land in the vicinity (c) amount of compensation already paid or agreed to be paid in private or PPP projects. The new Act, while determining the market value, takes market value of the land assessed by the Government into consideration. While registering the land this actual market rate is mentioned in the sale deeds intentionally low to minimize the stamp duty. Hence, the guidance value or price of the land mentioned in the sale deeds does not reflect the real sale price of the land. The market value calculated shall be multiplied by a factor as provided for in the First Schedule, namely by a two factors in the rural area and by one factor in urban area. If the market value cannot be determined for reasons as mentioned in the Sec. 26(3), the State Government shall specify the floor price. Sec. 30 mandates that in addition to the compensation a *solatium* amount of one hundred percent of the compensation amount shall be added. Sec. 27 of the new Act requires the Collector to include in the total compensation all assets attached to the land. The new Act *vide* Sec. 38 has conferred the power to take possession of land. In case of multiple displacements, Sec. 39 has provided for the additional compensation. Sec. 24 of the new Act gives retrospective effect to the provisions relating to the calculation and payment of compensation.

Rehabilitation and Resettlement (R&R) and Concern for food security

The provisions relating to rehabilitation and resettlement award have been laid down in Sections 31 to 42. Procedures and manner of R&R have been also laid down in Sections 43 to 47. Sections 48 to 50 have also provided for a Monitoring Committee for R&R at both State & National levels. The new Act has envisaged the establishment of authority for land acquisition and rehabilitation u/ss. 51 to 74.

The Government, after the issuance of preliminary notification and before declaration, has to conduct a preliminary survey of land to be acquired including hearing of objections. The administrator shall prepare rehabilitation and resettlement scheme and the scheme shall be reviewed by the Collector and the R&R Committee. The scheme shall be submitted to the Commissioner of R&R for approval of the government and after the approval, the scheme will be published. Pursuant to Sec. 31, the Collector has to pass Resettlement & Rehabilitation Award in terms of the entitlement and benefits as provided for in the Second Schedule of the new Act. These benefits are given to the affected families in addition to the compensation provided in the First Schedule. Sec. 43 of the new Act requires the appointment of Administrator for Rehabilitation and Resettlement where there is involuntary displacement, and Sec. 44 requires the appointment of a Commissioner for Rehabilitation and Resettlement.

Sec. 46 of the new Act provide for the acquisition of land by private persons through private negotiations. If any person other than specified person[23] purchases a land which is beyond certain limits as may be specified by the appropriate Governments, the R&R benefits are extended to the affected families. It is not mandatory for the Government to specify such limit, and no minimum limit has also been prescribed in this provision. Being so, the Government may not prescribe any such limit at all, or specify the higher limit which may clandestinely absolve a business or corporate house from the obligation to pay for R&R. Sec. 41(4) of the new Act of 2013 provides for the R&R benefits to the SCs and STs on displacement and for a Development Plan. The community rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, shall be quantified in monetary amount and be paid to the displaced people.[24]

Sec. 10 mandates that acquisition of irrigated multi-cropped land shall be made only as last resort and only under exceptional circumstances. However, no workable explanations or guidelines, regarding the 'last resort' and 'exceptional circumstances', are given. Whenever a multi-crop irrigated land is acquired, an equivalent area of culturable waste land shall be developed for agricultural purposes, or an amount equivalent to the value of the land shall be deposited for investment in agriculture to enhance the food security.

Constitutionality and Judicial Scrutiny of R&R Provisions

The Supreme Court and High Courts have laid down some essential requirements to be fulfilled in the process of R&R in order to pass the test of Article 21. In the *First Narmada Bachao Andolan Case*[25] the Supreme Court held that it shall be ensured that tribals who are displaced and are rehabilitated at new locations are better off than what they were and enjoy better amenities than those they enjoyed in their tribal hamlets.[26] The Court also suggested that the forcible displacement of tribals and other marginal farmers from their land and other sources of livelihood for a project was a violation of their fundamental rights under Article 21 of the Constitution of India. The Court also laid down the rules for the completion of project at the earliest. The Act of 2013 *vide* Sec. 32 fixes an explicit responsibility on the Government/Collector to ensure the provision of all basic minimum amenities in every settlement area. However, this provision does not fulfill the requirements of *more and better* amenities for the displaced people as ruled in the above judgments of the Supreme Court.

In *N.D. Jayal's Case* (*Tehri Dam case*)[27] the Court held that in the event of scarcity of agricultural land, the Government or the agency may offer employment or capital for self-

23. As per Sec. 46(6), *Explanation* (b) of the new Act 'specified person' means appropriate Government, Government Company and association or trust or society registered under Societies Registration Act, 1860 which are wholly or partially aided or controlled by the appropriate Government.
24. *Ibid,* Sec. 42(3).
25. (2000)10 SCC 664.
26. *Ibid*, para 62, p.702.
27. 2003 Supp(3) S.C.R. 152.

employment land to the displaced families and the landless agricultural labourers, and also that the Court must ensure early completion of project. The Act of 2013, *vide* Second Schedule, S.No. 4, has provided for certain benefit to the landless agricultural labourers.[28] In *B.D. Sharma's Case*[29] the Supreme Court observed that rehabilitation should be so done that at least six months before the area is allowed to be submerged the rehabilitation is complete. The new Act of 2013 *vide* Second Proviso Sec. 38 (1) has emphasized the need of completion of rehabilitation and resettlement before six months of submergence.

Return of Land: - Recognition of the Doctrine of Public Trust

The new Act *vide* Sec. 101 has provided that if any land or part thereof acquired under the Act remains unutilized for a period of 5 years from the date of taking of the possession then it shall return to the Land Bank or be returned to the original land owners. This provision has been designed to ensure early completion of project and also in lines with the doctrine of public trust. However, it is now provided that unutilized land may be kept for a period specified for setting up of any project or for 5 years whichever is later.[30] This change blatantly runs contrary to the above decisions of the Supreme Court and to the spirit of the doctrine of public trust.

Land Acquisition, Rehabilitation & Resettlement Authority

Sections 51 to 74 provide for machinery for the speedy disposal of the disputes relating to land acquisition, compensation, rehabilitation & resettlement. A reference or an application u/s. 64 may be made to the Authority within 6 weeks from the date of the Collector's award. This provision entails any person not accepting the award of the Collector to require the Collector to refer the matter to be referred to the Authority. If the Collector does not refer the matter then the aggrieved person need not have to wait further or again approach the Collector, he may apply directly to the Authority seeking it to direct the Collector to make the reference to. Appeals may be preferred before the High Court within 60 days from the date of the award passed by the Authority u/s. 69.

Private Companies, Public Private Partnership (PPP) and the Consent Clause

Sec. 2(2) provides for declaration of acquisition of land for Private Companies and PPPs and such acquisition shall be only for the public purpose as defined in sub-section (1) of Sec. 2. It provides that the ownership of the land acquired for public private partnership projects continues to vest with the Government. However, the Ordinance of 2015 has added a new Chapter III A and Sec. 10 A in the Act, which has empowered the appropriate Government to exempt five categories of projects, such as projects as to the national security including PPP Projects, from Chapters II and III. These projects also have been exempted from the requirement of the consent under the First Proviso to Sec. 2(2).[31] This ends up in absolving these projects from the requirement of consent of the affected people. The Ordinance has struck at the root of the democratic process by removing the legal necessity of the government to obtain the consent of 80 per cent of the affected people for the private projects, and 70 per cent for the public-private partnership (PPP) projects. It is evident that the requirement of consent has been made mandatory to ensure transparency and participation. In all cases of land acquisition in Scheduled Areas, consent of the Gram Sabhas or Panchayats or Autonomous District Councils is mandatory. Such consent shall be obtained along with the process of SIA study envisaged u/s. 4.

Acquisition under Urgency Provision

Under Sec. 40 of the new Act, the urgency provision is restricted only to acquisition of land for defence, national security and to any urgency arising out of natural calamities. In the case of acquisition under urgency provision an additional compensation of 75 percent of total compensation shall also be paid. The undertaking SIA study is exempted[32] and the R&R benefits are also not available, if the Government so decides,[33] in case of acquiring land u/s. 40 of the new Act.

Other Laws relating to Land Acquisition and the new Act

There are other Central and State Acts which empower the Central and State Governments to acquire land for public purpose.[34] Pursuant to Entry 42 of the List III of Schedule VII of the Constitution, there has been a good number of special statutes enacted by the Union and the States empowering the Union and the State Governments to acquire land. *Vide* Sec. 105 r/w. the Fourth Schedule of the new Act; thirteen of these Acts dealing with land acquisition were exempted from the purview of this new Act of 2013. However, the Ordinance of 2015, *vide* amendment to Sec.105, has lifted the exemption clause from these Acts in the Fourth Schedule.[35] Hence, all the Acts have been brought within the ambit of the beneficial provisions of the new Act. Sec. 103 of the new Act provides that the provisions thereof shall be in addition to and not in derogation of *any other law* for time being in force. It is not,

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28. The expression 'affected family' in the new Act *vide* Sec. 3(c) (ii) includes also landless labourers.
29. Para 7, *available at* http://www.ielrc.org/content/c9102.pdf. Writ Petition (Civil) No. 1201 of 1990.
30. Amendments *vide* Sec. 11 of the RFCTLARR (Amendment) Second Ordinance, 2015 to the Sec. 101.
31. Sec. 3 of the RFCTLARR (Amendment) Second Ordinance, 2015.
32. Sec. 9 of the new Act of 2013.
33. *Ibid.,* Ss. 9 and 40 (4).
34. For example, The Atomic Energy Act, 1962, The Damodar Valley Corporation Act, 1948, The Land Acquisition (Mines)Act, 1885, The National Highways Act, 1956, The Railways Act, 1989, etc.
35. Sec. 12 of the RFCTLARR (Amendment) Second Ordinance, 2015.

therefore, mandatory for the Union and the State Governments to depend on and invoke the new Act if it wants to acquire land.

Conclusion

The Ordinance of 2015 has been brought to make some controversial changes in the new Act of 2013. The ordinance has absolved five categories of projects including PPP Projects from the requirement of SIA study, consent, public hearing and has lifted the restriction on the acquisition of multi-crop agricultural lands. These far-reaching changes in the basic law of land acquisition shall now be appreciated and meticulously scrutinized in the background of the present situation. A large number of farmer organizations and social activists have expressed strong opposition to the changes that have been made to the new Act through the Ordinance.[36] The social movements not only infuse new life into the dead words of the statute but sometimes completely change the statute and give it a new form. Such is the change and new form that have been brought to the basic law of land acquisition in India. In view of the serious shortcomings in the new Act and the controversial changes that have been made to the new Act through the latest Ordinance, it is doubtful whether these changes effectively address the grievances of the people. This is also in view of the fact that the Supreme Court of India on 4th February, 2015, dismissed more than 1,000 petitions filed by the Noida and Greater Noida authorities and upheld the judgment of the Allahabad High Court, which had directed the UP Government authorities to pay 64% additional compensation and allot 10% of the developed land to the farmers who have lost their lands. The concern over the high cost and low productivity in agricultural sector was expressed in the First Niti (National Institute for Transforming India) Ayog Meeting held on 6th February, 2015 headed by the Prime Minister. Hence, lifting the restriction on the acquisition of fertile or irrigated multi-crop agricultural lands has to be seriously reconsidered. Otherwise, it may cause serious threats to food security and result in unemployment in the agricultural sector, migration, farmers' suicide and so on and so forth.

Call for Contribution to IN LAW Magazine 6th Edition

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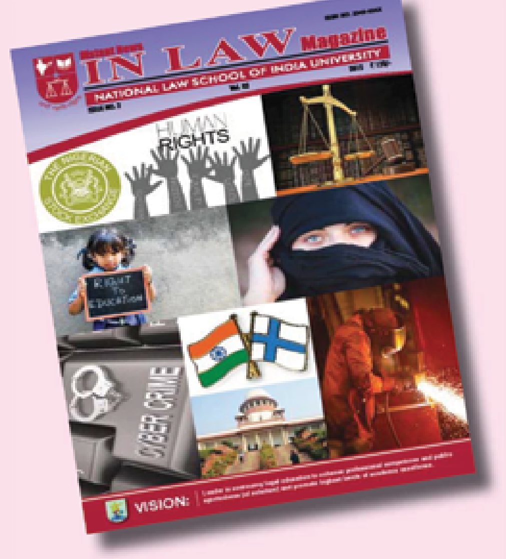

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36. *See,* The Hindu, 26/12/2015, 11/1/2015, 12/1/2015; *Hasty Changes in Land Law,* Editorial, The Hindu, 2/1/2015; *Fencing the Farmers out,* by Jairam Ramesh and Muhammad Khan, The Hindu, 31/12/2014; *No end to battle over land* by Anumeha Yadav, The Hindu, 4/1/2015. *Jaitley: Fifty errors in 2013 Land Act, "India would have become a nation of incomplete projects",* The Hindu, 5/1/2015.

Public-Private Partnership in Real Estate Development – Emerging Legal Issues: An Indian Perspective

Dr. Shaik Nazim Ahmed Shafi*

Introduction

Real Estate[1] as a general term, describes the built environment, which plays a vital role in every aspect of a nation's economy, society and environment. The term 'real estate' refers to land as well as building. It covers residential houses, commercial offices, trading spaces such as theatres, hotels and restaurants, retail outlets, industrial buildings, factories and also government buildings. A real estate transaction includes purchase, sale and development of land both residential and non-residential buildings.

The main players in the real estate market include the landlords, builders, developers, real estate agents, tenants and the buyers. India covers a land area of 3,287,263 sq. km. There are different types of land in India. The several types of land available in India are; agricultural land; barren land; real estate land; commercial land; farm land and residential land. Nearly 55% of it is cultivated land.

The real estate sector in India has assumed growing importance with the liberalization of the economy. Commercial real estate plays a significant role in business, industry and social life.[2] The most important factors for investing in real estate are location of the property; valuation of the property; investment purpose and investment horizon; expected cash flows and profit opportunities; being careful with leverage; investment in new constructions; indirect investments in real estate etc.

Focusing on sustainability; the buildings contribute significantly to energy use and greenhouse gas emissions directly and indirectly; but the real estate sector contributes towards a low carbon economy[3]. Real estate sector is the second largest employer in India after agricultural sector. The Indian construction industry is all set to become $180 billion sector by 2020.

Globalization and the Concept of PPP

The initiation of the concept of liberalization, privatization and globalization in 1990s, at the global level engrossed India to accept the said concept through Public-Private Partnership (PPP). According to industry estimates, the size of the Indian real estate market is expected to approximately US$ 140 billion in financial year 2017.

The concept of Public-Private Partnership also known as PPP, P3 or P can be defined as a governmental service or private business venture which is funded or carried out through a "partnership" of a governmental body or bodies and one or more private sector companies. A PPP represents considerable advantages; i.e. improved service quality; lower project costs; less risk; framework conducive to innovation; more rapid project execution; easier budget management; source of additional revenue along with many more benefits.

The Principles of PPP involves a long-term relationship between the public sector and the private sector along with the features which can be broadly characterized as a contractual framework; selection of service provider; Swiss Challenge Approach[4] and competitive negotiation. Presently some of the mechanisms of PPP applied in India PPP are Build-Operate-Transfer (BOT); Build-Own-Operate-Transfer (BOOT) and Operations-Maintenance-Development-Agreement (OMDA).

Taking note of measurement and performance evaluation; it must be noted whether PPPs will stand on successful side. Truly, the answer is based on; was a policy, program or project unsuccessful because it was wrong in concept, or because it's implementation was hampered by a PPP approach? Therefore it may be better to restate the question: "Are PPPs

1. Available at: http://www.epra.com/media/Real_estate_in_the_real_economy_- EPRA_INREV_report_1353577808132.PDF.
2. Commercial property, other than residential, encompasses shops and retail outlets, offices, warehousing and light industrial premises, as well as hotels, leisure facilities and other forms of infrastructure.
3. The Scheme of "Housing for All by 2022; is a Technology based sub-mission under the Mission to facilitate adoption of modern, innovative and green technologies and building material for faster and quality construction of houses. The Technology Sub-Mission will also facilitate preparation and adoption of layout designs and building plans suitable for various geo-climatic zones. It will also assist States/Cities in deploying disaster resistant and environment friendly technologies. The Technology Sub-Mission will also work on the following aspects: i) Design & Planning ii) Innovative technologies & materials iii) Green buildings using natural resources and iv) Earthquake and other disaster resistant technologies and designs.
4. The Swiss Challenge approach refers to suo-motu proposals being received from the private participant by the government. The private sector thus provides (a) all details regarding its technical, financial and managerial capabilities, (b) all details regarding technical, financial and commercial viability of the project/program (c) al details regarding expectation of government support/concessions. The government may examine the proposal and if the proposal belongs to the declared policy of priorities, then it may invite competing counter proposals from others (in the spirit of 'Swiss Challenge' approach) give adequate notice. In the event of a better proposal being received, the original proponent is given the opportunity to modify the original proposal. Finally, the better of the two is awarded the project/program for execution.

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effective approaches to particular economic development efforts?" In order to evaluate the success of PPPs, there has to be some consensus on what exactly is to be measured, whether quantitatively or qualitatively.[5] And obviously a real estate-based PPP development will have different measures of success than would an ongoing PPP established to help market a region to potential businesses, investors, or workers.

Real Estate and the PPP

Focusing the Real estate development in India it is estimated to be in the region of USD 12 billion, growing at a pace of 30 per cent each year. Almost 80 per cent of real estate developed is residential space and the rest comprise office, shopping malls, hotels and hospitals. The sustained demand from the Information Technology (IT) sector certainly changed the urban landscape in India. It has been estimated that in India, there is a demand for 66 million square feet of IT space. Bangalore soon gave up its title of the Garden City, formerly known for its greenery to become India's own home grown Silicon Valley. Bangalore has positioned itself as the IT capital of India. Several multinational companies continue to move their operations to India to take advantage of lower costs. With human resources being the key element in this industry, the hiring and housing of people, both at their work place and home assume great importance and therefore the need to create space for people to work and live, which in turn triggers the development of other related infrastructure. So distinct are some of these locations that they are being termed as the "temples of modern India" - just an indication of the extent of real estate development taking place. However, the drawback was that while real estate development reached world-class standards, the urban infrastructure in the city could not keep pace. This led to the need to explore other alternative locations and thus began similar developments in cities such as Chennai and Hyderabad. But this served as a wakeup call for authorities: real estate development and urban infrastructure are inextricably linked and development of one is closely dependent on the other. This also led to the setting up of the Bangalore Action Task Force (BAFT) a popular and successful public-private partnership project to transform Bangalore into a world-class city.

The real estate market in India predominantly continued to remain unorganized, fairly fragmented, mostly characterized by small players with a local presence and hence there is a need of law and policy in real estate in India.

Legal Framework

The term real estate connotes immovable property which can be either land or building or both. Immoveable property is defined under various enactments.[6] There are various laws[7] governing the real estate transactions in India. However, the Constitution (Seventy-Fourth Amendment) Act, 1992 is a revolutionary piece of legislation by which Constitution of India was amended to incorporate a separate chapter on urban local bodies, which seeks to redefine their role, power, function and finances.

Present Scenario

The Bill, mainly known as the Real Estate (Regulation and Development) Bill 2013, was first introduced by UPA Government in 2013. The highlights of the Real Estate Bill speak of in regulating the transactions between the buyers and promoters of residential real estate projects. Neither housing nor commercial projects can be launched unless it got registered with the real estate regulator of the State. It establishes State level regulatory authorities called Real Estate Regulatory Authorities (RERAs). Residential real estate projects, with some exceptions, need to be registered with RERAs. Promoters cannot book or offer these projects for sale without registering them. Real estate agents dealing in these projects also need to register with RERAs. On registration, the promoter must upload details of the project on the website of the RERA. These include the site and layout plan, and schedule for completion of the real estate project. Seventy per cent of the amount collected from buyers for a project must be maintained in a separate bank account and must only be used for construction of that project. The State government can alter this amount to less than seventy percent. The Bill establishes State level tribunals called the Real Estate Appellate Tribunals. Decisions of RERAs can be appealed in these Tribunals. Developers can't even advertise of their projects without prior registration with the real estate authority. Instead, the developers must disclose the carpet area before putting any advertisements. Developers need to mention all details of contractor, architect, structural engineer, etc. associated with the project. Any buyer will get all information related to the project from the real estate regulatory authorities. On the whole, the said Bill will be a protection for the consumers.

Taking note of the aforesaid facts and figures relating to real estate; the author focuses on the concept of PPP in real estate development along with the emerging legal issues. This research paper explores the anatomy of a PPP in the context of major real estate projects entered into by a governmental body with a real estate developer or owner.

Emerging Legal Issues

PPPs are not appropriate in all instances. However, public sector agencies interested in using this tool need to implement a number of rules, tools, and institutions to ensure that the

5. Economists typically use two concepts in the framework of cost benefit analysis to measure the success or effectiveness of programs or initiatives. Efficiency and Equity.
6. The Transfer of Property Act, 1882; The General Clauses Act, 1897; and the Indian Registration Act, 1908.
7. The Indian Contract Act, 1872; The Indian Evidence Act, 1872; The Transfer of Property Act, 1882; The Indian Stamps Act 1899; The Cooperative Societies Act, 1912; The Indian Registration Act, 1908; The Wealth Tax Act, 1957; The Income Tax Act, 1961; The Specific Relief Act, 1963; The Urban Land (Ceiling & Regularization) Act, 1976; The Consumer Protection Act, 1986; The Arbitration and Conciliation Act, 1996; The Multi-State Co-operative Societies Act, 2002; The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013; and the State Laws governing the Real Estate.

process is carried out in a responsible manner. The following are the emerging legal issues which are; (i) as markets thrive on certainty and PPPs are no exception there must be a strong legal basis which is necessarily a precondition for a successful partnership. To avoid the lengthy procedures, delay in clearing files, etc. the Single Window System must be brought in for a speedy process of projects and a special law on PPP must be initiated as a common platform in confronting various legal issues pertaining to land acquisition; rehabilitation, resettlement and compensation of the displaced. The viability of a particular mechanism of PPP must be understood before applying or introducing for a particular project; (ii) the issue pertains to conversion of agricultural lands into industrial lands i.e. for special economic zones (SEZ). The government at the Centre must adopt the role played by Kerala State in introducing the Land Use Act, empowering the government to prevent the holder of land from using it to cultivate anything other than food crops, or for any other purposes. While approving the land use for real estate development, the government must focus on certain factors like the public interest; use of land; acquisition hierarchy, rehabilitation, resettlement and reparation. (iii) Thirdly, the issue of food security i.e. when the Land Acquisition Act 1894 was passed, the scope of public purpose was narrower when compared to the present Act 2013. The globalization, SEZs, various government welfare schemes pertaining to housing, industrial, commercial and infrastructure activities has had led in acquisition of vast tract of lands losing the valuable agricultural land effecting to a chaotic situation in food insecurity in the future. (iv) The fourth issue pertains to Rehabilitation, Resettlement and Reparation. In relation to the rehabilitation process, the author quotes;

"Yasmindeshe na sammano na vitirna chavandhawah
Na cha vidya agamah kaschit tam desham parivarjayeta"

(One should not inhibit a country [place] where one get no respect, no opportunity to earn one's livelihood, where one has no friends or relatives, or from where one cannot acquire knowledge)

"Dhanikah shrotriyo raja nadi vaidyastu panchamah
Panch yatra na vidyate na tatra diwasam vaseta"

(Do not stay there even for a single day where there is no rich man, No king, no learned Brahmini, no river or no doctor)[8]

However, in the light of the aforesaid circumstances the author suggests for the introduction of 'lease concept' in acquiring the land instead of outright sale to a private party creating many problems for the displaced. (v) The fifth issue if that the Panchayat Raj System is being ignored and acting arbitrarily without giving opportunity and the need for participation by the people affected in the process. (vi) Sixthly, the issue of resolving the conflict between the fertile and non-fertile agricultural lands; to resolve the issue of fertile and non-fertile agricultural lands, the government must create a special department known as the Department of Land Bank. The purpose of the said department is to collect the required statistical information relating to barren land, waste land of the government, encroached land of the government, non-yielding infertility of agricultural land belonging to agricultural farmers, industries closed due to Court Order or Government Order or declared sick by Board of Industrial and Financial Reconstruction[9] followed by winding up of sick industrial company under Section 20 (2).[10] (vii) The seventh issue pertains to the Human Rights aspect. Today in India, there is a set-back to the land rights of rural population which has led to a crisis on human rights which in turn has become a violation of human rights of the rural poor world over. The author points that the land is the most important source of livelihood. While some rights have been recognized under the legal framework, like life, health, work, education etc. they all can adversely affect the access to land, and the legal implication of it for a broad range of human rights is obvious. India, having favoured the U.N. General Assembly's adopting the Declaration on the Rights of Indigenous Peoples in 2007, it states that: 'Indigenous people have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'. Under the Indian Constitution, the right to property is a constitutional right under Article 300-A. This Article empowers the State to acquire land for public purpose and at the same time to protect the interest of the persons from whom land is required. The author suggests that the acquisition of private land shall be a last resort, but not the first.

Hence, the issue of environment has become the talk of the globe leading to Climate Change. As the number of projects and private investments increased, bureaucratic delays became a concern. Laws were modified to overcome these delays. Between 1980 and 1998, nine Acts, Bills, and Amendments related to environment were enacted. These included the Forest Conservation Act 1980, the Environment Protection Act 1986, the National Environment Appellate Authority Act 1997, and the Coastal Regulation Zone notification 1991. The Environment Protection Act (EPA) 1986 came into existence soon after the Bhopal gas tragedy. It became a protective legislation, and attempted to seal the existing gaps in the law. It empowered the central government to take measures to protect and improve the quality of the environment, by setting standards for emissions and discharges, by regulating the location of industries, and by protecting public health and welfare (EPA, 1986). The need for the Environmental Impact Assessment (EIA) was formally recognized at the Earth Summit held at Rio de Janeiro in 1992. In India, the EIA Notification was enacted in 1994, with the EPA as its legislative foundation (MoEF, 2008). The said Act has been amended in 1997, 2006, and 2007. In any event, as India took the welcome measure in inviting FDI in Real Estate sector, a nation with agriculture background will

8. Shrikant Prasoon, Rule the World – The Way I did. CHANAKYA The Guru of Governance, 1st ed. 2011.
9. Sick Industrial Companies (Special Provisions) act, 1985 (Act 1 of 1986).
10. *Ibid*.

be seen as a concrete jungle having an immediate impact on environment.

The author high lights the issue of a well drafting of Agreements relating to Real Estate transactions.[11] The principles of good drafting must be adhered to avoid any future litigation pertaining to the issues emerging from acquisition of land, title, ownership, developer's rights, and the consumers'. It is evident that a PPP based agreements drafted for Bangalore International Airport Ltd. and Hyderabad International Airport Ltd. are still in dispute before the Hon'ble High Courts of Karnataka and Andhra Pradesh inspite of the commencement of operations.

The concept of "partnership" is really a *non sequitur*, since the typical agreement which documents a PPP includes specific disclaimers that it is not a partnership or a joint venture. The following is a typical disclaimer section found in a PPP agreement referred to as a "Development Agreement" or "Disposition and Development Agreement".[12] Normally the private sector party is referred to as an independent contractor and cannot act as an agent for the government body, without an express designation in writing. Rarely is such a designation given.[13]

Conclusion

Overall, it appears obvious that PPPs in Real Estate sector will continue to grow in importance as an approach to the practice of economic development, particularly in the two areas of ongoing economic development and development projects. The new concept, as the name partnership itself suggests, is built upon interdependence and mutual benefits. All the actors in urban development need to realize that they are not competing with each other. Instead, together they are in competition with other cities in the region, especially in the new liberalized economy. Policy of inviting private sector in urban development has to be complemented with enabling environment. Approval procedures and single window clearances should therefore be adopted. Reforms in the management practices and accountability through greater transparency in the public sector are necessary.

Enabling legislation must be in place before PPP programmes can be embarked on in a country. The government has to demonstrate a clear, long-term political commitment to the use of PPP. Such commitment may manifest itself in a variety of practical ways. Usually sectors in infrastructure services, such as power, gas, water or transport, are among the most heavily regulated areas of economic activity. Government must ensure that there is an effective regulatory system to protect, on the one hand, the investor from director political interference and, on the other, the user from negative impacts of monopolies. A legal frame work that is favourable to the private sector in the rights it confers or protects is worthless if it is not underpinned by an effective system of public administration. With PPP projects, government's role becomes that of exercising general supervision throughout the project lifespan, including inspecting, monitoring and regulating. One of the most important functions of government here is to manage an appropriate procurement process, so that the project will meet the objectives set. A PPP project involves a number of important contractual arrangements among the participants and must be well drafted without giving an opportunity for litigation which will affect the owner, builder/developer, consumer as well as the investor.

REMEMBER!

A smart person knows what to say, A wise person knows whether to say it or not.

The greatest pleasure in life is doing what people say you can not do.

It doesn't matter if it's a Relationship, A Lifestyle, or a Job. If it doesn't make you happy let it go.

Go 24 hours without complaining Not even once Then watch how your life starts changing.

Opportunities are like sunrise if you wait too long you miss them.

Everyday is a chance to discover something new, to see something beautiful, to smell something sweet, to hear something memorable.

Never stop doing little things for others. Sometimes, those little things occupy the biggest parts of their heart.

Lets always meet each other with smile. For the smile is the beginning of Love.

Smile – it will make you look better
Pray – it will keep you strong
Love – it will make you enjoy life more.

11. Builder/Developer's Agreement; Concession Agreement; OMDA Agreements etc.
12. *No Partnership.* Neither anything contained in this Agreement nor shall any acts of the Parties be deemed or construed by the Parties, or any of them, or by any third party, to create the relationship of principal and agent, or of partnership, or of joint venture or of any association between any of the Parties to this Agreement.
13. ANATOMY OF A PUBLIC-PRIVATE PARTNERSHIP by Michael R. Silvey; *Center for Real Estate Quarterly Report, vol.7, no.2. Spring 2013.*

Real Estate Industry in India: Need for Effective Regulatory Mechanism

Dr. G. Mallikarjun*

Introduction

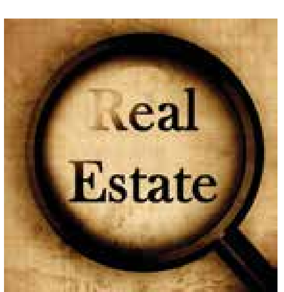
The term 'real estate' is defined as land, including the air above it and the ground below it, and any buildings or structures on it. It is commonly known or referred to as realty. Real estate business involves the purchase, sale, and development of land, residential and non-residential buildings. The main players in the real estate market are the landlords, developers, builders, real estate agents, buyers, etc.[1] India has witnessed phenomenal growth in the recent past due to the liberalization of the economy and opening up of Foreign Direct Investments (FDI)[2] considerably in the sector. Rapid urbanization, positive demographics and rising income levels of the people are also contributing factors for the development and growth of the real estate sector in India.

Real estate transactions are complex. Such transactions are currently regulated through various property laws, law of contract and tax laws making the matters even more complicated and creating an overall unsatisfactory situation for the sector. It impacts the fairness and competitiveness of the sector. Besides, it also creates an insecure environment for common man depending upon the sector to fulfil his or her needs of having a house. Quite often one can hear victimisation of buyers at the hands of builders or property developers. Thus, the orderly progress and development of the sector is possible, while ensuring the rights of the consumers, only through the joint efforts of both the industry and the Government. With this intention the Central government introduced the Real Estate (Regulation and Development) Act, 2016 to regulate real estate sector in India to provide for an institution of a uniform regulatory environment which is aimed at protecting the interests of consumers while ensuring efficiency, transparency, fairness and also to establish an adjudicatory mechanism for speedy adjudication of disputes. The regulations under the Bill, as approved by Union Cabinet, based on the report of the Select Committee of Rajya Sabha on Dec. 9th, 2015, applicable to all builders (promoters) and real estate agents, regardless of their size and influence, and also apply to consumers.

Background of the Act

The real estate transactions are presently regulated through various property laws, law of contract and tax laws making the matters even more complicated and creating disappointing situation for sector in India and for a long time a need has been felt to regulate and organise the sector. The Central Government has been trying for several years to introduce a Real Estate Bill to regulate real estate business in India since long time. In September, 2009, a first draft Bill was prepared to regulate realty which has undergone several revisions pursuant to detailed deliberations with State Governments. The Housing Ministry requested for comments/suggestions from the public by publishing the draft Bill on November 2011. Subsequently, the latest draft of the Real Estate (Regulation and Development) Bill, 2013 prepared proposes to establish a regulatory oversight mechanism to enforce disclosure, fair practice and accountability norms in housing transactions and to provide for adjudication machinery for speedy dispute resolution in the real estate housing sector.[3] The Bill was introduced in Parliament on August 14, 2013 and then it was referred to the Standing Committee on Urban Development for examination and suggestions.[4]

As of now, no State except Maharashtra has taken steps to protect the consumers. In exercise of the powers conferred by sub-sections (1) and (2) of section 51 and sub-section (2) of section 41 of the Maharashtra Housing (Regulation and Development) Act, 2012, and of all other powers enabling it in that behalf, the Government of Maharashtra, after considering the objections and suggestions pursuant to the Government Notification.[5] This Act was enacted to ensure that no promoter shall start any transaction including sale or marketing for sale of flats in a new project or phase of such project without registering the project with the Housing Regulatory Authority first. Further this Act also requires that the promoter retain a number



1. TENTH FIVE YEAR PLAN 2002-07, Planning Commission of India.
2. Government of India (vide Press Note No. 2 of 2005,) permitted FDIs up to 100%, in to the real estate sector.
3. Simona Singh, *INDIAN REAL ESTATE SECTOR – A NEW DAWN? (2013)*, June 27th, 2013. Available at: http://indianlawyer250.com/features/article/102/indian-real-estate-sector-new-dawn/.
4. Sandeep Sing, *Road to regulation: Real Estate Bill takes final shape*, Dec. 20th, 2014. Available at: http://indianexpress.com/article/business/real-estate-bill-takes-final-shape/.
5. Maharashtra Act. II of 2014.

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of flats not exceeding 10% of the total area in each building of the project until the occupation certificate has been obtained.

Real Estate Industry in India and Protection of Consumer Rights

The Real Estate Industry is known as infrastructure service which is, presently, having a large share in the economic growth of the country. Its market in the country is expected to touch US$ 180 billion by 2020.[6] The fast-growing Real Estate Industry would certainly contribute to the development of Indian economy to a large extent and it is good for the economically developing countries. However, the consumers are facing problems due to land mafias, black money influence and even lack of transparency in realty business. Real Estate agents lure the consumers into buying a plot of land which is below the agreed standards by means of misrepresentation or sham advertisements in the print or electronic media. Consumers may even become victims of fraud or deception at the hands of real estate agents and also prone to exploitation owing to their illiteracy and ignorance of their rights.[7]

The real estate industry in India, though progressive, is unregulated and it also lacks the legitimate ethics. Consumers are exploited by taking advantage of these limitations that plague the real estate industry. The housing sector is immensely opaque, due to which consumers are unable to get complete information, or enforce accountability against builders and developers.[8] There exists no binding regulatory body to the industry. This causes delays in completion of projects, diversion of funds collected from buyers. This will effect long-term growth of industry. The Competition Commission of India categorically stated[9] that:

"*Consumers are normally not in a position to organize or act meaningfully for redressal of their grievances, or the protection of their interests, even though often their life-savings may be at stake. The absence of any single sectoral regulator to regulate the real estate sector in totality, so as to ensure adoption of transparent and ethical business practices and protect the consumers, has only made the situation in the real estate sector worse.*"

Therefore, the Government has also been undertaking steps to improvise in the industry and to bring out higher amount of investment in all the sub-sectors of Real Estate. The Real Estate (Regulation and Development) Act, 2016 is to create a uniform Real Estate Regulatory Authority and an Appellate Tribunal that will act as a watchdog for the housing sector, primarily towards protecting consumer interests while creating an alternative redress mechanism for any disputes that may arise.

Amendments to "The Real Estate (Regulation and Development) Bill:[10] An Overview

The Real Estate (Regulation and Development) Bill, 2013 which was pending in the Rajya Sabha had been approved by the Union Cabinet with proposed amendments made by the Rajya Sabha. The original Bill was only applicable for residential real estate. Now the Act is applicable for both commercial and residential real estate projects. The main aim of the Act is to promote fair play in real estate transactions and to ensure timely execution of projects and ensures orderly growth through efficiency, professionalism and standardization. With this it is expected to ensure greater accountability towards consumers, and to significantly reduce frauds and delays. Now under the Bill, consumers are to organize or act meaningfully for redressal of their grievances or the protection of their interests by establishing consumer association. It also provides for the establishment of a 'Real Estate Regulatory Authority' in States or Union Territories (UTs) to regulate real estate transactions. This is as follows:

A. Registration of Real Estate Projects is Mandatory

Under the Act registration of developers, their projects and their real estate agents who intend to sell (booking or even offer to sell) any plot, apartment or building, on at least 500 square metres of area, or with eight flats, will have to be registered with the with the Real Estate Regulatory Authority to accredit and monitor projects. This is mandatory, without which transfer of interest is not permissible. This is against the minimum size of 1,000 square metres suggested earlier. Thus, more projects are covered under the regulatory ambit and any development, conversion or commencement of construction of immoveable property would be permissible only after obtaining requisite approvals and registration with the Authority. Another benefit is that Regulatory Authority proposed under the Act could grade the projects along with grading of promoters, in addition to ensuring the digitisation of land records.

B. Mandatory Public Disclosure of all project details

Disclosure of information, such as details of promoters, project, layout plan, plan of development works, land status (relating to land title, encumbrances over land, number and carpet area of units), status of statutory approvals and disclosure of proforma agreements, names and addresses of real estate agents, contractors, architect, structural engineer etc., is compulsory under the Act, as of now consumers are unable to procure complete information or hold developers to account in the absence of effective regulation. It is intended

6. *Real Estate Industry in* India, India Brand Equity Foundation, Sept. 11th, 2015. Available at: http://www.ibef.org/industry/real-estate-india.aspx.
7. *Deeksha Jain*, Real estate industry and protection of consumer interests in India, Available at: http://blog.ipleaders.in/real-estate-industry-and-protection-of-consumer-interests-in-india/.
8. Ibid.
9. *Belaire Owners' Association* v. *Dlf Limited, Huda & Ors.* (Case No. 19 of 2010), Decided on Jan. 3rd, 2013, COMPETITION COMMISSION OF INDIA. Available at: http://indiankanoon.org/doc/100579451/.
10. As approved by Union Cabinet on the report of the Select Committee of Rajya Sabha Bill, 2015 on Dec. 9th, 2015.

to ensure fairness and to substantially reduce the disputes. In case of wilful default of the provisions of the proposed Act, or unfair practice by a developer, including false representation of the quality of services or status of approvals, the Authority may revoke registration of the developer.

C. Compulsory Deposit of 70 percent

Under the Bill the developers have to open a separate bank account (escrow account) compulsorily to deposit 70 percent (or such lesser percent as notified by the Appropriate Government, compared with the earlier proposal for 50 per cent) of the amounts realized for the real estate project from the allottees in a separate account in a scheduled bank within a period of fifteen days to cover the cost of construction to be used for that purpose. Acceptance of an advance/deposit for the proposed sale of a unit in a project by developers will only happen in pursuance of execution of a written agreement with the buyers. Builders will be liable for structural defects for five years, instead of two years as mentioned in the original Bill.

D. Regulation on Carpet Area

Generally, developers mention “super built-up area” of a unit, which is an ambiguous, misleading term because the super built-up area may be 25-40 per cent more than the ‘Carpet Area’. The present Act provides for developers to clearly specify the carpet area for each unit and it is a step in the right direction to protect the consumer. Now under the Act, ‘Carpet Area’ has been clearly defined to include usable spaces like kitchen and toilets, while the garage has been kept out of the purview of definition of apartment.

E. Developers’ obligation

a) **Adherence to plans approved by the authority:** Under the Act, the developers and the promoter must adhere to approved plans and project specifications and no alteration to plans, structural designs and specifications of the plot, apartment or building are possible without the consent of two-third allottees after disclosure. Developers are liable to rectify any major structural defect in the unit or services incidental thereto for one year from the date of handing over possession. If developers fail to rectify such defects within a reasonable time, they shall be liable to pay the compensation to the buyers as may be determined by the Authority.

b) **Delayed possession:** The Act provides that if the developer is unable to complete construction to give possession of the flat to the buyer, the developer would be liable to refund the deposit received along with interest at the rate prescribed by the Authority. Correspondingly, the buyer must make payments in a timely manner and would be liable to pay prescribed interest in case of delayed payment. Thus Act also strives to strike a balance by ensuring that the buyer makes timely payment to the developer.

c) **Transparency**: Developers would be required to make available information and documents to proposed buyers to ensure transparency in development of the proposed project such as approvals, site plans, structural designs, specifications, construction schedule, etc.

d) **Real Estate Agents:** Real estate agents to sell properties should be registered themselves with the Authority. Maintaining accounts books, records and documents are necessary. If they resort to involving in any unfair trade practices their names will be black listed.

e) **Real Estate Regulatory Authority:** A two-tier dispute resolution mechanism is proposed comprising a Real Estate Regulatory Authority (the Authority) and adjudicating officers at state-level and a central Real Estate Appellate Tribunal to adjudicate upon matters relating to residential projects covered under the Act. The Authority to act as the nodal agency to co-ordinate efforts regarding development of the real estate sector and render necessary advice to the appropriate Government to ensure the orderly growth and promotion of real estate sector.

F. Central Advisory Council

It is proposed to establish to advise the Central Government on implementation of the Act, with a mandate to make recommendations on major questions of policy, to protect consumer interests and to foster growth and development of the real estate sector.

G. Establishment of Real Estate Appellate Tribunal

The Real Estate Appellate Tribunal is to hear appeals from orders of the Authority and the adjudicating officer. The Appellate Tribunal is to be headed by a sitting or retired Judge of the High Court, with one judicial and one administrative/ technical member.

H. Penal Provisions

The provisions for punishment in case of non-compliance with the provisions of the proposed Act would lead to imprisonment for a term of up to three years, or a penalty of up to 10 per cent of the estimated cost of the real estate project, or both in case promoters, up to one year in case of real estate agent. It also provides for de-registration of the project

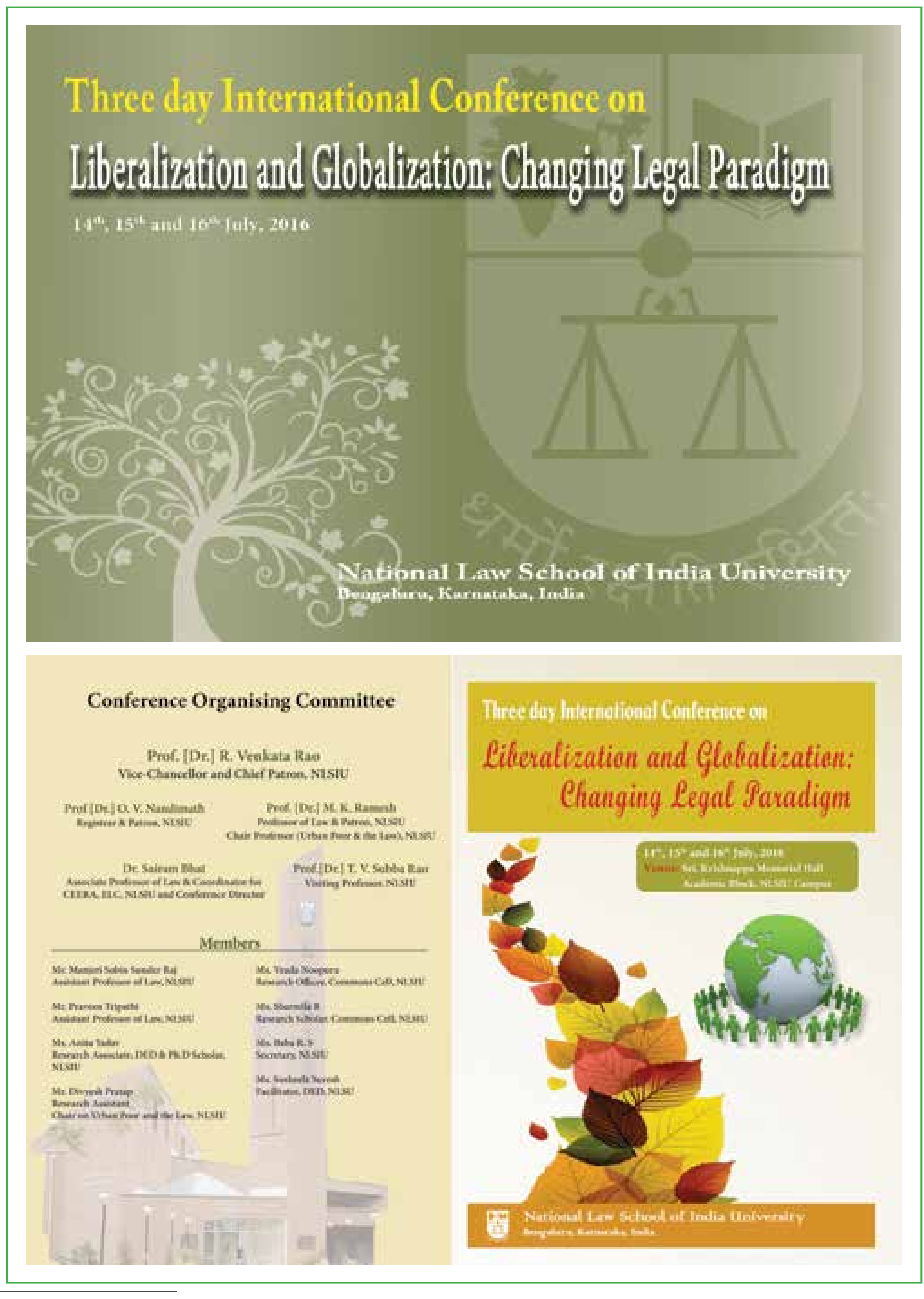
Conclusion and Suggestions Act

To sum up, one can say that the Real Estate (Regulation and Development) Act is a good and revolutionary initiative to protect the interest of consumers, to promote fair play in real estate transactions and to ensure timely execution of projects. It also helps in speedy adjudication of disputes and ensures orderly growth of the real estate sector. Further, it is expected that domestic and foreign investment in the sector will be increased, which would help the government to achieve its object to provide ‘Housing for All by 2022’, with help of private participation. The proposed regulations in the Act are not only going to safeguard the interests of the buyers but would also help in wiping out the corruption from the sector. Even, the Act

is going to maintain a balance between the rights and obligation of the builder as well as the buyer power equations.[11]

Suggestions

1. It is suggested that apart from implementation of the provisions of the Act, the reforms in administration is to be initiated so that sanctioning of projects must not be delayed due to red-tapism. Further, simultaneously regulatory reforms are also required to be undertaken.
2. That States should implement the new regulations taking the Act as model and that uniformity be maintained among the States.
3. That though the Act provides for the Real Estate Regulatory Authority to deal with a major dispute, it is also quite essential to create Complaints Redress System to resolve minor grievances by creation of a Complaints Redress System on similar lines of the SEBI Complaints Redress System (SCORES).
4. The Act needs to be reviewed to the extent to make the authorities answerable about who is (or are) responsible for the delay.
5. Government should also ensure that the Land Titling Bill, 2011 is introduced in the parliament for its approval as it is intended to introduce conclusive property titling system in India with title guarantee and indemnification against losses in property titles. This will give further and better protection to the consumers.



11. Shalini Nair, *Cabinet Nod for Real Estate Bill*, Indian Express, New Delhi, Dec. 10th, 2015. Available at: http://indianexpress.com/article/india/india-news-india/. Last visited on Dec. 20th, 2015.

Indian Supreme Court *VIS-A-VIS* The Need for Specialised Division in Constitutional Adjudication

Muthu Kumar*

Introduction

The interpretation of the Constitution and constitutional review is indispensible in the constitutional system of Government. The two major models of constitutional review, which are famous and also in practice in every continent are: Firstly, the American model, considered to be the pioneer in constitutional review. In this type, the highest Court of the land has dual function: It exercises the power of judicial review and acts as the highest appellate Court. Secondly, the Kelsanian model of constitutional review, which was adopted by new Constitutional Democratic Governments.[1] In this model, a separate Court or tribunal is set up to deal only with constitutional issues, and this acts as the highest Court of the land. Concerning our Supreme Court, it exercises power similar to the American model of constitutional review. It exercises vast appellate jurisdiction under the Constitution and the Statutes enacted under Article 138 of the Constitution of India. Along with this broad appellate jurisdiction, it exercises constitutional review also. The substantive differences are many for adjudicating a constitutional question from other issues. However, concerning the procedural aspect, there is only one difference, where a constitutional issue shall be heard by a Bench consists of not less than five judges.[2] At the commencement of the Constitution, more Constitution Benches were constituted.[3] However, the increase in cases and mounting arrears in the Supreme Court[4] made the Court sit in fragmented Benches and since the past decade, fewer Constitution Bench matters were disposed[5] and many important questions of law involving constitutional interpretation have been decided by smaller Benches.[6] The Law Commission of India and many eminent lawyers of the Supreme Court and researchers had addressed this issue. They observed that the Supreme Court had virtually turned into a general Court of Appeal, and the Court has to be restructured to restore the exclusivity of the institution. However, the suggestions for restructuring is varied in nature, such as creating a separate Court for constitutional review, Dividing the Supreme Court into a Constitutional Division and Court of Appeal, Setting Benches of the Supreme Court in other parts of the country, etc. Nevertheless, Of late, there is a demand for creation of intermediate Court may be called as 'National Court of Appeal (NCA)' between the Supreme Court and the High Court. This NCA should deal with the appeal matters arising from High Courts and Tribunal, and the Supreme Court should be engaged with constitutional issues and questions of general public importance. Of late, i.e. on February 26, 2016, a Chennai-based advocate filed a petition before the Supreme Court for setting up a National Court of Appeal with regional benches to act as the final courts of justice in criminal and civil cases. Surprisingly, the Court admitted the petition and referred it to the Constitution Bench by appointing senior advocates K.K. Venugopal and Salman Khurshid as *amicus curiae*.[7] In these circumstances, this paper analyses the importance of the Supreme Court in constitutional adjudication and further, keeping these as a background, an attempt has been made to bring out the advantages of setting up of specialised Court for constitutional adjudication.

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1. There are around 45 countries in the World set up either Constitutional Court or Constitutional Tribunal for the purpose of Constitutional review explicitly. *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 7-8 (2003).
2. INDIA CONST. art. 145 cl. 3. Art 145(3) Indian Constitution, 1950.
3. The Five+Judge Bench Disposals (in percentage) during 1950-54 - 45.6; 1955-59 – 49.8; 1960-64 – 134.4; 1965-69 – 69.4., *See* Rukmini S, *Cases decided by Constitution Benches dropping*, THE HINDU, Nov. 14, 2013, available at http://www.thehindu.com/news/national/cases-decided-by-constitution-benches-dropping/article_5348431.ece.
4. As on 01/03/2015, there are 61,300 pending matters before the Supreme Court, among which the Constitution pending matters are 29. *See* available at http://supremecourtofindia.nic.in/p_stat/pm01032015.pdf (last visited on March 31, 2016).
5. of The Five+Judge Bench Disposals (in numbers) during 2000-04 – 77; 2005-09 – 36; 2010-14 – 48.
6. The Supreme Court consisting of three judges struck down the use of narco-analysis without consent to obtain confession as unconstitutional in *Selvi v. State of Karnataka* (2010) 7 SCC 263. Further, the Court consisting of two judges uphold the Constitutionality of Sec. 377 of I.P.C in *Suresh Kumar Koushal and another v. NAZ Foundation and others* (2014) 1 SCC 1. In *Nandini Sundar and others v. State of Chattisgarh*, (2011)7 SCC 547, it was held unconstitutional for the Government to form and arm militias to fight Maoists. However, concerning the constitutionality of Sec. 377 of I.P.C., the Hon'ble CJI referred a batch of the curative petition to the Constitution Bench observing that the petitions pose several constitutional questions. *See* Krishnadas Rajagopal, *Five Judge Constitution Bench to take a call on Section 377*, THE HINDU (Chennai), Feb. 03, 2016, at 1.
7. Krishnadas Rajagopal, *S.C. does U-turn, admits plea for Court of Appeal*, THE HINDU (Chennai), Feb. 27, 2016, at 1.

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Importance of Specialised Court in Constitutional Adjudication

A Specialised Court or tribunal can play many important roles, including reviewing the constitutionality of legislation, protecting individual rights, providing a forum for the resolution of disputes in a federal system and balancing the separation of powers. The text of the Constitution is authoritative but cannot be entirely perfect, and may sometimes also be vague, open-textured, ambiguous and generally in desperate need of elaboration. This can be done only by an independent agency and usually the power vests with the judiciary and particularly the Constitutional Court. The burden of the Constitutional Court is thus a heavy one. A notable circumstance accounting for this heavy load is that constitutional cases usually involves a choice. It is primarily due to two reasons: the first, some provisions of the Constitution are stated in wide or ambiguous terms. The interpretation of provisions in a particular case involves making a choice between competing values. Secondly, some of the critical phrases occurring in the Constitution cannot be intellectually understood or given shape without a substantial injection of content from some source beyond the language and the discoverable intention of those who wrote it. In constitutional adjudication, the choice is not between parties as such, but between goals.[8] Woodrow Wilson's description of such a Court as a 'Constituent Assembly continuously in session' deserves to be kept in mind.[9] Mr. Justice Frankfurter's appellation – 'a very special kind of Court', applies almost for every Court entrusted with the functions of deciding constitutional questions.[10] An occasion for the Court to carry out constitutional adjudication is regarded as most troublesome and uneasy when the meaning of the Constitution is at stake. This is not merely because the Constitution is often more important than other types of law. It is rather because constitutional adjudication produces regulation that may overturn or veto enacted law and this sort of judicial control is relatively final since it is hard to change.[11] The US Constitution with just seven articles & 27 amendments had endured for more than 200 years, because of the interpretation made by the US Supreme Court. The written Constitution of a modern democratic State is the fundamental organic law of that State. Such a Constitution has to be read and interpreted according to the changing socio-economic and political context to suit the present scenario by considering past experiences and future growth. It is significant to note that the rules of statutory interpretation shall not always be appropriate or suitable to interpret a written Constitution although we may follow the rules of statutory interpretation while interpreting a Constitution as a legal document.

Special Features of Constitutional Adjudication

The concept of constitutional review or judicial review got approval from all modern democratic Constitutions by the influence of the historic case of *Marbury v. Madison*.[12] But the acceptance rate depends upon the legal system prevailing in that nation. Although there has been long and undisputed growth and development, even in the 21st century the anxiety about judicial review i.e. constitutional adjudication remains. The anxiety exists over how it has to be exercised i.e. the modalities and the qualities that the institution must possess when it is entrusted with the power of judicial review. To begin with the answers to the above questions, it is pertinent to note the unique features of constitutional adjudication, which are either not found in non-constitutional adjudication, or, if found, are found only in a much lesser degree. They are discussed briefly below along with the instances of experience of the Supreme Court of India.[13]

(i) ***Specialised Approach:*** The most significant aspect is the need for the unique approach. In the report of Speciality Courts submitted in 1983, Chief Justice Warren Burger raised a relevant question 'If the advocates must be specialist then can we wholly ignore the need for some specialisation in the judicial systems?' Justice Sandra Day O'Connor of the Supreme Court of the United States, speaking to the Council of Chief Justices of Courts of Appeal in Chicago said that she had found that the fields of criminal law, probate, tax, domestic relations and administrative law particularly well suited for specialisation. When a judge has particular expertise in an area or field of law, the judge, she said, can prepare for hearings with less time and can resolve issues more quickly, and perhaps better.[14] In India, the 42nd constitutional amendment provides that Parliament may establish tribunals for adjudication of disputes concerning recruitment and conditions of service of persons appointed to public service under Central, State or any local or other authority, or a Corporation owned or controlled by Government. Similarly, Article 323 B(1) and (2) empower the appropriate legislature to provide, by law, for adjudication or trial by tribunals. It may be for any disputes and offences on taxation; foreign exchange; industrial and labour disputes; land reforms; ceiling on urban property; elections to Parliament or State Legislature. It also includes production, procurement, supply and distribution of foodstuffs and other essential goods and control of prices of such goods; rent, regulation of tenancy issues including the right, title and interest of landlords and tenants; offences against laws concerning these matters.

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8. *See* Law Commission of India, Report on Constitutional Division Within The Supreme Court - A Proposal For, 95, March 1984, 12 *available at* http://lawcommissionofindia.nic.in /51-100/Report95.pdf.(hereinafter LCI Report 95).
9. Arthur Selwyn Miller, *Supreme Court: Myth and Reality* 6 (1978).
10. *Id*, at 24.
11. Harry H. Wellington, *Interpreting the Constitution – the Supreme Court and the Process of Adjudication* 20 (1990).
12. 5 U.S. 137 (1803).
13. LCI Report 95, *Supra* note 10, at 7.
14. *Id*., at 9.

The tribunals are otherwise called 'Specialised Courts' since it is dealing with the particular issue. These tribunals consist of administrative or technical members to be a part of the tribunal. Executive members are those who have practical experience of the functioning of the services and professional members are those who are experts in the field related to the respective tribunals.[15] The Government set up special Courts even in criminal matters such as terrorist offences, economic offences and corruption cases to expedite the trial. The landmark case concerning the setting up of Special Courts was *In re Special Courts Bill*, where the Supreme Court upheld the validity of the Bill.[16] Hence, there exists number of specialised Courts to deal with a particular type of offences or crimes.[17] Thus, special courts and specialised tribunals are not unknown to the Indian Legal system but concerning constitutional adjudication, a Constitutional Bench could be set up by the Hon Chief Justice to resolve any constitutional questions arising in any case or matter. But, this can be done only when there is any call for the same and there is no separate permanent bench in the Supreme Court to deal with the constitutional matters.

(ii) ***Consistency:*** The second aspect of constitutional adjudication that needs emphasis is consistency. It means that a decision rendered in the past, and the approach underlying the past decision, should be pondered over by the Court when deciding a case wherein that approach may have some relevance. Whether to follow it or not, will be a matter to be decided in each case, but the Court must be at least conscious of the past decision. This task of the Court can be more adequately discharged when there is a functioning of a specialised division, devoted exclusively to constitutional questions. It is emphasised that the aspect of consistency does not mean that there should be no new developments in constitutional adjudication. It should undergo some stability and change i.e. the two opposites have to be reconciled by the judicial process. In other words, 'the Court is to decide not by what is good, or just or wise, but according to law, according to continuity of principle found in the words of the Constitution, judicial precedents, traditional understanding and like sources of law.'[18] In constitutional cases, the Constitutional Courts possesses a broad freedom to decide as it deems fit. But in exercising that freedom it must not create too much confusion. Unlike the US Supreme Court, the Supreme Court of India in *State of Rajasthan* v. *Union of India*[19] has rejected the application of doctrine of the political question in the Constitution of India. It read many socio economic rights enshrined in the directive principles into the fundamental rights and made them justiciable rights. It extended the meaning of life and liberty to the needs of the time and incorporated many rights[20] into the Article 21 of the Constitution of India. Nowadays, the Court is intervening in all matters and correcting the public officials,[21] and carrying out the policy of the Government. For instance, they directed the most complex engineering of interlinking of rivers in India within a time frame.[22] Sometimes, they arrogate themselves the power of other organs by monitor the conduct of investigating and prosecuting agencies,[23] who are perceived to have failed or neglected to investigate and prosecute ministers and officials of government. Thus, in this process, although, the Supreme Court of India is acting as a national conscience for the people of India,[24] it lacks consistency in dispensing justice and thereby actually creating more confusion and leads us to doubt whether it is an institution of judicial nature or not.

(iii) ***Developing Constitutional Jurisprudence:*** The third consideration to which attention may be usefully drawn is the need for systematic evolution of constitutional jurisprudence. It is desirable that such jurisprudence should be allowed to evolve as a self-contained and coherent body of doctrine, emerging from judicial decisions rendered with that deep knowledge of, and

15. M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1541 (2014).
16. In re Special Courts Bill, A.I.R. 1979 SC 478; (1979) 1 S.C.C. 380.
17. Family Courts deals with family matters; Protection of Civil Rights Court deals with atrocities of SC and ST violations; Special Courts set up to try terrorists who are charged under Terrorist and Disruptive Activities Act, Prevention of Terrorist Act, Unlawful Activities Prevention Act, National Security Act, Special Court (Trial of Offences relating to Transactions in Securities) Act and etc.
18. ARCHIBALD COX, THE WARREN COURT-CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 21 (1968).
19. A.I.R. 1977 S.C. 1361.
20. Right to life includes living with human dignity; Right to Know; Right to clean and healthy environment; Right to free legal aid; Right against handcuffing and arbitrary arrest; Right to Shelter; Right to primary education etc.
21. The Supreme Court ordered control over automobile emissions, air and noise and traffic pollution, gave orders for parking charges, wearing of helmets in cities, cleanliness in housing colonies, disposal of garbage, control of traffic in New Delhi, made compulsory the wearing of seat belts, ordered action plans to control and prevent the monkey menace in cities and towns, for control of loudspeakers and banning of fire crackers and etc.
22. In Re: Networking of Rivers, (2012) 4 SCC 51.
23. The investigation and prosecution of ministers and officials believed to be involved in the Jain Hawala case, the fodder scam involving the former Chief Minister of Bihar, Lalu Prasad Yadav, the Taj Corridor case involving the former Chief Minister of Uttar Pradesh, Mayawati, the recent prosecution of the Telecom Minister and officials in the 2G Telecom scam case and the appointment of Special Investigation Team in Post Godhra violence and issue of Black Money.
24. T.R. Andhyarujina, *Disturbing trends in judicial activism*, The Hindu, Aug. 6, 2012, available at http://www.thehindu. com/opinion/lead/disturbing-trends-in-judicial-activism/article3731471.ece.

familiarity with, constitutional law that could more easily come from constant contact with work of a specialised character.[25] As society becomes complex, the issues that come up for constitutional adjudication will also tend to become complex. The Court has to take into account the requirements of the society, and should evolve new doctrines to the needs of the time and thereby enrich the constitutional jurisprudence to the expectations of the community. It is clear that the originalism shrinks the minds of judges to not allow progressive thinking and limit them to the text alone. Hence, the Court should take into account new scientific and social developments and propound new constitutional principles and doctrines to fulfil the societal aspirations. Undoubtedly, the Supreme Court of India has contributed a lot to the evolution of constitutional jurisprudence.

(iv) Time: It is of considerable importance, having regard to several factors: (i) the gravity and complexity of the issues involved; (ii) the impact that an adjudication of a constitutional issue in a particular direction may possibly have on the future course of public law; and (iii) the nature and volume of materials that may be needed by the Court, for arriving at a proper conclusion on constitutional issues. Judges should, therefore, have adequate time and ease of mind for research, reflection and consideration. In reaching judgments, they need time for critical review when draft judgments are prepared; and they need further time for clarification and revision in the light of all that has gone before.[26] Sir Edward McWhinney has lucidly stressed the need for the availability of adequate time for a court of last resort as 'A final appellate tribunal can only function effectively when it has enough time adequately to consider, research and decide those cases that do come to it.' In this connection, the best example is the Constitutionality of Constitution (99th Amendment) Act, 2014 and the National Judicial Appointment Commission Act, 2014. The Supreme Court struck down both the constitutional amendment and the Act on the ground of violation of Basic Structure of the Constitution on October 16, 2015.[27] However, it found certain lacunae in the existing collegium system and called for suggestions to revamp it[28] and received 3000 suggestions running over 15,000 pages. When the Government showed its unwillingness to draft 'Memorandum of Procedure' on the appointment of judges by the collegium, the Court by its judicial Order[29] directed the Central Government to prepare it. It took a long time for the Government to finalise it but it is yet to be enforced. Almost one year passed and during this period, no new appointments were made in the Supreme Court and the High Courts. The vacancies in these Courts as on March 31, 2016, were around 500 and it caused huge pendency of cases in every High Court and in the Supreme Court too. The administration of justice is totally paralysed in Constitutional Courts because of the delay in the *NJAC case* and the story of seeking opinion for reforming collegium system. Further, the 31 judges of the Court are busy in dealing sundry appeal cases that made the Constitutional benches set up long ago to gather dust. As per the Supreme Court report for Nov. 2014, there were 29 Constitution Bench cases were pending.[30] The reference to the Constitution Bench also became a time-consuming process. There are some issues which can change the economic landscape. For instances, the definition of 'industry' under Sec. 2(j) of the Industrial Disputes Act, 1947 has been surrounded by controversy ever since the enactment of Industrial Disputes Act of 1947.[31] The confusion seemed to have been somewhat cleared with the landmark seven-Judge Bench decision in *Bangalore Water Supply Sewerage Board v. A. Rajappa and others*[32] (hereinafter referred to as *Rajappa's case*). In *Coir Board, Ernakulam v. Indira Devi P.S. and others,*[33] a two-Judge Bench called for a reconsideration of *Rajappa's case* in the light of globalised, privatised and liberalised economy. But the then CJI did not refer it to the larger Bench. Again, in 2005,[34] a five-Judge Constitution Bench of the Supreme Court has accepted for reconsideration of the *Rajappa's case.* It seems they have constituted a larger Bench to reconsider the *Rajappa's case* but it is yet to function. There are certain important matters touching vital constitutional questions are kept unanswered for many years. The instances are: In the case of *Property Owners' Association v. State of Maharashtra,*[35] the revision of the extent of the right to property, once a fundamental right and now only a legal right, is waiting for the final word for nearly 20 years. The roots of the controversy go back to the 25th Amendment to the Constitution. Similarly, the issue relating to powers of the Centre and State Government in liquor trade was taken cognizance of by the Supreme Court

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25. LCI Report 95, *Supra* note 10, at 16.
26. *Id.*
27. *See* http://supremecourtofindia.nic.in/FileServer/2015-10-16_1444997560.pdf.
28. Krishnadas Rajagopal, *SC throws open collegium system to public scrutiny*, The Hindu (Chennai), Nov. 6, 2015 at 1.
29. Writ Petition (Civil) No. 13 of 2005 dated Dec. 16, 2015.
30. *See* http://supremecourtofindia.nic.in/p_stat/pm01032015.pdf (last visited on March 15, 2016).
31. Act No. 14 of 1947.
32. A.I.R. 1978 SC 548; (1978) 2 SCC 213.
33. A.I.R. 1998 SC 2801; (1998) 3 SCC 259.
34. State of U.P. v. Jai Bir Singh, (2005) 5 SCC 1.
35. (1996) 4 SCC 49.

in 2007 in the case *State of Uttar Pradesh v. M/s. Lalta Prasad Vaish.*[36] These and some more like cases has been in limbo all these years.[37] There are some constitutional questions raised by parties took almost two decades to dispose of it. *Rajeev Dhawan v. Gulshan Kumar Mahajan & Ors.*[38] and *Dr. Subramanian Swamy v. Arun Shourie*[39] were filed in the year 1994 and 1990 respectively raising constitutional questions about Contempt of Court Act and both the cases were disposed off on July 23, 2014. Thus, the Supreme Court shows scant regard to disposing off matters relating to constitutional questions.

Conclusion

The Constitution has to be interpreted with the exercise of great caution, and when the Court sits to interpret the Constitution, indeed produces great ramifications in the society in all its spheres, i.e. social, political and economic. Undeniably, the huge backlog and mounting arrears of cases display a lack of enthusiasm in setting up of Constitution Benches in deserved cases since 2000. The main reason is less number of judges in each bench will clear more cases and if five or more judges allotted for one matter then regular appeals automatically proliferate. Concerning the quality of the Constitution Bench, it is evident from the above discussion, that the Supreme Court of India lacks special features for constitutional adjudication. Although it has Constitution Benches to adjudicate on constitutional questions, it will be constituted only by the Chief Justice of India when it warrants. Thus, the delay of disposing constitutional matters and the lack of specialised approach in dealing with constitutional cases poses a grave threat to the development of the nation in each and every sphere. These are the reasons that emphasize the fact that we require a separate specialised Division in the form of Court structure for constitutional adjudication. There are certain proposals and suggestions 'How to make our Supreme Court as a true Constitutional Court?' One is reform within the Supreme Court. The employment of self-imposed restrictions in entertaining special leave petitions (SLPs) because it occupies a major portion of Supreme Court docket. But, of late, the Supreme Court Constitution Bench heard a reference from a Division Bench which consists of two-Judges in *Mathai @ Joby v. George and another*,[40] which brought out the apathy of the Supreme Court in entertaining appeals under Article 136 and held that exercise of discretionary power too leniently has resulted in an enormous backlog of cases and proposed for laying guidelines for the exercise of discretion judiciously. But, the Constitution Bench on Jan. 11, 2016 refused to revisit the scope of Article 136 and held that there could be no strait-jacket approach in the exercise of discretionary powers under Article 136 and that it is different with every case.[41] The other reform is setting up of 'National Court of Appeal'. It provides another tier of appeal to the litigants. Although it has been contemplated to act as a final appellate Court in civil and criminal matters, the potential litigants will make an attempt to the Supreme Court. Thus, the NCA will not dissuade the litigants from filing another appeal to the Supreme Court. Undoubtedly, the NCA in four regions will proliferate appeals not only for itself but also in the Supreme Court. Thus, to maintain the Constitution with the needs of the time, interpretation is inevitable, and it should be done through a specialised Court. The feasible reform is setting up of a permanent specialised Bench in the Supreme Court devoting time only to constitutional adjudication and simultaneously, adopting self-imposed restrictions in entertaining appeals under Art 136.

REMEMBER!

There are four very important words in life, Love, Honesty, Truth & Respect.
Without these in your life, you have nothing.

Life is too short, Enjoy your days.
Laugh at every chance
Cry only if you must & never let others bring you down…

The difference between can and cannot are only three letters.
Three letter that determine your life direction,

Bell has no sound till someone rings it,
Song has no tune until someone sings it,
So never hide your feeling, because
It has no value till someone feels it.

You will never free yourself from the prison of your own false thought

Let go of grudges
Forgiving people & moving on
With life feels so much
Better than holding on to anger and resentment

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36. (2007) 13 SCC 463.
37. M.J. Anthony, *Sittings of Constitution Benches have become a rarity*, available at http://www.rediff.com/ news/column/ sittings-of-constitution-benches-have-become-a-rarity/20131120.htm.
38. (2014) 12 SCC 618.
39. (2014) 12 SCC 344.
40. (2010) 4 SCC 358.
41. Apoorva Mandhani, *Constitution Bench of Apex Court refuses to revisit the scope of Article 136*, LIVELAW.IN, Jan. 13, 2016, available at http://www.livelaw.in/ constitution-bench-of-apex-court-refuses-to-revisit-scope-of-article-136/.

The sunshine law under a cloudy regime: Transparency and Accountability of Right to Information Act

Pallavi Bajpai*

Introduction

The 21st century is said to be a century of governance. It has recognized that the state and its machinery should work for the welfare of the people. Good governance constitutes the cornerstone of every democracy and includes wide range of issues like economic, political, administrative and judicial as well. Good Governance rests on positive, responsive and sensitive administration.

According to the World Bank[1], good governance entails sound public sector management, accountability, exchange and free flow of information i.e. transparency, and a legal framework for development. In seeming agreement with the World Bank, the Overseas Development Administration of the United Kingdom defines good governance by focusing on four major components namely legitimacy, accountability, competence, and respect for law and protection of human rights[2].

The Indian Constitution incorporates Fundamental Rights and these rights are especially enforceable in the court of law. Citizens' right to receive information has been interpreted to be within Article 19 which guarantees freedom of speech and expression. In 2005, the legislators took a bold step and drafted Right to Information Act. By passing the RTI Act the Parliament empowered billons of Indians to gain knowledge and information about the actions those were affecting their daily lives. There are two basic imperatives of a successful liberal democracy i.e. right to information and open government. Both these imperatives can be fulfilled by the application of a law which demands information from public authorities.

Transparency and accountability in administration is, in fact, *sine qua non* of participatory democracy. Transparency will not be accomplished unless we have open governance with accurate, accessible, and verifiable information. The Act makes it statutory for authorities to disclose all unclassified information as demanded by citizens. Those in authority need to be reminded about their obligations under this Act, until they get integrated into the democratic culture sans official knowledge barriers. On the hand, citizenry need to be conversant with the modalities for availing information under this Act. The Main thrust of RTI law is to change the culture of secrecy, red-tapism and aloofness that has long plagued India's monolithic and opaque bureaucracy.

Success Stories

RTI has been a catalyst in challenging the unequal power equation between the common masses and the ruling classes. There are quite a number of cases where the Commission has ordered for information to be provided which has unearthed scams and other irregularities on behalf of the state authorities.

Adarsh Society Scam: The applications filed by RTI activists like Yogacharya Anandji and Simpreet Singh in 2008 were instrumental in bringing to light the irregularity where the building had permission only for six floors and was originally meant to house war widows and veterans. Instead, the flats of the 31-storey building went to several politicians, bureaucrats and their relatives. The scandal led to the resignation of Ashok Chavan, the former chief minister of Maharashtra. Other state officials are also under the scanner.

Public Distribution Scam in Assam: In 2007, members of Krishak Mukti Sangram Samiti, an anti-corruption NGO based in Assam, filed an RTI request that revealed irregularities in distribution of food meant for people below the poverty line. The allegations of corruption were probed and several government officials were arrested.

Appropriation of Relief Funds: Information obtained through RTI by a Punjab-based NGO in 2008 revealed that bureaucrats heading local branches of Indian Red Cross Society misused money intended for victims of Kargil war and natural disasters to buy cars and air-conditioners, among other things. Local courts charged officials found responsible with fraud.

IIM's Admission Criteria: Vaishnavi Kasturi a visually-impaired student filed an RTI Application on being denied a seat in IIM in spite of an impressive CAT score. This resulted in IIM making public its admission criteria, revealing that CAT mattered little compared to class 10 and 12 results.

Pond Scam: K.S. Sagaria, a resident of rural Orissa, filed an RTI application seeking information on the number of ponds constructed in his village under national wage employment scheme. The information revealed that the ponds had never been constructed even though money had been allocated and spent. Following complaints from villagers, the local administration was forced to take action and suspend the officials involved in the pond scam.

1. Available at http://www.ifad.org/gbdocs/eb/67/e/EB-99-67-INF-4.pdf.
2. 9 Overseas Development Administration, Taking Account of Good Government, London, 1993.

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The Cloudy Regime

Resistance to eradicate opacity comes from many levels and in varied forms – both actively and passively, for a variety of reasons. CIC observed that a total of 962,630 requests were pending for disposal for the year 2013-14. The percentage of applications rejected by the public authorities has been increasing over the years. The penalty clause was not used, and further the amount recovered was far lesser due to administrative delays or grant of stay order by the High Court. Experiences show that often, when citizens demand information, either it is not provided or ambiguous unusable data or piles of files are offered, thus making it difficult for a person to filter relevant required facts. Thus, the citizens' entitlement to know is at stake.[3]

Participation of women in RTI process was found to be as low as 8% and only 14% of the applicants hail from rural areas.[4] The report further noted that, "Applicants, especially from the weaker segments of society, are often intimidated, threatened and even physically attacked when they go to submit an RTI application, or as a consequence of their submitting such an application". When raised in Lok Sabha, the findings of this report were dismissed by the state authorities on the ground of lack of formality in the research that was conducted.[5]

Areas which heed Attention:

1. Enforcement Mechanism:

It has been noticed that the weak enforcement mechanism in itself hinders spirit of the law. Public Information Officers are not trained or sensitized. The process of seeking information is obstructed by those in power using whimsical, arbitrary, and illogical grounds. For instance, a state medical education department denied information regarding the number of seats available in post-graduation programme and number of teachers deployed on the pretext that "it could be detrimental to the safety of preservation of record in question."[6]

Also, imperceptive justifications are given by the state apparatus to avoid giving information under the RTI Act. For instance, in an order dated June 30, 2013, the CIC ordered that political parties should be considered public authorities under the Act and they should furnish information related to donations they receive as well as their expenditure within public domain. However, the state comes to the rescue of these parties in its affidavit[7] filed before the Supreme Court. It firmly stood the ground that "political parties are not established or constituted by or under the Constitution…cannot be construed akin to the establishment or constitution of a body or institution by an appropriate government as held by the CIC". It further submits that making parties amenable to RTI would hamper their smooth internal working and may lead to malicious RTI applications by rivals.

2. No uniformity in the prescribed Fee:

Under Sections 27 and 28 of the Act, the state governments and competent authorities are empowered to make rules and prescribe fee payable by the applicant to seek information. In effect, the Central government, state governments and the courts are devising and interpreting their own rules for charging fees. The Department of Personnel and Training in 2011 has clarified that fees should not be a disincentive to those who might wish to make a request under the RTI Act. The Centre, therefore, notified RTI (Fees and Cost) Rules and Appeal Procedures Rules in 2012. Yet, only a few states have harmonized rules relating to fees with that of Central Government.

The Commission held that "Fee is not a material factor in throwing out the request."z[8] It ruled that the departments must provide information to applicants even if fee is not paid in prescribed mode. In another case, Delhi University demanded Rs 80,000/- on the account of the reasoning that the information sought was extensive and the staff would have to work for extra hours to process it.[9] This was in spite of the fact that Rules under the Act clearly provides that the public authorities could not charge other than the fees fixed under the law.

3. Information Commissions lacking zeal towards the Act:

When the RTI Act was framed, it was assumed that the Commissions formulated under the law will act as the keepers of transparency. However, this has not happened as these bodies themselves are marred by bureaucratic approach. In many places there is paucity of staff, and often due to delay in appointments, cases are piling up.[10] Successive governments are maintaining secrecy in appointment of commissioners

3. Gandhi Shailesh (2015) Right to Information is Slowly but Surely being Suffocated, The Wire, available at http://thewire.in/2015/08/07/right-to-information-is-slowly-but-surely-being-suffocated-7970/.
4. RAAG and Samya Centre for Equity Study (2014) People's Monitoring of RTI Regime in India available at http://nebula.wsimg.com/93c4b1e26eb3fbd41782c6526475ed79?AccessKeyId=52EBDBA4FE710433B3D8&disposition=0&alloworigin=1.
5. Ministry of Personnel, Public Grievances and pensions (2015) Increase in RTI Applications, Press Information Bureau, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=123499.
6. Sujatha R. (2015) Information Panel terms RTI query Impractical, The Hindu, Chennai, available at http://www.thehindu.com/news/cities/chennai/information-panel-terms-rti-query-impractical/article7483484.ece?ref=tpnews.
7. Association of Democratic Reform v. Union of India Civil Writ Petition No. 333 of 2015 Counter Affidavit filed by the Respondents.
8. Tikkuu Aloke (2015) NGT spends Rs 30,000/ to make Citizen Pay Rs 10 RTI fee, The Hindustan Times available at http://www.hindustantimes.com/india-news/cic-raps-ngt-for-spending-rs-30-000-to-make-citizen-pay-rs-10-rti-fee/article1-1367673.aspx.
9. Prakash Satya (2015) DU Colleges asks for Rs 80,000/ to frame RTI reply, The Hindustan Times, available at http://www.hindustantimes.com/newdelhi/du-college-asks-for-rs-80-000-to-frame-rti-reply-ht-exclusive/article1-1371063.aspx.
10. Misra Udit (2015) The Slow Death of RTI Act February 20, 2011, The Forbes India,http://forbesindia.com/article/resolution/the-slow-death-of-the-rti-act/22182/1?utm=slidebox.

and officials to senior positions.[11] Questions have been raised regarding approach of those appointed as Information Commissioners towards the regime of transparency.[12] Also, the Commissions rarely impose fines or penalize officers who failed to perform their duty of providing timely information. The study by CHRI reveals that Commissions themselves are not updating their annual reports or even in case the annual reports are updated, the data lacks even basic details like number of cases filed, number of cases disposed off, pending cases, gender wise segregation, rural urban divide, so on and so forth.

4. Playing Field of Bureaucracy:

It has been lamented by those in power that people are filing frivolous and vexatious complaints and therefore the process of exposing the truth needs to be controlled. For instance, the State Information Commission in one of its ruling observes, "Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency, accountability and eradication of corruption) would be counter-productive." It also maintained that such questions would "adversely affect the efficiency of the administration", stating that "the Act should not be converted into a tool of oppression or intimidation of honest officials striving to do their duty." The State Commission in Lucknow stated that RTI is acting as a stumbling block in the functioning of the government.[13]

Actively, the state is propagating the agenda that RTI has been used more to achieve the personal vendetta and therefore it is hampering the process of governance. This approach of the state towards RTI is dangerous as it is blocking the path towards transparency and accountability. Though RTI web portal has been initiated where citizens can seek information online from 431 public authorities[14] yet there is a need to monitor its credibility.

5. The Protection of Whistle Blower Protection Act:

In India, the cases of Manjunath, Satyendra Nath Dubey, Shehla Masood, Avijit Misra and many others who lost their lives in Vyapam or similar scams recently illustrate the manner in which the Right to Information has been obstructed and denied by those who are in powerful positions. These are ordinary people who want to expose the corrupt government officials, and yet they face legal barriers, physical and mental harassment and are victimized because of abuse of power.

In India, after much debate and protest the Whistle Blower Protection Act, 2011 was passed which received the presidential assent on May, 9, 2014.[15] The intent of this law is to establish a mechanism to protect anyone who exposes the corruption, prevent wilful misuse of power and to provide adequate safeguards against victimization of the person making complaints of corruption. It ensures confidentiality and penalizes any public official who reveals complainant's identity without proper approval.

However, it has its limitations. The law does not impose criminal liability on those who physically attack the whistle blowers. This is significant keeping in mind the number of attacks in past years on whistleblowers. The law does not define the terms `victimization' or `disclosure'. Thus, this law provides for inadequate protection and merely provides lip services to whistle blowers.

Though the rules under the law are yet to be notified, the current government is planning a Whistle Blower Protection (Amendment) Bill under the guise of "national security, integrity and sovereignty of the country, information categorized as commercially confident, or information obtained in fiduciary capacity, or unwarranted invasion of privacy." Once implemented, these amendments will certainly reduce the space for blowing lids of corporate or government's wrong doings. Under the amended Act, the Center and state government are considered as ultimate arbiters in deciding if the information provided by the whistle blower falls under any of the exempted categories. These provisions ultimately defeat the purpose of the law as it empowers the state agencies, rather than the citizens who are struggling to expose the truth.

Set back by the Judiciary: A Reality Check

Initially, when RTI was enacted, many positive judgements were pronounced by the judiciary. Recently, the quasi- judicial and judicial bodies are narrowly interpreting the law while constricting the rights of citizens and neglecting their role as independent and just arms of the state. In the case of *Bihar Public Service Commission v. Saiyed Anwar Hussain Abbas Rizvi*[16] the Supreme Court held that the "Right to information is a basic and celebrated fundamental/basic right but is not uncontrolled. It has its limitations. The right is subject to a dual check. Firstly, this right is subject to the restrictions inbuilt

11. Christin PM (2015) Seeking Transparency, activists applied for the top positions in RTI Panel, The Times of India, Chennai, available at http://timesofindia.indiatimes.com/city/chennai/Seeking-transparency-activists-apply-for-top-posts-in-RTI-panel/articleshow/48092418.cms.
12. Gandhi Shailesh (2015) Regressive Forces are Undermining RTI. We Must Stop Them, The Scroll.in available at http://scroll.in/article/726801/regressive-forces-are-undermining-the-rti-we-must-stop-them.
13. The Times of India (2015) RTI Act not for Stalling Government Work, available at http://timesofindia.indiatimes.com/city/lucknow/RTI-Act-not-for-stalling-govts- /articles how/48322333.cms.
14. Press Trust of India (2015) Now File Online RTI Applications With 431 Public Authorities, NDTV, available at http://gadgets.ndtv.com/internet/news/now-file-online-rti-applications-with-431-public-authorities-724475.
15. The Whistle Blower Protection Act 2011, Act No. 17 of 2014 Available at available at http://persmin.gov.in/DOPT/EmployeesCorner/Acts_Rules/TheWhistleBlowersProtectionAct2011.pdf.
16. 2012 (13) SCC 61.

within the Act and secondly the constitutional limitations emerging from Article 21 of the Constitution." The Supreme Court while explaining the fiduciary relationship between the public authority and the citizens observed that, "… equal importance and emphasis are given to other public interests." The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The state using this judgement has issued a circular[17] using it as an excuse to deny information to the citizens, dissenting which many activists have argued that even based on conservative assumptions, the government officials will be spending 4.6% of their time on providing information.[18]

Further, the High Courts too are narrowly interpreting the citizens' right to know. For instance, the High Court of Chennai in its judgement (HC Madras v. The Central Information Commissioner – WP 26781) elaborated that an applicant must disclose the "bare minimum" reasons for his application, a condition which was later deleted via suo- moto review after much media attention. This observation violates Section 6 of the Act which specifically mandates that the citizens need not provide any reason for his application.

Shadowing the Spirit of Democracy

There are many conscientious citizens and activists who are using RTI to expose maladministration, nepotism, corruption, wrong-doing, mis-governance and mismanagement in the governance process; however, this is not an easy task. Most civil society actors complained that either the state officials do not accept applications or they are often being pressurized to withdraw their applications. Data collected by the CHRI reveals that within eight years over 251 activists were murdered, attacked, harassed or their property was damaged because they sought information under RTI. The activists are now lobbying with the government to collect data on the attacks of those who use RTI law.[19]

Way Ahead to bring back the sunshine law into its full Regime:

Mahatma Gandhi opined, "I hope that real Swaraj will come… by the acquisition of the capacity by all to resist authority when abused." RTI is a potential tool to change the discourse of governance and alter the paradigms of power with the object to attain Swaraj or people's governance. It was framed with the awareness of unequal power dynamics that underpin the relationship between the state and the citizens and is seen as a weapon to change the situation rather than an end in itself. However, the citizen's right to information is clearly facing strong challenges due to hostile attitude of powerful bureaucratic structure which act as a strong deterrent. Ten years of operation of this law depicts that it failed to change the mind-set of the rulers and could not eliminate the belief that state is an apparatus formulated to serve the people rather than rule. The backlash against RTI by government and judiciary is further hampering the citizen's fundamental right to know. It is essential to promote openness and transparency as tools to true democracy.

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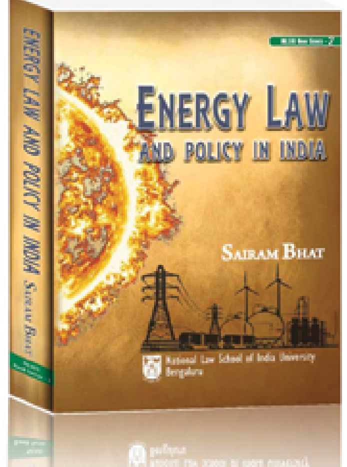

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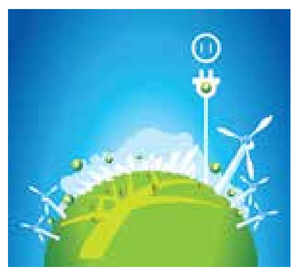
17. CBSE v Aditya Bandopadhyay Civil Appeal No. 6454 of 2011 arising out of SLP No. 7526/ 2009.
18. Circular issued by the Department of Personnel and Training, Ministry of Personnel, Public Grievance and Pensions, Government of India, No. 1/18/2011 IR Dated 16/09/2011.
19. The Hindustan Times (2015) Government to collect data on assaults on RTI activists, scribe, available at http://www.hindustantimes.com/india-news/govt-to-collect-data-on-assaults-on-rti-activists-scribes/article1-1372192.aspx.



Ashes to Ashes - Creator must also be a responsible destroyer

Vasuki K N*

A sui-generis system for disposal of old vehicles

This paper attempts to find a solution to the problem of safe disposal of old and polluting vehicles being currently debated in India. Some of the issues for which answers are being sought are:

- People in India generally tend to use vehicles for a long time that is much beyond its intended life. This is especially true with public vehicles such as trucks, mini-vans, transport vehicles and auto-rickshaws. How does one try to coax them to replace them regularly? Is the incentive scheme that is currently debated the best system? Does it not amount to rewarding the polluters?
- Although there are laws in place which mandate obtaining fitness certificate for older vehicles, they are mostly flouted leading to highly polluted air and its attendant problems especially for the children. Vehicular pollution is a clear and present danger. We have a law on the basis of 'Polluter pays' principle. But here, who is the polluter? Is it the owner of the vehicle or is it the manufacturer of the polluting vehicle?
- The authorities are reluctant to seize such vehicles that do not possess fitness certificate as they are unable to find suitable space for storing them or disposing them.
- The solution followed in other countries such as vehicle crushing are yet to gain foot in India. Moreover, that method entails enormous wastage of re-cyclable resources given our huge population and potential growth of vehicle population in the coming years.
- The vehicles that are scrapped now generally end up with re-cyclers (kabadiwallahs) who have absolutely no knowledge of safe disposal thereby creating further environmental damage
- It is a well-known fact that dealing with old vehicle parts is a highly lucrative but not entirely legal business thereby putting the lives of people in danger as well as causing loss of revenue to the government
- The workers involved in vehicle breaking business are mostly poor and are made to work in hazardous conditions as well as deal with hazardous parts with no scientific training on safe disposal. A case in point is the battery disposal. It is an open secret that the stringent laws in relation to battery disposal are followed more in breach thus poisoning our ground water as well as endangering the workers.

Blindly following the systems that are in place in other developed countries does not seem to work in India due to our huge population density. This paper argues that a sui generis system of solving the problem of disposing old vehicles as a public policy is perhaps the answer, and the following legal firmament provides the basis of such a system:

Supreme Court in ONGC v Saw Pipes[1] said:

….Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved.

Sir William Holdsworth in his "History of English Law", Volume III, page 55, has said:

In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no heading of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest, declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

Supreme Court in Murlidhar Agarwal and another v. State of U.P. and others[2] while dealing with the concept of 'public policy' observed thus:-

Public policy does not remain static in any given community. It may vary from generation to generation and even in the same

1. ONGC v Saw Pipes Ltd AIR 2003 SC 2629.
2. Murlidhar Agarwal and another v. State of U.P. and others [1974 (2) SCC 472].

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generation. Public policy would be almost useless if it were to remain in fixed moulds for all time.

...The difficulty of discovering what public policy is at any given moment certainly does not absolve the Judges from the duty of doing so. In conducting an enquiry, as already stated, Judges are not hide-bound by precedent. The Judges must look beyond the narrow field of past precedents, though this still leaves open the question, in which direction they must cast their gaze. The Judges are to base their decision on the opinions of men of the world, as distinguished from opinions based on legal learning. In other words, the Judges will have to look beyond the jurisprudence and that in so doing, they must consult not their own personal standards or predilections but those of the dominant opinion at a given moment, or what has been termed customary morality. The Judges must consider the social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results. .... The point is rather that this power must be lodged somewhere and under our Constitution and laws, it has been lodged in the Judges and if they have to fulfil their function as Judges, it could hardly be lodged elsewhere."

Supreme Court in M.C. Mehta v. Union of India[3] on oleum gas leak from Shriram Food and Fertilisers Ltd. complex at Delhi laid down the principle of absolute liability and the concept of deep pockets.

The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.

We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in Rylands v. Fletcher. We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

Proposed Public Policy on management of old vehicles:

This paper argues for putting the onus on of disposing off the old vehicle on its creator - the manufacturer. Every creation (including us the human beings!) follows the law of nature - we rise from the ashes and after our life go back to the ashes - 'Ashes to Ashes'. It is the creator who 'creates' us and it is the very same creator who then 'takes' us back. This is the law of nature. There is no reason why this very basic law cannot be applied to all things created by man – the automobile in this specific case.

There can be no better organization than the very company that in the first place manufactured the vehicle to take it back for safe disposal. There are several reasons to support this theory:

1) The manufacturer knows best what has gone into his creation and all he needs to do is to retrace the steps back on his assembly line to dismantle the vehicle
2) There are several parts and components that can be reused without compromising on quality - for instance the engine body, chassis, gear box body etc.
3) This policy encourages responsible designing of vehicles keeping in mind the compatibility and utility of several parts for their future models.
4) It conserves raw materials which are becoming scarcer due to indiscriminate and inefficient use. There are reports that by mid-August, we have already used up the annual stock of earth's resources for this year. Indiscriminate use of natural resources without concern for the future generations will be curbed by making judicious use of existing resources.

5) It is a money spinner as it is a proven fact that there is much profit being made by kabadiwallahs and the manufacturers themselves can be the beneficiaries of this fortune thereby reducing their overall cost of procurement and production.
6) A vehicle should in future never be 'owned' by the buyer. It should merely be 'leased' to the user for a certain number of years and taken back thereafter. We have an opportunity here to redefine vehicle ownership. After all it is the manufacturer who created and is the first owner of the vehicle. The user merely 'uses' the vehicle for his comfort and convenience. The 'user' need not be the 'owner' to use the vehicle. Here again the law of nature is a guide to us: We come to this earth, use its resources and return back. We do not 'own' the earth, we merely 'use' the earth.
7) A related issue is the tax income for the state and central governments from the sale of vehicles. The road tax and VAT on vehicles currently go to the State government. Since there is no 'sale', VAT may no longer be applicable. However, since there is 'service' in the form of lease, service tax or the proposed GST may be made applicable. Similarly, the Central Excise on manufacture of the vehicle

3. M.C. Mehta v. Union of India AIR 1987 SC 965.

that now goes to the central government gets substituted by the proposed GST.

8) It encourages customer loyalty as the user is more often than not inclined to acquire a newer vehicle in exchange for the old vehicle from the same supplier than from a different supplier. However, the proposed law must mandate that taking back the old vehicle is independent of acquiring a new vehicle either from the same manufacturer or another manufacturer. This will promote healthy competition and better customer service.

9) It fits with the concept of 'Ashes to Ashes' as it is for the creator to find the most appropriate way to destroy his creation - the kabadiwallah has no idea of the means of safe disposal of the vehicle whereas the company which created the vehicle has to merely retrace the steps of its manufacturing process - akin to setting up of a 'de-manufacturing plant'. (In fact the entire ship breaking business that has brought misery to thousands of workers due to its hazardous nature would not have occurred if the ship maker was made the ship breaker.)

10) New vehicles that are produced in a factory are transported all over India by huge trucks to dealers. These huge trucks invariably go back empty. This empty return trip could carry the old vehicles back to the same factory at no extra cost.

11) With this method there will be a proper control over the life of the vehicle. Every vehicle must be mandatorily taken back by the manufacturer after a specified number of years. This policy makes it possible both for the manufacturer as well as the user to be aware of the span of use. It also automatically takes off the polluting and old vehicles from the roads. Suitable legislation such as refusal to renew insurance and online tracking of the vehicle ownership will enable compliance.

12) The vehicle manufacturing factories already have huge land mass keeping in mind their future expansion. This will enable them to apportion space for stocking and de-manufacturing the old vehicles and also make it a part of their new vehicle manufacturing plan. This also solves the major problem of finding safe disposal sites in the already over-crowded cities and towns for used vehicles.

13) It dove-tails well with the concept of 'absolute liability' propounded by the Supreme Court when dealing with cases of industrial pollution. It is the creator with deep pockets who is responsible for safe disposal of his creation rather than the user or the government.

14) The manufacturer in turn can return parts to respective suppliers for safe disposal - a reversal of the supply chain that is already created for manufacture. Every supplier of parts and sub-assemblies to the main manufacturer takes back during his return trip old parts that he originally supplied and this chain can go on until each element of the product reaches the respective creator.

For example, the supplier of the clutch assembly brings in a truck load of new clutch assemblies to the vehicle maker and the truck on its return journey takes back the old clutch assemblies. This process is repeated again with the clutch assembly manufacturer so that at the end of the chain, every part or component reaches the entity who created it either for safe disposal or re-creation.

Another example: A computer or laptop manufacturer takes back his computer and in turn returns each of its component part to the original supplier for either safe disposal or re-use. It thus creates a complete life cycle for the product. The creator is also the responsible destroyer. Similarly, a tyre that is bought by the vehicle user must find its way back to the tyre manufacturer after its use. The buyer of the tyre here did not buy the tyre. He merely bought or paid for the use of the tyre. What the buyer needs is the content or the usable period of the tyre and not the residual tyre itself.

15) This concept of 'Ashes to Ashes' can in due course be applied to every product sold in the market - from air-conditioners to tooth paste. The consumer of toothpaste merely uses the toothpaste and it is the 'absolute responsibility' of the toothpaste maker to take back his tooth paste container or tube and in turn return it to the maker of the tube. This policy will force manufacturers to bring out more eco-friendly containers. It will also solve the problem of the safe disposal of urban waste. For example, if the bottled water companies were to be mandated to take back every empty bottle after its use, they would sure have a huge incentive to promote eco-friendly bottles than merrily dump plastic on the earth in addition to laughing all the way to their banks. What the buyer needs is the content (water) or the usable part. The product sold by the bottled water maker is only the water and not the bottle. It is for the manufacturer to either find a better way of providing water to the user or to take the responsibility of safely disposing off the bottle.

16) Essentially, what is proposed to be put in place is an elaborate **reverse-supply chain**. The raw material in its most raw form is transformed into a finished good as it traverses through an elaborate forward supply chain system. This proposal creates an equally elaborate reverse-supply chain system that places the onus of safe disposal of the product or residue on the creator. Whereas the supply chain system enables creation, the reverse-supply chain enables safe disposal by the respective value adder / creator.

17) Initially, there would be chaos as the vehicle manufacturers would fear a flood of used vehicles being dumped into their back yard. But in India, even as of now the vehicle density is relatively low and over a period of few years an equilibrium between outflow of new vehicles and inflow of old vehicles would be created.

18) There would be a problem in relation to vehicles made by defunct companies. Since their number is limited, a suitable scheme or incentive to one of the existing manufacturers would mitigate the problem.

The Juvenile Justice Act, 2015

Ipsita Mishra* & Honey Mariam Jacob**

Introduction

The Juvenile Justice (Care And Protection Of Children) Bill 2014 was passed by the Rajya Sabha in the winter session and has now become an Act, Juvenile Justice (Care And Protection Of Children) Act, 2015, with the presidential assent on the 4th of January, 2016. The Act has been put forth with primary focus on issues with regard to children in conflict with law and in need of care and protection, and it intends to replace the Juvenile Justice (Care and Protection of Children) Act, 2000. It has been evolved from the notion of criminal justice, which mainly revolves around two things: firstly, justice should be served to the victim and secondly, punishment should be awarded to the accused.[1]

Historical Perspective

Over the years, there have been several acts governing juvenile crimes. These include Apprentice Act 1850, Reformatory School Act 1876, The Recommendation of India Jails Committee 1919-20, and Children Act 1960 etc.[2] The Juvenile Justice Act of 1986 states that a boy would be considered as a juvenile if he is less than 16 years of age, and a girl would be considered as a juvenile if she has not attained the age of 18 years.[3]

In 1985, UN Standard Minimum Rules for Administration of Juvenile Justice came up with the Beijing Rules, which stated as follows:[4]

- Juvenile should be treated different from adults
- Juveniles should be kept apart from adults
- Countries have to look for intellectual, mental and emotional state of the juvenile and the beginning of that age shall not be fixed at too low on age level.

In 1989, UN Convention on Rights of Child came up with four sets of rights:[5]

- Right to survive where the juvenile should have a right to name and nationality
- Right to protection where the juvenile should not have any inhuman treatment
- Right to development where the juvenile has a right to education, recreation etc.
- Right to participation where the juvenile will have a freedom of thought and expression, conscience, religion etc.

UNCRC also considered anyone under the age of 18 years as juvenile.

Finally the Juvenile Justice (Care and Protection of Children) Act came up in 2000, where it was stated that:[6]

- The age of both boys and girls should be uniformly raised to 18 years.
- There are two categories; child in need of care and protection who is found is difficult circumstances and in danger of survival and growth and the Child Welfare Committee will take care of it; secondly, a juvenile in conflict of law where the child who is alleged of committing an offence is looked after the Juvenile Justice Board.

The Juvenile Justice (Care and Protection of Children) Act 2000 also stated that the juvenile should not be exposed to media.[7] Moreover the maximum punishment given to juvenile would be 3 years after which he/she shall be released back to the society else the juvenile can also be sent for stay in reformatory home.[8]

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1. The Juvenile Justice (Care and Protection of Children) Bill, 2014, available at http://www.prsindia.org/billtrack/the-juvenile-justice-care-and-protection-of-children-bill-2014-3362/.
2. The History And Development Of Juvenile Justice Delivery System, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/7809/10/10_chapter%203.pdf.
3. Section 2(h), The Juvenile Justice Act, 1986.
4. United Nations Standard Minimum Rules for Administration of Juvenile Justice ("Beijing Rules"), 1985.
5. United Nations Convention on Rights of Child, 1989.
6. Juvenile Justice (Care and Protection of Children) Act, 2000.
7. Section 21, Juvenile Justice (Care and Protection of Children) Act, 2000.
8. Section 44, Juvenile Justice (Care and Protection of Children) Act, 2000.

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Rise in Juvenile Delinquency and Requirement of New Legislation

When we look through some of the statistics, we can see that there have been rise of participation of minors in illegal crimes. From 2012 to 2014, there has been 30 % rise in crimes by Juveniles. According to NCRB, from 2003 to 2013, the juvenile rate of crime has increased from 1% to 1.2 %.70 % of juveniles who have been accused of crime are between the age of 16 to 18 years.[9]

In December 16, 2012 gang rape, one offender was a juvenile who was 6 months short of 18 years and the punishment was only for 3 years. Was it justified for the victim who died due to multiple organ failure after the gang rape? Similarly, even in Shakti Mills gang rape case, the convicts were juveniles.

Adoption is yet another aspect wherein the provisions lack clarity and the Central Adoption Resource Agency (CARA) seemed to be the only institution to talk about regulations regarding the adoption of orphaned, abandoned and surrendered juveniles.

Hence, it is in the backdrop of all these scenarios and especially, the public outcry in the verdict of the unfortunate Delhi gang rape case, that there was a dire need to propose a new Act and hence, the Juvenile Justice (Care and Protection of Child) Act, 2015 came up.[10]

Characteristics of the New Act

The Juvenile Justice (Care and Protection of Children) Bill 2014 came about with the Ministry of Women and Child Development introducing it in the Lok Sabha on 12th August 2014. The Act, was mainly intended on framing a more robust, effective and responsive legislative framework for children in need of care and protection as well as children in conflict with the law. The new legislation clearly defined and classified offences as petty, serious and heinous, and also talked about differentiated processes for each category.[11] Since a there was a rise in the number of serious offences being committed by juveniles belonging to 16-18 years age group, and taking into consideration the fact that recognizing the rights of the juveniles, in par with that of the victim was equally important, special emphasis was given to provisions that tackle heinous offences committed by individuals in this age group. It was thus, a response to the perceptions, articulated by a wide cross-section of society who was of the opinion that an effective and strengthened system of administration of juvenile justice, care and protection was an utmost necessity.[12]

This Act that intends to replace the Juvenile Justice Act of 2000, states that juveniles between 16-18 years of age should be tried as adults for heinous offences. Also, any such juveniles, who commit a lesser, i.e. serious offence may be tried as an adult only if he is apprehended after the age of 21 years. Since this assessment will take place by the Board which constitutes of psychologists and social experts as stated under Section 15 of the Act, it will ensure that the rights of the juvenile are duly protected if he has committed the crime as a child.[13] The trial of the case will accordingly take place as a juvenile or as an adult on the basis of this assessment. The responsibility of determining whether a juvenile offender is to be sent for rehabilitation or be tried as an adult is vested on the Juvenile Justice Boards (JJB) and Child Welfare Committees (CWC) constituted in each district.[14] They are required to do so only after conducting a thorough preliminary inquiry into the matter so as to ensure that the rights of the juvenile are duly protected if he has committed the crime as a child. Thus, as opined by the Women and Child Development Ministry, headed by Maneka Gandhi, this kind of a detailed assessment helps in creating a balance that is sensitive to the rights of the child, protective of his legitimate interests and yet conscious of the need to deter crimes, especially brutal crimes against women.[15] The Act also addresses the issue of eligibility of adoptive parents and the procedure for adoption. Penalties for cruelty against a child, offering a narcotic substance to a child, and abduction or selling a child have also been prescribed.[16]

The Act also incorporates the principles of the Hague Convention on Protection of Children and Cooperation in Respect of Inter Country Adoption (1993) in cases involving detention, prosecution or penalty of imprisonment; in matters relating to apprehension, production before court, disposal orders and restoration, procedures and decisions related to adoption of children, and rehabilitation and reintegration of children who are in conflict with law or, as the case may be, in need of care and protection under other such law.[17]

Currently, the Act replaces the word 'juvenile' in the Juvenile Justice Act, with the word 'child' and the expression 'juvenile in conflict with the law' with 'child in conflict with law".[18] The Act identifies a 'child in conflict with law' to be one who has been

9. The Juvenile Justice (Care and Protection of Children) Bill, 2014,available at http://www.prsindia.org/uploads/media/Juvenile%20Justice/SC%20report-%20 Juvenile%20justice.pdf.
10. *Juvenile Justice Bill introduced in the Lok Sabha*, The Indian Express, August 12, 2014.
11. Section 2(45), 2(54) & 2(33), The Juvenile Justice (Care And Protection Of Children) Act, 2015.
12. *Amendments to the Juvenile Justice (Care and Protection of Children) Bill*, Press Information Bureau Government of India Cabinet available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=118528.
13. Section 15, The Juvenile Justice (Care And Protection of Children) Act, 2015.
14. Sections 4 & 27, The Juvenile Justice (Care And Protection of Children) Act, 2015.
15. *Supra* note 12.
16. *Supra* note 1.
17. Anil Malhotra, *Towards A Comprehensive Juvenile Justice Law,* The Hindu, July 18, 2014.
18. Section 2(12) & 2(13), The Juvenile Justice (Care And Protection of Children) Act, 2015.

found by the Juvenile Justice Board to have actually committed an offence.[19] The Act also defines also defines an 'abandoned child' as well as 'aftercare'.[20] Chapter II of the Act, providing for 'General Principles for Care and Protection of Children', is the most noteworthy characteristic of the Act as it incorporates in it internationally accepted principles of presumption of innocence, dignity and worth, family responsibility, non-stigmatizing semantics, privacy and confidentiality, repatriation and restoration, equality and nondiscrimination, and diversion and natural justice, among others.[21] Institutionalisation is suggested as a measure of last resort wherein juveniles can be institutionalised only if no other family based care option is possible or available.[22]

Confidentiality is yet another important aspect of the Act, as it prohibits the media from disclosing the identity of children or propagating any such information which would lead to identifying them as stated under Section 70.[23] All reports in relation to the same are supposed to be treated as highly confidential in nature. Some of the other acts that are punishable under the Act include corporal punishment and ragging,[24] cruelty to children,[25] employment of children for begging,[26] adoption without proper procedure,[27] and sale or procurement of children for any purpose, etc.[28]

Juveniles between the ages of 16 to 18 years, who committed heinous offences may be tried as adults irrespective of date of apprehension and in other cases and juveniles will get maximum 3 years imprisonment in institutional care as determined by the Juvenile Justice Board. Moreover, juveniles cannot be given death penalty and juveniles cannot be given life imprisonment without possibility of release.[29] Thus,

i. for heinous offences, minimum punishment would be 7 years imprisonment under Indian Penal Code or under any other law.[30]

ii. for petty offences , the punishment shall be less than 3 years.[31]

iii. for serious offences punishment would be between 3 to 7 years.[32]

Criticism

As is the case with every bill, the bill in question, which has now become an Act, was also subjected to several criticisms. A majority of these differing views revolve around the fact that whether juveniles should be tried as adults. While some are of the view that the current law is not deterrent in nature, others opine that a reformative approach will reduce the tendency and likelihood of repeating the offences. Looking at it from a constitutional point of view, the provision of trying a juvenile committing a serious or heinous offence as an adult based on date of apprehension could lead to a serious violation of Articles 14 and 21 respectively. The provision also defies the spirit of Article 20(1) by according a higher penalty for the same offence, if the person is apprehended after 21 years of age.

The United Nations Convention on Rights of Children states that juveniles cannot be treated separately between 16- 18 years. Article 20(1) is no ex post facto criminal legislation. For example, the age of consent for sex is 18 years. Eminent personalities like Shashi Tharoor, were also of the view that the justice system should focus on "*rehabilitation and not retribution*" and that it would be "*emotionally, ethically and morally*" wrong to punish a child, who does not have access to basic facilities, like an adult.[33]

The Justice Verma Committee constituted as a result of the gang rape, in its report, states that if the juvenile is under 18 years and sent to normal jail and treated as adult, then there is no chance of rehabilitation. On the contrary, they will in turn into hardened criminals, as the child's brain in the formative stage is very mild and vulnerable in nature.[34]

The Parliamentary Standing Committee stated that the existing juvenile justice system is reformative and rehabilitative. Children between the age of 16 and 18 years are extremely sensitive in nature and it is a critical age requiring greater protection and hence there is no need to subject them to adult or different type of judicial system.[35]

19. Section 2(13), The Juvenile Justice (Care And Protection of Children) Act, 2015.
20. Section 2(1) & 2(5), The Juvenile Justice (Care And Protection of Children) Act, 2015.
21. Chapter II, The Juvenile Justice (Care And Protection of Children) Act, 2015.
22. *Supra* note 17.
23. Section 70, The Juvenile Justice (Care And Protection of Children) Act, 2015.
24. Section 82, The Juvenile Justice (Care And Protection of Children) Act, 2015.
25. Section 75, The Juvenile Justice (Care And Protection of Children) Act, 2015.
26. Section 76, The Juvenile Justice (Care And Protection of Children) Act, 2015.
27. Section 80, The Juvenile Justice (Care And Protection of Children) Act, 2015.
28. Section 81, The Juvenile Justice (Care And Protection of Children) Act, 2015.
29. *Juvenile Justice Bill 2014: What you should Know,* available at http://www.oneindia.com/feature/juvenile-justice-bill-2014-what-you-should-know-1497925.html (Pravia Singh).
30. Section 2(33), The Juvenile Justice (Care And Protection of Children) Act, 2015.
31. Section 2(45), The Juvenile Justice (Care And Protection of Children) Act, 2015.
32. Section 2(54), The Juvenile Justice (Care And Protection of Children) Act, 2015.
33. *Lok Sabha Passes Amendments To Juvenile Justice Act, To Face Rajya Sabha Test,* available at http://www.firstpost.com/india/lok-sabha-passes-amendments-to-juvenile-justice-act-to-face-rajya-sabha-test-2232674.html.
34. *Report of the Committee on Amendments to Criminal Law*, available at http://bba.org.in/sites/default/files/Justice-Verma-Committee-report.pdf.
35. *In Fact: New Juvenile Justice Act On The Way, But Debate Continues,* available at http://indianexpress.com/article/explained/in-fact-new-juvenile-justice-act-on-the-way-but-debate-continues/.

The statistics in this regard also needs to be looked into as these constitute some of the grey areas that require proper understanding. 56% of juvenile offenders have an annual income of Rs.25000 at home. 1 in every 8 juvenile criminals is an orphan. 1.2 % of all these crimes are committed by the juveniles. 6 % of all the rapes are committed by the juveniles. 87 % of all juvenile criminals have not even attended school.[36]

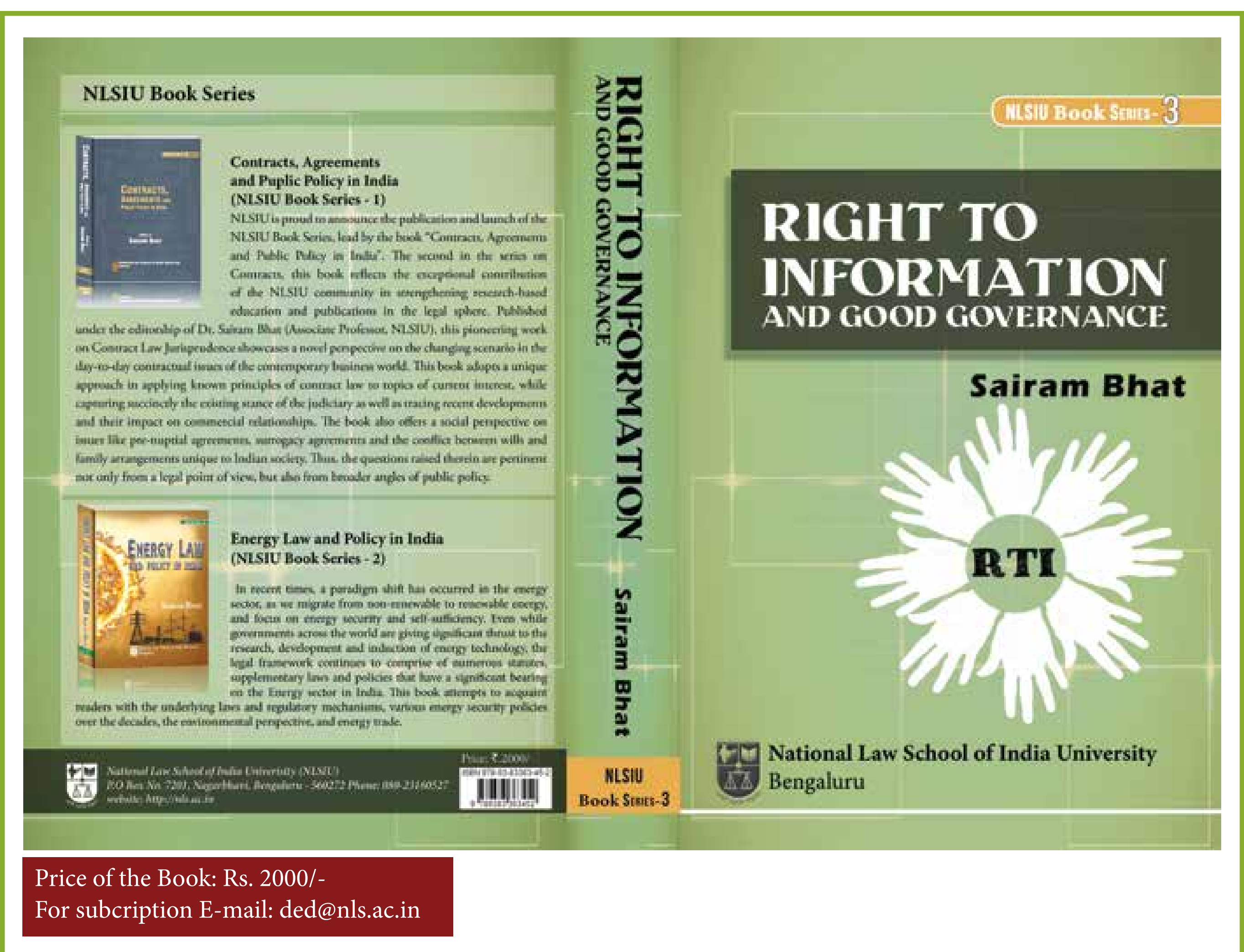
So, now the question arises as to what if a child less than 15 years commits a crime? Will the law have to be changed again? The harsh truth behind this scenario is that ours is an over legislated but an under implemented/enforced country. There has been no word on Juvenile Justice Reforms. The pendency of cases before the Juvenile Justice Board is 45,258. Most cases of juvenile crimes stems from substance abuse. There are no de-addiction centres. Even AIIMS, one of the most reputed institutions in the world has only two beds as of today. The Asian Centre for Human Rights, in 2013 also conducted a survey and had prepared a report on "India's Hell Holes" which deals with child sexual harassment in Juvenile Justice Homes.[37]

Conclusion

The social conditions should be improved. The juveniles themselves are victims. They do not have access to education. Many children at a tender age take the responsibility of the family and start earning. They are themselves victims of child labour and child abuse. Hence, rationality should determine our policy which should be reformative and not retributive, which should be of care and not vengeance.

As the saying of the Nobel laureate Kailash Satyarthi goes,

"Whether it is crime by a child or on a child, the focus has to be on reform and restitution and not on deterrence."



36. *The Juvenile Justice System in India and Children who commit serious offences – Reflections on the Way Forward*, https://www.nls.ac.in/ccl/justicetochildren/intl.pdf.

37. *India's Hell Holes: Child Sexual Assault in Juvenile Justice Homes*, Asian Centre for Human Rights available at http://www.achrweb.org/reports/india/IndiasHellHoles2013.pdf.

Locus Standi of 3rd party under Criminal Law

Amitabh Srivastava*

Introduction

State is treated as the guardian of society. Therefore all types of offences whether committed against any person or property is considered as the offence committed against the state and state conduct the trial on behalf of the victim. But in the modern era of corruption where corruption is flowing from top to bottom, granting *locus standi* only to the state may be questioned. For example if the accused for the offence is very influential person ,then there may be case that state is not willing to conduct investigation against him or may discharge him while submitting final report u/s 173(2) of CrPCin such circumstances a very moot question arises that whether victim or 3rd party has any right to go for reviewing investigation. The same question also arises in case of discharge and acquittal. Further a situation may arise where crimes have been committed but the state machinery is reluctant to conduct inquiry or investigation. In such cases whether public-spirited pleaders can intervene, with the permission of the court, and take up prosecution is also a debatable question.

Section 24 of the code of criminal procedure, 1973 lays down that the public prosecutor shall be appointed for conducting prosecution, appeal or other proceeding on behalf of the government, as the case may be. Section 301 CrPC states that the public prosecutor or the assistant public prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under inquiry, trial or appeal. It further states that if in any such case any private person instructs a pleader to prosecute any person in any court, the pleader so instructed shall act under the directions of the public prosecutor or the assistant public prosecutor and may with the permission of the court, submit written arguments after the evidence is closed in the case. Section 302 CrPC empowers the magistrate inquiring into or trying a case to permit the prosecution to be conducted by any person other than a police officer below the rank of inspector. It further states that no person other than the advocate general or government advocate or a public prosecutor or assistant public prosecutor shall be entitled to do so without such permission. Any person conducting the prosecution may do so personally or through his pleader.

The above sections clearly indicate that there is ample scope in CrPC for introducing the concept of third-party intervention in criminal cases. But most of the decisions so far have taken the view that third-party intervention in criminal cases is not desirable[1] and that it is the duty of the public prosecutor to conduct the prosecution and state always have been considered the master of prosecution.

What is locus standi

One of the important methods by which courts saved themselves from spurious or vexatious litigation was by determining whether the person who petitioned the court had *locus standi* to do so.[2] *Locus standi* is a latin phrase meaning "place to stand". It refers to whether or not someone has the right to be heard in court. In law, standing or *locus standi* is the term for the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. According to black's law dictionary, *locus standi* means "a right of appearance in a court of justice, or before a legislative body, on a given question."[3]

Parties to a criminal case

Likewise other cases, a criminal trial also involve two or more parties. There are two parties under the criminal cases accused and prosecution. Accused person means the person who has been alleged for committing the crime and prosecution represents the state.

What is the status of victim under criminal trial

As already discussed, the parties to the criminal trial are the accused and the state. A moot question arises here about the status of victim under the criminal trial. The term victim has been defined under CrPC as, "a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."[4] But so far as status of victim as a party to the case is concerned, the

1. (2005) 2 SCC (Jour) 75.
2. S.P.Sathe, *Judicial Activism : The Indian Experience*, 6 Washington University Journal of Law & Policy 29, 70 (2001).
3. Black's Law Dictionary. 5th Edition, 1979.
4. Section 2(wa) of Cr.P.C, 1973.

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position is quiet clear that the crime victim is not a party to the criminal case because crimes are considered to be wrongs committed against society as a whole. Thus any person other than state and accused will come under the term 3rd party under the criminal law.

Locus standi of 3rd parties under CrPC

Locus standi of 3rd parties under CrPC may be viewed under 3 heads mainly:

1. **At the time of f.i.r: sec** 154 and sec 155 of CrPC deals with information as to cognizable and non-cognizable cases respectively. Both sections do not talk about *locus standi* of the victim only. They provide that any person may give information to the police in respect of commission of any crime whether cognizable or non-cognizable. Thus it can be said that at the stage of FIR 3rd party has *locus standi* to set the criminal law into motion.
2. **Appeal**: so far as the provisions related to appeal is concerned, 3rd parties have not been provided the right to appeal both in case of convection or acquittal. In case of conviction the right to appeal has exclusively been provided to the convicted person.[5] in the case of acquittal before the amendment of 2009, the right to appeal was vested in the state only and victim had no right to appeal in case of acquittal or inadequate punishment or inadequate compensation.[6] But after the amendment of 2009 a proviso was added in the section 372 and it provides the right to appeal of the victim in cases of acquittal or inadequate punishment or inadequate compensation.[7] Thus from the above analysis it is crystal clear that 3rd parties (except victim) does not have any right to appeal either in conviction or acquittal.
3. **Revision**: so far as provisions related to revision is concerned if we examine the option that a third party has under CrPC one thing that stands out is that section 397 empowers the high court or the sessions court to call for the records of any proceeding, before any criminal court inferior to it to satisfy itself as regards the correctness, legality and propriety of any finding, sentence or order, recorded or passed by the lower court. This can be done *suo motu* or if an application is filed by a party. The section uses the term 'otherwise comes to the knowledge', thus it leaves ample scope to include a party which is alien to the proceedings. Hence, the victim or a third party can point out the illegality, impropriety of order at the stage of revision. But it does not make sense in allowing this at a later stage of the proceeding, but not at the trial stage itself.

Stand of judiciary on recognizing locus standi of 3rd parties in criminal cases

As we have examined that the *locus standi* of 3rd parties are not very clear under the criminal law. Therefore it is very important to examine judicial pronouncement by different high courts and the supreme court of india because principles of law pronounced by the apex court becomes binding on the subordinate courts and acquires the shape of law.[8] Stand of judiciary on this issue can be divided in three time periods which are as follows:

➢ First phase (upto 1978)

In this phase the courts went for literal and strict interpretation and did not give recognition to 3rd parties for criminal revision and the term *locus standi* was interpreted in a very narrow sense. In the case of *Seneviralne v. R*[9] it was held that "*allowing third parties to enter the arena of criminal justice would be to destroy institutional perspectives that have been built over the year. State is now recognised as the guardian of criminal justice.''*

The apex court reiterated the same approach in *Thakkur Ram v. State of Bihar*,[10] where it was held that "*in a case which has proceeded on a police report, a private party has really no locus standi.*" It further ruled that, barring a few exceptions, in criminal matters, the aggrieved party is the state, which is the custodian of the social interests of the community at large, and so it is necessary for the state to take all steps necessary for bringing the person who has acted against the social interests of the community, to book.

➢ Second phase (1979-1990)

In this phase the scope of the term *locus standi* was widened and in the courts was of the view to grant locus standi to 3rd parties also in criminal cases. In *Arunachalam v. P.S.R. Sadhananatham*[11] where the supreme court had ruled that under article 136, it can entertain appeals against judgments of acquittal by the high court at the instance of private parties also, as article 136 does not inhibit anyone from invoking the court's jurisdiction. Further in the case of *Manne Subbarao v. State of A.P.*[12] which involved the issue whether a third party, who is neither the complainant nor the first informant,

5. Section 374,379 and 380 of Cr.P.C 1973.
6. Sec 377 and 378 of Cr.P.C 1973.
7. Proviso to Sec 372 of Cr.P.C 1973, (inserted by Ins. by Act 5 of 2009).
8. Art 141, Indian Constitution 1950.
9. 1936 (3) A.E.R. 36.
10. AIR 1966 SC 911.
11. (1979) 2 SCC 297.
12. (1980) 3 SCC 140.

can appeal to the supreme court, against an order of acquittal by the high court, if the state does not prefer an appeal. The court ruled that there is no black-letter law that permits the same. However, the criminal-justice system supports the view that a wrong done to anyone is a wrong done to oneself. Justice is outraged when a guilty person is allowed to get away unpunished. It held that access to justice to every *bona fide* seeker is a democratic dimension of remedial jurisprudence even as public interest litigation, class action and pro bono proceedings are.in the case of *Akhil Bhartiya Soshit Karamchari Sangh (Railway) v. Union of India*,[13] the court observed that "*the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions.*" Although this case was not related to criminal law, it had a deep impact on expanding the narrow concept of the term *locus standi* to 3rd parties.

In *Sheo Nandan Paswan v. State of Bihar*,[14] it was held that "*it is now settled law that a criminal proceeding is not a proceeding for vindication of a private grievance but it is a proceeding initiated for the purpose of punishment of the offender in the interest of the society. It is for maintaining stability and orderliness in the society that certain acts are constituted offences and the right is given to any citizen to set the machinery of the criminal law in motion for the purpose of bringing the offender to book*."

Further in the case of *A. R. Antulay v. Ramdas Sriniwas Nayak*[15] it was held that "*punishment of the offender in the interests of the society being one of the objects behind penal statutes enacted for the larger good of the society, the right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a strait-jacket formula of locus standi.*" The apex court again followed the same approach in *D. Gopalan v. Shanthi alias Vennira Adai*[16] and held, "*if he can be a complainant for initiation of criminal prosecution, he should equally be entitled to oppose withdrawal of the criminal prosecution which has already being initiated at his instance.*"

- **Third phase (1990-till now)**

In this phase judiciary adopted a mixed approach on granting *locus standi* to 3rd parties in criminal matters. The apex court in the case of *People's Union of Civil Liberties (Delhi) v. C.B.I & Ors*[17] held that "*a 3rd party has no locus standi to file criminal revision petition against judicial order as a 3rd party is neither complainant nor aggrieved party.*" It further held that the state is the master of prosecution and it would be extremely unsafe to accord locus standi to 3rd party to file a criminal revision against a judicial order."

The same approach was reiterated n the case of *P.V. Narashimharao v. State*[18] where the petitioner sought to intervene in an appeal filed by the accused against the order of the trial court. The Delhi high court ruled that there was no provision in CrPC analogous to Order 1 Rule 10 of the civil procedure code. It further stated that a reading of the section shows that a private party has no role in a proceeding instituted by the state. Hence, the application of the petitioner to intervene was rejected.

Further in case of *Rajubhai Dhamirbhai Baria v. State of Gujarat*[19] he same approach was followed that "it is a settled position in law that third parties have no *locus standi for intervening in criminal trial. If one peruses the scheme of the code of criminal procedure, it will be abundantly clear that third parties do not have any right to intervene either in the trial or at appellate stage in the high court.*"

In 2012 the case of *Dr. Subramanian Swamy v. Dr. Manmohan Singh*,[20] the court held "*punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a straitjacket formula of locus standi unknown to criminal jurisprudence, save and except specific statutory exception.*"

In the case of *Subramaniam Swamy v. Raju*,[21] the court looked into the exceptional circumstances doctrine and held that "*generally 3rd party has no locus in criminal matters but in certain exceptional situations there is recognition of the limited right of the 3rd party.*" But what are those special circumstances have not been defined and it is a matter of fact, it will depend on the facts and circumstances of the case. Recently in the case of *Manzoor Ali Khan v. Union of India*,[22] the apex court observed that "*the society for its orderly and peaceful development is interested in the punishment of the offender. Therefore, prosecution for serious offences is undertaken in the name of the state representing the people which would exclude any element of private vendetta or vengeance.*"

Thus from the analysis of above judgments it can be deduced that the courts in india had been very slow in approving third party intervention in criminal proceedings.

Intervention in criminal matters through pil

Now a very important question arises that needs to be addressed is whether it makes sense to introduce a concept akin to public

13. AIR 1981 SC 298.
14. AIR 1987SC 877.
15. AIR 1988 SC 1531.
16. 23 January, 1989.
17. 1997 Cr.L.J 3242.
18. 1997,Cri LJ 3117 (Del).
19. 2012 (114) Bom LR 3549.
20. AIR 2012 SC 1185.
21. (2013)10SCC 465.
22. AIR 2014 SC 3194.

interest litigation, in criminal prosecutions. In our opinion it would, since the aim of criminal law is to punish infractions of life and property of individuals. This is similar to the rights guaranteed under the constitution, which are enforceable using public interest litigation as a tool. But the apex court is not in favour of it.[23] in the case of *Janata Dal v. H.S. Chowdhary*[24] it was held that "*even if there are millions questions of law to be deeply gone into and examined in a criminal case of this nature registered against specified accused persons, it is for them and them alone to raise all such questions and challenge the proceedings initiated against them at the appropriate time before the proper forum and not for third parties under the garb of public interest litigants.*"

The same approach was reiterated in the case of *state of Kerala v. R. Balakrishna Pillai*,[25] where it was held that "*public interest litigant is an alien figure on the landscape of criminal justice system. The supreme court had never recognised locus standi in third parties in criminal law.*"

Thus the stand of judiciary in this point is ample clear that it is not in favour of granting *locus standi* to third parties in criminal matters through the mechanism of public interest litigation.

Conclusion

Thus it is seen that under CrPC as it stands today, it is possible to allow third-party intervention in criminal matters. The only problem that arises is with respect to stage of trial. As we have seen earlier, the Supreme Court has held that under article 136 of the constitution, it can hear the petition filed by a third party in any criminal proceeding.[26] The same logic should be extended to the lower court and to the trial stage. This would also save the time of the high court and the Supreme Court, which are already facing severe docket explosion. Finally, one of the major aims of punishment under criminal law is deterrence. With abysmal rates of conviction, deterrence is becoming meaningless. The criminal-justice system is becoming overburdened and unreliable.[27] Hence, it makes sense to permit third-party intervention in criminal cases. But granting the locus to third parties would involve many difficulties too. It may act as a double edged sword whose one edge would allow a 3rd party to run their crusade of vengeance against any accused person on the ground of their enmity and may either caused into suffer by misusing the provision to cause delay in the prosecution. The other edge of the sword may serve the accused person who would abet the filing of frivolous petitions so that he may always evade the clutches of law. Thus allowing third parties *locus standi* without a cap may be prejudicial for the accused and the principle of fair trial. That is why a very balanced provision is needed for granting locus to third parties.

23. (2005) 2 SCC (Jour) 75.
24. 1991(3) SCC 756.
25. [1993] 2 Kerala Series 752.
26. Arunachalam v. P.S.R. Sadhanantham (1979) 2 SCC 297.
27. (2005) 2 SCC (Jour) 75.

Role of Media in Ensuring Good Governance: A Critical analysis of the Present Media Trends and Challenges to Good Governance

Archita Prajapati*

INTRODUCTION

The notion of media power in last decade has called for inevitable scrutiny as to its ethics in the job it has been assigned to by the people. The trinity of Money, muscle and power has become so frequent for media and elite citizens that such transactions have undermined the concept of what democracy meant and what democracy was imagined as at the time of independence. It was entrusted to check irregularities in public institutions and erring behavior of officials whose contribution matters to larger public interest and growth and development of the nation.

RTI AND GOOD GOVERNANCE

"Information is the lifeblood of democracy. Without adequate access to key information about government policies and programs, citizens and parliamentarians can't make informed decision and incompetent or corrupt governments can be hidden under a cloak of secrecy."

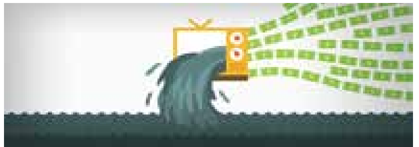
Thus, information is the basis for maintaining transparency and accountability in the public realm in any democracy. RTI has been brought in replacing the Freedom of Information Act, 2002. It ensures information as the people have right to know what their elected representatives are doing as to the welfare of the Nation. The Act seeks to establish that transparency is the norm and secrecy is its exception in working of governance institutions.[1] It applies to both the Central and State public authorities. Public authorities are bound to furnish information.

RTI came as a tool for the poor and marginalized to seek transparency in the allocation of resources, to ask for budget and thereby monitor the expenditure. Media persons also have accessed information through RTI. It has brought the malpractices and poor functioning of the public sector in the lime light. Thus, it has helped to ensure transparency through access of information to the citizens. It helps to scale the efforts made by a particular government. Free and fair information in turn leads to fair election of the representative during elections. It helps the citizens choose their representatives on the basis of how well are they able to form and implement the policies. It is an anti-corruption tool, encourages participatory development and ensures economic development by keeping check on the allocation of resources.

ROLE OF MEDIA IN ENSURING GOOD GOVERNANCE

Media plays an important role in building information and imparting the same to the public at large. Prominent media reports about the government policies, actions and implementation has spread awareness amongst public and even encouraged them to know more about management of the fund utilized and progress of government projects. Media reveals the scams and thereby brings transparency in the mechanisms, asks the system to be more accountable. Thus, it ensures rule of law by action of fair play

Media uses RTI in best possible manner as it has time and resources to find out the information, can analyze and present the same for public good. It is through the medium of News channel that the citizens are able to know the cases such as Vyapam scam, corruption and black money issue, match fixing, crime against women, election campaigns, consumer based news, stock market updates and many more. The scams revealed through sting operations though are criticized on basis of violation of right to privacy; the courts in various cases have sentenced the accused on basis of sting operations. In Jessica Lal Murder case too, it was brought out that money was used to influence the witness. Here the media not only played its role as an information giver, but also did the job which police should have done.



WHO WILL GUARD THE GUARDIAN?

News as per Press Council of India, news are meant to be fair neutral and objective, and the advertisement are ones which are paid for. But, nowadays, the paid content is being published in the newspaper in the editorial section and the TV channels too are hosting programs that are scripted and paid for publicizing the products or which are rhetoric for the election purpose for influencing voters. Paid news is the content for which the media houses charge consideration to highlight them in the editorial or supplement section as per demands of their clients. This corrupt practice was formerly known as surrogate advertisement which later was termed as paid news when the APUWJ coined it as paid news.[2]

1 C.L.V. Sivakumar, The Right to Information Act, 2005: Perspectives-Practices-Issues, IJMBS, Vol. 1, Issue 2, June 2011, available at www.comic journals.com/ijmbs/12/clv.pdf.

2 Anuradha Sharma, In Need of a Leveson? Journalism in India in times of Paid News and 'Private Treaties", Thomson Reuters Foundation (2013).

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On the launch of Medianet TOI provided a justification for paid news stating that people are no longer interested in information relating to just governance and public affairs. People are more interested in lifestyle, fashion and entertainment. Thus, viewers are not able to distinguish between the marketing stunts which are in fact advertisements and they take it as news and even believe upon it due to the confidence they have on the media channels and the actress that hosts the talk show.

By doing so the media channels violates the following two provisions of law i.e., Rule 7(10) under Advertisement Code of Cable Television Networks (Regulation) Rules, 1994 which states that all advertisements should be clearly distinguished from the programs and should not interfere in between the programs.[3] Additionally, Rule 6(1)(d) under Programme Code which states that 'No program should be carried in the cable service which contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half-truth.[4]

The case of M/s Jindal Steel Power Limited and M/s Zee Ltd highlighted the misdeeds of M/s Zee Ltd. which may shock the conscience of the viewers who trust media channels. In a face-off between Zee and Jindal, Zee had demanded a sum of 100 crore to "forge a relationship with them". The case was brought before Inter Ministerial Committee and the committee said that because court proceedings for defamation were going on, the case is sub-judice and hence they cannot act till the court decides. No action was taken by the committee. Under this interpretation, Jindal Steel wanted the Ministry of Information and Broadcasting to cancel the license given to Zee Ltd., but as the committee was not able to decide whether this dispute between private parties could be taken as a matter of public interest or not, no action was taken by the committee.[5]

Paid news includes publishing news in favor of a candidate and opposing their rival. The media houses had published special rate cards that mentioned the total expenditure for a politician's coverage during an election – including coverage of rallies, election campaign, interviews, conversation with public, Appeal to voters and Special articles on demand of contesting candidate.

It is difficult to define liability on the individuals due to convoluted money trails ike in the case of P Sainath and Ashok Chavan, Parcha Rama Rao, Atul Kumar Anjan, Shri Lalji Tandon, Shri A.K Roy, Tulsi Singh Rajput, Om Prakash Chautala etc. Election Commission had set an example in October 2011 by disqualifying a sitting MLA of U.P. Smt. Umkesh Yadav from contesting for next three years for suppressing expenditure of election under Section 10A of the Representation of the People Act, 1951.[6]

Sting Operations

India does not have any firm law to regulate sting operation. Sting operations help the court in order to gather evidence. Though, it is criticized to be against the right to privacy on an individual, any kind of ban is not imposed upon it. Media uses this leverage given to it in order to telecast salacious and sensational news. The stings which do not relate to public interest are captured and telecasted to ruin the repute of individuals. In the case of Uma Khurana and AMU's gay professor, sting was captured for sensationalism and money.[7] Uma Khurana was showcased as if the teacher forced students to get into flesh trade and in case of AMU' professor, a sting was released where he was taped having sex with another man. Few days after this, the professor was found dead. Thus, the first case was recorded for money on the directions of a businessman who had animosity towards Uma Khurana and the second one for sensationalism. None of this had any sort of public Interest.

Private Treaties

These are agreements entered into between a media and a non-media company, under which the media house ensures the non-media corporate of favorable media coverage and in return buys stake in the company. Such agreements compromise the rights of the citizens to be informed accurately and truthfully.[8]

After 1980, scenario in Indian media changed. After Sameer Jain became the executive head of BCCL, the media and press initiatives of BCCL group were made profit oriented and driven by marketing tactics. BCCL is the highest profit earning media venture in India. In 2003, it was the one to start *Medianet*, an initiative for sponsored content which was followed by *Brand Capital*, which provides Equity against advertisement, an initiative by the Times Group for Private Treaties.[9] These tactics were awarded among the seven most innovative business ideas,[10] but these are unfortunately the precursor of undermining objectivity, fairness of news in India.

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3 Rule 7(10), Advertisement Code of Cable Television Networks (Regulation) Rules, 1994.

4 Rule 6(1)(d), Programme Code, Cable Television Network Rules, 1994.

5 Issues Related to Paid News, 47th Report of Standing Committee on Information Technology (2012-13), p. 41-44.

6 Issues Related to Paid News, 47th Report of Standing Committee on Information Technology (2012-13).

7 Sting operation: Legal, Illegal or Beyond the Law, Available at: https://sadianasr.wordpress.com/2010/04/17/sting-operation-legal-illegal-or-beyond-the-law/,accessed on 22/8/2015 at 9.00 a.m.

8 Parliament LARRDIS Reference Note No. 22/RN/Ref./August/2013 on Paid News.

9 Anuradha Sharma, In Need of a Leveson? Journalism in India in times of Paid News and 'Private Treaties", Thomson Reuters Foundation (2013), p.26.

10 Ibid.

The paid instances do not reveal true picture of a company and this also leads to building a wrong image of the company in the mind of the investors. Times Group on its website brand capital has mentioned that "There exists a Chinese Wall between Brand Capital and Editorial Department."[11] Ravi Dhariwal, stated, "Editors do their job and we, the management do ours." This was proved to be incorrect by a leaked email, which was brought into lime light, by Sucheta Dalal, Padma Shri award winning business journalist. The Email from Rahul joshi, the editor of Economic Times revealed that there was no Chinese wall that existed between the Editorial Department and the Management.

This result is because of the overdependence of media on the advertising revenue and not on circulation. Though lack of resource is a valid reason for grabbing revenue from advertorials, but hiding genuine news for sake of money is leading to breach of trust to the citizens. After independence, media has become powerful to reach to the masses and hence this medium is used by the corporate entities and other individuals to influence the mind through influenced reporting in guise of the private treaties.

This has led to mixed feeling on both parts that is management and editors[12]. Management are happy as they are leading their business towards high profit trend but on the other hand the editors are reluctant to such crafted news as these news are advertisements per se which the innocent readers are not informed about. This is the shortcoming on the part of the editors to work under the pressure of the management, as they do not have any independent say against the management.

The Times of India owners say that "They are in Advertising business, as 90% of the revenue of their newspaper comes through newspaper advertisement."[13] P. Sainath, The editor of Rural affairs, The Hindu, states that the private treaties are a device to legitimize the boasting about corporate entities so that small and medium retailers can influence the public and can enter into the big retail business by attracting customers through favorable media coverage. He adds saying that, when a newspaper owner has 240 treaties, does it remain a newspaper or turns to an equity firm?[14] Practically, the media will not be able to go against its own stake and will definitely favor the firms it holds interest in. He further states that such news when are published without a disclaimer-that they are advertisement, is an attack to the press freedom.

In order to protect the interests of the investors, SEBI has suggested that such private treaty coverage should be accompanied with disclosure in the form of disclaimer, that should state that the media house has a private treaty with the company and also the percentage of stake it has in the company and other interests. SEBI had also referred to the existing guidelines for financial journalists that were framed in 1996 which states that the financial journalists should not accept gifts, trips, discounts, that may compromise their position. If they hold any interest or accepted any privilege in any company they cover, they must disclose the same. Also, any reporter who brings to the limelight any scam of public interest should be rewarded.[15]

CRITICAL ANALYSIS

Corrupt practices in media is not only causing concern to the election commission or Income Tax Department but it is also affecting the rights of citizens to get free, true, objective and neutral information. With paid news during election time it is infringing their right to free and fair election and they may vote an undeserving candidate because of the undue influence caused upon them by media channels and newspaper.

Media sector also should be made open to filing RTI when something unusual appears on the TV channels or in the newspaper. Editors are protected under norm 37(A) of the Norms of Journalistic Conduct which states that the editor is supreme in all matters related to the editorial section in the newspaper, supreme even above the owner. The judiciary is also inclined to such a stand and it is those who are pressurized should fight for their rights else such corrupt people would keep on exploiting honest journalists for their motive.

In *K K Birla v. Press Council of India*,[16] the court held that. The council was established to ensure liberty of the press and stated, "Freedom is always from things and circumstances. It is the state of being at liberty rather than restraint. Freedom is an exemption from external control. The liberty of press is necessary to the nature of a free democratic state." Describing about the editors the court held that, "the value of the newspapers is in its content, selection of which is the sole and undivided responsibility of the editor."

Thus, if the senior editors come up and fight the pressure exerted on them, the juniors can very well learn to fight against such causes and ensure independence without fear of termination.

RECOMMENDATIONS

Press Council should fix the investment limit of external entities into media and vice versa so that excess investment does not lead to pecuniary bias and media protecting such entities against negative coverage.

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11 Anuradha Sharma, In Need of a Leveson? Journalism in India in times of Paid News and 'Private Treaties", Thomson Reuters Foundation (2013), p.32.

12 Anuradha Sharma, In Need of a Leveson? Journalism in India in times of Paid News and 'Private Treaties", Thomson Reuters Foundation (2013), p.37.

13 Auletta, "Citizens Jain", See also, Anuradha Sharma, In Need of a Leveson? Journalism in India in times of Paid News and 'Private Treaties", Thomson Reuters Foundation (2013), p.41.

14 Issues Related to Paid News, 47th Report of Standing Committee on Information Technology (2012-13),p.21.

15 Press Council of India, Sub-Committee Report on Paid News: How Corruption in Indian Media undermines Democracy, p.15.

16 Sebastian Paul, Law, Ethics and Media, 3rd ed., Lexis Nexis Publication; ILR 1976(1) Delhi 753.

Powers of the Press Council should be revamped so that it is enabled to revoke license of any media house for a certain period or discontinue its advertisement revenue for certain months. It should be given penalizing powers. The ambit of press council should be widened so as to include electronic media into it. Section 15(4) should be amended accordingly.

During Elections various journalists should be appointed as secret observers to ensure strict vigilance of the management in media houses and report to the election commission.

Ombudsman mechanism should be brought into the media house in order to serve as the first tier of grievance redress authority.

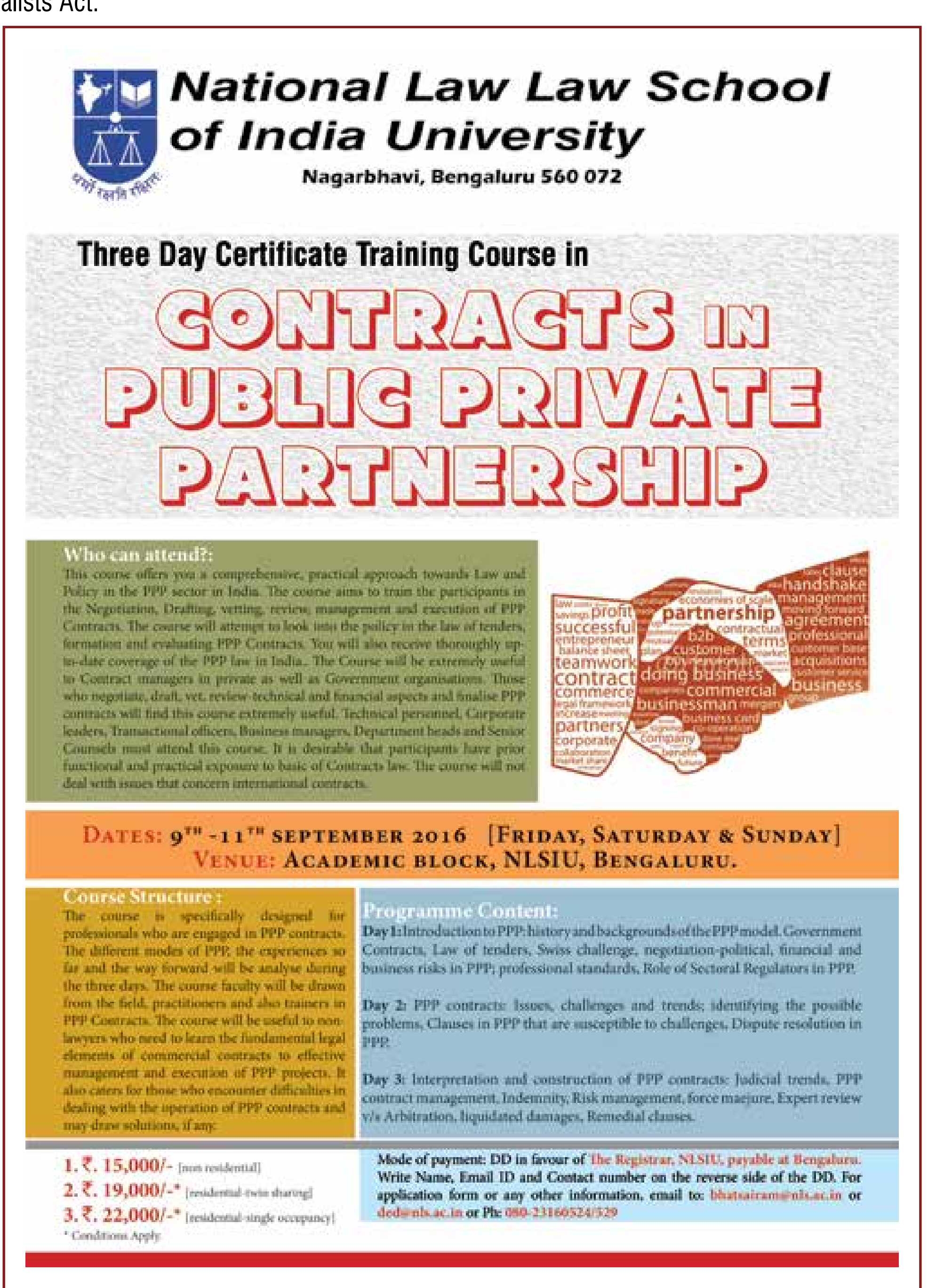
Condition of wages of journalists should be improved and the stringers and contractual employees should be eliminated. All those working as Journalist should be given protection under the Working Journalists Act.

Above all, the provisions of RTI should be enlarged so as to include the fourth estate, media within it, being the fourth wing of governance. Cognizance should be taken when circumstantial evidence points towards something unusual published or telecasted by Media Houses.

CONCLUSION

Thus, it is required that the connotation as to 'what freedom means to media today' should be redefined and restructured so as to safeguard interests of citizens.

Media owes social responsibility. In order to be free and responsible it has to follow ethics. It has to disclose the source of income and even the source of news on receipt of complaints that are *prima facie* correct. Governance in the country can only be safeguarded when the institutions of Governance and transparent and accountable to people.



The Medical Termination of Pregnancy (Amendment) Bill, 2014: Panacea for the Maternal Mortality Conundrum?

Anand Swaroop Das*

Introduction

The Medical Termination of Pregnancy (Amendment) Bill, 2014 ('Bill') that seeks to incorporate changes in the original Medical Termination of Pregnancy Act, 1971 ('Act') appears to be an exercise to make the original legislation viable in achieving its object which the original legislation has conspicuously failed. The proposed amendment has generated controversies and oppositions from different quarters for various reasons and such oppositions are not totally bereft of merit and certainly not without concern. However, the striking question that the proposed amendment raises is whether this amendment will in effect bring about a paradigm shift in the law itself which has for more than four decades since its inception achieved precious little in terms of its object of *inter alia* reducing maternal mortality and morbidity. Confronted with this rather stark conundrum it appears that the proposed amendment is an exercise in futility albeit well intentioned and instead of making the original Act more viable it will only make it more pliable and that to for the unscrupulous and will enlarge and compound the problem it sought to eradicate.

While endorsing the *bonafide* intention behind the proposed amendment this article proceeds to supplement the views as stated above and give some insights into the pros and cons of the Bill in a holistic manner and discusses whether it enhances or dilutes the original law and what ideally should the amendment be in order to make the law really viable.

General Observations of the Bill: New Provisions, Old Concerns

To ensure that the Bill is put into proper implementation, it is necessary to ensure that facilities for the same have to maintained to cater to the needs of women in such condition. Lack of infrastructure has always been an area of concern when it comes to implementation of the present law surrounding medical termination of pregnancy. The Act[1] under section 4 provided specific places where Medical Termination of Pregnancy ('MTP') could be performed.[2] In the Amendment Act of 2002 some modifications were made to the said provision.[3] The present amendment bill however, does not say anything about the place where MTPs can be conducted; therefore the govt. hospitals and govt. approved places remain unchanged. It has been found out that most states in the country do not have adequate facility for carrying out MTPs in safe and hygienic condition. Even there is a dearth of primary health care which can be used for the purpose.[4] This is one of the reasons for failure of the law in achieving desired results.

Even after four decades, the woman does not have primacy in the matter of MTP. The woman i.e. the pivotal player in an MTP is relegated to play negligible role in the process which affects her most. The Act did not give any importance to the woman's wish, say or opinion in the matter of abortion and understandably so. The present amendment should have given some respect to the women's right over their body, sexuality, and their right to reproduction. Even after four decades the law remains archaic in respect of women's right. Women only have right to MTP if they fall in one of the prescribed categories and time period and are certified by doctors. Even in case of unwanted and accidental pregnancies or in the case of pregnancies of rape victims and sex workers the woman has no right to go for MTP if the conditions are not fully satisfied and has to bear the lifelong brunt.

Contrary to the general precedence, the proposed Bill does not specify the objectives and needs of the Bill against the current scenario of the country. The amendments, which were inspired from a study conducted by Population Council in 2012, imply that Ayurvedic doctors and trained nurses can provide medical abortion in a manner similar to that of a doctor with MBBS degree.[5] However, in the year 2012 when the MTP Act, 1971 was still in operation, no person other than an MBBS doctor registered under the Act could provide for abortion services. Sudden inclusion of a potpourri of healthcare providers seems to be without rationale and against the spirit of MTP Act. Also, allowing non-allopathic doctors to conduct abortions might not be medically correct, as it may lead to higher maternal mortality

1. The Medical Termination of Pregnancy Act, 1971 (Act No.34 of 1971), Ministry of Health and Family Welfare, Government of India.
2. S 4, Medical Termination of Pregnancy Act, 1971.
3. S 4, Medical Termination of Pregnancy (Amendment) Act, 2002.
4. Mary Philip Sebastian, M.E.Khan, Daliya Sebastian, Unintended Pregnancy and Abortion in India: Country Profile Report, Population Council, (2014) available at http://www.popcouncil.org/uploads/pdfs/2014STEPUP_IndiaCountryProfile.pdf.
5. *Supra* note 4.

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rate and a declining sex ratio. This may defeat the purpose of the Pre-Conception and Pre-Natal Diagnostics Techniques Act ('PC-PNDT Act'). Thus, the amendments based on the study by population council are devoid of rationale and stand in violation of MTP Act.

Expecting non-allopathic healthcare providers to successfully carry out abortions when even allopathic healthcare providers have to undergo extensive training, is too ambitious and impractical a proposition. The Bill certifies non-allopathic healthcare providers to perform all the procedures concerning medical termination of pregnancy.[6] As per a particular report released by the Population Council, an organization whose studies were the major influence behind the present amendments, even allopathic doctors require extensive training for performing abortions. The report opines that there remains a dearth of knowledge even among allopathic doctors who carry out abortion services under the MTP Act[7] and the PC-PNDT Act.[8] It also brings to light the inability of such doctors to maintain various forms and registers as compliances with procedures under the MTP Act and the PC-PNDT Act. These allopathic doctors have very less idea as to which law governs their practices or what forms they are supposed to submit. To conduct abortions, it is pertinent to be aware of the legal and surgical intricacies like determining possible complications, identifying complications, providing referrals etc.[9] Thus, an argument can be drawn here that if allopathic doctors require so much training in abortion services then non-allopathic doctors will face a lot of hassles to carry out the same, which might lead to ineffective service. The present Bill talks about both surgical and medical abortions. Medical abortion involves the usage of allopathic medicines which are not taught to non-allopathic healthcare professionals. Also, there has been no development of Ayurvedic and Homeopathic drugs to deal with MTP. MTP surgery has been a wholly allopathic practice till date.[10]

Widespread use of contraceptives and adoption of sterilization may indirectly serve the purpose of the law. Although the present law relates to medical termination of pregnancies, it would be desirable if the law provides and prescribes use of contraceptives and adoption of sterilization procedures in order to reduce and eliminate the very reason of many cases of MTPs.

Critical Analysis of the Specific Provisions of the Bill: One Too Many Ambitious Propositions?

Registered Healthcare Providers Not a Desirable Solution in All Cases of MTPs

Allowing all healthcare providers to conduct all types of MTPs is not the solution to overcome slow implementation of the law. This proposed incorporation is the crucial point of discord and controversy which are not without substance. The Act defined registered medical practitioner as a medical practitioner who possesses any recognized medical qualification as defined in the Indian Medical Council Act, 1956[11] (102 of 1956), whose name has been entered in a State Medical Register and who has such experience or training in gynecology and obstetrics as may be prescribed by rules made under the Act. The MTP Rules, 2003 laid down the experience and training required for being eligible as a registered medical practitioner under the Act.

The proposed amendment replaces registered medical practitioners by registered healthcare providers which apart from registered medical practitioners include Ayurveda, Unani, Siddha, Homoeopathy practitioners and nurses and auxiliary nurse midwives.[12] This inclusion of the motley healthcare providers is apparently to counterbalance their already probable and clandestine complicity in induced abortions, except for the quacks. There are diverging opinions on the capability of healthcare providers in contrast to certified physicians in carrying out MTPs. As per the World Health Organization ('WHO'), abortion care can be safely provided by any properly trained health-care provider, including midlevel (i.e. non-physician) providers which refers to midwives, nurse practitioners and others who are trained to provide basic clinical procedures related to reproductive health and who can be trained to provide safe abortion care.[13] The Population Council also opines that expanding the number and type of providers able to legally perform abortion services, including manual vacuum aspiration ('MVA') and medical abortion ('MA') could greatly expand women's access to safe abortion and save many lives each year.[14]

6. S 2, Draft Medical Termination of Pregnancy (Amendment) Bill, 2014.
7. The Medical Termination of Pregnancy Act was enacted by the Indian Parliament in 1971 to tackle illegal abortion and maternal morbidity.
8. Pre-Conception and Pre-Natal Diagnostics Techniques Act was enacted by the Indian Parliament in 1994 to stop the growing female foeticide in the country and the declining sex ratio.
9. *Supra* note 4.
10. Vidhee Rathee, *Doctors oppose proposal to legalize abortions by nurses, AYUSH practitioners*, India Medical Times, November 4, 2014 available at http://www.indiamedicaltimes.com/2014/11/04/doctors-oppose-proposal-to-legalize-abortions-by-nurses-ayush-practitioners/.
11. S 2(h), Indian Medical Council Act, 1956.
12. S 3, Draft Medical Termination of Pregnancy (Amendment) Bill, 2014.
13. Safe Abortion: Technical and Policy Guidance For Health Systems, Department of Reproductive Health and Research, World Health Organization, 2nd Ed (2012).
14. Shireen Jejeebhoy, Shveta Kalyanwala, A.J. Francis Zavier, Rajesh Kumar, Shuchita Mundle, J. Tank, Rajib Acharya, Nita Jha, *Can nurses perform manual vacuum aspiration (MVA) as safely and effectively as physicians?* Evidence from India, Contraception 84(6) 615-621 (2011).

In contrast Indian Medical Association ('IMA') has strongly objected to the proposal of permitting non-allopathic health care providers to conduct abortions.[15] As per Dr. Mala Srivastava, "Without proper training and qualification, MTP procedures can result in incomplete abortions and infections which can be hazardous for patients."[16]

It may be the intention of the government to make MTP easily accessible legally through the healthcare providers whose services were probably used to be availed illegally. But question remains as to whether it is prudent to legalize illegal abortions in this way by generally empowering healthcare providers to conduct MTPs. It may be true that with training the non-physician healthcare provider can prescribe oral medicines and conduct some safe non-incisive procedures for MTP in non-complicated cases in the initial stages of pregnancy and as such their services in such cases can be useful. However, pregnancy and abortion can be very complicated in many cases, may be associated with other serious afflictions, may require surgical intervention etc. which cannot be left to be handled by any non-physician.

Questionable Enhancement of Length of Pregnancy for MTP from 20 to 24 Weeks

Increase of the MTP period from 20 weeks to 24 weeks is only helpful partially and will cause more harm than good. It is a valid justification that fetal cardiac anomalies are detected after 22 weeks of pregnancy for raising the MTPs up to 24 weeks. This ceiling may be desirable for the unborn child suffering from congenital defects although there may be defects which manifest as the pregnancy progresses.[17] However, this limit should not be absolute or inflexible either for the child or for the mother. Detection of severe defects or deformities can be detected after the ceiling period as happened in the case of Niketa Mehta in 2008 when Bombay High Court declined to grant her prayer for abortion of her unborn child suffering from severe cardiac anomaly, because her pregnancy was more than 20 weeks old and law did not permit MTP after 20 weeks.[18]

Imprudence to Empower Variegated Healthcare Providers to Form Opinion Regarding Medical Expediency for MTP

Evaluation of status of the pregnant woman and the child and formation of opinion being central to an MTP the same cannot be entrusted to all healthcare providers. As per the Bill, MTP can be performed up to 24 weeks on the basis of opinion of the healthcare provider that continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health or that there is substantial risk that if the child were born, it would suffer from serious physical or mental abnormalities.[19] The definition of healthcare providers in the bill which include nurses, midwives, unani, siddha practitioners among others do not inspire confidence that they are qualified enough to evaluate the physical and mental status of the pregnant woman or the child to form such opinion. It is also doubtful whether they can be capable of the task even after the training that may be provided to them. Such evaluation is too complex medically to be left to the healthcare providers excepting the qualified physicians. This will also be a likely loophole in the law for misuse.

No Directive on Training of Healthcare Providers in the Bill

The unaddressed aspect of training of non-allopathic healthcare providers in the Amendment Bill might lead to anomalous situation. After passing of the Bill, ensuring its proper implementation by the Government is of utmost importance. According to a multicentre survey titled 'Abortion Assessment Project', a huge scale of unsafe abortions is caused due to the unawareness regarding the MTP Act, 1971.[20] The amendment Bill will require large-scale training of the non-allopathic and midlevel doctors. Doctors providing abortion services need to be trained in electrical vacuum aspiration ('EVA'), manual vacuum aspiration ('MVA') and post abortion care.[21] MVA training requires time because of lack of training, equipments or both.[22] The Bill however fails to address the training aspect of the problem. However, it is expected that if the present amendment is incorporated it would follow by amendment of the existing rules or a new set of rules to inter alia prescribe the categories[23] and prescribe the abnormalities.[24] The rules also have to prescribe the nature and extent of training of for the healthcare providers. It need be pointed out that the practitioners in Ayurveda, Unnani, Sidha or Homeopathy

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15. IMA opposes government's proposed amendments to the MTP Act, Economic Times, (2014) available at http://articles.economictimes.indiatimes.com/2014-11-06/news/55835712_1.
16. Shveta Kalyanwala, A.J. Francis Zavier, Shireen Jejeebhoy, Rajesh Kumar, *Experiences of unmarried young abortion-seekers in Bihar and Jharkhand*, India, Culture, Health and Sexuality 14(3) 241-255, (2012).
17. Leela Visaria, Alka Barua and Ramkrishna Mistry, *Medical Abortion in India: Role of Chemists and Providers*, Economic and Political Weekly, Vol. 43, No. 36 (2008).
18. Neha Madhiwalla, *The Niketa Mehta Case: does the right to abortion threaten disability rights?* Indian Journal of Medical Ethics, Vol. 5, No.4 (2008).
19. S 3, Draft Medical Termination of Pregnancy (Amendment) Bill, 2014.
20. Duggal R, Ramachandran V., The abortion assessment project-India: Key Findings and Recommendations, Reprod Health Matters (2004) 122-9.
21. Helen Kamel, Sebanti Goswami, Rekha Dutta, *Manual Vacuum Aspiration and Electrical Vacuum Aspiration- A Comparative Study for first trimester MTP*, The Journal of Obstetrics and Gynecology of India, Vol. 61 (2011).
22. *Ibid.*
23. S 3(2)(B), Draft Medical Termination of Pregnancy (Amendment) Bill, 2014.
24. S 3(2)(C), Draft Medical Termination of Pregnancy (Amendment) Bill, 2014.

cannot be trained to administer Allopathic medicine or conduct any procedure in Allopathy. It is worthy to refer to the decision of the Supreme Court in the case of *Poonam Verma v. Aswin Patel*[25] wherein the Court held that a person who does not have knowledge of a particular system of medicine but practices in that system is a quack and a mere pretender to medical knowledge or skill, or to put it differently, a charlatan.

Suggestions and Conclusion

It is suggested that the government should take steps on war footing to establish proper infrastructure for providing facilities in conducting MTPs with proper service providers so that the aim and objective of the law is fulfilled. The woman and not the society or the government should take decisions relating to her body; otherwise, we may forget women's liberalization and equality as only hype. The proposed amendment needs rethinking taking into account the practical hurdles that it is likely to create. Inclusion of health care providers without any discrimination will be counter-productive in the long run and may defeat the purpose of the law. Backing of law for the use of contraceptives and sterilization programmes can be made popular and widespread, thus, helping the initiative in the long run.

Generalization for the conduct of MTPs by any healthcare provider should be avoided in the interest of patients seeking MTP. Otherwise, the mortalities and morbidities which used to happen in illegal manner will continue to happen with legal sanction. In cases where complications develop or are detected either of the mother or the child after the prescribed period the law should make exception and allow abortion which may be subject to conditions. Inflexibility of law should not lead to undue hardships and harassments. To avoid any misuse of the law or any mishaps the evaluation and opinion as per section 3 should be done by qualified physicians. The training to healthcare providers will have to be in their respective system of medicine. This does raise an anomalous situation which needs to be addressed before pushing through the proposed bill. The Bill, no doubt has ambitious proposals, but with proper and effective implementation, it could help in achieving its objective of maternal mortality in a quick span of time.

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25. Poonam Verma v. Aswin Patel, 1996(4) SCC 332.

Arbitrability of Fraud in India-Changes brought by the 2015 Amendment

Aarushi Bhatnagar*

Introduction

Arbitration is an alternative method of dispute resolution which is relatively informal in nature and provides amicable means of resolving disputes. It can be defined as a non-judicial process, by which parties agree in writing to refer present or future disputes to one or more persons or an institution or a body of members, for a decision on their rights and liabilities in accordance with the agreement or understanding between them and by applying the law governing their relationship.[1] In India, the Arbitration and Conciliation Act, 1996 (the Act) is the governing law for domestic and international commercial arbitrations.

International commercial arbitration is a modern growth industry. It gives effect to the principle of 'party autonomy'. The flexibility of being able to tailor the dispute resolution process to the needs of the parties, and the opportunity to select arbitrators who are knowledgeable in the subject matter of the dispute, make arbitration particularly more attractive.[2] The fact that all dispute resolution methods have their drawbacks and problems cannot be ignored, however, international commercial arbitration can be considered to be the least ineffective one out of the lot due to the advantages and convenience that it provides.

Arbitration Agreement and its Governing Laws

Through an arbitration agreement or an arbitration clause, the parties to a dispute oblige themselves to arbitration. An arbitration agreement can be understood as an agreement between the contracting parties to use arbitration as the method for dispute resolution between them.[3] Any contract consisting of an arbitration clause or arbitration agreement is generally governed by three sets of laws – (i) the proper law of the main contract. This is also known as the governing law of the contract. This is meant to govern the substantive issues between the parties to the contract. For example, dispute regarding the title of goods, or dispute regarding the nature or type of contract, etc; (ii) the proper law of arbitration agreement. This law governs the substantive issues of arbitration, for example, existence of arbitration agreement, validity of the arbitration agreement, and the arbitrability of disputes; and (iii) the procedural law of arbitration. This law governs the conduct of the arbitral proceedings.

Arbitrability of Disputes

As per Section 7 of the Act, the three important components of an arbitration agreement are – agreement, parties, and disputes. Section 7 allows the parties to decide upon the scope of arbitration by determining as to what all disputes between them can be subject to arbitration (known as the arbitrability of disputes). Arbitrability of disputes refers to the question of what types of issues can and cannot be submitted to arbitration. While party autonomy espouses the right of parties to submit any dispute to arbitration, national laws often impose restrictions or limitations on what matters can be referred to and resolved by arbitration.[4] It answers the basic question of what all disputes in a given matter are arbitrable.

Arbitrability is governed by the proper law of arbitration agreement. The importance of the proper law of the arbitration agreement can be understood with the help of an example. Suppose, one party to the agreement contends that fraud and cheating cannot be subjected to arbitration as per the laws of his country, whereas, the other party to the agreement states that such matters can be subjected to arbitration as per the laws of his country. Over here, how the arbitrability of dispute will be determined? Therefore, proper or substantive law of the arbitration agreement is important to be stated clearly in the agreement itself so that such essential questions can be answered as per it.

Case Laws on Arbitrability of Disputes- How Far Have We Come?

The arbitrability of various subject matters has given rise to a lot of debates worldwide. This is due to the reason that with

1. D. Rautray, Master Guide to Arbitration in India 18 (2008).
2. Margaret L. Moses, The Principles and Practice of International Commercial Arbitration 1 (2008).
3. Under the Arbitration and Conciliation Act, 1996, Section 7 deals with "Arbitration Agreement."
4. Loukas A. Mistelis & Stavros L. Brekoulakis, Arbitrability- International & Comparative Perspectives 4 (2009).

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the growing popularity of arbitration as a preferred method of dispute resolution, the types of disputes that can be resolved through arbitration is also increasing. Time and again the question has been raised before the Indian courts that whether or not allegations relating to fraud or misrepresentation between parties are subject to arbitration. The Indian courts have taken steps towards coming at par with the international level with respect to arbitrability of fraud and misrepresentation cases.

There is no such provision in the Act which explicitly prohibits arbitrability of fraud or misrepresentation claims in India. However, via certain judicial pronouncements the Courts have laid down that such cases cannot be subjected to arbitration. Until the advent of the 2015 Amendment to the Act, matters involving fraud or misrepresentation allegations were explicitly treated as non-arbitrable matters. However, post-2015 Amendment, such cases fall under the head of arbitrable matters.

There are mainly four landmark Indian cases with regard to arbitrability of disputes, namely – N. Radhakrishnan v. Maestro Engineers & Ors;[5] Booz-Allen & Hamilton Inc v. SBI Home Finance Ltd. & Ors;[6] WSG Mauritius Ltd v. MSM Satellite Singapore Ltd;[7] and Swiss Timing Ltd v. Organizing Committee, Commonwealth Games 2010, Delhi.[8]

In the *N. Radhakrishnan case*, there was a partnership deed which contained an arbitration clause for dispute resolution. The SC held that the current dispute between the parties was arbitrable. The Court went ahead to decide whether the arbitrator was competent to deal with the dispute raised by the parties. The Court was of the view that the cases which relate to allegations of fraud and serious malpractices cannot be dealt with properly by an arbitrator as such cases can only be settled in court through furtherance of detailed evidence by either parties. Therefore, in this case the Court concluded that arbitral tribunals do not have the substantive jurisdiction to adjudicate upon complex issues of fact such as those arising out of serious allegations of fraud in the interest of justice, and hence, issues concerning fraud are not arbitrable in India.

In the *Booz-Allen case*, the SC held that a suit for enforcement of a mortgage by sale is not arbitrable. In this case, the SC made some observations with regards to the power of the Chief Justice to determine questions pertaining to arbitrability in an application under Section 11 (appointment of arbitrators) of the Act. One of the main questions that arose before the SC in this case was whether the subject matter of the suit is 'arbitrable', that is capable of being adjudicated by a private forum (arbitral tribunal); and whether the High Court ought to have referred the parties to the suit to arbitration under section 8 of the Act (scope of the decision to be taken by the judicial authority pursuant to an application under Section 8).

Here, the Court distinguished the scope of the Court's power under Section 8 from that under Section 11, and held that the scope of issues for consideration is wider under Section 8. The SC was of the view that while considering an application under Section 11 the Chief Justice would not examine on the issue of arbitrability once he finds that there was an arbitration agreement between the parties, and would leave the issue of arbitrability for the decision of the arbitral Tribunal. In case the tribunal is constituted inter alia an application under Section 11 and if the tribunal decides that the dispute is indeed arbitrable, the only remedy available to challenge the tribunal's decision with respect to arbitrability is under Section 34(2) (b) (i) of the Act, wherein a party may file an application in the Court and the latter may set aside the award of an arbitral tribunal in case it finds out that the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Therefore, in the application of Section 11, the issue of arbitrability is left for decision by the arbitral tribunal, whereas the Court must decide the same in a section 8 application on its own.

The Court was also of the opinion that the term 'arbitrability' has different meanings in different contexts. It laid down three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal – (i) *Whether the disputes are capable of adjudication and settlement by arbitration?* (This means that whether or not the nature of disputes is such that they can be resolved by an arbitral tribunal, or whether such disputes would exclusively fall within the domain of the public courts); (ii) *Whether the disputes are covered by the arbitration agreement?* (This means that whether or not the given disputes fall within the scope of the parties' arbitration agreement, or whether they fall under the head of exceptions that are explicitly excluded from the purview of the arbitration agreement); (iii) *Whether the parties have referred the disputes to arbitration?* (This means that whether or not the disputes fall under the scope of the submission to the arbitral tribunal. Even if a dispute is capable of being decided by arbitration, it may still not be arbitrable if it is not enumerated in the list of disputes referred to arbitration).

The SC was of the opinion that every civil or commercial dispute (whether contractual or non-contractual) which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. It is important to note over here that certain categories of proceedings are reserved exclusively to be adjudicated upon by the Legislature as a matter of public policy. Thus, if a particular dispute is not arbitrable, the Court may refuse to refer the parties to arbitration, under section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The

5. (2010) 1 SCC 72.
6. (2011) 5 SCC 532.
7. (2014) 11 SCC 639.
8. (2014) 6 SCC 677.

Court went ahead and gave some examples of certain disputes that expressly fall under the category of 'non-arbitrable' disputes- *(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.*

In the ***WSG Mauritius case***, it was held by the SC that the allegation of fraud is not a bar to refer parties to foreign seated arbitration. Here, the SC set aside the previous judgment of Division Bench of Bombay High Court in MSM Satellite v. WSG Mauritius wherein the Bombay HC had held that allegations of fraud were arguable not arbitrable under the Indian law. However, the SC adopted a pro-arbitration approach and held that the only bar to refer parties to foreign seated arbitration are those which are explicitly specified in Section 45 of the Act, i.e. where the court finds that the arbitration agreement is invalid on any of the three grounds- (i) null and void; (ii) inoperative; (iii) incapable of being performed. This case dealt with the issue of arbitrability in cases of foreign-seated arbitrations.

In the ***Swiss Timing case***, the SC was of the opinion that allegations of fraud and other malpractices are arbitrable. The SC held the view that the judgment laid down in N. Radhakrishnan case was *per incuriam*, i.e. it did not lay down the correct law as it failed to duly consider the earlier judgments of the court in certain cases, where it has been expressly held that a civil court is obligated to direct parties before it to arbitration in cases where there exists an arbitration agreement. The Court also took the view that contention of one of the parties of the substantive contract being void or voidable is no bar to arbitration. Further, the Court was of the opinion that mere possibility of conflicting decisions is no bar against simultaneously proceeding with arbitration and criminal proceedings. This case was dealt with the issue of arbitrability with respect to domestic arbitrations.

The Play of Words in Sections 8 and 45 of the Act

Not only has the question of what disputes are arbitrable been a matter of immense debate, in fact the comparison between Sections 8 and 45 of the Act has given rise to a lot of discussions on the point that whether the scope of power and discretion with the judicial authority to decide upon the arbitrability of disputes is wider in case of international commercial arbitration (Section 45) than in cases of domestic arbitration (Section 8). Due to the way in which words had been put in both these section, it was believed that Section 45 on gives a wider scope of judicial intervention. The pre-amendment wording of the sections were-

Section 8(1) – *"A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration."*

Section 45 – *"Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."*

As per the wordings of Section 8, there was no such restriction on the judicial authority's power to refer the parties to arbitration. In fact, it stated that the judicial authority "shall" refer the parties to arbitration. However, Section 45 went a step further by stating that the judicial authority "shall" refer the parties to arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed." Therefore, under the latter section, the judicial authority had the power of not referring the parties to arbitration on any of the three grounds.

The 2015 Amendment

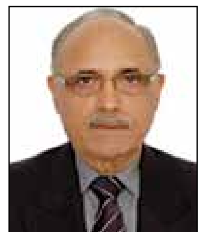
It was observed that when serious allegations of fraud or misrepresentation are made, it is not possible for the Court to proceed to appoint an arbitrator under Section 11 of the Act without deciding upon the question of validity of the arbitration agreement itself. The fact that such allegations are likely to involve recording of evidence or involve causing delay in disposal cannot work as grounds for refusing to consider the existence of a valid arbitration agreement. This was the main reason why prior to the 2015 amendment to the Act the law relating to arbitrability of fraud and misrepresentation was confusing and ambiguous.

The 2015 Amendment to the Arbitration and Conciliation Act, 1996 has amended Section 8 and stated that the judicial authority has to compulsorily refer parties to arbitration irrespective of any decision by the Supreme Court or any other court, if the judicial authority finds that a valid arbitration clause exists. Section 8 has been amended to include – *"A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."*

Section 8 has been amended to bring it at par with Section 45 of the Act. Under this section disputes can be brought before the Court on any of the three grounds- *firstly*, in case there exists no arbitration agreement, *secondly*, if the existing arbitration agreement is not a valid one, and *thirdly*, if one of the parties is contending that a particular dispute is not arbitrable. This amendment has played the role of nullifying the Supreme Court's judgment in the *N. Radhakrishnan case*, as post-amendment, the Courts are bound to refer every dispute to arbitration if there exists a valid arbitration agreement, irrespective of any decisions of any Court to the contrary, unless it finds that prima facie no valid arbitration agreement exists. This means that even if any of the Court, including the Supreme Court, had ruled that fraud and misrepresentation charges are not arbitrable matters, such judgments will not have a bearing upon the power of the judicial authority under Section 8 of the Act to refer the parties to arbitration in case a valid arbitration agreement exists between them.

Therefore, the 2015 Amendment and the above set of rulings can be looked at as a step towards achieving the Act's goal of least judicial intervention. It has put the uncertainty revolving around the matter of arbitrability of fraud to rest, thereby narrowing down the scope of using the ground of fraud as a means of delaying arbitration proceedings.

PRACTITIONER'S CORNER



Adv. Lalith Bhasin

Mr. Lalit Bhasin, is currently the Managing Partner of Bhasin & Co., having offices in New Delhi and Mumbai and also serves as the President, Society of Indian Law Firms. He was honoured by Hon'ble Chief Justice of India on Law Day, November 6, 2012 for having completing 50 years in the legal profession. He has received several accolades and awards for his contribution to the Legal Profession amongst which a few ones are the Indira Gandhi National Unity Award(1991); Plaque of Honour presented by the Prime Minister of India for outstanding contribution to the Rule of Law(2002); National Law Day Award (2007) given by the President of India in the presence of the Chief Justice of India at Vigyan Bhavan for "Outstanding contribution in the development of the Bar in India and for deep involvement and conscientious engagement in the maintenance of the highest standards at the Bar."

Q1: What is your opinion on the professional ethics that lawyers must and should follow?

A: We have the rules made by the BCI – the rules of professional conduct and etiquette, those in any case have to be followed. But those rules may not be exhaustive. Therefore, what is required is self-regulation by lawyers, not just relying upon on Bar Council rules. Their conduct should be absolutely above the board. They should be fair to their client, fair to the opposite party, fair to the court and above all fair to themselves. Therefore it requires lot of introspection by them as to what their model role should be because they represent a very influential section of the society. They are in a position to give guidance to the underprivileged people or the economically weaker people who look up to the lawyers as role models. That is how we have produced great leaders from amongst the legal professional including the father of our nation and the first Prime Minister of India and the first President of India. That is what people look for in a role model as even today in cabinet we have many eminent lawyers, even in the opposition - Mr.ArunJaitley, Mr.Ravi Shankar Prasad, Mr.KapilSibal, Mr.Abhishek ManuSinghvi, Mr. Chidambaram – all of whom are well known.

Q2: Globalisation and other factors have led to the trend of branding and several such brands of law firms have sprouted, and have made their presence felt in the legal profession. Sir, if you were a law graduate, in this era where would you have opted to start your career – a brand law firm or asa conventional law junior advocate, and why?

A: New entrants in the profession today should always start in a traditional way of coming up and having to work hard, and not just get a cushy job in a Multi-national firm as an in-house counsel or a trainee, where you don't learn much. You actually learn by rubbing your shoulders with people in the courts, starting with the district courts and then in the high courts and also trying to do what you feel like doing in the profession. If you want to go for civil law – civil practice, you should opt for that. If you prefer criminal law you should go for litigation with famous criminal lawyers. If you want to join some law firms, you should at least spend two three years in the courts, and then join law firms. You should start in a traditional way which is the tried and tested way, and not just straight away join a law firm or even a multi-national brand and all that - certainly not. That way you don't learn much.

Q3: You have established yourself as a luminary in the legal profession, well-seasoned and rich experience of over 55 years in the same. How do you opine that law students work towards the developments of requisite skills with regard to corporate transactional work and litigation?

A: That is again a matter of aptitude, and then again the question comes whether the young lawyer is a lady or a young man because I have seen in my experience that young ladies would like to join law firms. They feel it is transactional work and they have a sense of security also. They are working in a proper environment which they find quite protective for them. At the same time there are ladies who would like to go for litigation and argue cases, there are so many leading (lady advocates). But so far as the young boys are concerned, they have to decide whether they would like to take up litigation or transactional work. It is a matter of choice. They should not be guided by anyone else, because they might eventually find that corporate work is very boring – only sitting in office from 9 am till 7 or 8 pm and draft agreements. After spending so much time there, they lose interest, and then it is finished. Law is a zealous profession. You cannot keep changing your mind about what to do; you have to be consistent in your approach. You need to make up your mind when you are a law student in your 4th or 5th year– whether you want to be a law teacher, work with an NGO or work in a law firm or practice litigation.

Q4: What were the greatest challenges you faced in the early days of your profession? How did you overcome them?

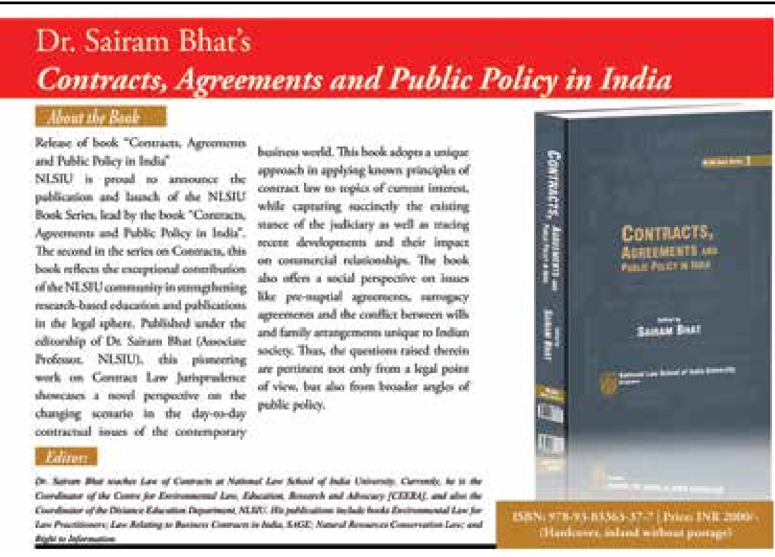
A: The greatest challenge was of course to get work, because if you get work then you had to deal with it, make your client happy by your work and research. Back then we did not have facility of internet and laptops. We had to work hard till 12 midnight, looking into all India reports, cases, commentaries on constitutional and contract act. One had to work hard to get work. It was a 'Catch 22' situation – work hard to get work and then again work hard to satisfy the clients. There, luck also plays some role, you may have some contacts and they get you some work. So it is a combination of various factors which helped me in my initial years. I was privileged that my father was also a lawyer, although he passed away quite early and then I was on my own. He was like a role model for me, because he was hard-working and committed. That helped me in a way.

Q5: Sir, as the author of several treatises and articles, on law, how do you view the need and evolution of legal research?

A: There is definitely a need for good research journals to come up and because of the expanding horizon of law, with so many specialist activities coming up and technology improvements – new subjects being added in space law, aviation and intellectual property and information technology, competition law, so many areas of new practice coming up. In India you see the insolvency and banking code which has come up recently. They would constantly require to study and research – because it is evolutionary process. This jurisprudence will evolve over a period of time. So constant research is the answer and constant dissemination of information to all that can only be done through the journals, online or offline, whatever the way – there is definitely a need for it

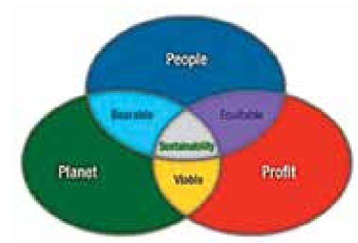
Q6: liberalization of legal profession to allow for FDI has been something that has been proposed by society of Indian law firms. Why do u see FDI as threat to the Indian legal profession, would it not actually serve the beneficiaries by lowering the cost of legal services due to increased competition

A: FDI is only for business. What we had been opposing is the entry of foreign law firms. There is no question of FDI. This is not a business for having direct investment in legal profession. It is happening in UK – business houses are investing in law firms and they are being listed on stock exchanges. In Australia they are doing it. In India it is not a question. We have opposed it for 20-24 years. What now we feel is that Indian profession can face this competition and we are second to none. We can match the competition and we are second to none. We can match the speed, efficiency, technology of the foreign law firms. But here will be no FDI business in law firms which will be business to business. Ours is a profession. We do not want to make a commercial activity from it.



Reconciling Utilitarianism, Environmental Law and Intellectual Property Rights

Namratha Satish* & Nirupama Valluru**



Utilitarian Approaches to Environmental Law

Environmental Protection being the need of the hour, it emphasises clearly that such protection is for the benefit of all in the world and not just a single species. The Utilitarian Concept has much to do with Environmental Protection. For example, Utilitarians would state that undertaking small efforts to reduce carbon footprint would overall, in cumulate, would bring about more pleasure and hence would be ethically just towards the greatest good of all. On the other hand, if some event against the environment would give more pleasure than pain to a justifiably large number of people then, a Utilitarian would allow this. Hence, it is always better to consider and prioritise the Utilitarian concept which would protect the environment by giving pleasure to a large number rather than the other half which would hamper the environment. Bentham's Utilitarian concept of giving maximum satisfaction may be looked at as a Utopian concept but it would be the duty of the law makers to ensure that such utility is derived and availed to the maximum number of living beings, to at least establish mechanisms that would help achieving near Utopian concept, if not the concept as a whole. In such an attempt, the utilitarian concept would do much good to the Environment and it would also create an opportunity for sustainable development. Ecological sustainability imposes a duty on everyone to protest and restore the integrity of the earth's ecological systems to operate in its ecological capacity.[1]

The utilitarian concept imposes a duty on the present generations to reduce the risks of the future generations which could imply, positively that present generations have to develop and invent new energy technologies that's substitute for resources that may be unavailable to the future generations or has a risk of being annihilated. Negatively, it can imply that present generations refrain from depleting and using natural resources that may be needed by future generations, in situations of technological backlash, where transition of technologies from one generation to another is interrupted.[2] When the future generations would want to innovate technology that is eco-friendly and when they would want to introduce and create new technology to improve their standard of living, that technology would fall back if the present generations would deplete and use resources in an unsustainable manner. The government and various other organisations must work towards encouraging the production and innovation of technology that would not only protect the environment now but should also make sure that it is fostered it for the future generations as this would mean the greatest utility and would support the very essence of Utilitarianism.

Utilitarian Theories in Intellectual Property

Theorists of Utilitarianism generally endorsed the creation of intellectual property rights as an appropriate means to protect innovation, subject to the caveat that such rights are limited in duration so as to balance the social welfare loss of monopoly exploitation in public interest. Therefore, utilitarian theories of intellectual property rest on the premise that the benefit to society of innovators crafting valuable works offsets the costs to society of the incentives the law offers to creators. According to utilitarian theory, copyright law gives an impetus of exclusive rights for a particular duration to authors to motivate them to create socially valuable works.[3] Without this stimulus, authors might not invest the time, energy, and money necessary to create these works because they might be copied cheaply and easily by free-riders, eliminating authors' profitability from their works.[4] The reason for providing intellectual property protection to creators is to encourage them to produce socially beneficial works, thereby maximizing social welfare and public good.[5] Utilitarian theories are more concerned with boosting the benefit to society via properly calculated incentive to creators. Legislators have created intellectual Property rights explicitly in the form of restricted and limited exclusive rights. Pursuit of that end in the context of intellectual property, requires law makers to strike an optimal balance between the power of exclusive rights to stimulate the creations of inventions on one hand and on the other hand partially offsetting the tendency of such rights to

1. Andrea Ross, Hazel Nash, *EU Environmental law- Who legislates for whom in devolved Great Britain?* (July 2009) Public Law, 564.
2. Gerard Keijzers *Business, Government and Sustainable Development* 56 (Routledge, 2005).
3. Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 Yale L.J. 186 (2008); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 Mich. L. Rev. 1197, 1197 (1996).
4. Alina Ng, *The Author's Rights in Literary and Artistic Works*, 9 John Marshall Review of Intellectual. Property. Law 453, 453 (2010); Symposium, *The Constitutionality of Copyright Term Extension: How Long Is Too Long?* 18 Cardozo Arts & Ent. L.J. 651, 676 (2000) [hereinafter Copyright Term Extension] (statement of Wendy Gordon).
5. 1 Ralph S. Brown, *Eligibility for Copyright Protection*, 70 Minn. L. Rev. 579, 592-96 (1985).

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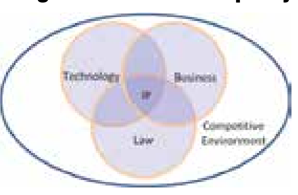
curtail widespread public enjoyment of such creations. In other words, under a pure Utilitarian framework, Intellectual property rights are part of a balancing act an attempt to get something by giving up something else. Therefore, Intellectual property in such context should not contradict with Public benefit. If an intellectual right would diminish the Public benefit too severely, then it should be rejected. That which one man has created and invented, all the world can imitate. Without the assistance of laws, the inventor would almost always be driven out of the market by his competitors, who finding himself without any expense, in possession of a discovery which has cost the inventor much time and expense would be able to deprive him with all the advantages, by selling at lower price. Temporary exclusive right was preferable to general governmental awards on the grounds that it avoided discretion and ensured that the reward to the inventor was proportional to the usefulness of the idea or innovation to the entire ecosystem at a later period, which would ensure sustainable development.

An inventor of a new product or technology is required to be rewarded and the reward that would be generally accepted in such cases would be "ownership". A bone of contention from a Utilitarian here, would be that certain creations of the human mind are essential when it comes to environmental sustainability and that such creations must get fresh incentive by receiving some form of reward, but above all society in general is expected to benefit from new ideas that are made available for wider use. This Utilitarian justification of Intellectual Property have been adopted by the World Trade Organisation.[6] The Trade-Related Aspects of Intellectual Property (TRIPS) Agreement essentials treats Intellectual Property Rights as economic or commercial rights. The TRIPS Agreement however embraces the Utilitarian justification in Article 7, namely that Intellectual Property protection should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to mutual advantage of producers and users of technological knowledge and in a manner favourable to social and economic welfare, and to a balance of rights and obligation.[7]

Utilitarian Justification in Balancing Intellectual Property Law and Environmental Law



For sustainability on economic level, utilitarian ethics based on consequences and the happiness of the majority go together with the economic level of the triple bottom line;[8] where economic innovation and entrepreneurial activities into the current economic markets would take the lead, whether in the form of the rise of SMEs or the superiority of the sustainability indexes in major stock markets at the time of financial crisis.[9] An environmental perspective, therefore, distinguishes between harmful and advantageous technologies, and discourages the former while encouraging the latter.[10]

Ideas themselves may be independently valuable, but when in use, possession (in some cases), and control are curbed in a free market environment, the value of certain ideas increases dramatically. Moreover, with maximizing value come increased incentives, or so it is argued.[11] Hence stressing upon such a view, it is essential to restrict the degree protection given to the intellectual works especially of the ones which directly have a positive effect on the environment. A consensus hence needs to be reached where in there is a conciliation of the protection of the works and ideas of green technology innovation.

Environmental regulation requires broad disclosure.[12] Environmental disclosure presents great risk to industry because much of the information required to be disclosed in, for instance, a permit application or an emissions report, relates to processes, equipment, and formulas at the heart of a company's competitive position. Such disclosure may damage competitive advantage to alleviate the legitimate concern of industry that, and encourage full disclosure, most environmental statutes couple the duty to disclose with provisions protecting intellectual ideas and innovations.[13]

Sustainability, Green Patents and Intellectual Property Rights

The greatest challenge to our country's economic freedom is energy. There is no other industry that has the potential for such a great effect on society. Clean and renewable energy being an alternative to fossil fuels has become important for protecting the environment and also has enormous political and national security implications. Along with the emergence of its importance to the public and society at large, "green-tech," also known as "clean-tech," has recently become one of the fastest growing industries.

"Meeting the needs of the present without compromising the ability of future generations to meet their own needs"[14] as elaborated on by UN General Assembly and quoting sustainable development as a necessity that needs to be addressed as a

6. Ricardo Melendez-Ortiz and Pedro Roffe (Ed), *Intellectual Property and Sustainable Development (Development Agendas in a Changing World)* (Edward-Elgar, 2009).
7. Uruguay Round Agreement: TRIPS Part I – General Provisions and Basic Principles.
8. Triple bottom line (or otherwise noted as TBL or 3BL) is an accounting framework with three parts: social, environmental (or ecological) and financial. Many organizations have adopted the TBL framework to evaluate their performance in a broader perspective to create greater business value.
9. Mehler, D. A.T. Kearney, Inc Green Winners: The Performance of Sustainability-focused Companies in the Financial Crisis. Washington DC: (2009).
10. The paradox of technology is that while technological development can cream opportunity~ for improving the environment, it can also disrupt and harm the environment. By distinguishing between harmful and beneficial technology, the paradox can be resolved. Ausubel & Sladovich ed, Gray, The Paradox of Technological Development, in Technology And Environment (1989).
11. *Ibid*.
12. *See*, e.g., Community Right to Know Act, 42 U.S.C. §§ 11041-11050 (1988).
13. National Parks & Conservation v. Morton, 498 F.2d 765 (D.C. Cir. 1974).
14. The resolution is available at http://www.un-documents.net/a42r187.htm, accessed on 16 July 2010.

central guiding principle.[15] Every technology has an impact on the society and its surroundings in an indirect or direct manner. Patents are granted without the consideration of its impact on the environment to competitive and capital oriented firms who aim to obtain industrial leadership. The negative externality of social cost on the society and environment is a result of such functions. Environmental fees as a compensation for environmental degradation would be retrieved from this green patent system internalizing environmental externalities.[16] Patents play a very important role for industries as they directly link with economic growth. Companies tend to spend gigantic capital on Research and Development by dedicating time, resources and labour for creating an innovation that will hit the target markets. They focus on patenting such an innovation to increase their profits. Hence patents become the main element to capture the desired or aimed position in the market. A patent is a sanction by a state and when patents are granted by patent laws for innovations that hinder the environment and adversely affect the natural resources state then the scope of such innovations is limited by the state with environmental law. Therefore, it is considered very important for environmental law and patent law to go hand in hand. Intellectual property rights incentivize both harmful and beneficial technologies but environmental law blocks the path for harmful technologies. It is wise to incentivise innovation in a clean and green manner which helps in sustainable development. There is a need to build a coherent system[17] to achieve sustainability. Mere refrain from depletion of natural resources by the present generation would not be adequate. Promoting technology that encourages and inculcates clean and green environment to curb these environmental threats can be an alternative. The existing technologies fail in stabilizing and controlling the global carbon emissions.[18] IP strategies help in incentivising innovation. Innovation in green technologies will be a central component of any solution to the problem of global warming.[19] Patenting products that involve clean and green technology gives an edge over the other products when the policies initiated by the government are esteeming towards eco-friendly and sustainable equipment and techniques followed by incentives to innovators for the inventions.[20]

The Global Scenario: the Advent of Green Patent Fast Track System

Developed countries hold the most of the innovations. For over five hundred years they have had system of patenting. They have developed their way towards economic growth.[21] On the other hand, the developing countries are budding in the field striving to innovate and move towards development. It becomes very important for upper middle income developing countries to have IP protection.[22]

Countries have adopted green patent fast track system to offer rapid patents for technologies protecting the environment. With the advent of such programs the time taken to determine the patentability of an innovation has diminished. Instead of spending years to obtain a patent, it can be done within few months. A start-up requires investors for funding the research and development and for capital to work on the technologies. Green patents and these fast track systems help start-ups to demonstrate that they have exclusive rights to their technologies. It guarantees and provides assurance of return on investment and motivates them to spend on these clean start-ups. United States, United Kingdom, Canada, Israel, Australia, Japan, Korea have already established fast track patent programs. Also an analysis on the spread of the program shows that the patenting of green technology is concentrated in developed countries. The procedures and rules vary from country to country. It is a network that has been created to ease the system of acquiring patents for environmental benefit.

Motivation to Invest

We have been talking about incentivizing innovation for the environmental benefit. For the public interest and benefit of the biodiversity, green technologies would contribute majorly. As discussed earlier, the utilitarian approach towards patents highlights the need for limited ownership over the patents. Despite the limited ownership an innovator must be driven to invest in green and clean technologies. It is justified to provide incentives to encourage better inventions for the better ends i.e. the contribution towards sustainable development and environment protection. The incentives to invent have a very simple ideology. A promise for a better return is an incentive to invest in a particular technology. Similarly, Patents encourage companies to spend substantial sums on Research and

15. Roberto d'Erme, SUSTAINABLE HUMAN DEVELOPMENT: why PATENTS are the PARAMOUNT, at 4.
16. Itaru Nitta, Proposal for A Green Patent System: Implications for Sustainable Development and Climate Change, 5 Spring, at 63 (2005).
17. *Ibid*.
18. Lisa L Ouellette*,* Addressing the Green Patent Global Deadlock Through Bayh-Dole Reform, 119 Yale L.J.1727 (forthcoming 2010).
19. *See* Sarah M. Wong, Environmental Initiatives and the Role of the USPTO's Green Technology Pilot Program, 16 Marq. Intell. Prop. L. Rev. 233, 237-38 (2012) ("There is a general consensus that new eco-efficient, clean, and economically competitive technology is needed to solve the "green' problem.").
20. Adam Jolly, Clean Tech, Clean Profits Using Effective Innovation and Sustainable Business Practices to Win in the New Low-carbon Economy, 101-102 (2nd ed. 2014).
21. *Ibid.*
22. Michael Blakeney, Thierry Coulet, Getachew Mengistie & Marcelin Tonye Mahop, *Extending the Protection of Geographical Indications. Case Studies of* Agricultural Products in Africa at 8.

Development[23] thereby driving technology with an incentive and investing in R&D for better and improvised innovations that mitigates environmental concerns across the globe.[24] Hence there is mitigation of the risk factor. The Return on investment attitude by the investors for the capital that they would be shelling out for the development of the technology is followed by a justification for the capital outlay.[25] When an innovator lacks the appropriate resources to put the invention to the right use or develop he can licence it to some other party for royalty. Clean tech companies both large and small are partnering with firms in developing countries to commercialize renewable energy generation equipment such as wind turbines and solar concentrators, lay critical infrastructure such as retrofit emissions reduction technologies on existing fossil fuel-fired power plants.[26] Another important aspect to be considered is the diffusion of these innovations across the world. Patents thereby become the means to achieve the end i.e. the distribution of this technology which partially fulfils the goal of inculcating use of clean and green technology. A strong global intellectual property system aims at developing and deploying green technology all over the world hence promising a technological advancement.[27]

Conclusion

New mechanisms must be introduced under law so that it could foster the environment along with intellectual property rights making sure that the greatest good is available to the greatest number of beings. The utilitarian justification of Environmental law and Intellectual Property rights gives an insight into how reconciliation of Intellectual Property rights and Environmental law would help in sustainable development through incentivising, limiting exclusive intellectual property rights and licensing. Hence, law should encourage and provide incentives to innovators to come up with green technology which would foster the environment with limited exclusive rights and diffusion. The innovative idea used in one country which has been patented must be made available to other countries and places when the environment is put at stake and where particular innovation would help in the betterment of the environment. India must try providing incentives to innovators to innovate green technologies and also bring in procedures to file green patents. The Indian Government must provide subsidies and rewards for innovating and dissemination of ideas and innovations especially in Green Technology.

Sustainability becomes very essential in the present day scenario which can be achieved by shaping intellectual property rights as a tool. Incentives motivate the innovators to produce efficient green technologies. Developing countries like India and China must also adopt the fast track patent system to facilitate innovators with a speedy process of attaining patents. It is crucial to initiate immediate and active steps which contribute in transferring innovations across the globe. It makes sure that these innovations are replaced improved technologies by maintaining the competition among the innovators. This benefits the environment which serves public interest and fulfils the greater need of for environment sustainability

REMEMBER!

If you're searching for that one person who will change your life take a look in the mirror.

Successful people are not gifted, they just work hard then succeed on purpose.

Trust takes years to build seconds to break & forever to repair.

When life gives you a hundred reasons to break down and cry, show life that you have a million reasons to smile and laugh.

Everyone will not get everything this is the rule of life Don't try to get which is not yours, But don't dare to loose that is yours….

Always welcome a new day with a smile on your lips and good thought in mind….

You don't always need a plan.
Sometimes, you just need to breathe, Trust, let go & see what happens…

Instead of looking at what's Depressing, look at what's a Blessing….

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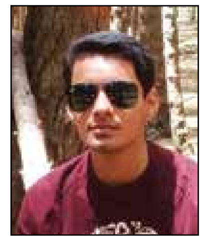
23. Eric Lane, Building the Global Green Patent Highway: A Proposal For International Harmonization of Green Technology Fast Track Programs, 27 Berkeley Tech. L.J. 1119 6-8(2012).
24. *See* generally Teneille R. Brown, The Eminence of Imminence and the Myopia of Markets, 9 J. MARSHALL REV. INTELL. PROP. L. 674, 682–84 (discussing the theory and practice of patent protection and how patents are believed to foster innovation and investment in R&D).
25. The WIPO General Director Francis Gurry has recently reaffirmed this statement in a public lecture delivered at the CEIPI –University of Strasbourg on the topic "Intellectual Property, a Changing International Landscape", on March, 19th 2010.
26. Eric L. Lane, Clean Tech Reality Check: Nine International Green Technology Transfer Deals Unhindered by Intellectual Property Rights, 26 Santa Clara Computer & High Tech. L.J. 544-48, 552-53 (describing eSolar's deals to build solar thermal power plants in China and India, GE's plan to install coal gasification technology in China, and ECOtality's deal to distribute EV charging systems in China).
27. Scott Taylor, Where are the Green Machines? Using the Patent System to Encourage Green Invention and Technology Transfer, 23 Geo.Int'l Envtl. L. Rev. 577, 3 (2011).

Union of India v. N. K. Garg: A Case Comment



Girish Deepak* & Almas Shaikh**

Introduction

There are ever changing perceptions in today's modern world, especially in terms of the social norms and the criteria which we use to determine the policy and morality of our country. One need only look at the present day India debating on issues such as homosexuality and juvenile punishment, all concepts which would have been unimaginable just a few years back. It is essential that the law also keep up with these varying perceptions and create a law which is apt for the time period that we live in.

It is clear that India is now shifting from a social and cultural model to a more capitalistic approach towards solving the dilemma of poverty. The resounding vote of confidence that Prime Minister Modi received has assured that we will move further towards an economic model favoring commerce as our primary thrust. This definitely bears impact on how we must now perceive issues of public policy and morality in the background of such a political stance. *N.K. Garg*,[1] which examines the relation between commercial practice and public policy is a pointer to this. It deals with the issue of waiver of interest and discusses whether any contract can be entered into between parties which states that interest need not be paid *pendente lite* till the passing of the Award/Decree under the Arbitration Act.

Facts of the Case

In this case, the dispute before the Delhi High Court was whether Clauses 16(1) and 16(2) of the General Conditions of Contract (hereinafter "GCC") were valid. The submission of the Petitioner, the judgment debtor, was that Clause 16(2) of the GCC was a valid clause. To support the same, it relied on Section 31(7) (a) of the Arbitration and Conciliation Act, 1996 and on various judgments, which held that in the wake of a contractual clause, interest need not be paid.[2]

The respondent on the other hand questioned the validity of such a clause which denied the right to get interest. It was submitted that Clause 16(2) of the GCC was void on the ground that it was immoral and contrary to public policy which therefore was liable to be struck down in accordance with Section 23 of the Indian Contract Act, 1872. And if the clause in question is not existent, then the Petitioner is liable to pay the interest, both prior to the reference to arbitration and post-reference to arbitration till the passing of the Award.

On an analysis of the issue at hand, it is clear that this is already a well settled position, sufficiently supported by several decisions of the Apex Court. The most recent of these decisions include the case of *Union of India* v. *M/s. Bright Powers Projects (I) P. Ltd*.[3] and *Union of India* v. *Krafters Engineering and Leasing Private Limited*.[4] In these cases clauses similar to Clause 16 of the GCC in the present case were considered and it was clearly decreed that the grant of interest by an arbitral tribunal would be barred by the contract between the parties.

This is in fact provided for in the Arbitration and Conciliation Act itself as is evident under Sec 31(7)(a)of the Act which states as follows:

"Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made."

Even on a plain and simple reading of this section it is clear that the non-obstante clause at the beginning of the section provides for an option to the parties to make any agreement to the effect of restricting the power of the arbitral tribunal to grant interest on any award.

The approach taken by all the previous decisions with regard to similar cases has been limited to a mere mechanical application of this section to declare all such clauses valid and limit the power of tribunals to grant interest. All the cases referred to by the petitioners apply the provision squarely, that there shall not be any interest payable if the same had been agreed upon by the parties.[5] Keeping in mind the fundamental

1 *Union of India* v. *N.K. Garg*, 224(2015)DLT668.

2 *Sree Kamatchi Amman Constructions* v. *Divisional Railway Manager (Works), Palghat & Others*, (2010) 8 SCC 767.

3 (2015) 7 SCALE 638.

4 (2011) 7 SCC 279.

5 *Sayeed Ahmed & Co.* v. *State of UP & Ors.*, (2009) 12 SCC 26.

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contractual principle enshrined in *L'Estrange* v. *F Graucob Ltd*.,[6] the only valid outcome of this conundrum would usually be to enforce the contract and bind the parties with what they agreed upon. However, in the present case an interesting new approach has been taken which serves to broaden age old common law principles which have otherwise been thought to lose all relevance in current times.

The Court relied on the arguments put forth by the Respondents, stating that the clause in question was invalid. To reach this surprising conclusion, the Court heavily relied upon Section 23 of the Indian Contract Act, 1872 and concluded that the clause was void as it was against public policy. By referring to precedents,[7] the court held[8] that where law has a public interest/ public policy element, such rights cannot be waived by an individual person inasmuch as such rights are a matter of public policy/ public interest. The court followed the principle laid down by the Supreme Court in the *G.C. Roy case*,[9] which stated that a person whose money had been wrongly withheld is entitled to be reimbursed under whatever name the same is called; be it damages or interest.

Observing that "morality" is a fluid concept the court held that there could be no universal standards laid down for the same.[10] Although, what usually came under the ambit of morality were matters relating to or restricted to sexual immorality, in the current day and age, Mehta J. speaking for the court went on to explain that immorality also applies to situations when monies are wrongfully retained by not paying interest which has accrued over a long passage of time. Furthermore, according to Nariman J,[11] it was observed that morality under Section 23 of the Contract Act is confined to sexual morality, but if it were to be interpreted in today's world, morality would go beyond the sexual character and would apply even in the case of agreements which were not illegal but would not be enforced given the prevailing mores of the day. At the same time he restricted any interference on this ground to an instance which would shock the court's conscience.

Implications of the decision

The implications of this decision are yet to actually be evaluated, as before it is accepted by the Apex Court, it will still hold minimal value in terms of practical application. However, it is indeed interesting to see that even the oldest of doctrines can be challenged due to changing circumstances. This decision if judged in this light is extremely important, as it challenges the exiting norms of morality and dovetails the same with public policy, which is something that has not been done since 1959 when the case of *Gherulal* was decided.

Mehta *J.* has not expressly elaborated on this point, but the tone of the judgement seems to follow the age old principle of *commodum ex injuria sua non habere debet*[12] (No one should benefit from their wrongs). In usual circumstances it is understood that one must abide by what one has agreed to in terms of a contract. However, as every position has exceptions and there can be circumstances where the law must allow or disallow certain clauses in order to safeguard larger interests. In today's modern contracts, most agreements in specific industries are already pre-decided in a standard form which is usually applied mindlessly at times. This is further aggravated in circumstances where there is a clear difference between the positions in which parties are signing the contract. For instance, a party which is in need of the contract would not be in a position to actively object to a clause similar to Clause 16 in the current case, and being the weaker party may end up facing the brunt of the repercussions as they will end up with only a pittance in comparison to their original investment.

Another important aspect to note is that in the current commercially driven society allowing such clauses to derogate from paying interest in case of damages would essentially leave a party with no remedy for breach of contract. This is primarily because receiving the original sum after 30 years, without interest or adjustment for inflation would prove as little solace to any businessman. This type of a clause also has the negative effect of allowing the party committing the breach to enjoy benefits of the money by depositing it and deriving interest during the pendency of litigation.

Conclusion

It will be interesting to observe the treatment that this judgement receives in the Supreme Court, as keeping in mind the overwhelming number of judicial pronouncements against it, it seems unlikely to stand. However, it has helped bring in an important question of equating party rights and restricting burdensome clauses to ensure meaningful justice rather than justice on paper. The current Contracts Act provides for "undue influence,"[13] however not all cases can fit under its bracket and a lot of circumstances are liable to slip under its radar.

It is also important to keep in mind India's woes in rendering decisions within a reasonable timeframes. Suits for Damages such as the one in the present case generally take anywhere between 10-30 years to be resolved, by which point the original sum that was in dispute means barely anything to the original party as economic forces such as inflation and the losses suffered in terms of the interest would leave the party

6 [1934] 2 K.B. 394.

7 *India Financial Assn., Seventh Day Adventists* v. *M. A. Unneerikutty and Anr*. (2006) 6 SCC 351.

8 *ibid.*

9 *Secy., Irrigation Deptt., Govt. of Orissa* v. *G. C. Roy*, (1992) 1 SCC 508.

10 *Gherulal Parakh* v. *Mahadeodas Maiya & Ors*., AIR 1959 SC 781.

11 *Associate Builder's* v. *DDA*, 2014 (4) ARBLR 307(SC).

12 *Kusheshwar Prasad Singh* v. *State of Bihar*, (2007) 11 SCC 447, 451; *ONGC Ltd.* v. *Modern Construction & Co*., (2014) 1 SCC 648, 653.

13 *Indian Contract Act*, 1872; S 16.

with a justice only in words and in a decree without any actual justice being served.

The primary function of law is to provide justice and not allow for unjust enrichment of lawbreakers. The law as it stood prior to this decision allowed people to contract out of an obligation to pay interest and derive benefit from wrongfully retained monies by investing the same in the pendency of litigation. The repercussions of such a clause would be that contract breaking could form a new method of making money, as one would only have to return the principal sum after all the litigation is over. This would effectively make lawbreaking and not complying with contracts beneficial to a party, something unthinkable for any lawful society.

Not So NEET-ly Done : A New Medical Entrance Exam?

Ujval Mohan*

In 2012, taking note of the hardship of numerous entrance exams that medical college aspirants needed to appear for, the government decided to conduct one uniform entrance exams for all medical colleges based on which admissions would be carried out. NEET, was thus introduced by way of notifications made by Medical Council of India (MCI) and Dental Council of India (DCI). These notifications were challenged across the country, and effectively NEET could only be conducted once after which it was struck down by the Supreme Court in 2013, in the case of Christian Medical College Vellore and Ors. v. Union of India and Ors., reported at (2014) 2 SCC 3050.

2013 SC Ruling

Over 178 writ petitions challenging the MCI and DCI's NEET regulations were clubbed and decided by a three judge bench of the SC. The notifications were challenged on a plethora of grounds. The petitioners were mainly different medical colleges that were run by private enterprises, religious or linguistic minorities. The case, Christian Medical College v. Union of India was heard by a three judge bench which struck down NEET by a majority of 2:1.

Petitioners, only of whom was CMC, argued that MCI or DCI had no statutory authority to conduct entrance examinations, and was wrongfully doing so under the guise of laying down minimum standards of medical educations, as provided for in their respective Acts. The SC agreed with this contention.

Further, the notifications were contended to be in violation of the private college's right to practice their trade and business under Article 19(1)(g). The Supreme Court noted that while Article 19(6) provides for restriction to the right guaranteed under 19(1)(g), the notification issued by MCI was not covered by the reasonable-restriction-exception.

Some medical colleges were institutions run by minority groups. Another interesting ground of challenge was that the MCI notification violated the rights of the minority groups to administer their educational institution in a manner of their choice under Article 30. It was argued that admissions are an important facet of administration, and a common entrance test would destroy the essence of the rights of administration guaranteed under Articles 29 and 30. Petitioner CMC, Vellore's history was traced back as a one-bed clinic opened by the daughter of a missionary in order to highlight its religious background in light of Article 30. Additionally, it was reiterated that CMC was an unaided institution run by an association of around 53 Christian churches. The entrance test conducted by CMC was fine tuned over the years and reflected the ideologies it wished to espouse. The petitioners relied on the 11 judge bench ruling of State of Karnataka v. TMA Pai Foundation to assert that professional courses came within the ambit of Article 30. Further, Harish Salve appearing for the petitioner tried to circumscribe the power of the government to 'regulation' the procedure of admission by fixing minimum requirements etc, as long as the procedure of the institution itself was fair and reasonable. On this aspect, the majority opinion on this case was that none of the authorities cited approved of nationalisation of seats by way of compelling institutions to admit candidates chosen by the State. It held that such a move would not be called a 'regulatory measure.' The SC observed that such a move was in violation of rights guaranteed under Article 30 and was not a reasonable restriction contemplated under Article 19(6) to curtail the said fundamental rights.

Mr. Harish Salve also argued that healing the sick was a part of the teachings of Christ documented in the New Testament, and CMC which furthered this religion tenet definitely also attracted the provisions of Article 25. Therefore, it was argued on behalf of the petitioner that providing medical care and education were acts done in furtherance of religion. Based on these submissions, the petitioner supported their argument on twin pillars of Articles 25-26 and Articles 29-30.

The SC also considered the question of the hierarchy between the state made regulations and the regulations made by MCI in light of the addition of 'Education...medical education' in the concurrent list of Schedule VII. Interestingly, it was argued by the petitioners that the regulations made before the amendment was void, and could not be validated by the amendment.

In the course of examining the scope of powers of the MCI, the SC noted that under Section 19A, the MCI was empowered

to prescribe minimum standards of medical education; and in general that the powers of the Council were recommendatory in nature. By way of the impugned notification, the Council introduced a single eligibility-cum-entrance exam with overall powers vesting with the Council. It was argued by one of the petitioners that there was also a lapse in the process of prescribing 'minimum standards' since due consultation was not taken from the appropriate bodies as mandated by the MCI Act. One petitioner also argued that NEET would be conducted only in English and Hindi, and would severely disadvantage students who study in other vernacular languages.

Out of these considerations of fundamental rights, the petitioner also contended that the notifications made by way of subordinate legislations cannot take away fundamental rights guaranteed by the Constitution.

On the other hand, the respondent MCI submitted that as per the MCI Act, the Council had the power to make regulations regarding the standards of education, and contended that admissions is very much incidental to 'standards of education.' Moreover, it highlighted that conducting NEET would prevent severe hardships on behalf of the students who would be forced to travel across the country to appear for numerous exams. It was also highlighted that many of these exams were plagued with issues like malpractice and corruption. MCI argued that the test met the reasonableness standard set by the SC in St. Xavier's College Society v. State of Gujarat. Union of India further supported the arguments of MCI by adding that the rights on minority institutions under Article 30 were not adversely affected by the introduction of NEET. It was pointed out that the rights guaranteed were not absolute rights and could be regulated under special circumstances. It was also clarified the NEET-UG would be conducted in multiple regional languages, to address the concerns of a few petitioners.

The judges in majority agreed with the arguments advanced by the petitioner and held that the rights of the MCI to make regulations does not flow anywhere near the fundamental rights guaranteed to the petitioners under Articles 19, 25-26, and 29-30. As long as the various admission procedures conform to the triple test (fair, reasonable, transparent) indicated by the SC, the same cannot be objected to. Therefore, the SC concluded that the MCI was not empowered to conduct NEET.

While this was the view adopted by Altamas Kabir CJ and Vikramjit Sen, J; Anil R Dave, J, dissented. He opined that that medical education needs to be of optimum quality, and one of the facets of 'quality' was admission of students. The judge took note of trauma caused to patients and the hardship to society in general when the doctors or dentists are not as competent as they are expected to be. Conducting NEET under the supervision of an apex body would ensure that there are no extraneous considerations that would be made, and admission would strictly be merit-based. He held that fetters cannot be imposed on the powers of MCI/DCI which are empowered to uphold the high quality of medical education. The major thrust of his opinion was keeping in mind the interest of upholding high standard of medical education, as had been endorsed by the SC in Dr. Preeti Srivastava v. State of MP. Therefore, he held that non-publication of the regulations strictly as prescribed by the Act was not fatal to the regulations. He held that conducting NEET was a reasonable regulation under Article 19(6). He held, thus, that NEET would not violate any fundamental rights.

However, the most significant observation made by Dave, J, early on in this judgement was regarding the lack of time given for consideration of the case as between the judges. He noted that there was insufficient deliberation between the judges due to paucity of time.

What happened in 2016

In April, 2016 a batch of review petitions were filed by the Union government and the MCI seeking review of the 2013 ruling. The chief grounds for review were that certain binding precedents were ignored and the fact that there wasn't sufficient deliberation on the bench. Towards the end of the month, the SC scrapped all entrance exams conducted by private medical colleges, state governments as well as colleges run by minority groups, and allowed NEET to be conducted as a common entrance test. In order to quell apprehensions about the May 1 test, the SC ordered that the May test will be NEET-I, and NEET-II would be conducted on July 24 where students who wanted more preparation could appear. The SC dismissed all pleas of various parties regarding lack of preparation time, students who were trained in regional languages etc.

The final order of the SC on NEET was greeted with huge hue and cry by various states and confused students. Many were of the opinion that it was too late to prepare for the NEET syllabus, when, for two years, they had put in their hard work keeping in mind their state syllabus.

NEET Ordinance and Current Position

The Union cabinet has cleared a NEET ordinance that partially nullifies the effect of the SC order to the effect that states with their own board examinations as a criteria will be allowed to conduct their own examinations. However, the July 24 exam will be conducted as scheduled. The ordinance had been presented to the President for promulgation, when President Mukherjee expressed reservations about the ordinance route to conduct NEET. The President, after extensive considerations with the Union Health Minister and Attorney General has given assent to the ordinance.

Therefore, state medical colleges need not conduct examination by way of NEET for this academic session; however aspirants of private medical colleges and those under the central government will need to take NEET on July 24. Nevertheless, from the following academic session, all state medical colleges will also come within the ambit of NEET.

In re: Inhuman conditions in 1382 prisons[1]

Ashwini Shantaram*

Background

Conditions in the Indian prisons have remained poor or rather worsened for about 35 years now. Numerous cases regarding prison reforms have appeared before the courts but very little has been done toward them. In the cases *Suni Batra (II) v. Delhi Administration*,[2] *Rama Murty v. State of Karnataka*,[3] *T.k Gopal v. State of Karnataka*,[4] the court recognized prisoner's rights and the hopeless state of prisons in the country but hardly suggested any reforms. This particular landmark case was admitted as a Public Interest Writ Petition (PIL) through a letter addressed to the Chief Justice of India by the former C.J.I R. C. Lahoti.

Facts

In the letter the former Chief Justice of India wrote to the Hon'ble Chief Justice of India, the inhuman conditions of 1382 prisons in the country has been described as disturbing, and that the State is responsible for the life and liberty of the prisoners. He also stated that there was no scope for the reformation of the first time offenders nor were they safe from other hardened inmates. He further wrote that he, as a citizen of the country intended that the letter be taken in as a PIL . After the PIL was registered, the Supreme Court, notices were issued to the concerned authorities to produce the conditions of prisons and prisoners in their respective States/ Union Territories. The responses to the notice that the Court received established that although steps had been taken toward reformation, there were inadequacies in implementation.

Issues

1. The over-crowding of prisons and improving the living conditions of the prisoners.
2. Ineffective implementation of the Section 436 (A) of the Code of Criminal Procedure.

1. **The over-crowding of prisons and improving the living conditions of the prisoners.**

The Social Justice Bench by passing an order on 13th March 2015, demanded information by the Union of India on the serious issue of over-crowding of prisons. The Union of India replied with an affidavit but it stated that aggregating information was particularly difficult due to the absence of proper management information systems. Hence, e-prisons application was being developed, and in future would be installed in all States and Union-territories.

It was also stated that funds allocated for the improvement of prison conditions were not properly utilized by most states.

The affidavit also stated that the overcrowding was a cause for inhuman conditions in the prison which was against United Nations Standard Minimum Rules for Treatment of Offenders to which India is a signatory.[5]

It was also asserted that there was a huge number of people languishing in jails for compoundable offences, and some for their inability to provide security or surety for their release. There's nothing mentioned in the affidavit about steps taken to release these prisoners from custody.[6]

2. **Ineffective implementation of the Section 436 (A) of the Code of Criminal Procedure.**

It was stated in the affidavit that the Ministry of Home Affairs advised the states and the UTs to effectively implement the provisions of the Section 436 (A) CrPC to reduce overcrowding in persons, and also to constitute a Review Committee[7] with the District Judge as the chair, the District Magistrate, and the Superintendent of Police as its members who meet every three months to review the cases of the under trial prisoners. It was suggested that the prison authorities might conduct a survey of under trial prisoners who have completed more than

1. AIR 2016 SC 993 Writ Petition (Civil) No. 406/2013 (Under Article 32 of the Constitution of India).
2. *Suni Batra (II) v. Delhi Administration*, 3 SCC 488 (1980) ("it has been ruled that fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration.").
3. *Rama Murty v. State of Karnataka*, 2 SCC 642 (1997) (This court listed nine problems prisons face, and need reforms for.).
4. *T.k Gopal v. State of Karnataka,* 6 SCC 168 (2000) ("therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, maybe a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy.").
5. *supra* note 1, at Para 20.
6. *supra* note 1, at Para 21.
7. *supra* note 1, at Para 16.

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one- fourth of their maximum sentence, and make them aware about their right to bail.

National Crime Records Bureau provided a statistical data which said the total under trial prison population was 67%,[8] and it was argued to be extremely high. It was suggested that plea bargaining, establishment of fast track courts, holding lok Adalats, ensuring proper means to produce the accused before the court, and arranging for legal aid for the inmates were essential for bringing down the number of under trial prisoners.

Judgment

The Court issued the following directions after considering the suggestions made in the affidavit.[9]

1. The Prisoner Management System Software found in Tihar Jail to be developed and installed in other jails of the country.
2. National Legal Services Authority to assist by appointing a nodal officer to look into these issues.
3. Set up an Under Trial Review Committee in every district with the assistance of the National Legal Services authority in co-ordination with the State Legal Services Authority and the Ministry of Home affairs.
4. The Under Trial Review Committee to take into account cases of all under trial prisoner who can avail the benefit of the 436 (A) of the Code.
5. Ministry of Home Affairs to ensure the Bureau of Police Research and Development to undertake the review of the Model Prison Manual (circulated in 2003) every three months.
6. NALSA to instruct the State Legal Services Authority to immediately consider cases of the prisoners who are in custody because they cannot furnish bail. The Court asserted that poverty must not be the reason for imprisonment.
7. Steps to be taken to urgently take up cases of the persons imprisoned for compoundable offences. The Court has urged for the efforts to be made to expedite the disposal of these cases.

Later, NALSA filed a compliance report in which they have stated that steps have been taken to set up Under Trial Review Committee in every district, and a Project Management consultant was appointed to prepare a detailed e-prisons project report. They also stated that efforts were made to expedite the disposal of cases on compoundable offences.

The Social Justice Bench passed that the committee looking into the Model Prison Manual to include members of the civil society, NGOs and also academicians. The committee was also to provide for a crèche for the children of the prisoners, particularly the women prisoners.

Additional Solicitor General submitted that the all the Director Generals have been informed to include the Secretary of the District Legal Services Committee as a member, and to integrate the software regarding the Prison Management into the cloud within the period of two months.

NALSA again filed a compliance report dated 14th October 2014,[10] stating that the Under trial Review committee has been set up in every district but some states haven't responded.

An affidavit dated 16th October 2016 was filed by the Ministry of Home Affairs stating that progress was made with regard to provisions of Sec 436(A) CrPC, Model Prison Manual was approved, and an evaluation of software for the e-prisons project was completed. However, the Court stated that the Under Trial Review Committee did not meet regularly in a few states, and the overcrowding persisted. The Court emphasized that we need to remember the Civil and Political Rights of the prisoners, and the necessity of treating prisoners with dignity and as human beings.[11] Hence, the Court further issued some directions:[12]

1. The Under Trial Review Committee had to meet every quarter, and that the Secretary of the District Legal Services Committee to attend every meeting. The Under Trial Review Committee should look into aspects to effectively implement the provisions of Section 436 (A) CrPC.
2. The Secretary of the State and District Legal Services Authority to co-ordinate with each other, and the Court cautioned that "legal aid for the poor does not become poor legal aid."[13]
3. The Secretary of the District Legal Services Committee to also look into the issue of the prisoners for compoundable offences.
4. The Director General of police/Inspector General of Police to ensure that the funds are properly utilized.
5. The Ministry of Home Affairs to ensure that the Management Information System to be put in place in all State and District prisons at the earliest.
6. The Ministry of Home Affairs to also conduct an annual review of Model Prison Manual.
7. The Under Trial Review Committee to look into the issues raised by the Model Prison Manual, and to pay regular visits to the prisons.

The Court also added that a similar manual as the Model Prison Manual is prepared for the juveniles in terms of the Juvenile Justice (Care and Protection of Children), Act 2015.

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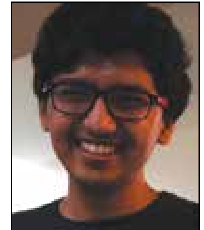
8. *supra* note 1, at Para 17.
9. *supra* note 1, at Para 23.
10. *supra* note 1, at Para 41.
11. *supra* note 1, at Para 54.
12. *supra* note 1, at Para 56.
13. *supra* note 1, at Para 56(3).

Conclusion

This landmark case in prison reforms is undoubtedly of great significance in impacting the conditions of the life of the prisoners that we most often neglect. This judgment covers a wide range of issues concerning prison reforms and has managed to provide logical and workable solutions to different problems that the prisoners face. The judgment emphasizes on the fact that prisoners are also human, and they need to be treated with dignity. The positive aspect of the judgment is the effort of the authorities in rehabilitating and reforming the prisoners which in my opinion is highly commendable.

Whaling in the Antarctic (Australia v. Japan)

Shiksha Maniar*



Official citation: Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014, p. 226.

Bench: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge ad hoc Charlesworth; Registrar Couvreur.

Prelude

Whaling is considered a tradition in Japan. With its origins dated way back to the 12th century, the Japanese are the most ruthless whalers in the world. On an average around 900 whales are killed every year for the use of cooking, making oils, fertilizers, making folding fans etc. Whales also finds a place in religious beliefs of the Japanese.

This carrying out of large scale whaling causes a great deal of concern, particularly amongst the western nations that are in close proximity to the Japanese whaling operation and were a witness to the wide spread massacre. In 1949 the International Convention for the Regulation of whaling was signed in order to conserve and regulate whaling and its industry. The agreement set up various obligation to be met with regard to the matter of Whaling. More specifically one of the article adopted by it commission were article X (1) (a) which imposed a moratorium on all whaling operations for the purpose of commercial undertakings. However there were serious violation of this moratorium by the Japanese calling for immediate interjection from the world community.

Summary of Relevant Facts

As mentioned above the ICRW issued a moratorium on all whaling operation for the purpose of commercial activities limiting the number of whales that can be killed to zero. It further imposed article VII (b) which provided that there cannot be any killing of the Minke whale stock in the Southern Ocean Sanctuary.

The said articles were complied with by the government of Japan. However the Japanese set up the 'Japanese Whale Research Program under Special Permit in the Antarctic' which engaged in the killing of the Antarctic Minke under the blanket reason of it being done for the purpose of scientific research. The killing of whales was allowed to be done under article VIII of the convention as contracting nations were allowed to kill the whales if non-lethal methods for undertaking research did not suffice. Under JARPA I there were 6800 whales that had been killed. These figures were ghastly higher that previous 31 year figures that amounted to only a total of 840 killings for the purpose of research in the pre moratorium period. The capture meat was further taken to the harbour for commercial sale and thus in violation of the moratorium.

The Japanese government further launched JARPA II, which also focused on the killing of not only the Antarctic Minke but now also of other species of whales found in the southern ocean Sanctuary. This time too, high number of whale deaths were reported with most of them ending up in the market as cooking meat.

Subsequent intervention and negotiations did not amount to anything with Japan asserting justification of its action as being of scientific purpose. With this the Australian government took the initiative of questioning the legitimacy of Japan's actions and to see if they were congruent to their international obligations.

New Zealand filled an intervention claiming that JARPA II did not have any rightful permit to conduct its research.

Issues Raised

1) Whether there has been a violation of Article V (1) (a) and Article VII (b) of the IRWC convention.
2) Whether the Japan's action were legitimate under Article VIII of the IRWC convention.
3) Ceases all operation of JARPA II and gain further assurance from Japan to not undertake whaling activities contrary to international obligations.

Averments made

The agents for Australia submitted that the Japanese in pursuant of the JAPRA project were in violation of the article VIII of the IRWC convention as their activities did not meet the necessary requirements to be called 'scientific research'. They further went on to submit that there are four criteria that need to be met for an operation to be called as scientific. As the Japanese research programme does not meet these criteria it

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cannot receive sanction under the said article and therefore is in violation of the convention. The court must for this primary reason call for an end to the JAPRA II programme.

New Zealand contended further in its intervention that according to Article VIII there needs to be special permit that has to be granted for the scientific research, however the permit cannot fail to recognize other obligation that exist in the convention. In this case as Japan's actions have an effect on the conservation of the stock, there is a failure of meeting obligation of the convention with the grant of such a permit and therefore the grant is violate of the convention.

Japan in its counter contends that there is adequate scope of the JARPA project to be considered scientific. In counter to Australia's submission, the Japanese laid down the objectives of the JARPA programme and contended that the programme was rightful under Article VIII as the objectives clearly show the existence of the programme for the 'purpose of scientific research'. It dismisses the claims made by the New Zealand government by stating that granting of the permit is a sovereign matter, in compliance with its right given in the article and there cannot be interference by the court as the conditions to grant such permits are allowed to be subjective varying from nation to nation. With regards to the claim of commercial operations that were taking place through this programme, the Japanese countered that the sale of the meat was for the purpose of funding the research project.

Judgement

With regards to the contention about the validity of the special permit granted and the claims made by New Zealand, the court held the article VIII is a Non obstante clause to the rest of the convention and therefore the special permit granted under it should not be interpreted from the perspective of the obligations rendered by the whole convention. Therefor the grant of the special permit is valid. The state is also granted relevant margin of appreciation with respect to assessment of the requirements to check what meets criteria for being considered scientific research.[1]

The court rejected the criteria submitted by Australia and further stated that it is not necessary for it to lay down a generalized meaning of the term 'scientific research'.[2]

With regard to more substantive claims the court observed that with the margin of difference between the actual size of population of whales taken for research and the sample size needed, shows that there is no objective approach towards the scientific research that is claimed to be carried out, as similar results or experiment could be done with a much smaller sample. Further the court held that there was no need to use lethal methods to the study of some of the species and the fact of its use was not necessary to meet the research objectives of the JARPA II.[3] It also observed that, the programme not having a particular time frame, casts a shadow on the scientific validity of the programme.[4]

Under the scheme of article VIII the use of lethal methods are not considered to be unreasonable but the scale at which lethal methods were used by Japan is held to be unreasonable.[5]

The court concluded that though the purpose of setting up of the JAPRA II project with its objectives were valid but it implementation and execution was not it pursuance of the objectives set and therefore in violation of Article VIII, paragraph 1, that is the JAPRA II was not for the purpose of Scientific Research.

With regard to specific claim made by the Applicants as for violation of Article X (d) and Article VII (b), the court held that all actions that do not come under Article VIII will be subject to these two provision and thus in the instant matter the activities of JAPRA II are in violation of both the provisions. Under these submissions the court found the need to go beyond a declaratory order and hold that there must be immediate revoking of the authorized permit given to JARPA II and no further permit should be granted to the programme under Article VIII of the IREC convention.[6]

Comment

With this Judgment the court showed the ability of the ICJ to interact between legal question and questions of fact. For example the court allowed for distinct evidence collecting, expert opinion in order to truly understand the complexities and the scientific basis for the formulation of a correct viewpoint. It recognized that in order to ensure rightful adjudication on specialised issues, it needs to have correct of the knowledge of the subject matter. However, even with the expertise that the court was exposed to, it duly accounted for the subjective interpretation of issues that can be held across nations. The court thus did not make a clear or universal guideline to what 'scientific research' is, as it recognised that a verity of notions about the term can be held by different members of the international community. Making any stringent criteria could have a counterproductive effect. The world court, therefore in this case, got a right mix of fact- law considerations.

Recent Developments

The international court had ruled that there is no way that it can specify any guideline for the prevention of research project on whales. If such guidelines were made then the Japanees could reject the ICJ's jurisdiction to do so. In this regard Japan commenced a new research project in 2015.[7] It did not need the permission of the IWC even though it sent a request for one. On 1 December, Japan sent its first fleet to capture Minke Whales in the Antartic.

1 p. 253, ¶ 61 *of the* Judgment.
2 p. 258, ¶ 86 *of the* Judgment.
3 p. 272, ¶ 146 *of the* Judgment.
4 p. 280, ¶ 181 *of the* Judgment.
5 p. 292, ¶ 224 *of the* Judgment.
6 p. 294, ¶ 229 *of the* Judgment.
7 *Darby, Andrew (19 October 2015). "Japan rejects international court jurisdiction over whaling". The Sydney Morning Herald.*

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