BHOPAL GAS TRAGEDY AFTERMATH: DEVELOPMENT OF ENVIRONMENTAL POLICY IN INDIA

Abhishek Kumar
abhishekcnlu6@gmail.com | An Independent Researcher

The disastrous Bhopal Gas Tragedy occurred on December 2, 1984 at the premises of Union Carbide India Limited officially killing 3000 people and unofficially around 10,000 people. After the leakage of 27 tons of deadly “Methyl Isocyanate”, about half a millions of people became direct victims of the said tragedy and a large number of people are exposed to fatal diseases and environmental hazards in the surroundings. During the manufacturing process at the UCIL, highly volatile and toxic Methyl Isocyanate (MIC)\(^1\) was combined with Alpha-Nepthol to produce Sevin, a kind of pesticide which was widely used in India at that time.

Introduction

The Supreme Court of India in 1989 reached at the settlement mentioning that Union Carbide Corporation (UCC) was to pay 470 million US dollars as full and final settlement of all civil and criminal claims by the victims by giving the justification that “this court, considered it a compelling duty, both judicial and humane to secure immediate relief to the victims.” For the Bhopal gas victims despite sincere efforts made by various civil society organizations justice remain a far distant dream over the last thirty years. With this all, the tragedy can surely be said to be a stigma in the Indian history as the government, firstly, for giving a boost to the economic development started industrialization in densely populated areas putting people’s lives in danger, and secondly no strict surveillance mechanism was put in place to cope up with the situations arising after a disaster.

Following this disaster, the Government of India soon passed the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985.\(^2\) Under this Act, the Government in 1985 itself formulated a scheme known as the Bhopal Gas Leak Disaster Scheme for the registration, processing, and determination of compensation to each claim and appeals arising from thereon. However, the saddest part of this incident is that even after the passage of more than 30 years the victims are still running from the pillar to the post in search of just and

---

\(^{1}\)MIC is produced by treating Methylamine with Phosgene. Phosgene, a lethal gas used during First World War against Germany is derived by mixing toxic carbon monoxide gas with chlorine.

\(^{2}\)The Act gave power to the Central Government to represent all claimants in appropriate forums, appoint a Welfare Commissioner and other staff and to discharge duties connected with hearing of the claims and distribution of compensation.
fair justice. It is, therefore, appropriate to recall the words of Prof. Upendra Baxi: “The broken world of Bhopal victims invites a jurisprudence of human solidarity.”

2. Legislative Developments after the Bhopal Gas Tragedy

When the Constitution of India came into being, at that time, there were no direct provisions related to the protection of environment. The emphasis on issues relating to environmental concerns increased with the passage of time as the country faced newer challenges as regards environmental damage. The constitutional framers, in fact, did not mention direct provisions in the constitution learning that Indians, who are too close to the nature to disturb her to an alarming level.

In India, a sharp decline in natural resources has been observed all across the country following the liberalized move of the government in the year 1991 i.e. LPG. In 1991, the country faced a major foreign exchange crisis which made the economic position of the country very vulnerable. To give a further push to the economic development of the country, a large number of industrial units were established by the government. After the Bhopal tragedy i.e. after 1984, the country witnessed a sea change was observed. Several comprehensive enactments including Environmental Protection Act, 1986, legislative amendments, rules and regulations relating to the environment with a view to having a strict vigil on industrial activities were passed.

Before the tragedy, Ms. Indira Gandhi went to attend the Stockholm Declaration wherein she focussed a lot on equity while addressing the conference. Further, this concept gave rise to a new concept named “Sustainable Development”. In the term, the word “sustainability” is derived from the Latin word “Sustinere” which means to hold up. Sustainable Development is a pattern of resource use that aims to meet human needs not only to the present generation, but also for future generations. The principle of

---

6 India made an international commitment at the United Nations Conference on the Human Environment held at Stockholm in June 1972 to protect and improve the human environment in order to prevent hazards to human life and other living creatures, plants and property.
7 The term was used at the first time by the “Brundtland Commission” describing that “meets the needs of the present without compromising the ability of future generations to meet their own needs.”
intergenerational equity has its genesis in Principles 1 and 2 of the Stockholm Declaration, 1972.  

2.1 The Environment (Protection) Act, 1986

The Environment (Protection) Act, 1986 is popularly known as mother legislation or umbrella legalization as it covers almost all the possible dimensions relating to the environment. It is, in fact, a comprehensive piece of legislation which extends to the whole of India. The opening preambular words of the Act goes like this “……to provide for the protection and improvement of environment and for matters connected therewith.” If we look closely upon the wordings used “matters connected therewith”, one thing is clear therefrom that the legislators are intended to cover all matters arising in the future to come with the help of the comprehensive legislation i.e. Environmental Protection Act, 1986. Further, it also makes an attempt to define the term “Environment”9 which includes water, air, land, and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, microorganisms and property.

Moreover, the Act empowers the central government to take all such measures as it deems necessary or expedient for the purposes of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution.10 In this connection, the central government has the authority to issue direct written orders including orders to close, prohibit, or regulate any industry, operation or process or to stop or regulate the supply of electricity, water or any other service.11

Other powers granted to the central government to ensure compliance with the Act include the power of entry for examination, testing of equipment, etc.12 and the power to take samples of air, water, soil or any other substances from any place for analysis.13 The Act prescribes the penalties for a prison term of up to 5 years or a fine of up to Rs.1 lakh, or both.14 The Act has a unique section which underlines where an offence under this Act is also an offence under any other Act, the offender shall be punished only under the other Act.15

Under the Act, “Environmental Protection Rules” were also framed in the year 1986 itself so as to deal with specific environmental issues like Hazardous Waste, Biomedical Waste

---

8Wherein Environment has been taken to be resource basis for the survival of the present generation and right to be beneficially used by the future generations.
9The Environment (Protection) Act, 1986 (Act 29 of 1986), Sec. 2(a).
10The Environment (Protection) Act, 1986 (Act 29 of 1986), Sec.3.
11The Environment (Protection) Act, 1986 (Act 29 of 1986), Sec. 5.
12The Environment (Protection) Act, 1986 (Act 29 of 1986), Sec.10.
13The Environment (Protection) Act, 1986 (Act 29 of 1986), Sec.11.
14The Environment (Protection) Act, 1986 (Act 29 of 1986), Sec.15.
etc.\(^{16}\) The EPA, 1986\(^{17}\) largely bears the influence of the commitments made by the world community at the Stockholm Declaration, 1972. The government evolved guidelines for submission of yearly environmental audit/statement\(^{18}\) by units requiring consent under the Water Act, Air Act and authorization under Hazardous Wastes (Management and Handling) Rules. Several important aspects of the environment are contained in Sec. 8 of the 1986 Act which imposes a liability to comply with procedural safeguards in disposal of Bio-Medical Waste.

### 2.2 Public Liability Insurance Act, 1991

The Public Liability Insurance Act, 1991 is a well-intended act to provide immediate relief to the victims affected by accidents while handling hazardous substances and for matters connected therewith or incidental thereto. The Act incorporates a provision making it mandatory for the industrial units that every owner shall take out before he starts handling any hazardous substance, one or more insurance policies and renew it or them from time to time before the expiry of validity.\(^{19}\) The Rule 11\(^{20}\) states that an owner shall contribute to “Environmental Relief Fund” a sum equal to premium. The accidents by reason of war or radio-activity are excluded from the scope of the Act. The Act further imposes a duty and liability for providing relief specified in schedule for such death, injury or damage.\(^{21}\) However, it is also the duty of the state to provide for effective remedies against the environmental hazards.

The Act mandates the need to provide for mandatory public liability insurance for installations handling hazardous substances to provide minimum relief to the victims. Such insurance policy, on the one hand, would safeguard the interests of the victims and on the other hand, it would also enable the industry to discharge its liability to settle large claims arising out of major accidents. Moreover, the positive aspect of this Act which is in the public interest is that the availability of immediate relief would not prevent the victims to go to courts for claiming larger compensation.

---


\(^{19}\)The Public Liability Insurance Act, 1991, Sec.4.


\(^{21}\)The Public Liability Insurance Act, 1991, Sec. 3.
Moreover, the Act also recognizes the principle of “No fault liability or Absolute Liability.” 22 The claimant shall not be required to plead that the accident was due to any wrongful act. The owner is also liable to pay other compensation, if any. Every application for claim 23 should be filed to the Collector within 5 years of the occurrence of accident. The Collector should decide the amount and inform the parties within 15 days. The insurer shall pay within 30 days. The Collector shall have the power of Civil Court and the case should be disposed of within 3 months.

The Public Liability Insurance (Amendment) Act, 1992 states that the 1991 Act could not be implemented on account of the insurance companies not agreeing to give insurance policies for unlimited liability of the owners. This Amendment limits the liability of insurance companies to the amount of insurance policy but the owner’s liability shall continue to be unlimited under the Act.

The Act provides for creation of an “Environmental Relief Fund” 24 established by the Central Government with the additional money collected from the owners having control over handling of hazardous substances. This fund was also required to be used to meet the requirement of providing immediate relief to the victims. As per this Act, the owner shall be liable to pay relief as specified in the Schedule: 25

(i) Reimbursement of medical claim up to Rs. 12, 500 in each case;

(ii) Relief of Rs. 25,000 per person for fatal accident in addition to the reimbursement of medical expenses up to Rs. 12,500;

(iii) For permanent total or permanent partial disability or other injury or sickness, the relief will be (a) reimbursement of medical expenses incurred up to a maximum of Rs. 12,500 in each case and (b) cash relief on the basis of percentage of disablement as certified by an authorized physician. The relief for total permanent disability will be Rs. 25,000;

(iv) Compensation for loss of wages due to temporary disability will be Rs.1000 per month for a maximum of 3 months; provided the victim has been hospitalized for a period exceeding 3 days and is above 16 years of age.

22The principle of absolute liability states when an enterprise is engaged in hazardous or inherently dangerous industry and if any harm results in account of such activity then the enterprise is absolutely liable to compensate for such harm and that 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. In the case of absolute liability, even the defences available under strict liability would not apply. The occupier of the industry will be liable for the injury and the damage caused to the environment irrespective of fault on his part.
24The Public Liability Insurance Act, 1991, Sec. 7A.
25See Section 3(1), The Schedule.
(v) Up to Rs. 6,000 depending on the actual damage, for any damage to private property.

Thus, the Public Liability Insurance Act, 1991 can be considered to be a milestone in the Indian context as in our country a vast population is vulnerable due to many reasons like poverty and illiteracy. The people living in the nearby areas are more prone to disastrous accidents due to the poor implementation of rules and regulations in place. The very objectives of the Act can be met when the vulnerable sections are saved from hardships arising out of delayed relief and inadequate compensation.

2.3 Establishment of National Green Tribunal

The Supreme Court of India laid down the foundation of Environmental Courts in India by passing a remark in the case of “M.C.Mehta v. Union of India” 26 that “Since cases involving issues of environmental pollution, ecological destruction and conflicts over natural resources are increasingly coming up for adjudication and these cases involve assessment and evaluation of scientific and technical data, it might be desirable to set up Environment Courts on the regional basis with one professional judge and two experts drawn from the Ecological Science Research Group keeping in view the nature of the case and the expertise required for its adjudication. There would be of course a right of appeal to the Supreme Court from the decision of the environment court.”

The urgency of Environmental Courts can be understood by the fact that the environment is the base for survival of all beings on the earth. If the environment is at stake, it may lead to serious repercussions in the near future. As we all know that a large backlog of cases pending before several courts in the country present a gloomy picture before all of us. In this regard, if environmental cases are delayed for a long time, it would not be a healthy practice towards environmental justice for the country as a whole. The expeditious disposal of cases especially relating to the environment must be taken as a priority issue.

To give effect to the international commitment 27 and to provide for a forum for effective and expeditious disposal of cases arising from any accident occurring while handling any hazardous substance, the Government of India enacted the National Green Tribunal Act, 2010 to fulfill the long standing demand. The Act was enacted in response to the recommendations of the Law Commission of India and the Indian Supreme Court which

---

26 AIR 1987 SC 965.
27 The Principle 11 of the Stockholm Declaration, 1972 states that “the environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.” The Principle 13 of the Rio Declaration, 1992 states that “states shall develop the national law regarding liability and compensation for the victims of Pollution and other environmental damage.”
highlighted the large number of environment-related cases pending in the courts. The Act finally come into being on June 2, 2010.

The National Green Tribunal has, no doubt, added a new chapter in the field of environmental litigation in India and has remained successful in drawing the attention of the people as regards critical environmental issues. Unlike its predecessor, the National Environment Appellate Authority, its five benches have wide ranging powers to adjudicate upon any dispute that involves questions of seminal importance to the environment as specified in Schedule-I. This power coupled with technical expertise has exponentially strengthened the environmental protection regime in the country. In a number of decisions, the Tribunal has proved its efficiency in resolving environmental disputes.

Tough the National Green Tribunal is headquartered at New Delhi yet its four circuit benches all across the country have undeniably ensured door step justice to the people. It is crystal clear that mostly poor people who are subject to the victims of environment pollution come to the tribunal with the help of non-governmental organizations working at the grassroots level.

3. Procedural Development after Bhopal Gas Tragedy Case

3.1 Initiative of Judicial Activism

Finding vacuum on the point of environmental concerns, the courts especially Supreme Court of India went a step further and applied the concept of Judicial Activism in the Indian context to bridge the legislative gap. The credit for the same can be attributed to two of the most revered Judges of the Supreme Court Namely Justice V.R. Krishna Iyer and Justice P.N. Bhagwati who widened the scope of Article 21 of the constitution to meet the constitutional objectives for the poor and the deprived.

29The Act mandates for the effective and expeditious disposal of cases relating to environment protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to prisons and property and for matters connected therewith or incidental thereto.
31Armin Rosencrantz and Geetanjoy Sahu, “Assessing the National Green Tribunal After Four Years” Vol. 5: Monsoon JILS.
32The tribunal is functioning in full swing with its four circuit benches established in Bhopal, Pune, Chennai and Kolkata. The recently established branch is at Kolkata.
33The judiciary plays the central role in the enforcement of legislations and interpreting the laws going extra miles to render justice to the needy.
With the passage of time, in India also the trajectory of environmental pollution has reached to a threatening level. The environment is considered to be the very basic element of human survival; therefore, its protection has drawn not only national but international attention too. In this regard, the statement of Justice Lodha is worth mentioning herein as he rightly puts that “Judiciary exists for the people and not for vice-versa.”

If all or any of the fundamental rights is infringed by a state action then the citizen or the person as the case may be may approach the Supreme Court under Article 32 or the High Courts under Article 226 having territorial jurisdiction in order to get their redressal. It is very interesting to note that Article 32 itself is a fundamental right and the courts has no power to refuse in its direction to grant appropriate remedy if the violation of any fundamental right is proved.

The idea of the Social Interest Litigation or Public Interest Litigation came from “action popularis” of the Roman Jurisprudence which allowed court access to every citizen in matters of public wrongs. The Supreme Court by relaxing the process of “Locus Standi” allowed PIL to enable the poor, downtrodden, under-privileged, and ignorant to be heard. In the Mumbai Kamgar Sabha, Bombay v. Abdulbhai Faizullah and Ors. the Supreme Court of India made conscious efforts to improve the judicial access for the masses by relaxing the traditional rule of “Locus Standi.”

In the case of Ramsharan Autyanuprasi and Anr. v. Union of India and Ors. the Court observed that the public interest litigation is for making basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social, economic and political justice.

3.2 Principle of Absolute Liability

The Principle of Absolute Liability came as a result of farsighted approach followed by the apex court setting aside all the exceptions provided in the case of Rylands v. Fletcher. The proposition involved in this case is that a person who for his own purpose brings on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it

34The Supreme Court and the High Courts can issue any order, direction, or writs including the writs in the nature of Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo Warranto.
35According to the “Locus Standi” rule, only those persons can approach the court for their remedies, whose rights have been infringed. Any petitioner having no ‘Locus Standi’ cannot be heard in a court of law.
36According to the concept of PIL, any public spirited person or an organization can approach to the courts seeking remedies on behalf of the people who cannot approach to the courts because of their social, educational and economical situations.
37AIR 1976 SC 1455.
38AIR 1989 SC 549.
39(1868), L.R. 3 H.L. 330.
at his peril and, if he fails to do so, is *prima facie* liable for the damage which is the natural consequence of its escape.

The apex court finding the principle held in *Rylands case* inadequate in the Indian context, evolved a new principle to mitigate the challenges arising out of environmental pollution as it is often said that law cannot afford to remain static.\(^{40}\) Judicial thinkers should not be constricted by reference to the law as it prevails in England or in any other foreign country. Bhagwati. J., therefore, states in “*M.C. Mehta v. Union of India*”\(^{41}\) that, “We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England.”

Having evolved the Absolute Liability Principle, the Supreme Court of India has made the public stand stronger than ever before. The poor and indigent people have taken a sigh of relief. Now, it is crystal clear that if an enterprise is engaged in a hazardous or inherently dangerous activity, it will be strictly and absolutely liable to compensate all those who are affected by an accident. Moreover, such liability is not subject to any of the exceptions which operate vis-à-vis the tortuous principle of strict liability under the rule in “*Rylands v. Fletcher*.”

**Conclusion**

Marine biodiversity is the prosperous and magnificent variety of plants and animals that live in watery habitation. It is the quantity of diverse native species, or species adequateness. Some marine organisms endure in the deep sea, whereas others, like water striders, subsist floating along the water surface. So protecting and maintaining biodiversity is necessary for the wellbeing of our environment and for the development of human life. Human beings depend on various marine plants, animals and their ecological functions for their survival. Aquatic and terrestrial biodiversity are sources of food, medicine, shelter, energy and the raw materials that is required for survival. Although it is hardly ever recognized, each marine genus or species has a significant role in making lives comfortable, healthier, easier and more dynamic. More or less, all the components of environment are equally important for ecosystem. Though there are many laws for the protection of biodiversity but still there is need for proper implementation and for proper implementation there is need of awareness among the common people. Therefore, the world community has focused on creating awareness among the common people by arranging various conventions, conferences and declarations so that conservation and preservation of marine biodiversity can be done for present and future generation. Thus, it can be concluded by saying that

---


\(^{41}\) AIR 1989 SC 424.
exploitation of marine biodiversity must be done but it should be done in a sustainable manner.
CONSTRUCTING LEGAL STRUCTURE
FOR MAINSTREAMING ENVIRONMENTAL CONSERVATION
VIS-À-VIS COMMUNITY RIGHTS

Mohammad Haroon Rashid

Anu Mishra

Community rights are the rights which deal with the rights of the people who are basically living in a particular local area. The effect of globalization has brought a devastating effect on the fact that certain people have been deprived of their basic rights whereby their existence on the earth has become a threat due the very policies and the act of the government. Tribals are considered to be the aborigines of the land and are therefore indigenous people, and account to 7.5% of the total population of the country. This very fact itself is explanatory that they are a significant part of the society. The present article throws light on the contemporary issues related to the tribal rights, with certain provisions mentioned in the constitution such as Article.14, 21,244, Vth Schedule and much more. The authors try to draw the attention towards certain groups among the Tribals which are facing problems in the present scenario owing to the fact that they are deprived of their right to participation when the policies are framed relating to the usage of resources. The paper explains the significance of the land when it comes in relation with that of tribal people. The paper further lays significance on various laws as well as committee reports made by the government, such as national association of local councils, local planning authorities etc.

Introduction

Tribals are a group of people that very much come under the citizenship of our country and are also said to be a significant part of the country. One needs to be in trepidation as being a responsible citizen of the country because the constitution of the country which itself thrives to achieve socio economic justice, is itself making things more complicated and difficult for its very own people by making such laws which are coercive in nature, and thus this amounts to distress in the society. Tribal are the indigenous people who have such sense of affection to their place and land on which they have been brought up that, they are not willing to leave it. The economy of scheduled tribes is mainly based on agriculture and the forests area in which they live in. The main problems of tribals being exploited are poverty and illiteracy. Since Independence, various planned efforts have been made for development of these people, thereby bringing more uniformity in the administrative units like tribal blocks, integrated tribal projects etc. in various states having tribal population and formulation of tribal sub-plans and quantification of funds for tribal areas can be counted as important step taken by the government, but a lot has to be done in this area.
Attachment towards the Property

“Every Man has a property in his own Person: This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are property of his.” -John Locke

This term property in its particular application means “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual”. The dominion which the man owns has the materialistic value, in which the hidden interests of a man is vested and due to this hidden interest he makes himself more attached to the property and therefore has an attachment to its life. The restatement (First) of Property defines ‘Property’ “as anything, tangible or intangible whereby a legal relationship between persons and the State enforces a possessory interest or legal title in that thing”. This reconciling relationship between an individual, property and the State is referred to as property regimes, whereby this gives rise to the issue of rights related to property.

The reason for affection and the struggle for survival

Man is said to be affectionate of certain things especially to what they possess and the area in which they live in, and the same is applicable to tribals. Their attachment to the land is something that cannot be explained in those easy words, but can be stated that the main reason of these people having affection towards their land is due to the fact that they don’t have any other material kit to possess other than the land, whereby the land in which they live in has the value and emotional attachment for them. Land also seems to be security to them for coming generation. The main stay of the tribal is that more than 90 percent of them are dependent on the agriculture and allied activities, and their economy is primarily agro based, whereby land is only the tangible asset.

The right to property pursuant to Article 300A of the constitution of India speaks about the right to property and thus has particular significance for indigenous and tribal peoples, because such guarantee of the right to territorial property is a fundamental root for the advancement of indigenous communities’ spiritual life, integrity, culture and economic survival.

---

3 RC Verma, Indian Tribes Through the Ages (Ministry of Information & Broadcasting Indian tribes throughout the ages 2nd ed., 1995)
4 Article 300 A of the Indian Constitution 1950: “No person shall be deprived of his property save by authority of law.”
It is a right to territory that covers the use as well as enjoyment of its natural resources. It is directly related, even a pre-requisite, to enjoyment of the rights to an existence under conditions of right to food, water, health, life & dignity. It is also vital to understand that the cultural identity of indigenous and tribal peoples which is shared by their members, but it is inevitable that some members of each group will live with less attachment to the corresponding cultural traditions than others.5

2. State Obligations towards Indigenous and Tribal People

India and welfare of tribal peoples6

India has been successfully experimenting with federalism during the last half a century. And it should be said to the credit of the system that India has succeeded in affording protection of human rights of its citizens including the members of the tribal communities.7

The Constitution of India, it may be noted, does not define the term “Scheduled Tribes”. Instead, Article 366(25)8 refers to Scheduled Tribes as those communities who are listed in accordance with Article 342 of the Constitution. According to Article 3429 of the Constitution, the Scheduled Tribes are the tribal communities or tribes or; part of or groups within these tribal communities and tribes that have been declared as such by the President of India through a public notification. The Constitution of India provides for a comprehensive framework for the socio-economic development of Scheduled Tribes and for preventing their exploitation by other groups of society. It provides the necessary safeguards for the rights of tribal peoples in Articles 1510, 1611, 1712 and 2313 of the constitution. Article 4614 of the Part IV of the Indian Constitution known popularly as the directive principles of state policy which are “fundamental in the governance of the country” states that the State has the duty to take care for the educational and economic interests of the poor people.

7See, Ministry of Tribal Affairs, Government of India at http://tribal.nic.in/index1.html, last viewed on 28/08/2015.
8Article 366(25) A OF THE INDIAN CONSTITUTION 1950: “‘Scheduled Tribes’ means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution;”
9Article 342 A OF THE INDIAN CONSTITUTION 1950
10Article 15 OF THE INDIAN CONSTITUTION 1950
11Article 16 OF THE INDIAN CONSTITUTION 1950
12Article 17 OF THE INDIAN CONSTITUTION 1950
13Article 23 OF THE INDIAN CONSTITUTION 1950
14Article 46 OF THE INDIAN CONSTITUTION 1950
Further Article 330\textsuperscript{15} of the Constitution of India makes reservation of seats for Scheduled Tribes in the House of People. Article 335\textsuperscript{16} requires the government to consider the claims of Scheduled Tribes in appointments to services and posts in connections with the affairs of the Union or of a State.

\textit{Introduction and background: Forest, conservation and protected area laws in India}

The government of India has found that its traditional methods of forestry and biodiversity conservation approach in the country have not had a very positive impact on the regeneration and protection of forests.\textsuperscript{17} Over the decades it has given way to certain shifts in the policy and programme designs towards forestry where regeneration of forest cover is now being conceived by making local communities inclusive partners of protection and sharing of the benefits of forests around them, but has not been implemented properly. The other important aspect is the recognition of the diversity of biological resources in the country and communities' traditional livelihood and social practices of management and protection as significant not only in the cultural sense, but also in administrative, management as well as economic definitions.\textsuperscript{18}

In India, the majority of the population depends on land and forests for their survival and livelihood, ownership and utilization of forest resources were vested with local communities or traditional governance structures until the advent of the British. The administration of the natural resources and its forest wealth in India started in 1864 by the British followed by the Indian Forest Act of 1865, which was the first attempt at legislation.\textsuperscript{19} With this began the shift in ownership of forests from people to the State thereby leading to the beginning of the conflict between State and communities over protection and utilization of forests. The Indian Forest Act which came into being in 1927 brought in three significations legal entities into the forest policy – the specific interpretation and legal mechanisms in defining Reserved Forests, Village Forests and Protected Forests.\textsuperscript{20} The concept of protected forests takes roots in this Act, giving the State government the right to declare any forest lands or waste lands not declared as reserved in the country and have corresponding state laws to protect the tribal people as enshrined in the Fifth

\textsuperscript{15}ARTICLE 330 OF THE INDIAN CONSTITUTION 1950
\textsuperscript{16}ARTICLE 335 OF THE INDIAN CONSTITUTION 1950
\textsuperscript{19}K.K. MISRA, PEOPLES AND ENVIRONMENT IN INDIA 11 (DISCOVERY PUBLISHING HOUSE 1ST ED., 2001)
\textsuperscript{20}Id.
Schedule.\textsuperscript{21} Though the Fifth schedule speaks of, for the protection of tribals, the method of implementing the adequate measures have not been fruitful.

\textit{Ethics of Socialism and the core of social contract theory}\textsuperscript{22}

The connotation ‘socialism’ is common ownership. This means that the resources of the world are being owned by all the entire global population. Those people ‘owning’ certain personal possessions do not contradict the principle of a society based upon common ownership. In practice, common ownership will denote one and all having the right to partake in decisions on how global resources shall be used. It means that nobody can take personal control of resources as they are beyond their own personal possessions.

\textit{Social Contract Theory}\textsuperscript{23}

The idea of the social contract is basically based on the, believe that the state only exists to serve the will of the people, and they are the source of all political power enjoyed by the state. They can choose to give or withhold this power, thus it has to be understood in the light of the general will\textsuperscript{24} whereby people want to be governed in a manner according to their will. Social Contract; from this Social Contract the general will can be devolved. The general will be the result of people forming an association for a common goal. Their goal is “the protection of the person and the property of each constituent member. By joining together, the people retain those rights that they submit to each other but also acquire the right of protection. Those rights that they protect are the core values of the general will. Then further John Locke’s property theory\textsuperscript{25} has to be also brought into the focus whereby it speaks about the fact that the land gets the value only when the labourer’s effort is included in that, “\textit{The real price of everything, what everything really costs to the man who wants to acquire it, is the toil and trouble of acquiring it. What everything is really worth to the man who has acquired it, and who wants to dispose of it or exchange it for something else, is the toil and trouble which it can save to himself, and which it can impose upon other people.”} Thus the state cannot take away the basic rights of the tribals were by the taking away of rights become a threat to their very existence.

\textit{State approach towards Local Communities with regard to Forests and Tribal People}

\textsuperscript{21} Mahendra Mohan Verma, \textit{Tribal Development in India: Programmes and Perspectives} 516 (Mittal Publications 1st Ed., 1996)

\textsuperscript{22} Supra note 1.


\textsuperscript{24} Urmila Sharma & S. K. Sharma, \textit{Western Political Thought} 473 (Atlantic Publishers and Distributors Vol 1 1st Ed., 2006)

\textsuperscript{25} Supra note 1.
The policing attitude ruled the system of governance which considered local forest dwelling communities as ‘encroachers’ and ‘exploiters’ of the forests. In many of the states which have tribal populations, there are revolts and resistance against these highhanded State laws. Tribal uprisings which were reckoned as part of the freedom movement in India, are in reality, struggles against the oppressive forest regulations of the British and its exploitation of local communities in order to plunder these forest resources. This oppressive attitude has continued Post Independence where the State was considered the supreme authority over the forests and the local communities were regarded as exploiters of the forests. Besides, the nature of development pursued by the State led to large-scale displacement of forest dwelling.

Communities and also led to submergence of vast areas of forests for big development projects. Industries have been given priority of access to forest resources or of destruction of forest cover, at highly subsidized costs whereas the same was denied to local villages. Notification of forests took place without proper consultation with the people and without recognition of their customary habitations and resource use within the forest areas.

Settlement of rights of forest dwelling communities has been conducted in a highly lackadaisical manner leading to harassment of people by the forest officials. With the increase in paper, timber, mining and other industries in the forest areas bringing in new populations, the pressure on the local communities and on the natural resources multiplied spreading a vicious web of exploitation of the resources and of innocent tribal communities traditionally living in these regions. The realization of the need for dialoguing with the local communities began when government failed to stop the large-scale deforestation which was caused both by people, large development projects and by industries. The alarming rate at which thousands of hectares of forests and biodiversity have become extinct, has led to the administration’s focus on re strategizing its intervention in forest conservation.

Social forestry programmes that have been initiated which in the 90’s took the shape of joint forest management programmes under the influence of both internal rethinking and external financial institutions. Quasi legal institutions and programmes like the Joint/Community Forest Management (J/CFM) programmes for forestry are being created currently in various states for conserving forests with huge external aid, also bringing in policy changes. At the national level there are contradictory processes happening in the forestry management approaches. On the one hand, there is a great impetus to participatory models of forest governance like the JFM programmes and on the other, there is an increasing pressure on local forest dwelling communities by the State by terming them as ‘encroachers’. And ‘illegal’ inhabitants of the forest regions the greater pressure being on the tribal people whose existence in these regions for centuries is not being recognized.
Contribution of Tribals in preserving environment and how they are deprived of their rights

Tribals are thought to be devotees of nature and also very close to wildlife. The reason behind it is the fact; these people are living in forest since prehistoric time. Therefore, their understanding of forest is superior to the said authorities of the government. In several cases the eco-friendly and empathetic nature of these tribals is noticeable. For example, before scientist could interpret the threat of tsunami it was found that the tribal of Andaman and Nicobar were fully aware of it. It has been said that the tribals can “smell the wind, they can gauge the depth of the sea with the sound of their oars. They have a sixth sense which we don’t possess”. Though these people are mostly illiterate and less civilized but there understanding of nature is far more reliable and accurate than highly educated scientists. Which saved many tribal lives in case of tsunami? Scientist were late in understanding the threat caused by nature but had there been proper communication between these people and government many lives of fishermen and others could have been be saved.

The connection of the tribal and Mother Nature does not end with their skill of analysing the threats of nature. Their interest in nature spreads to the extent of loving and caring for the flora and fauna. In various tribal groups they consider certain wild animals as a symbol of god; this forbids them from killing those animals. In all the tribes some or the other animal is worshipped. This means less killing of such animals. For example, The Gonds in India worship a horse-god, the warali tribe of Maharashtra worship Waghia the lord of tiger. This way certain endangered species like tiger get protection from being hunted.

Furthermore, the concept of sacred grooves is fundamentally associated with Tribals. Sacred grooves are a traditional way of biodiversity conservation. Forest dwellers believe in conservation of natural resources so they created sacred grooves, which is usually dedicated to some local deity or to treat as the home of dead ancestors, for example, Scrub forest in Thar Desert, of Rajasthan is also a sacred groove which is maintained by the Bishnois. Cutting trees or hunting in such areas is totally restricted by tribals. In early 1970s Chipko moment was started, Bishnois took active part in order to save forest from getting deforested. Few precious tribal lives were also lost. This shows how Government in disguise of development is not only compromising the life of tribals but also destroying biodiversity. These were earlier protected by the tribals. But now unfortunately with the decline in the number of tribals, along with the urbanization there is also decline in the activities that are been carried on by the government, eventually it is the biodiversity getting endangered. This also leads to ecological imbalance. Earlier whatever was protected by the...
tribals using traditional method is now getting obsolete due to the new techniques applied by the government.

Tribals have just not restricted their contribution till protection and preservation of environment but they have also contributed in other social things as well, like other Indians, tribals also participated in Indian struggle for independence. Forest dwellers rebellions also protested against British government. For example The Kuki Uprising in Manipur,1st Rampa Rebellion28. These all fought for India against British government. But the ironically even after Independence, these people were deprived of their rights Tribals are still the victim. Government in the name of National Interest has taken away everything possible from them. Under the disguise of forest reservation, their Mother Land was taken away. They were deprived from their means of survival. Whenever it was possible these tribals adjusted and left the forest area required by the government. They shifted themselves in other interior parts of the forest. In post-independent India due to the growing population and urbanization these forest dwellers were asked to vacate the forests.

After, suffering from all the possible miseries when at certain instances government of India did made some regulations in support of these tribals, it was found in several surveys that these regulations were never implemented properly. In many circumstances it was found that forest officers were corrupted and inefficient which made implementation of such polices more difficult, for example Land Regulation Act, 195929 was enacted. Later in the year 1970 and 1971 various amendments were also made in this act in order to stop land alienation from tribals to non tribals. But because of lack of proper surveillance such enactments and amendments never helped the tribals. “Similarly in Utnur Taluk in South India “final patta” was regularly issued by the Utnur tahsildar but Forest department never recognized it. On top of all such atrocities it was also establish that forest authorities started a campaign to evict tribals from such allotted land. They started collecting fines irrespective of whether there was any yield and also irrespective of the economic position of the tribals.”30

After suffering from all such misfortunes whenever tribal have asked for their rights or rebelled against the independent government, all have gone in vain. In these situation tribals fight for their rights but unfortunately the voice of these people does not reaches government executives of Democratic India ended this by inhumanly killing such innocent, spirited people. There are many such happenings where instead of understanding tribals and fulfilling their simple demands. Government officials took ruthless steps. These

28SAROJNI REGANI, WHO’S WHO OF FREEDOM STRUGGLE IN ANDHRA PRADESH?
29A.K. PANDEY, TRIBAL SOCIETY IN INDIA (MANNAK PUBLICATION 1997).
30BAIDYANATH SARASWATI, TRIBAL THOUGHT AND CULTURE (CONCEPT PUBLISHING COMPANY, 1ST ED., 1991)
discussed facts bring in lime light the sufferings and how the Forest Dwellers are deprived of their rights.  

Conclusion

From the facts already discussed in this paper it seems that framers of our constitution gave importance to the tribal community. For example, presence of Article 366(25), 342, 15, 16, 17, 23; basically all these articles safeguard some or the other tribal rights for the upliftment and development of tribal. Therefore, With the general standpoint one can find that government is doing its best for the tribal.

Government relationship with the tribal looks unpretentious and protective. However, in everyday life reality is different. Tribal are the most suffering people in India. After independence whole nation out of government polices benefited but still there were some who remained untouched and tribal being one of them were being deprived of their rights. Instead of returning back tribal’s lands which were taken away from them during British time, in the name of “Nations Interest” more tribal’s lands were taken away from tribal’s. Moreover, whenever government has made some policies in favour of Tribal’s, the objective of such polices were never fulfilled. The very basic problem was in ineffective implementation of polices. For this also government bodies were responsible who failed in following proper surveillance techniques in order to make sure that tribal get benefited out of such polices. To some extends for such conditions of tribal our society was also responsible. In many incidents it was found that non-tribal people either forcefully or illegally took tribal land. This also shows government’s casual behaviour towards such illegal atrocities because of which even society openly benefited itself. But it was duty of the state to ensure protection against any such activities. In most of the cases where injustice was done to tribal the main reason was absence of government’s interest towards such tribal.

Altogether looking after all related aspects, in conclusion authors try to suggest that government should become more active towards tribal so that whatever benefits our framers and lawmakers want to give to tribal, should reach them in full. Along with government our society also needs to show caring nature towards deprived and blameless tribal.

PROTECTION AND CONSERVATION OF MARINE ENVIRONMENT AND BIODIVERSITY IN INDIA

Subhashree Mukherjee
Assistant Professor, JRSET College of Law

-----------------------------

Bashudeb Guha
Advocate, Calcutta High Court

The quantity and assortment of plants, animals and other living beings that subsist in different ecosystems is known as biological diversity. The fertility of biodiversity rests on the climatic considerations and soil quality. It is sine qua non for ensuring the endurance of human species because it provides diverse resource to humanity. The marine environment has a very high biodiversity and contributes to many significant processes that have straight and circuitous impressions on both marine and terrestrial environments. However, due to several factors like oil spills, dumping and sea bed mining the marine biodiversity is getting affected. Therefore, there is a need to analyse the relationship between marine biodiversity and related factors. Standing at this point, the international community took baronial measures to protect and conserve marine biodiversity by arranging many international conferences, conventions and treaties. In this connection the United Nations Convention on the Law of the Sea, 1982 is a vital one. The parliament of India also made a good follow up of the proposals and rules prescribed by the international community for the protection, preservation and conservation of marine biodiversity. Though many issues have been addressed amicably, a lot more is awaiting to be achieved.

Keywords: Marine Biodiversity, Marine Environment, United Nations, Sea, Law.

Introduction

The term ‘environment’ has a wide meaning but basically it includes air, water and land. Since the Vedic period, it has been the main motive of human kind to protect the environment and to live in harmony. However, in modern times, the concept of environment has changed and now it is being greatly analysed and interpreted by various scientists, environmentalists and researchers. About seventy percent of the total earth’s surface has been taken by the oceans, creating its own biological diversity cycle and contributing in the development process of human life. Presently, over-exploitation and man-made pollution is responsible to a huge extent for the degradation of environment. Due to excessive pollution some species of birds, animals, fishes, plants, corals etc. are already extinct and many are becoming ‘rare species’. These types of extinctions cause huge imbalance in the environment. Therefore, immediately it is necessary to take preventive and protective measures for the preservation and conservation of the environment. Humankind has to live in harmony with the environment. There is need for making a
balance between environment and development. Currently, it is the main duty of humankind to provide and ensure protection and conservation of the environment and its biodiversity.

1. Phylogenies and Concept of Biodiversity

Biodiversity or biological diversity is the variety of life forms within an area. It is variation within and between all species of plants, animals and micro-organisms and the ecosystems within which they live and interact\(^1\). Origin, development, evolution and forms of life have been subject of researches through past centuries. It is an undeniable fact that mankind largely depends on the natural resources even today, standing at the peak of scientific development and technology. Human society depends on natural resources for their survival but unfortunately human activities are responsible for causing huge pollution and the over exploitation of natural resources. For the protection of environment and for creating general awareness regarding this matter, the famous ‘Stockholm Conference’\(^2\) was organized on 1972 and after that United Nations Conference on Environment and Development, popularly known as the ‘Rio-Earth Summit’, was held on 1992 at Rio De Janeiro. This Earth Summit of 1992 achieved Convention on Biological Diversity, 1992 along with other agreements. According to the Convention on Biological Diversity, “Biological Diversity means the variability among living organisms for all sources, including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within, species, between species and of ecosystem”\(^3\).

In pre-independence period, the Zoological Survey of India in 1916 tried for the documentation of flora and fauna of various regions. The Asiatic Society in Bengal and the Indian Museum in Calcutta floored the way of research for better understanding of the concept of biodiversity. After independence, the process of research was further developed by various National Survey Organizations. Presently, India holds 10\(^{th}\) place amongst biodiversity rich nations of the world.\(^4\) India covers 2.4 percent of global space, 16 percent of global population and 9 percent of the global biodiversity\(^5\) and is the seventh largest country in the world. Thus, to preserve and promote biological diversity, the Biological Diversity Act, 2002 was passed by parliament of India. The main objective of the Act is conservation of biodiversity and sustainable use of biological resources. Its overall objective is to encourage actions that lead to a sustainable future.

\(^1\) http://www.wwf.org.au/our_work/saving_the_natural_world/what_is_biodiversity/. (Retrieved on 02.08.2015).
\(^2\) From 5\(^{th}\) to 16\(^{th}\) June, 1972.
\(^3\) The Convention of Biological Diversity, 1992- Article 2.
\(^5\) Ibid.
2. Marine Environment & Biodiversity

Ocean is an indispensable part to support life on the earth. Ocean has huge contribution towards humankind. However, in recent years both at national and international level there is an emerging menace to marine biodiversity due to various human activities. Huge exploitation of fish for commercial purpose, reduction of marine mammals and turtles and over-exploitation of certain coastal ecosystems, such as coral reefs indicate that these resources and their benefits are threatened by human activities. Ocean is a great source of various foods, nutrients, medicines and occupation for significant number of people. Our seashores provide space to live and directly and indirectly create wealth, including millions of employments in diverse industries such as fishing, aquaculture and tourism. The marine environment includes the water of the ocean, the seabed, its subsoil, all marine life of the sea and coastal habitats. Marine resources are the precious assets and heritage that must be protected, conserved and properly utilized. The ocean provides earth's most precious and greatest natural resource. It gives food in the form of fish and shellfish. It is used for transportation for both travelling and shipping for commercial purposes. It is mined for minerals e.g. salt, sand, gravel, and some manganese, copper, nickel, iron and cobalt can be found in the deep sea and drilled for crude oil. The ocean indirectly contributes in the process of eradication of carbon from the atmosphere and providing oxygen which regulates earth's climate. The ocean also provides resources for biomedical organisms with huge potential for fighting disease. The oceans have been fished for thousands of years and fishing is an essential part of development of human society. Fisheries are also important to the world economy. Early fisheries have been founded in Europe, Italy, Portugal, Spain and India. At present fisheries of the developing nations provide 16 percent (approximately) of the total world's protein. Marine environment not only provides food but also natural substances including ingredients for biotechnology and pharmaceuticals.

3. Doctrine of the Freedom of Seas

The doctrine of ‘freedom of sea’ has accentuated the spirit of maritime law. This doctrine was established and applied under Roman law but the concept of this doctrine was spiflicated after the Roman Empire. After a long time, in the modern age, Dutch Jurist Grotius again revitalized this concept in his book “Mare Liberum” that is the first book on law of sea, published in 1609. Grotius wrote this book for protecting the right to

---

8 Ibid.
9 Original title: “Mare Liberum, sive de jure quod Batavis competit ad Indicana commercia dissertatio” or in English “The Free Sea or The Freedom of the Seas” is a book in Latin on international law written by a famous Dutch jurist and philosopher, Hugo Grotius.
navigation of his country in the Indian Ocean. The Portuguese landed in India in 1498. At that time, India had already achieved the right of free navigation in the Indian Ocean. Around 300 B.C. the great Hindu economist, Kautilya in his book ‘Arthasastra’ had inscribed the concept of maritime rules. As per the history of marine law, there was commercial relation between Rome and Indian provinces situated at coastal zone of the Indian Ocean. There the freedom of navigation was the rule of sea. On the one hand, India and East Indies had generated the practice of freedom of sea and on the other hand, Europe was in opposite position. After the destruction of Roman Empire, few states of Europe raised a claim over the huge area of sea, which gave birth to number of disputes regarding navigation. According to Justinian, “the sea is justnatural, common to all, as incapable of appropriation as is air and its use open freely to all men.” After 26 years of publication of Grotius’s book “Mare Liberum”, a British scholar John Selden wrote a book named as “Mare Clausum”, where he argued for absolute freedom of sea by the British over the sea. These two books of Grotius and John Selden emphasized two fundamental principles: i) Concept of high seas, and ii) Concept of territorial waters. The Hague Conference of 1930 again developed the doctrine of freedom of sea. After that, various international instruments developed this concept.

4. Sources of Marine Pollution

The key elements of environment are water, air and soil. Human beings reside on land that covers only a limited portion of the planet. However, the water area covers approximately two third of our planet and plays a vibrant role in support of a sound ecological balance of the environment. According to Section 2(a) of the Environment (Protection) Act, 1986 the term environment includes “water, air and land and the inter-relationship which exists among between water, air and land, and human beings, other living creatures, plants, micro-organism and property” and environmental pollution means “the presence in the environment of any environmental pollutant”. Marine pollution is continuously affecting the marine environment. The major accepted sources of marine pollutions are as follows:

**Pollution from Ships**: Pollution from ships can be categorized into: i) operational and ii) accidental. When pollution is caused during the normal operation or functioning of the ship, it is known as operational pollution, for example regular and traditional cleaning of
oil tankers and schedule disposal of oily dregs at sea\(^{19}\), but when pollution occurs due to collision between ships or sinking of large oil tankers in the ocean it is known as accidental pollution. During the Iraq-Kuwait conflict, a large quantity of oil poured into the sea resulting in marine pollution and death of many sea-borne lives. Even on account of oil craft wrecks a good amount of oil dribbles into the ocean\(^{20}\). Sometimes ship discharges cargo residues such as slug, oil deposits and pollutes oceans, waterways and ports\(^{21}\). In most of the cases, vessels intentionally discharge the wastes into the ocean and create hazards and therefore, there are many regulations prohibiting the discharge of illegal wastes into the ocean but apart from water pollution, large vessels and ships also generate noise pollution that disturbs and disrupts life under water. Therefore, ships are one of the responsible factors of marine pollution. Article 211 of the United Nations Convention on the Law of the Sea, 1982 provides some restrictions for the protection of marine environment from vessel’s pollution.

**Ocean Dumping:** Dumping includes disposal of all types of wastes such as hazardous and toxic industrial waste, waste from ships and tankers, sewerage waste, pharmaceutical and biomedical waste, radioactive waste, atomic waste, chemical waste, dumping of plastic and related waste into the oceans and seas, etc. Wastes are generally of two types: i) Domestic waste and ii) Industrial waste. Domestic waste includes wastes from food processing, domestic sewages, various land run off, detergents used for domestic purpose, run off from agricultural field, etc. Industrial waste includes radioactive wastes, chemicals, melted metals, inorganic chemicals and hot waters etc.\(^{22}\) The rivers collect the polluting substances, toxic chemicals, sewages, agricultural and industrial waste, etc. from their pathways and finally give it to the ocean. Therefore, to combat it, Article 210 of the United Nations Convention on the Law of the Sea, 1982 provides restrictions on the dumping of sea.

**Pollution from Atmosphere:** Atmospheric pollution includes highly polluted air, dust blown by the wind, plastic bags blown by the wind, poisonous gases that are the outcome of the industries, etc. Sometimes atmospheric pollution is responsible for the formation of acid rain that causes huge damage to the life above water and life under water. Acid rain is caused due to the emission of nitrogen oxide and sulphur dioxide. Acid rain causes harm to fish and other aquatic animals and it has already exterminated some species of insects and some fish species for example, the lakes and streams of Adirondack Mountains of the United States of America has already lost some species of fish and insects due to acid rain\(^{23}\). In fact, dusts from the Sahara desert moves in the direction of the southern part of the

\(^{19}\) Ibid.


\(^{22}\) Ibid. 16.

subtropical ridge and travels into the Caribbean and Florida during the warm season. Due to severe pollution, the level of carbon dioxide is increasing day by day and side by side, the temperature of the atmosphere is also changing. Ozone layer depletion is also causing global warming because it responsible for the arrival of ultraviolet ray on earth. Article 212 of the United Nations Convention on the Law of the Sea, 1982 provides some restrictions for the prevention of atmospheric pollution.

**Deep Seafloor Mining**: Seafloor comprises of many valuable supplies e.g. Polymetallic nodules, Sulphide deposits, Manganese Crusts, etc. Polymetallic nodules include copper, cobalt, manganese and nickel; Sulphide deposits include some scrap of gold, silver, copper, lead and zinc, and; Manganese Crusts include mainly cobalt, molybdenum, platinum and some vanadium, etc. Once a section of seafloor is found to be suitable for mining, then a mining ship is set up for that mine area. Minerals are extracted from the sea floor basically by using drilling method and by using a conveyor-belt, running to the surface of the ocean where a mining platform extracts the desired minerals. Sometimes, the deposits are mined by means of either hydraulic pumps or bucket method that bring ore to the surface for processing. Removals of minerals cause disturbance to the habitats of marine life. The sediments that are the outcome of mining also adversely affect under water plants and coral reefs. After mining, rest of the resource particles often float in the sea surface and sometimes crude oil also floats in the sea that is very difficult to remove and consequently, it causes great harm to the marine ecology. Therefore, at present marine scientific research is being carried on to ascertain the suitable and appropriate method of mining without causing any damage to the marine environment.

**Pollution from Land Based Activities**: It is a known fact that approximately eighty percent of marine pollution is contributed by land based activities. The hazardous land runoffs are continuously causing harm to the marine environment because hazardous substances are being carried by rivers or by any other water sources and finally enter into the ocean. Surface runoff arising from agricultural farming, urban runoff and runoff from the commercial activity involved in repairing old structures or constructing new ones, including roads and high ways, buildings and related constructions, seaports or water ports and harbours, carries soil and particles loaded with carbon, phosphorus, nitrogen and minerals. This water causes algae and phytoplankton to flourish in coastal areas by using all available oxygen and thus, upset the ecology. Therefore, many national and international laws have been enacted for the prevention of land based pollution activities and for the protection of marine environment.

5. Law relating to Marine Environment & Biodiversity

---

24 Ibid. 18.
26 Ibid.
There are several laws for the protection of marine environment and biodiversity. However, it can be classified into two heads: international law and national law.

A) Role of International Law: In 1972, the United Nations Conference on the Human Environment popularly known as the ‘Stockholm Conference’ was held at Sweden. The main object of the conference was to alert the world about the over exploitation of biological resources and to implement the concept of sustainable development. After the failure of Geneva Conventions of 1958 and 1960, the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) was organized to protect and preserve marine environment. The main concerns of the United Nations Convention on the Law of the Sea, 1982 are as follows:²⁷

i) Issues relating to National Zones: The UNCLOS, 1982 deals with the problem of national jurisdiction i.e. contiguous zones, exclusive economic zones, territorial sea and continental shelf. Problem of resource exploitation from continental shelf and from exclusive economic zone is determined by this convention. Problem of passage of warship from the territorial sea of a country that is not a party to the convention have also been exclusively considered and it further suggested for the modification of laws of territorial sea.

ii) Resource Exploitation from Seabed: One of the main objects of the convention is to unravel the controversy regarding exploitation of marine resources from the seabed, which is beyond natural jurisdiction. The question is who are eligible to exploit or explore the resources from seabed beyond jurisdiction? The developed countries are of the opinion that for exploitation of resources beyond the national jurisdiction there should be a system of licence or authorization and ‘International Machinery’ will grant this licence or authorization to the states and private corporations. However, the socialist countries proposed that an ‘International Seabed Authority’ should be established. This authority will regulate the exploitation areas and this authority will also regulate the licensing system.

iii) Problem Relating to Marine Pollution: In the present world, marine pollution is a burning issue. Due to serious pollution, marine environment is in danger. The UNCLOS provided that every signatory country should make special provisions for the prevention and reduction of marine pollution. It was agreed by the state parties that within 200 miles both national and international laws could be applied. In case of dumping, it was decided that dumping of waste within the exclusive economic zone, territorial sea or within the continental shelf is subject to prior permission of coastal state that has a right to control that particular area.²⁸

²⁷ Ibid. 10 at pp. 30-35.
²⁸ Articles 145, 209, 210 and 215 of the UNCLOS.
iv) Issue of Marine Scientific Research and Technology Transfer: Marine scientific research is essential for the protection of marine ecology and marine environment and it is also required for the progression of countries. Developed countries have some special marine scientific technology to exploit the marine resources but the developing countries are suffering due to lack of modern scientific technology. Modern marine scientific technology helps a lot to exploit marine resources properly and side by side causes very minimum marine pollution. Therefore, this convention tried to make a rule for transfer of marine technology from developed countries to developing countries.

*Convention on Biological Diversity, 1992:* The convention on biological diversity was held on 5th June, 1992. This convention was found approving by all countries worldwide, except Somalia, Andorra, Timor-Leste, Brunei Darussalam, Iraq and the United States of America.29 According to Article 1 of this convention, the main objective of this convention is to preserve and protect the biological diversity and sustainable use of biological resources, fair and impartial distribution of benefits arising out the exploitation of biological resources and to maintain cooperation and technology transfer among the signatory countries of the convention.

Article 2 of this convention provides that “Biological diversity means the variability among living organisms from all sources including, inter alia, terrestrial, marine aquatic ecosystems and ecological complexes of which they are part; this includes diversity within species, between species and ecosystems”.30 Article 2 of this convention also explains about biological resource. It states that “Biological resources include genetic resources, organisms or parts thereof, population, or any other biotic component of ecosystems with actual or potential use or value for humanity.”31

Article 3 of the convention empowers the sates to exploit their own biological resources and also imposes a responsibility to control pollution within jurisdiction and not to cause damage to the environment beyond their jurisdictional limit. Article 5 deals with cooperation among the state parties in case of exploitation and conservation of biological diversity. According to Article 6, each state party should develop their strategies, plans and programmes for conservation and sustainable use of biodiversity. Article 10 of this convention provides that each contracting state party should use components of biological diversity in sustainable and appropriate manner. Article 8 of this convention provides rules for *in-situ* conservation and Article 9 provides rules for *ex-situ* conservation. This convention promotes cooperation among the state parties for scientific research and training for adopting methods of sustainable exploitation of biological resources and Article 17 deals with the exchange of information among the state parties. Article 14 provides rules

30 Philippe Sands and Paolo Galizzi; Documents in International Environmental Law; Cambridge University Press; Second Edition; p. 700.
31 Ibid.
regarding impact assessment and minimizing adverse impacts of exploitation of biological resources. If any exploitation of biological resources is done without appropriate impact assessment then it may generate adverse effects on the environment. Therefore, impact assessment is necessary for every exploitation of biological resources. Like other international conventions, Article 27 of this convention deals with settlement of disputes. Article 27 provides various options for settlement of disputes e.g. negotiation, conciliation, arbitration and submission of disputes in the International Court of Justice.

B) Role of Indian Law: India is very much concerned about protection of marine environment and biodiversity. India has a rich marine biodiversity. The coastline of India is more than 7500 km in length including islands of Andaman and Nicobar groups and Lakshadweep and harbours unique marine habitats that shows a wide variety of marine biological diversity. There are many laws for the protection of marine biodiversity in India. Some of them are as follows:

i) The Constitution of India: Article 297 of the Constitution of India deals with the protection of marine resources. It vests all land, minerals and things of value under the territorial waters, continental shelf and exclusive economic zone in the Union of India and stipulates its usage for the benefit of the Union. Article 297 ensures the right of India over its sea-wealth. The provisions of Article 297 were influenced by a landmark decision of the Supreme Court of the United States of America. In U.S vs. State of California [332 US 18(1975)], it was held that the State of California is not the proprietor of the ocean resources which is underlying within the territorial water but the centre had full control and authority over the marine resources.

ii) The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zone Act, 1976: According to Section 3 of the Act, “the sovereignty of India extends and has always extended to the territorial waters of India (hereinafter referred to as the territorial waters) and to the seabed and subsoil underlying, and the airspace over, such waters”. Section 5 of this Act deals with the law regarding contiguous zone and the power of central government over the contiguous zone and Section 6 of this Act deals with the provisions of continental shelf. The continental shelf of India comprises the seabed and subsoil of the submarine areas that extend beyond the limit of its territorial waters throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of two hundred nautical miles from the baseline. Section 6 (4) of this Act puts a restriction and further stipulates that no person can explore the continental

---

33 Professor M.P Jain; Indian Constitutional Law; LexisNexis; Sixth Edition Reprint 2013; p. 1649.
34 The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zone Act, 1976- Section 3.
35 Ibid. Section 6 (1).
shelf or exploit its resources or carry out any search or excavation or conduct any research within the continental shelf or drill therein or construct, maintain or operate any artificial island, off shore terminal, installation or other structure or device therein for any purpose. However, any person including foreign states with prior approval of the central government through licence or by letter of authority granted by the central government can explore the continental shelf\textsuperscript{36}. This Act also empowers the union government over the exclusive economic zone.

Section 7 (5) of this Act also puts a restriction and further instructs that no person can explore or exploit any resources of the exclusive economic zone or carry out any research or excavation or conduct any research within the exclusive economic zone or drill therein or construct, maintain or operate any artificial island, off shore terminal, installation or other structure or device therein for any purpose but any person or any foreign state with the prior permission of the central government through licence or by letter of authority granted by the central government can explore or conduct research within exclusive economic zone\textsuperscript{37}. The Act also puts a punishment for contravening any of its provisions as per section 11 with imprisonment that may extend up to three years or with fine or with both.

iii) The Biological Diversity Act, 2002: The main objective of the Biological Diversity Act, 2002 is to protect and conserve the bio diversity, sustainably use its elements, share the benefits arising out of utilization of biological resources in a fair and equitable manner and to look after the rich biological diversity of India. It defines biodiversity as “the variability among living organisms from all sources and the ecological complexes of which they are part, and includes diversity within species or between species and of eco-systems”\textsuperscript{38}. It included “plants, animals and micro-organisms or parts thereof, their genetic material and by-products (excluding value added products) with actual or potential use or value”\textsuperscript{39}, in defining biological resources but did not include “human genetic material”\textsuperscript{40}. According to Section 3 of this Act, a person who is not a citizen of India or a person who is citizen but is non-resident or any corporate body which is not registered in India, without endorsement of the National Biodiversity Authority, shall not make use of or explore any biological resource from India or any knowledge associated with it for doing any research or for utilizing it commercially or for performing bio-survey and bio-utilization. According to Section 4 of this Act, no one can transfer result of any research relating to any biological resources without approval of the National Biodiversity Authority. This Act also provides a stipulation regarding intellectual property rights. The Act also empowers the central

\textsuperscript{36} Ibid. Section 6(4).
\textsuperscript{37} Ibid. Section 7(5).
\textsuperscript{38} The Biological Diversity Act, 2002- Section 2 (b).
\textsuperscript{39} Ibid. Section 2 (c)
\textsuperscript{40} Ibid.
government to adopt various strategies, plans, etc. for the conversation of biological resources.

**Conclusion**

Marine biodiversity is the prosperous and magnificent variety of plants and animals that live in watery habitation. It is the quantity of diverse native species, or species adequateness. Some marine organisms endure in the deep sea, whereas others, like water striders, subsist floating along the water surface. So protecting and maintaining biodiversity is necessary for the wellbeing of our environment and for the development of human life. Human beings depend on various marine plants, animals and their ecological functions for their survival. Aquatic and terrestrial biodiversity are sources of food, medicine, shelter, energy and the raw materials that is required for survival. Although it is hardly ever recognized, each marine genus or species has a significant role in making lives comfortable, healthier, easier and more dynamic. More or less, all the components of environment are equally important for ecosystem. Though there are many laws for the protection of biodiversity but still there is need for proper implementation and for proper implementation there is need of awareness among the common people. Therefore, the world community has focused on creating awareness among the common people by arranging various conventions, conferences and declarations so that conservation and preservation of marine biodiversity can be done for present and future generation. Thus, it can be concluded by saying that exploitation of marine biodiversity must be done but it should be done in a sustainable manner.
LETTERM MORTEM A BOON OR A BANE.

Adhiraj Bhandari & Bindya Singla

3rd Year, B.A.LL.B. (Hons.) | Army Institute of Law, Mohali

Dying declaration is a very vital element of the Indian Law. “Words said before death” is enshrined in the principle of “Letterm Mortem” & in a legal sense it is called ‘Dying Declaration’. This research will be dealing with the minutest of details related to the dying declaration. Dying declaration being a very important evidence in Indian law is given in the Section 32 of the Indian Evidence Act of 1872.

Introduction

The Section 32 reads as follows:

Cases in which statements of relevant fact by person who is dead or cannot be found-statement, written or verbal, or relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expance which, under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) When it relates to cause of death.
(2) Or is made in course of business.
(3) Or against interest of maker.
(4) Or gives opinion as to public right or custom or matters.
(5) Or relates to existence of relationship.
(6) Or is made in will or deed relating to family.
(7) Or in document relating to transaction mentioned in Section 13, clause (a).
(8) Or is made by several persons and expresses feelings relevant to matter in question.

A Dying Declaration is considered Credible and Trustworthy evidence as it is based upon the general belief that most people under the shadow of impending death don’t lie.

1. Evidentiary Value of a Dying Declaration
In *K.R. Reddy v. Public Prosecutor*¹, evidentiary value of dying declaration was observed as under:-

“The dying declaration is undoubtedly admissible under section 32 & not being statement on oath so that its truth could be tested by cross-examination, the court has to apply the scrutiny & the closest circumspection of the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to connect a case as to implicate an innocent person, yet the court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe & identify his assailants & that he was making the statement without any influence or rancor. Once the court is satisfied that the dying declaration is true & voluntary, it can be sufficient to found the conviction even without further corroboration.”

In *Khushal Rao v. State of Bombay*², Apex Court laid down the following principles related to dying to dying declaration:

(i) There is no absolute rule of law that a dying declaration cannot be the sole basis of conviction unless corroborated. A true & voluntary declaration needs no corroboration.

(ii) A dying declaration is not a weaker kind of evidence than any other piece of evidence;

(iii) Each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made.

(iv) A dying declaration stands on the same footing as other piece of evidence & has to be judged in the light of surrounding circumstances & with reference to the principle governing the weight of evidence.

(v) A dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, &, as far as practicable in the words of the maker of the declaration stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory & human character.

(vi) In order to test the reliability of a dying declaration the court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed in the night; whether the capacity of man to remember the facts stated had not been impaired at the time he was making the statement by circumstances beyond his control; that the statement has been consistent.

---

¹ 1976 SCC (3) 618.
² AIR 1958 SC 22.
throughout if he had several opportunities of making a dying declaration apart from the official record of it; & that the statement had been made at the earliest opportunity & was not the result of tutoring by interested party.”

As a result, dying declaration is an exception to the Hearsay rule, which prohibits the use of a statement made by someone other than the person who repeats it while testifying during a trial, because of its inherent untrustworthiness. If the person who made the dying declaration had the slightest hope of recovery, the statement is not admissible into evidence.

Word “Dying Declaration” means a statement written or verbal of relevant facts made by a person, who is dead. It is the statement of a person who had died explaining the circumstances of his death. This is based on the maxim ‘nemo mariturus presumuntur mentri’ i.e. a man will not meet his maker with lie on his mouth.

The Apex Court in P.V. Radhakrishna v. State of Karnataka held that ‘the principle on which a dying declaration is admitted in evidence is indicated in Latin maxim, nemo mariturus presumuntur mentri, a man will not meet his maker with a lie in his mouth.

In our country paramount consideration of the courts is to avoid miscarriage of justice as a result of which a special sanctity is attached to the dying declaration, as said in the case of Allah Rakha K Mansuri v. State Of Gujarat, that the miscarriage of justice may arise from the acquittal of guilty is no less than from conviction an innocent. It is an exception to the principle of excluding hearsay evidence rule. Here the person (victim) is the only eye-witness to the crime, and exclusion of his statement would tend to defeat the end of justice. Indian law recognizes the fact that ‘a dying man seldom lies.’ Or ‘truth sits upon the lips of a dying man’ as said in the case of Kachwwa v. State Of Rajasthan. The dying declaration is given special weightage as per section 32 as truth sits on the lips of a dying man s said in the case of Sukhdev Singh v. State Of Delhi. Also in the case of Sant Gopal v. State Of Uttar Pradesh, the court said that it is important to attach intrinsic values of truthfulness to the dying declaration. A dying declaration has a special sanctity attached to it since its given by a person on the dying bed and on the verge of dying and at that solemn moment a person is most unlikely to make any untrue statement as said by the court in the case of Narayan Singh v. State Of Haryana. The court also held in the case of Ram Bihari Yadav v. State Of Bihar & others, that the dying declaration is a substantive piece of

3 AIR 2003 SC 2859.
4 Criminal Appeal No. 1285 of 1998.
5 1986 Cri LJ 306.
6 2003 Cri LJ 4315.
7 1995 Cri LJ 312.
8 AIR 1980 SC 1087.
9 AIR 1998 SC 1850.
evidence. Even the Supreme Court in the case of *Laxmi v. Omprakash*\(^{10}\) held that, The law is well settled that the Dying Declaration is admissible in evidence. The admissibility is founded on principle of necessity. A Dying Declaration, if found reliable, can form the basis of conviction. The dying declaration has a special weightage and sanctity attached to it because usually the victim is the only principal eye witness of the crime, and for the sake of justice and so that a criminal does not go free dying declaration are taken seriously and sometimes become the sole basis of conviction. The Apex Court took a view that under Indian law, for Dying Declaration to be admissible in evidence, it is not necessary that the maker of the statement at the time of making the statement should be under shadow of death and should entertain the believe that his death was imminent. The expectation of imminent death is not the requirement of law\(^{11}\.\)

2. Admissibility & Reliability of a Dying Declaration

For the dying declaration to be admissible in the court of law:

a) There is no dispute that the dying declaration can be sole basis for conviction, however such dying declaration has to be proved to be wholly reliable, voluntary, and truthful and further that the maker thereof must be in fit state of mind\(^{12}\.\)

b) Dying declaration should be such, which should immensely strike to be genuine and stating true story of its maker. It should be free from all doubts and on going through it, an impression has to be registered immediately in mind that is is genuine, true and not tainted with doubts. Further, it should not be result of tutoring\(^{13}\.\)

c) It would be very unsafe and hazardous to sustain the conviction of the accused charged for offences under section 302\(^{14}\.\) read with section 34 of the same act on the basis of dying declaration recorded by special executive magistrate and police officer separately\(^{15}\.\)

d) Where there were infirmities in declaration regarding state of deceased to make oral dying declaration and unnatural conduct of witnesses to whom dying declaration was given by the deceased which was disclosed t the police after two days of death of deceased, accused was entitled t the benefit of doubt\(^{16}\.\)

---

10 AIR 2001 SC 2383
14 Indian penal code 1860
15 Dada Machindra Chaudhary v. State of Maharashatra, 1999 cr lj 4009 (hom)
16 Ram Sai v. State of Madhya Pradesh, 1994 cr lj 138 (sc)
e) Where the deceased victim knew assailants and gave their names to his family members at first opportunity, his dying declaration could be relied upon.\(^\text{17}\)

The dying declaration which as of now is considered to be a very vital evidence is supposed to be scrutinized by the court and is essential for the party using it for their case to prove it beyond all reasonable doubt.\(^\text{18}\) because in a case where dying declaration can form sole basis of conviction one thing has to be taken into account that the accused does not have the power of cross examination and also the dying declaration is an un corroborated piece of evidence.

If the dying declaration in the eyes of court is a piece of tutoring or is not trustworthy or is not credible or the person making it at the time of making the statement was not in a fit state, the dying declaration is inadmissible.

In the case of Bhajju Karan Singh v. State of M.P.\(^\text{19}\)

It was held, if Dying Declaration had been recorded in accordance with law, was reliable and gave a cogent and possible explanation of occurrence of events, then Dying Declaration could be relied upon by Court and could convict the accused on such basis. The Dying Declaration can be corroborated with circumstance evidence.

The Principal on which Dying Declaration depends on:

(i) There is neither rule of law nor of prudence that Dying Declaration cannot be acted upon without corroboration.\(^\text{20}\)

(ii) If the Court is satisfied that the Dying Declaration is true and voluntary it can base conviction on it, without corroboration.\(^\text{21}\)

(iii) The Court has to scrutinize the Dying Declaration carefully and must ensure that the declarations not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.

(iv) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.\(^\text{22}\) Dying Declaration was truthful and voluntarily made then same could be sole basis of conviction of Accused even in absence of any corroboration.\(^\text{23}\) If the Court is satisfied that the Dying Declaration is true and free

---

18 Mohan Singh v. State of Punjab, 1963 air 174
19 (2012)4sc27.
23 Anil Kumar v. State of Delhi, 2014iad(delhi)53.
from any effort to prompt the deceased to make a statement and is coherent and consistent, there is no legal impediment in founding the conviction on such a Dying Declaration even if there is no corroboration.\textsuperscript{24} Even in the pertinent case all the essentials have been fulfilled as it was an voluntary statement, it was not prompted or tortured and it was given in fit state of mind which makes the Dying Declaration more reliable.

3. Burden of Proof

Burden of proof- In \textit{Binay Kumar and others v. State of Bihar}\textsuperscript{25}, It was held by the Hon’ble Supreme Court that, it is basic law in the criminal case in which the accused is alleged to have inflicted physical injury to another person, the burden of proof is on prosecution to prove that the accused was present at the scene and has participated in that crime.

The burden always lies on the prosecution to establish all the essential elements which go to prove the guilt and these elements must be established beyond reasonable doubt\textsuperscript{26}.

It’s the duty of the prosecution to establish a prima facie case and to assert each and every fact that they are contending, the burden that arises from the pleadings depends upon the facts asserted or denied and is determined by rules of substantive or statutory law or by presumptions of law or fact. Such a burden never shifts\textsuperscript{27}.

As per section 101\textsuperscript{28} Burden of proof – whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

As \textbf{Per section 102}\textsuperscript{29} On whom burden of proof lies- the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

\textsuperscript{25}AIR 1997 SC 321.
\textsuperscript{28}Indian Evidence Act 1872.
\textsuperscript{29}Ibid
Section 103\footnote{Ibid} Burden of proof as to particular fact- the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

In a criminal case, it is always the duty of the prosecution to prove the guilt of the accused beyond reasonable doubt\footnote{Canadian Criminal Evidence, second edn, p 416.}.

Where an onus is placed upon him by statute to establish his innocence or some other fact, the extent of that onus is only to satisfy the jury of the 'probability' of that which he is called upon to establish, for he is not required to prove any fact ‘beyond reasonable doubt’\footnote{1963 AIR 174}. In \textit{Mohan Singh v. State of Punjab}\footnote{1963 AIR 174} it was observed by the apex court that the prosecution has to prove everything they contend beyond reasonable doubt.

Moreover, it’s a fact that the occurrences as alleged by the prosecution did not take place. The accused were, therefore, entitled to the benefit of doubt and acquittal\footnote{George v. State 1996 Cr Lj 1755.}. The burden of proof as to any particular fact lies on that person who wishes the court to believe the same\footnote{Pushparanui v. Paulini (1993) 1 LW 219(Mad)}. Also if the prosecution fails to prove beyond all reasonable doubt the suit must be dismissed\footnote{Appa v Subbunna ILR (1889) 13 Mad 60; Radha Mohan v. Kamaldhari AIR 19866 Pat 243; Ram Chandra Sahu v. Madhab Nayek AIR 1953 Cal 484.}. The onus of proof is not discharged by producing evidence which is just as consistent with the allegation of the party on whom the onus of proof lies as with the allegation of the party whom the onus of proof lies as with the denial of the opponent\footnote{Gopinath Sarangi v. Ajharrul Haque AIRR 1027 Pat 225, 101 IC 119.}. Where the undoubted evidence is consistent, both with the allegation of the plaintiff as well as with the denial of the defendant, the plaintiff must fail for the simple reason that he must establish the affirmative of the proposition which he asks the court to accept\footnote{Rameshwar Narain Singh v. Riknath Koeri AIR 1923 Pat 165; Sundarama Reddi v. State Of Andhra Pradesh (1928) 2 Andh WR 536, AIR 1959 AP 215; Swapan DDas Gupta v. The First Labour Court of West Bengal (1976) 1 Lab IC 202.}. Although the circumstances may be suspicious, it is essential to take care that the decision of the court rests not upon suspicion, but upon legal grounds established by legal testimony\footnote{Seth Manik Lal v. Raja Biijoy Singh AIR 1921 PC 69.}.

4. Role of Courts

\footnotesize
30 Ibid
31 Sir John Woodroffe & Sayed Amir Ali's, LAW OF EVIDENCE Ed 17\textsuperscript{th} Volume 3 Pg 3608.
32 Canadian Criminal Evidence, second edn, p 416.
33 1963 AIR 174
34 George v. State 1996 Cr Lj 1755.
35 Pushparanui v. Paulini (1993) 1 LW 219(Mad)
36 Appa v Subbunna ILR (1889) 13 Mad 60; Radha Mohan v. Kamaldhari AIR 19866 Pat 243; Ram Chandra Sahu v. Madhab Nayek AIR 1953 Cal 484.
37 Gopinath Sarangi v. Ajharrul Haque AIRR 1027 Pat 225, 101 IC 119.
39 Seth Manik Lal v. Raja Biijoy Singh AIR 1921 PC 69.
i. It is for the court to see that dying declaration inspires full confidence as the maker of the dying declaration is not available for cross-examination.

ii. Court should satisfy that there was no possibility of tutoring or prompting.

iii. Certificate of doctor should mention that victim was in a fit state of mind. Magistrate recording his own satisfaction about the fit mental condition of the declarant was not acceptable especially if the doctor was available.

iv. Dying declaration should be recorded by the executive magistrate or a police officer only if condition of the deceased was so precarious that no other alternative was left.

v. Dying declaration may be in the form of questions & answers & answers being written in the words of the person making the dying declaration. But court cannot be too technical.

5. Prescribed Form for Recording Dying Declaration

There is no particular form of dying declaration which is identified or admissible in the eye of law. But that must be functioning as a piece of evidence with the proper identification.

In a case, Apex court has also held that, “The crux of the whole matter was as to who had stabbed the deceased & why. These crucial facts are to be found in the dying declaration.”

i. Question answer form

Where the dying declaration was not recorded in question-answer form, it was held that it could not be discarded for that reason alone. A statement recorded in the narrative may be more natural because it may give the version of the incident as perceived by the victim.

ii. Gestures & signs form

In the case of Queen-Empress v. Abdullah\(^\text{40}\) Accused had cut the throat of the deceased girl & because of that, she was not able to speak so, she indicated the name of the accused by the signs of her hand, it was held by the full bench of the Allahabad High Court “If the injured person is unable to speak, he can make dying declaration by signs & gestures in response to the question.” In another case The Apex Court observed that “the value of the sign language would depend upon as to who recorded the signs, what gestures & nods were made, what were the questions asked, whether simple or complicated & how effective & understandable the nods & gestures were.”

iii. Language of statement

Where the deceased made the statement in Kannada & Urdu languages, it was held that the statement could not be discarded on that ground alone, or on the ground that it was recorded only in Kannada. Where the statement was in Telugu & the doctor recorded it in

\(^{40}\) (1901) ILR 24 Mad 262.
English but the precaution of explaining the statement to the injured person by another doctor was taken, the statement was held to be a valid dying declaration.

iv. Oral Declaration

The Apex Court emphasized the need for corroboration of such declaration particularly in a case of this kind where the oral statement was made by the injured person to his mother & she being an interested witness. Such declaration has to be considered with care & caution. A statement made orally by the person who was struck down with a lathi blow on head and which was narrated by the witness who lodged the F.I.R. as a part of the F.I.R. was accepted as a reliable statement for the purpose of Section 32.

v. Incomplete Statement

The Apex Court had held that if a deceased fails to complete the main sentence (as for instance, the genesis or motive for the crime) a dying declaration would be unreliable. However, if the deceased has narrated the full story, but fails to answer the last formal question as to what more he wanted to say, the declaration can be relied upon.

In *Abdul Sattar v. Mysore State*\(^1\), it has been observed that even if the dying declaration is incomplete, the statement of the dying man in so far as it went to implicate the accused would be relevant.

6. Critical Analysis

i. Misuse of dying declaration by the relatives of the victim: The relatives of the victim sometimes act as the interested victims as they try to fabricate and change the facts and situation of the actual incident and mislead the court. This results in the miscarriage of justice.

ii. Falsely implicating due to enmity: The victim at times bring in between the enmity which may be going on between the victim and the accused. Which ultimately puts the accused behind the bar.

iii. Dying Declaration- Result of Faulty Investigation: The faulty investigation leads to miscarriage of justice since the police sometimes does the investigation with biasness and also many a times the police carries out hasty investigations as a result of which important factors related to dying declaration goes in vain.

iv. Interested parties usually the Relatives and Kin of the Deceased Are Interested Witnesses as a result of which there can be misuse of the dying declaration.

The dying declaration may be a result of tutoring by the relatives of the deceased this shall also lead to the miscarriage of justice.

\(^{1}\) A.I.R. 1956 SC 168
Conclusion

Keeping in view the above mentioned opinions of various courts it is suggested that whenever dying declaration is to be recorded it should be recorded very carefully keeping in mind the sanctity which the courts attach to this piece of evidence. It retains its full value if it can justify that victim could identify the assailant, version narrated by victim is intrinsically sound and accords with probabilities and any material evidence is not proved wrong by any other reliable evidence. It is perfectly permissible to reject a part of dying declaration if it is found to be untrue and if it can be separated. Conviction can be based on it without corroboration if it is true and voluntary. Dying declaration becomes unreliable if it is not as per prosecution version. This has been summed up the Supreme Court:

i. It is for the court to decide that dying declaration inspires full confidence since the maker of the dying declaration is not available for cross examination.

ii. Court should satisfy that there was no possibility at all of tutoring or prompting.

iii. Certificate of the doctor should mention that victim was is in a fit state of mind. Magistrate recording his own satisfaction about the fit mental condition of the declarant was not acceptable especially if the doctor was available.

iv. Dying declaration should be recorded by the executive magistrate and police officer to record the dying declaration only if condition of the deceased was so precarious that no other alternative was left.

v. Dying declaration may be in the form of questions and answers and answers being written in the words of the person making the declaration. But court cannot be too technical.
CONSUMERISM TRANSCENDING CONSUMPTION:
IMPLICATIONS AND CHALLENGES ON ENVIRONMENT

Bushra Chawla

The industrialization as well as globalization had a great impact on the world economies. The boost in the economies of the world is viewed in the context of strengthening of the currency, rising trade, imports–exports surge and not to forget international ties which are instrumental in the economic developments. Most important factor of such a growth and development remains the Human satisfaction and on the top of it the Human Welfare. Although the economic developments seem to be for the nations’ interest and benefit. But whether the mass actually benefits out of it is the issue. Ever since man has begun to explore things and resources around him, he hardly is seemed to set limits for it. Many entrepreneurs, business enterprises, corporations have emerged applying their skills to ‘make more and get more’. The reality is that they get to enter in the area of production easily. As a result of which there is an end to monopolistic trades and a perfect competition has taken its place. Also there is an upsurge of variety of products being launched one after the other. Consumption has turned into ‘Consumerism’. This change of stance seems to be nothing on the part of the consumers nowadays but have a global implication. The inequality is not restricted only to the gender but inequality pertaining to the ‘haves’ and ‘have-nots’. This economic inequality or the “gap” is rooted in the poverty. And on the top of this Consumerism is playing havoc on the Environment.

This paper will make an attempt to analyze the concept of Consumption and Consumerism. It seeks to explain ‘consumerism’ as a concept. How there is a change in the stance of Consumption and Consumerism i.e. how Consumerism transcendent the consumption. What is its impact of Consumerism on the Environment? And the implications of Consumerism and the challenges it poses to the masses.

Introduction

Over a stretch of time humans are being involved in strenuous explorations and discoveries to which appreciation is often accorded. These activities have not lessened but are growing at a very fast pace. The competition has emerged to an extent that it seems sacrificing everything in the name of competition will be a state of bliss. The markets today provide much more than necessities. They are viewed as an enjoyment rather than providing for the bare sustenance. They are flooded with huge variety of almost everything. Indeed, the healthy act of Consumption has now been changed to the unhealthy act of Consumerism.

Globalization has placed its roots strongly on the consumers. One of the finest implications of it is the excess and surplus demands. These demands now do not pertain only to the bare minimum which is left to the minimum number but they now pertain to the luxuries. Indeed, Consumerism has transcended the Consumption. And so here is the reality reflected in the following lines -
“If you live for having it all, what you have is never enough.” - Vicky Robin

The death knell has already been sounded and that is of the deteriorating Environment. Our resources are being over utilized. All the developments are taking place at the heavy cost of the Environment. But the point is that the one who is involved in this act is ignorant that ultimately he is going to face the repercussions of what he has now established. Man is known for his unruly and disruptive desires and so undertakes to accomplish them through any means, be it at the cost of where he thrives.

The noteworthy thing is where consumerism is leading us. The point still remains that ultimately our Environment is being compromised in all this. It is usually the ideology - “The more, the better” but are we ready to compromise with our depleting resources and deteriorating environment?

1. Consumption- A Crucial Economic Factor

Consumption is one of the bigger concepts in economics and is very important as it helps in determining the growth and success of the economy. Businesses can open up and offer all varieties of great products, but if we don’t purchase or consume their products, they won’t stay in business very long! And if they don’t stay in business, many of us won’t have jobs or the income to buy goods and services.

Consumption is defined as —the utilization of economic goods in the satisfaction of wants or in the process of production resulting chiefly in their destruction, deterioration, or transformation1. We consume a multiplicity of products and commodities today having surpassed goods needed solely for survival to extra. This consumption of goods out of desire and not for continued existence is not essentially a negative thing as many of these products have improved our quality of life to a greater extent and made our lives profoundly more manageable and comfortable.

Consumption is the determining GDP component. Nations’ progress, growth and development is many a time, judged on the consumption levels of a country. Consumption may be divided according to the durability of the purchased objects. In this, a broad classification separates durable goods (as cars and television sets) from non-durable goods (as food) and from services (as restaurant expenditure). These three categories often show different paths of growth. Also consumption is divided according to the needs it satisfies. A commonly used classification identifies the following points of expenditure:

1. Food
2. Clothing

3. Housing
4. Health
5. Transport
6. Communication
7. Schooling education
8. Entertainment

Consumption can be said to involve healthy habits of buying for one’s necessity and use. It is the consumers’ right to purchase. Many laws are prevalent and in force which protect the consumers from the unscrupulous practices of the sellers. As regarded consumer is the king, so also there is “caveat emptor” which means buyers beware. The consumers can have variety of products and have freedom of choices regarding their consumption.

2. Consumerism

To define consumerism: — a preoccupation with and an inclination toward the buying of consumer goods. The concept of consumerism can be understood as a tendency to ‘spend more, get more’. Well it is said that greed has no limits. Indeed, Man has surpassed all bounds of greed. Satisfaction is a left out term. What comes in forefront is the amount spent? The pertinent question is to even get what we want, from where do we get the raw materials? Yes, Natural resources, which we know are getting depleted, are the source of such a consumerism.

Thus a reality check –

“Are these things really better than the things I already have? Or am I just trained to be dissatisfied with what I have now?” – Chuck Palahnuik

The concept which can be apparently observed is Planned Obsolescence — a business strategy in which the obsolescence (the process of becoming obsolete—that is, unfashionable or no longer usable) of a product is planned and built into it from its conception. This is a clever strategy adopted by the big corporations. For instance: mentioning the date of expiry on the product to be much earlier than it should be. This practice will obviously leads to larger utilization of the resources. Plus there is wastage resulting there from, making consumers to believe that the product is not fit for consumption. As a consequence of which the wastes are being dumped. Worse is the

---

2 "Consumerism." Merriam-Webster Online Dictionary. (July 4, 2016, 7:00 p.m.). http://www.merriam-webster.com


---
condition when the big corporations are involved in dumping the huge wastes out of their manufacturing plants often incurring liabilities for restoration of the ecology. It is estimated that four to six hectares of terrain is needed to support the consumption of the average person from a high-consumption country, but in 1990, there were only 1.7 hectares of arable or productive land for each human.

Consumerism is a global concern as it is spreading the culture of excessive consumption, can be called ‘needless’ consumption. Most importantly, it is an international concern as our environment is dangerously at stake. Rising rate of demand is pushing the sellers, businesses, and corporations to fully exploit the resources. Thus creating hegemony on the resources and then polluting the environment. The problem pertains to the presence of ‘alternatives’ of each and every product. The non-availability of one thing creates the availability of the other. So consumers have freedom of choices which is perhaps misconstrued as ‘freedom of pockets’ and that is what is leading the world to the evil of ‘consumerism’.

3. Backdrop of Consumerism

The origins of consumerism can be traced all the way back to when humans were first evolving their social skills; humans gathered in small groups where status and image were imperative for survival and attracting mates. This longing for high social status has evolved into purchasing impressive goods in today’s monetary-based economy. Nevertheless, consumerism did not take hold until the eighteenth century. Before modern times, societies often had clearly defined social hierarchies and as result of this, higher class citizens tended to try to prevent any consumerist activities in the lower-class, as this would allow them to cross social confines and enable individualism.

Consumerism in the Western World made a very gradual increase as worldwide trade and urbanism began to take hold. The primary indications of consumerism began with the growing demand for sugar in Europe. Countries like England, France and Spain increased the production of sugar in their colonies in the Americas and on the islands of the southern Atlantic. Sugar became one of the first worldwide, mass consumer goods and helped develop a desire for products that were not entirely necessary. This development of colonial trade continued with products such as coffee, tea, cotton and spices. The Eighteenth Century was marked with the rising western cultures, all forms of fashion emerged. Advertising was on its full swing with fashion magazines newspaper clippings becoming common. This was a source of attraction for the upper class and lower class as well for the

7 Stearns, Op. Cit. Pg. 17
products being advertised popularly. Consequently, there was a pressing demand for the same. The fewer goods turned to a bigger list of goods hovering in the market. Consumerism was not a problem until the Nineteenth century. This was when the sociologist and environmentalist started to raise voice against it. People fairly realized the problem posed by consumerism on the environment by the deleterious emissions by the manufacturing units and its effects on the biodiversity also instrumental in the climate change.

4. Raison D’etre of Mounting Consumerism

It is doubtless to state that consumers have their freedom of choices as they are the king. But the pertinent point is that on what is this freedom of choice is exercised? That is obviously on the variety of goods and products available and offered to them. And the underlying reason of the growing and unstoppable demand is – Advertisements. Without having any realization of it, people are being exposed to a plethora of advertisements on television, the internet and billboards that deeply influence their thinking and convince them to buy more products and services. The corporations are using advertisement as their perfect paraphernalia to attract more people and make them follow what they launch.

More strategies are adopted by these corporations. They shrewdly research the demands and problems in using their products and accordingly modify them. For instance, ketchup bottles initially used to come in the glass bottles but now due to inconvenience faced by many people, the corporations have started to manufacture plastic made squeeze bottles.

One of the reasons is competition. Any company now does not want its rival company to excel in any product. Due to this huge variety of alternative goods are available. For instance, Noodles. Maggi was a brand known for it. But now we are almost flooded with the brands of noodles. Toothpaste has hundreds of variety, no matter for their claim of whitening they use harsh chemicals that may cause mouth cancer or the teeth spoilage but as the competition permits, they are launching them carelessly.

“A linen shirt…is, strictly speaking, not a necessary of life. The Greeks and Romans lived, I suppose, very comfortably though they had no linen. But in the present times, through the greater part of Europe, a creditable day-laborer would be ashamed to appear in public without a linen shirt, the want of which would be supposed to denote [a] disgraceful degree of poverty.” – Adam Smith

The condition prevailing is best described by Adam Smith. People are nowadays more conscious of what they wear, of what they show, least caring about the ones those do not have means to buy minimum. Inequality is persisting more on an individual plane. Poverty is the best example of inequality. Yes there are Developed nations but does development

---

Adam Smith, The Wealth of Nations, (1st ed. 1776)
constricts to having successfully launched the nuclear missiles? Or having bilateral and trilateral relations without having fed the poor residing in their own countries? Moreover when this consumerism plays havoc on the environment having deleterious effects on the health and conditions of the masses, the poor are the most prone to the adverse effects as they cannot afford to be safe from the harmful effects, unlike the upper class who still have alternatives in their sweet homes getting ‘purified air’.

5. Consumerism is costing us our Environment

Satisfaction and minimum sustenance seems to be a myth. With the globalization playing its role everyone is obsessed with consuming and consuming and still consuming. As there is huge pile of goods which are approachable, affordable. Due to the easy accessibility of the products, there is lack of the basic understanding and the knowledge about what the people are consuming for themselves. Lesser they realize what are the raw materials being used? Form where the resources come from? Alas Environment is being compromised leaving nothing affordable to the future generation. Resources are being utilized on an extensive scale as if they are to revive automatically.

Landfills swell with cheap discarded and unused products that get obsolete early and cannot be recycled and reused. A generation is growing up without knowing of what quality goods are. Thus they are unknown of the standard of quality and so compromising with their own selves. Friendship, family ties and personal autonomy are only promoted as a vehicle for gift giving and the basis for the selection of communication services and personal acquisition. Everything is dealt through the spending of money on goods and services. Human beings who cannot spend become worthless.

‘Un-necessary demands create un-necessary goods, Rendering Environment un-necessarily marred’

Consumerism causes the wasteful use of energy and material far above and beyond that needed for everyday living at a comfortable level. Money is not the only way to measure the cost of an item. When one adds up all the raw materials and energy that go into the goods and services consumed over an individual’s lifetime, the toll on the environment is staggering. When this cost is multiplied out over the lifespan of families, cities and countries, the proportions are incredible.9 Due to the continuously increasing consumer demand, the planet itself has been out of balance for many years, and this imbalance is taking the form of climate change.

Climate change and its resulting effect will continue to worsen and is the first sign of what is expected to become an environmental disaster around the year 2025. There are two major effects of consumerism on the environment and that are: Environmental degradation and pollution. High levels of consumption and production

require larger inputs of energy and generate larger quantities of waste by products. Moreover, this excessive demand for consumer products has created most of the current environmental imbalances and these imbalances have already caused ecological disaster in different places all over the world. Also, our consumption of food can also affect the environment because of the amount of land needed to produce food and the water required to farm livestock and crops. With the ever continuing increase in environmental damage there will come a time when this will reach a point of non-reversible stage, whereby the planet will no longer be able to support its own functioning. In short, environmental imbalances result from high levels of consumption. Our attention should be drawn on the demand for natural resources generated by unsustainable consumption and take this problem seriously. The second effect of consumerism on the environment, one is Pollution. Increased extraction and exploitation of natural resources accumulation of waste and concentration of pollutants can damage the environment and, on the long run, limit economic activity. Moreover, consumption can also determine environmental dumping as far as developed countries shift their heaviest polluting industries to less developed countries. In other words, developed countries consume pollution causing goods produced elsewhere by developing countries. Plastic bags are a good example of how consumerism can affect our environment. Plastic bags affect our environment because when they are thrown out they can get washed into our water ways. When they reach the rivers and oceans, animals can get caught up in the plastic bag and suffocate. The buying and selling of fuels is also a major issue because the machines it goes into turns it into a poisonous gas (carbon monoxide) which is emitted into the world atmosphere. Furthermore, with this huge consumer demand, today, we have more and motor vehicles which run on motor oil and this oil pollutes our environment. In fact, used motor oils our largest source of oil pollution and over 20 million gallons of oil end up in our water every single year.¹⁰

There is a massive destruction of forests which is caused by human-induced fires, agricultural expansion, logging, and road-building, etc. which is necessary for fuel and, primarily, paper products. Thus, it prevents the Earth’s atmosphere from cleaning itself. Erosion (partially caused by deforestation) is causing the depletion of topsoil and, so there is, a fall in the Earth’s ability to produce food crops.

Urbanization is instrumental in pushing up the demands. As a result of which there are employment needs and so we now see an overhaul of industries and manufacturing units being set up. These industries are important for the growth and development of a country, but simultaneously they affect the condition of our environment. The urban solid waste is posing a serious threat to the environment as there is comparatively more consumption rather consumerism involved. Also the slum dwellers tend to settle to the urban sites so

that they get some livelihood. As a result there is over-crowding, increase in the waste
dumping and filth and pollution.\textsuperscript{11}

\textit{Vellore Citizens Welfare Forum V. Union Of India}\textsuperscript{12}

Pollution was caused by untreated effluents being discharged and the entire surface and the
sub-soil of the river Palar got polluted. Around 35,000 agricultural land had become unfit
for cultivation.

The Supreme Court of India rightly observed: “\textit{Though the leather industry is of vital
importance to the country as it generates foreign exchange and provides employment
avenues, it has no right to destroy the ecology, degrade the environment and pose as a
health- hazard.}”

\textit{T.N. Godavarman Thirumulkpad V. Union Of India}\textsuperscript{13}

The Apex court showed concern over the felling of trees and issued direction to stop the
activities going on in the forest areas. Running of saw mills including veneer or plywood
mills within the forests were also stopped.

Indeed, our forest resource is the riches resource and due to rising consumerism in the form
of establishing mills to satisfy the market demands is bad as there is uncounted felling of
the trees thus a reduction of our precious ‘green gold’.

With the participation in the \textit{Stockholm Conference}, India has recognized the two
important principles i.e. \textit{Polluter Pays Principle} and \textit{Precautionary Principle}. Many
industries and the companies came under the scanner of these principles and were held
liable for infringing the statutory limitations and obligations.

\textit{M.C. Mehta V. Union of India}\textsuperscript{14}

The tanneries were discharging effluents to the river Ganga and not setting up of the
primary treatment plant. The discharged effluent from the tanneries is ten times noxious
as compared to the domestic waste. Thus the plea of financial incapability was rejected by
the court thus issuing directions for the closure of the same.

6. International Response on Consumerism

Many organizations have emerged highlighting the ill effects of consumerism. There is
great response and restraint posed by the international organizations and the international
movements.

Greenpeace, an organization that promotes peace and environmental protection, has held
numerous campaigns promoting the consumption of environmentally friendly products

\textsuperscript{11} P.S. Jaswal, \textit{Environmental Law}, at 167,(3\textsuperscript{rd} ed. 2009).
\textsuperscript{12} Vellore Citizens’ Welfare Forum v. Union of India, 5 SCC 647 (1996)
\textsuperscript{13} T.N. Godavarman Thirumulkpad v. Union of India, 2 SCC 267 (1997)
\textsuperscript{14} M.C. Mehta v. Union of India, A.I.R. 1037 (1988)
and condemning the production and consumption of environmentally destructive products. In 2010, Greenpeace launched a campaign criticizing the confectionary giant Nestle and its use of palm oils from companies that destroy rainforests in Indonesia, endangering hundreds of species of animals and the livelihoods of local people.\(^{15}\)

- **STOCKHOLM DECLARATION ON HUMAN ENVIRONMENT, 1972:** It clearly in its Principle 2 laid down the intergenerational equity, preserving resources for the future generation.

- **RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT:** Its Principle 16 lays down “polluter pays principle” clearly providing the polluter to pay and restore the ecology which got disturbed due to the act of the polluter.

- **CONFERENCE OF PARTIES (COP), COP 21** drew the attention of the nations to participate rigorously in cutting the carbon emissions.

**Conclusion**

*Eat of the wholesome things We have provided for your sustenance, but commit no excess therein, lest My condemnation fall upon you; he upon whom My condemnation falls has indeed thrown himself into utter ruin.* – Qur’an (20:81)

The race of getting excess of anything is unending. As greed have no limits, Consumerism is perceived to be okay amongst the upper class as they follow it as their trend in the absence of which how will they be called as “upper class”. The hazard it poses to the environment and to the masses is evident in change in the climatic patterns and the growing poverty. The world has reached to a stage where there is less and less of resources while the demand is surging high. Whereas an initiative being taken by the Third World and the Developed nations to eradicate hunger and poverty. But lesser is being done towards it.

Venezuela’s Case: The classic example is of Venezuela. The country has been declared to be the World’s poorest country as it is in debt and the economy has dipped to the lowest. Poverty is lurking throughout the country. No funds for importing of the basic necessities. Though oil-rich nation, but still there persists food crisis. Ninety-percent of the population can’t even buy the food stuffs. The president of Venezuela, Maduro has urged the women to stop using the hair-dryers to save power.

What a contrast this case study shows that where there is Consumerism on one end characterized by the unending extravagance while other nation is struggling for the bare minimum!

The problem of Consumerism will further rise until some steps are taken to curb it. The “upper class” should take the initiative to reduce their lifestyles from ‘luxuries to necessaries’. There should be “conscious consumption”, meaning that one should have a

\(^{15}\) “Ask Nestle to Give Rainforests a Break.”, Greenpeace (July 5, 2016, 11:31 a.m.) <http://www.greenpeace.org/international/campaigns/climate-change/kitkat>
check that whether the thing purchased is needful, thereby being conscious at the time of consuming.

Changing the mindsets that consumerism will make them more elite class. Expenses should be curbed. Unnecessary purchases just because of the high incomes should not be done. Most importantly, Care for our Environment on which we sustain should be preserved at all cost and not destruction on its cost. Our immediate goal should be to check whether our consumption is adversely affecting our environment.

Thus, Consumerism shouldn’t at all cost transcend Consumption. Our tendencies to fill some voids through consumerism are threatening. There is a ‘Common Heritage’ and that is our Earth. Controlled consumption will never lead us to consumerism. World to be a better place the inequality has to be removed by resorting to the essentials and not the extravagance.

“Sadly it’s much easier to create desert than to create forest”

It’s our collective duty to preserve our precious resources for future resorting on the same.
There have been numerous alterations in the Succession laws which apply to the Christian community residing in the Travancore/ Cochin area. The laws which have been applied ranged from the Classical law as laid down by Moses to the laws framed by the Emperor of Travancore, then came British laws and finally Indian law after independence. Alongside the codification of the law by the legislature, we have the courts applying their reasoning to cases of intestate succession. The Landmark and conclusive case in this regard was the matter of Mary Roy v. State of Kerala. The judgement is marked as a defining moment in the constant struggle for gender equality in Indian Family Law.

Introduction

The judgment prompted a repeal of the Cochin and Travancore Succession Acts and upheld the contents of Part-B states act, whose objective was to extend the application of the Indian Succession Act to the area which was governed by the discriminatory Travancore and Cochin Succession Acts. The judgement had its fair share of criticism too, an aspect which will be analysed further by the researcher. Leaving that aside, the holding by the Supreme Court offered Christian ladies much needed assistance in obtaining their rights pertaining to intestate succession.

This “paper has been divided in three parts. Part I, the introductory part, contains the events before the Mary Roy Judgement and explains the evolution of various legislation and how they impacted intestate succession. Part II, contains a bare description of the judgement and contextualizes the judgement with help of the various arguments and the relevant sections, Part III, assess the larger significance of the judgement and concludes” the paper.

1. Intestate Succession Laws Among Cochin/ Travancore Christians: Prior to the Events of Mary Roy

A Historical Background

Prior to 1949, the Christian community of Kerala was governed by the Travancore and Cochin Succession Acts. Apropos the aforementioned law, it is pertinent to note that it essentially was applicable to the Syrian Christian community which constituted the major chunk of the relevant population.

This act was enforced with a motive to outline and delineate the succession law in Kerala which prior to the enactment changed with change in the section of the Christian community. The enactment basically codified the rules and regulations laid down by the king regarding the situation of intestate succession, which in turn fuelled a debate regarding
the discriminatory nature, the antediluvian provisions, and the non-inclusion of numerous practices.¹

The discriminatory nature of this law led to the calls for introspection of the provisions of law, with questions arising regarding the unjust nature of the law and the need of such laws with a very narrow interpretation. The debate was further aggravated by the judgment of the Mary Roy case.²

The researcher believes that in order to aptly study the rationale of such laws, it is imperative to study the historical and cultural backgrounds of the Christians or more particularly the Syrian Christians, who are directly impacted by the provisions of the law.

It is pertinent to note that Christianity came to India during the earlier times of the Christian era. Moses laid down some laws, supposedly for the Christians of the regions of Cochin and Travancore. This implied that there were no uniform laws and almost all the decisions were taken on the case to case basis implying a reliance on the wisdom of the judges.³ There were certainly some common features between the Laws of Moses and the Travancore Succession Act, 1912 like the right of inheritance was solely restricted to men and unmarried women were barred from holding any type of property. Surprisingly, the daughters, at the time of their marriage were given stridhanam, which invariably took the form of ornaments, property etc. With the regards to the Travancore Christian Succession Act, which has been often criticized for its inability to solve the issues posed by the earlier law and in turn have in one sense constricted the options of numerous progressive societies which existed within Kerala.

2. Discriminatory Nature of the Old Succession Acts

Under the Travancore and Cochin Christians Succession Acts, any daughter whose father died intestate would be entitled to obtain or have a stake in only one-fourth of the property. This sum in any case, was limited to just five thousand rupees, regardless of the value of the father’s total property. Pragmatically, this share that the women got was a mere pittance which was also denied a lot of times as the daughter was instructed to be satisfied with the ‘Stridhanam’.⁴ Section 16, 17, 18 and 19 of the act, set out the guidelines identifying with the intestate succession in TCS. These sections were biased in nature as they in effect denied equal rights in the property to women and took away entitlement of widows and mothers from the property of the intestate. Section 28 was another discriminatory provision which laid down the draconian ‘Stridhanam’ or 5000 rupees limit on the women’s right to

⁴ Sebastain Champappily, Christian Law of Succession in India, 12, (1997)
the intestate’s property. Thus, the provisions were prima facie discriminatory on the basis of gender. These provisions were so arbitrary that even by the standards of morality present in the 1920’s, the committee which constituted to discuss and frame the 1916 bill reprimanded various provisions of the enactment on the basis that the daughter was being overtly discriminated against. The recommendations of the committee pointed towards a more progressive approach but their suggestions were ignored.

The section which allowed for the limitation of 5000 rupees with respect to the intestate’s property and the Stridhanam, irrespective of the total value of the property was actually added, surprisingly and absurdly, at the last moment. The rationale presented was that after entering into the matrimonial bond, the woman ceases to be a part of her former home and becomes a part of her husband’s family, thus making the claim of the woman to her ‘former’ family’s estate ‘unnecessary’ and ‘unfair’. It was based on the presumption that daughters would easily sustain from their ‘new’ households whereas the sons would have to work to sustain themselves. The reasoning behind this move is obviously flawed and bases itself upon gender stereotypes, patriarchy and vague generalisations. The number of women who were on the committee was also zero.

3. Changes in Law and the Events Leading up to Mary Roy

Legislation’s furthered gender equal norms in relation to intestate succession were passed by the British but these could not be applied to the Travancore region. The reason being that the affected regions were still under the title of a princely state and thus the enactment could not be applied to them.

In 1949, the State of Cochin and Travancore were combined to form one state and in furtherance of that in order to bring about a similarity of legislation throughout the entire country, the legislature enacted Part-B States (Laws) Act, 1951. The Act aimed at empowering certain Parliamentary legislations to govern over the Cochin- Travancore region.

4. Extension and amendment of certain Acts and Ordinances

The Acts and Ordinances specified in the Schedule shall be amended in the manner and to the extent therein specified, and the territorial extent of each of the said Acts and Ordinances shall, as from the appointed day and in so far as any of the said Acts or Ordinances or any of the provisions contained therein relates to matters with respect to which Parliament has power to make laws, be as stated in the extent clause thereof as so amended

5 Supra, Note 2, at 19.


7 Id.


5. Repeals and savings

*If immediately before the ~appointed day, there is in force in any Part B State any law corresponding to any of the Acts or Ordinances now extended to that State, that law shall, save as otherwise expressly provided in the Act, stand repealed:*

These provisions allowed for the bringing in of several other statutes too like the Caste Disabilities Act. The power to repeal all contradictory laws in force in the Part B states was also given by these sections.10

It would seem that the question of which law would apply to the Cochin and Travancore regions would be settled but serious discussion and conflict still continued and the judiciary had to step in. A single judge of the High Court ruled in favor of the TCS and held that Christians living in the conflicted state were bound by the state enactments but the High Court clearly held otherwise.11 The words ‘save as otherwise expressly provided’ mandated the withdrawal of enactments corresponding to the laws sought to be made applicable to the states in the Part B by the Part B States (Laws) Act. This decision propagated and upheld patriarchy and gender discrimination, something which the Central Act wanted to cut down upon.

6. The Decision in *Mary Roy*: A Brief Description

The “Travancore Succession Act and the Cochin Succession Act remained till the 1980’s until Mrs. Mary Roy challenged this position in the Supreme Court. Mary Roy was the youngest child of a Syrian Christian couple, who had four children.12 Mary had already married out of the Syrian Christian community to a Bengali, and was not given *Stridhanam*.13 Due to her marriage failing, Mrs. Roy had to leave her husband and settle in Ooty, where her family owned a cottage.

After her father’s death, Mrs. Roy had been forced out of her Ooty home by her brother. Citing the TCS, they argued that since their father had died intestate, she wasn’t entitled to any share of the property under section 28. After years of lobbying for the Indian Succession Act to be valid in the Travancore region, Mrs. Roy finally decided to go to court to fight the oppressive bill. Initially no lawyer was ready to accept the case. Indra Jaising however, decided to fight out in court, challenging sections 24, 28, 29 of the TCSA on the grounds that they were violative of Article 14 of the Indian Constitution.

The bench considered many questions with regard to the Christian intestate succession in the state of Travancore. Some of them were-

a. *What was the impact of the extension of the Indian Succession Act, 1925 to the territories of the State of Travancore–Cochin on the continuance of the Travancore*

---

10 Supra, Note 6, at 55
11 Supra, note 2, at 192
13 Id.
Christian Succession Act, in the territories forming part of the erstwhile State of Travancore?

b. Did the introduction of the Indian Succession Act, 1925 have the effect of repealing the Travancore Christian Succession Act?

c. Or did the Travancore Christian Succession Act continue to govern such intestate succession despite the introduction of the Indian Succession Act, 1925?

d. Is section 24, 28, 29 violative of the equality” doctrine?

“In what is now a historic judgement, Justice P.N Bhagwathi along with his fellow judges held that” with the extension to “Travancore of the provisions of the Indian Succession Act with effect from April 1, 1951, the Travancore Succession Act stood repealed” and was no longer in existence”.14

This “meant that D. Chelliah Nadar v. G Lalita Bai15, was overruled and the court firmly stood with the respondents by saying that TCS was not a corresponding to the Indian Succession Act, but a law that was corollary to the law set up by the Part B Laws Act. The court reasoned this out” remarking:

“When Section 6 of Part B States (Laws) Act, 1951 provided in clear and unequivocal terms that the Travancore Christian Succession Act, 1092 which was a law force in Part B States of Travancore-Cochin corresponding to Chapter II of Part V of the Indian Succession Act, 1925 shall stand repealed, it would be nothing short of subversion of the legislative intent to hold that the Travancore Christian Succession Act, 1092 did not stand repealed but was saved by Section 29 Sub-section (2) of the Indian Succession Act, 1925.”16

The “court also based this claim on the fat there was nothing that expressly saved the TCS statute from being repealed. Another argument by the respondents was” that

“… By reason of Section 29 Sub-section (2), the Indian Succession Act, 1925 must be deemed to have adopted by reference all laws for the time being in force relating to intestate succession including the Travancore Christian Succession Act, 1092 so far as Indian Christian in Travancore are concerned”.17

“Justice Bhagwathi rejected this argument and said that the case cited by the respondents in favors of the same was wrong its ratio. The case in particular was Kurian Agusty v. Decassy Aley,18 which Justice Bhagawthi deemed” to be inadmissible.19

Concluding Analysis: The Impact of Mary Roy

17 Id.
18 Kurian Agushty v. Decassy Aley, AIR 1956 T.C II
The implication “of this judgement reached far and wide, this made the powerful patriarchal systems insecure and defensive. Even the Majority of women were not happy with the decision of the court, albeit for a very different reason. How did a judgement that was hailed as land mark judgement invoke such sharp reactions and from such diverse groups? The answer to this will be discussed in the following part of the paper.

The decision in *Mary Roy v. State of Kerala* was one of many judgements which was criticised by the church and the local community for its affirmation of the retrospectively clause.\(^{20}\) The displeasure expressed was, due to the local community expecting a sharp increase in litigation challenging previous transaction and succession. The retrospectively clause was defended by Mrs Mary Roy herself, she argued that ‘the taking away of the retrospectively clause would deny justice to the many poor Christian women whose fathers had died without leaving a will.’\(^ {21}\) The argument of loss and increase litigation was proved false, as there had been only about 29 cases that turned up in court.\(^ {22}\)

The other criticism came from the women’s rights activists, who criticised the judgement for not delving in the constitutional aspect of the case. The felt that both Justice Bhagawthi and Justice Pathak, took the easy way out, by deciding the case on the reasoning that TCS is in violation of ‘Part B states (law) amendment act and totally ignored the gender justice aspect to it.’\(^ {23}\) The other criticism of the judgement was that it totally blurred the distinction between ‘*stridhanam*’ and ‘Dowry’. This meant that, it became extremely difficult to marry off the daughter without giving the in-laws a heavy chunk” of the property.

It must also be noted that the judgement was merely the beginning for Mary Roy. On the basis of that decision she filed a case in the Kottyam District Court in 1989 for the one-sixth property that she was now entitled to under the Indian Succession Act. However, the court ruled against her on the grounds that the partition would not be possible until the death of the mother, who held a life estate in the property. Recently, almost 25 years later, the final decree came and justice (symbolic) was done.\(^ {24}\) She had to face a lot of hardships from all the sides. The women in Travancore initially did not support her because of family pressure and conservatism. The church also attacked her, launching a ‘pulpit campaign’ to contain the ‘damage’ by means such as encouraging the drafting of wills to safeguard the son’s share and attempting to gather support for a bill which would invalidate the retrospective effect of the judgement. Such a bill was actually introduced but it was refused presidential assent. The Government of Kerala also made an attempt with a similar motive but the petition was dismissed.\(^ {25}\)

\(^{20}\) Supra, Note 2, at 55
\(^{21}\) Supra, Note 2, at 55
\(^{23}\) Id, at 3
\(^ {25}\) Supra, note 2.
To conclude, examining Mary Roy as a landmark case which took cognizance of the rights of women to inheritance is a false analysis to make and quite difficult as the case does not actually strike down the impugned act on the question of its constitutional validity, but rather on the operation of the Part B States(Law) Act. Although, in effect, it was definitely a step forward for the female Indian Christians covered under the Travancore and Cochin Succession Acts. The Legislature, who drafted the Indian Succession Act, should be the ones who should be lauded for promoting gender equality. The activism shown by Mary Roy was inspirational and such steps need to be lauded.

“Oh, I was just very angry. I didn’t have any other reason. I was just angry because I was told to leave my father’s house because I did not have a share.”

Mary Roy, when asked why she went to court.26

---

26 Supra, note 2.
ANALYSING GLOBAL DEBATE ON DEATH PENALTY IN THE ERA OF TERRORISM: 2001-2015

Kishore Dere
Advocate, The Supreme Court of India

Dr. Juri Goswami
Research Scholar, The National Law University & Judicial Academy, Assam

This paper analyses international debate on death penalty in the terror-hit 21st century. A decade and half of the new century has already passed. It has witnessed an unprecedented rise in executions. Ever since the 11 September 2001 (9/11) terrorist attacks on the US, there has been almost a legislative upsurge world over to pass draconian counter-terrorism laws. Death penalty happens to be a major feature of such laws. Guantanamo Bay detention camp is a vivid example of the so-called exceptional measure adopted by the US to face an exceptional threat of terrorism. The controversial practices such as water-boarding, confinement, sleep deprivation, rendition and detention, used by CIA to interrogate terror suspects have been widely debated. In this heated debate over national security and personal liberty, even the courts in democratic nations have at times upheld validity of such laws. Thus, judiciary has awarded death sentence to terror convicts. The global figures on the use of the death penalty in 2015 revealed two starkly divergent developments. On one hand, four countries abolished the death penalty, reinforcing the long-term trend towards global abolition. On the other hand, the number of executions recorded by Amnesty International during 2015 increased by more than 50% compared to 2014 and constituted the highest total that Amnesty International has reported since 1989, excluding China. It is necessary to analyse views of protagonists and antagonists of death penalty.

Introduction

Terrorism is a term that eludes global consensus on definition. It is usually said that one man’s terrorist is another man’s freedom fighter. It seems to have become a cliché by now but the point to be driven home is about its inherently divisive character. As a result of this crucial semantic difference among various nations on what exactly constitutes terrorism, the United Nations has not been able to adopt a Comprehensive Convention on International Terrorism. The negotiations for this treaty are under way at the United Nations General Assembly’s Ad Hoc Committee established by Resolution 51/210 of 17 December 1996 on Terrorism and the United Nations General Assembly Sixth Committee (Legal). The negotiations are deadlocked. It is an irony that on the one hand the UN claims to be combating terrorism, already has a variety of sector specific anti-terrorism conventions, and yet it has not been able to adopt a comprehensive convention. This speaks volumes of the complexity of the problem at hand. Likewise, the term death penalty evokes strong emotions both from its proponents and opponents. Both the sides on this debate of abolishing and retaining capital punishment have irreconcilable differences. These days one
frequently hears news of terrorist attacks anywhere in the world and involvement of names of dreaded terrorist organisations like Islamic State of Iraq and Syria (ISIS), Al-Qaeda, Taliban, Haqqani Network, Jaish-e-Mohammad, Lashkar-e-Toiba, Sipah-e-Saiba, Al-Qaeda in Arabian Peninsula, Boko Haram, and Ansar Dine among many others in those barbaric attacks. While countering terrorism has been on the agenda of the United Nations for several decades, the attacks against the United States on 11 September 2001 prompted the United Nations Security Council to adopt resolution 1373, which for the first time established the Counter-Terrorism Committee (CTC).¹

Five years later i.e. in 2006, all Member States of the United Nations General Assembly for the first time agreed on a common strategic framework to fight the menace of terrorism: the UN Global Counter-Terrorism Strategy. The strategy helps combine efforts of the international community to counter terrorism along following four themes²:

i. Addressing conditions conducive to the spread of terrorism;
ii. Preventing and combating terrorism;
iii. Building Member States’ capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard;

Ensuring the respect for human rights for all and the rule of law as the fundamental basis for countering terrorism. At the time of the adoption of the strategy, the United Nations General Assembly also endorsed the Counter-Terrorism Implementation Task Force (CTITF), which was set up by the United Nations Secretary-General in 2005. Comprising of 38 entities of the UN and affiliated organisations, CTITF seeks to promote coordination and coherence within the UN System on counter-terrorism and to provide assistance to Member States. The UN Counter-Terrorism Centre (UNCCT) provides capacity-building assistance to Member States and carries out counter-terrorism projects around the world in line with the aforesaid four pillars of the Global Strategy. The Security Council works to enhance the capacity of Member States to prevent and respond to terrorist acts through its subsidiary bodies, which include the Counter-Terrorism Committee, the 1267/1989/2253 ISIL (Da’esh) and Al-Qaida Sanctions Committee, as well as the 1540 Committee on the non-proliferation of nuclear, chemical, and biological weapons. The Committees are supported in their work by different entities; whereas the Counter-Terrorism Committee has its Executive Directorate (CTED) to carry out its policy decisions and conduct expert assessments of Member States, the 1267 Committee draws on a Monitoring Team. On 15 January 2016, the Secretary-General submitted a Plan of Action to Prevent Violent Extremism to the UN General Assembly. The Plan includes recommendations for the consideration of Member States to take a more comprehensive

approach and address the drivers of violent extremism at the local, national, regional, and global levels. As the threat of terrorist attacks anywhere anytime has become a reality, countries around the world are passing tough laws to control terrorism. Taking into account gravity of the offence, it is natural for them to prescribe capital to harshest ever punishment to the guilty. That naturally includes death sentence. As a result, the spread of terrorism has witnessed more and more executions around the world. For example, Amnesty Report for 2015 says governments diverse parts of the globe continued to use the death penalty to respond to real or perceived threats to national security and public safety. The death penalty was used in at least seven countries for terrorism-related offences. Most executions in the Middle East and North Africa region were for such offences, and some countries made legal changes to expand the scope of the death penalty to terrorism-related offences.


Amnesty International noticed that at least 1,998 people were awarded death sentenced in 61 countries in 2015. The number of death sentences recorded in 2015 was much lower than previous years – and in particular compared to 2014, when Amnesty International reported a record-high 2,466 death sentences. However, the decline was also because of limitations in Amnesty International’s ability to substantiate data in several countries. Amnesty International recorded strikingly lower numbers of death sentences in Iran, Nigeria, Saudi Arabia, Somalia and Viet Nam, partly because of inaccessibility of information on the death penalty.

According to the analysis done by Amnesty International, like in the past years, the death penalty was frequently taken recourse to by the governments by callously disregarding international law and standards. Amnesty’s sources suggest that Iran and Pakistan both executed individuals who were below 18 years of age when the crime was committed and that juvenile offenders remained under sentence of death in several other countries at the end of 2015. Moreover, death sentences continued to be imposed for offences that do not meet the threshold of the “most serious crimes”, to which the death penalty must be

---

5 Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all. Amnesty International opposes the death penalty in all cases without exception regardless of the nature or circumstances of the crime; guilt, innocence or other characteristics of the individual; or the method used by the state to carry out the execution. The organization campaigns for total abolition of capital punishment. Amnesty is independent of any government, political ideology, economic interest or religion and is funded mainly by its membership and public donations, Amnesty International Global Report: Death Sentences and Executions 2015 (London Amnesty International 2016) 2
restricted under international law. Death sentences were also imposed after trials that did not comply with international fair trial standards.7

Abolitionist nations and Retentionist nations:

On the issue of capital punishment, nations can be classified into abolitionists and retentionists. Amnesty international Report states that in 2015, the total number of countries that were abolitionist for all crimes reached 102 as Republic of Congo, Fiji, Madagascar and Suriname repealed the death penalty during the year. Other countries also reported forward movement. For instance, Mongolia adopted a new Criminal Code in December 2015, that abolishes the death penalty for all crimes from 2016; then the Governor of the US state of Pennsylvania fixed a moratorium on executions in February; China and Viet Nam reduced the number of offences that can be punished by death and Malaysia announced legislative reforms to review the country’s mandatory death penalty laws. Burkina Faso, Guinea, Kenya and South Korea all considered bills to abolish the death penalty.8

The perceptive analysis done by Amnesty reveals that irrespective of the frightening rise in executions in Iran, Pakistan and Saudi Arabia, the over-all global shift is towards abolition of the death penalty. Amnesty International points out that when it launched its campaign for abolition in 1977, only 16 countries had fully abolished the death penalty. Today the majority of the world’s countries are fully abolitionist, and dozens more have not invoked death sentences for over a decade, or have given ample hints that they are moving towards full abolition. The diametrically opposite developments of 2015 reveal that the number of countries using the death penalty is dwindling.9

Amnesty Report claims that the worldwide statistics on the use of the death penalty in 2015 revealed two starkly divergent developments. On one hand, four countries abolished the death penalty, reinforcing the long-term trend towards global abolition. On the other hand, the number of executions recorded by Amnesty International during the year increased by more than 50% compared to 2014 and constituted the highest total that Amnesty International has reported since 1989, excluding China.10

---

Amnesty International registered a whopping 54% increase in the number of executions across the globe in 2015. It notes that at least 1,634 people were executed, 573 more than in 2014. These numbers do not include the executions carried out in China, where information on the use of the death penalty remained classified as a state secret. This is quite strange that information on death penalty is regarded as a national secret in China. Disturbingly, of all the documented executions, 89% were carried out in merely three nations namely Iran, Pakistan and Saudi Arabia. Number of executions in Iran and Saudi Arabia noticed by Amnesty International rose by 31% and 76%, respectively, compared to 2014. Over 320 individuals were executed in Pakistan in 2015. Its data suggests that this was the highest number of executions that Amnesty International ever recorded for Pakistan in a year and follows the official decision to lift a six-year moratorium on executions on 17 December 2014. Amnesty International recorded seven executions in December 2014 and 326 in 2015, bringing the total number of executions in Pakistan since December 2014 to 333.

Amnesty International also documented a remarkable rise in executions in Egypt and Somalia, by 47% (from 15+ in 2014 to 22+ in 2015) and 79% (from 14+ in 2014 to 25+ in 2015), respectively. Above all, Amnesty International happened to register executions in 25 countries, three more than in 2014. Chad and Oman resumed executions after years without executing anyone. Bangladesh, India, Indonesia and South Sudan executed people in 2015; no executions were reported in these countries in 2014, although each executed people in 2013. Three countries that executed in 2014 – Belarus, Equatorial Guinea, Palestine – did not order any executions in 2015. As in the past, Amnesty International could not verify information about judicial executions in Syria. In 2013, 2014 and 2015 consecutively, Amnesty International was unable to confirm reports on executions in Syria.

Various methods of executions:

Nations followed diverse methods of executions: for instance, beheading (Saudi Arabia), hanging (Afghanistan, Bangladesh, Egypt, India, Iran, Iraq, Japan, Jordan, Malaysia, Pakistan, Singapore, South Sudan, Sudan), lethal injection (China, US, Viet Nam) and

11 Amnesty informs that until 2015, it presented in its annual reports on the global use of the death penalty two figures for executions in Iran: the figure of officially announced executions, which the organization used as its main figure in infographics and short text; and the figure relating to those executions that were not officially announced. From 2016 onward, Amnesty International will use the sum of officially announced and non-officially announced executions as its main figure. The aggregated figure of executions in Iran for 2014 is 743, which brings the number of global executions that Amnesty International recorded for the same year to 1,061.
shooting (Chad, China, Indonesia, North Korea, Saudi Arabia, Somalia, Taiwan, United Arab Emirates (UAE), Yemen). Amnesty International in its report for 2015 informs us that it was unable to confirm whether executions in Oman were carried out by hanging or shooting.14

Questions over fairness of trial:

Amnesty International argues that in most of the countries where people were sentenced to death or executed, the death penalty was imposed after proceedings that did not meet international standards of fair trial. In 2015 Amnesty International expressed concerns over court proceedings in Bangladesh, Belarus, China, Egypt, Iran, Iraq, Libya, North Korea, Pakistan, Saudi Arabia and Viet Nam. In many jurisdictions – including Bahrain, China, Iran, Iraq, North Korea and Saudi Arabia – some of the convictions as well as death sentences were based on “confessions” that might have been extracted through torture or other ill-treatment. In Iraq some of these “confessions” were telecast before the trial was held, further violating the defendants’ right to presumption of innocence.15

2. Terrorism, National Security Threats and Death Penalty

In almost all regions of the world, the death penalty was used by governments to respond to real or perceived threats to national security and public safety posed by “terrorism”, crime or political instability, despite uncertainty about the deterrent value of death penalty in committing violent crime.16

Amnesty reminds that in the Americas, Guyana introduced the mandatory death penalty for acts of “terrorism” resulting into death. In Asia-Pacific, three people from the Uighur minority were executed in the Chinese province of Yunnan after they had been convicted of murder and leading a “terrorist” organization for their alleged association with five people involved in a 2014 attack at the Kunming train station that resulted in the death of 31 people. Indonesia executed 14 people convicted of drug-related offences to confront “a national emergency” in drug-related deaths. Pakistan executed more than 320 people since it lifted a six-year long moratorium on the execution of civilians in the aftermath of the Peshawar school attack.17

In the Middle East and North Africa, the death penalty was used for terrorism-related offences in Algeria, Egypt, Iraq and Tunisia. In Jordan, two people were hanged in

---

14 Amnesty International Global Report: Death Sentences and Executions 2015 (Amnesty International 2016)8, 9
February in response to the release of a video by the Islamic State depicting the brutal killing of a Jordanian fighter pilot. Both individuals had been convicted of terrorism charges. Iraq sentenced 24 men to death by hanging under Article 4 of the 2005 Anti-Terrorism Law after convicting them of involvement in the killing of at least 1,700 military cadets from the Speicher Military Camp, near Tikrit in Salahuddin governorate, on 12 June 2014. The brief trial of the men relied primarily on “confessions” obtained from the defendants during interrogation, and video footage of the massacre. In July 2015, Tunisia adopted a new law that provided for the use of the death penalty for terrorism-related offences. In sub-Saharan Africa, Cameroon sentenced 89 suspected members of the armed group Boko Haram to death. Chad executed 10 suspected Boko Haram members and introduced a new anti-terrorism law that provided for the death penalty. 18

Debates for and against Death Penalty:

Capital punishment is the sentence of death, or practice of execution, handed down as punishment for a criminal offence. It can only be used by a state, after a proper legal trial. The United Nations in 2008 adopted a resolution (62/149) calling for a moratorium on the use of the death penalty, however fifty-eight countries, including the United States and China, still exercise the death penalty. As such, the topic remains highly controversial. Abolitionist groups and international organisations argue that it is cruel and inhumane, while proponents claim that it is an effective and necessary deterrent for the most heinous of crimes. 19

The debate over capital punishment be it in the courts, in state legislatures, or on nationally televised talk shows—is always fraught with emotion. The themes have changed little over the last two or three centuries. Does it deter crime? If not, is it necessary to satisfy society’s desire for retribution against those who commit unspeakably violent crimes? Is it worth the cost? Are murderers capable of redemption? Should states take the lives of their own citizens? Are current methods of execution humane? Is there too great a risk of executing the innocent? 20

This debate is not unique to any one country. Nations around the world—judges, legislators, and ordinary citizens—have struggled to reconcile fervent calls for retribution with evidence that the death penalty does not deter crime. They have argued about whether

19 ‘Debates- This house supports the death penalty- Points For; Points Against’ (International Debate Education Association IDEA) <http://idebate.org/debatabase/debates/capital-punishment/house-supports-death-penalty> accessed 3 June 2016
the death penalty is a cruel, inhuman, or degrading treatment or punishment. They have weighed its costs against the need for an effective police force, schools, and social services for the indigent. National leaders have engaged in these discussions while facing rising crime rates and popular support for capital punishment. Yet, while the United States has thus far rejected appeals to abolish the death penalty or adopt a moratorium, other nations have—increasingly and seemingly inexorably—decided to do away with capital punishment.21

3. Points in favour of Death Penalty:22
   i. It helps the victims’ families achieve closure.
   ii. The death penalty deters crime.
   iii. Execution prevents the accused from committing further crimes.
   iv. The death penalty should apply as punishment for first-degree murder; an eye for an eye.
   v. Execution helps alleviate the overcrowding of prisons.

4. Points against Death Penalty:23
   i. State-sanctioned killing is wrong.
   ii. The death penalty is a financial burden on the state.
   iii. Wrongful convictions are irreversible.
   iv. The death penalty can produce irreversible miscarriages of justice.

After having had seen theoretical issues besides the glance at Amnesty Report 2016 based on empirical evidence of 2015 events, this paper mentions a couple of judicial decisions of Pakistani and Bangladeshi courts on death sentences and surrounding political controversies. It is just an effort to illustrate how deeply the societies are divided on this polarising issue.

22 ‘Debates- This house supports the death penalty- Points For’ (International Debate Education Association IDEA) <http://idebate.org/debatabase/debates/capital-punishment/house-supports-death-penalty> accessed 3 June 2016
23 ‘Debates- This house supports the death penalty- Points Against’ (International Debate Education Association IDEA) <http://idebate.org/debatabase/debates/capital-punishment/house-supports-death-penalty> accessed 3 June 2016
5. Pakistan Supreme Court Judgement in 2015 on Upholding Award of Death Penalty

In Malik Muhammad Muntaz Qadri (in Criminal Appeal No. 210 of 2015); The State (in Criminal Appeal No. 211 of 2015) … Appellants versus The State, etc. (in Criminal Appeal No. 210 of 2015); Malik Muhammad Muntaz Qadri (in Criminal Appeal No. 211 of 2015) … Respondents, Pakistani Supreme Court made interesting observations. Brief facts of the case were as follows:

At about 04.15 PM on 04.01.2011 Mr. Salman Taseer, the then Governor of the Province of the Punjab, was returning home near Kohsar Market, Islamabad when Malik Muhammad Muntaz Qadri appellant, serving in the Elite Force of the Punjab Police and performing the duties of an official guard of the Governor at that time, opened fire at Mr. Salman Taseer from his official weapon riddling his body with bullets and causing multiple injuries. The grievously injured Mr. Salman Taseer was immediately shifted to Polyclinic Hospital, Islamabad but upon arrival at the hospital he was declared dead. Soon after firing at Mr. Salman Taseer the appellant laid down his weapon and surrendered before the other official guards deputed on the Governor’s security who arrested him at the place of occurrence and secured the weapon of offence.²⁴

Mr. Shehryar Taseer, a son of Mr. Salman Taseer deceased, reported the matter to the local police through an application at 05.10 PM on the same day whereafter formal FIR No. 06 was registered in that regard at Police Station Kohsar, Islamabad at 05.25 PM during the same evening for offences under section 302, PPC read with section 109, PPC and section 7 of the Anti-Terrorism Act, 1997.²⁵

The court said the law of the land does not permit an individual to arrogate unto himself the roles of a complainant, prosecutor, judge and executioner. The appellant was a trained police officer who knew the importance of recourse to the law. The appellant was very well aware of the case of Mst Asia Bibi who was alleged to have committed the offence of blasphemy and through the course of law she had been convicted for that offence by a trial court. If the appellant had suspected Mr. Salman Taseer to have committed the offence of blasphemy, then he should also have adopted the legal course knowing that the embargo contained in the provisions of Article 248 of the Constitution against criminal proceedings

against a serving Governor of a Province was only temporary in nature and not permanent. Apart from that the appellant had acted in this case on the basis of nothing but hearsay and he had murdered the serving Governor of his Province without making any effort whatsoever to get his information about commission of blasphemy by Mr. Salman Taseer verified or confirmed. Throughout the world a police officer committing a crime is dealt with more sternly in the matter of his sentence than an ordinary person because an expectation is attached with a police officer that in all manner of circumstances he would conduct himself strictly in accordance with the law and under no circumstances he would take the law in his own hands. If the asserted religious motivation of the appellant for the murder committed by him by taking the law in his own hands is to be accepted as a valid mitigating circumstance in this case, then a door shall become open for religious vigilantism which may deal a mortal blow to the rule of law in this country where divergent religious interpretations abound and tolerance stands depleted to an alarming level. It may also be relevant in the context of the appellant’s sentence that in the execution of his design he had riddled his victim’s body with as many as twenty-eight bullets causing thirty-two grievous injuries which clearly showed that the appellant had acted cruelly and brutally in the matter and such cruelty and brutality demonstrated by the appellant detracts from any sympathy to be shown to him in the matter of his sentence.\(^{26}\)

The court went further and said it is difficult to ignore that in his statement recorded under section 342 CrPC the appellant had also maintained that Mr. Salman Taseer used to indulge in different kinds of immoral activities. This part of the appellant’s statement had opened a window to the appellant’s mind and had clearly shown that it was not just the alleged commission of blasphemy by Mr. Salman Taseer which prompted the appellant to kill him but there was some element of personal hatred for Mr. Salman Taseer which too had played some part in propelling the appellant into action against him. Such mixture of personal hatred with the asserted religious motivation had surely diluted, if not polluted, the acclaimed purity of the appellant’s purpose. For all the reasons detailed above no occasion was found by the court for reducing the appellant’s sentence from death to imprisonment for life for the offences of terrorism and murder committed by him.\(^{27}\)

\(^{26}\) Malik Muhammad Mumtaz Qadri (Criminal Appeal No. 210 of 2015); The State (Criminal Appeal No. 211 of 2015) v The State, etc. (Criminal Appeal No. 210 of 2015); Malik Muhammad Mumtaz Qadri (Criminal Appeal No. 211 of 2015) [Supreme Court of Pakistan, Islamabad] [07 October 2015] [27] <http://www.supremecourt.gov.pk/web/user_files/File/Crl.A._210_2015.pdf> accessed 2 June 2016

\(^{27}\) Malik Muhammad Mumtaz Qadri (Criminal Appeal No. 210 of 2015); The State (Criminal Appeal No. 211 of 2015) v The State, etc. (Criminal Appeal No. 210 of 2015); Malik Muhammad Mumtaz Qadri (Criminal Appeal No. 211 of 2015) [Supreme Court of Pakistan, Islamabad] [07 October 2015] [27] <http://www.supremecourt.gov.pk/web/user_files/File/Crl.A._210_2015.pdf> accessed 2 June 2016
6. Pakistan Military Court Executes Four Army Public School terrorists in Kohat:

Four Taliban gunmen involved in the Army Public School attack in Peshawar in December 2014 were hanged at a civil jail in Kohat on 2 December 2015. The hangings were the first executions of civilians convicted by Pakistan’s military courts. A security source confirmed the execution of the four terrorists saying, “Four militants involved in the attack on Army Public School were hanged this morning in Kohat prison”. The executions were confirmed by a prison official, who said the militants had held a final meeting with their families on Tuesday night, reported AFP. The executions come as the country prepares to observe the first anniversary of the attack on Dec 16. The Army Chief had signed the black warrants of Maulvi Abdus Salam, Hazrat Ali, Mujeebur Rehman and Sabeel alias Yahya on Monday. The mercy appeals of the terrorists were rejected by President Mamnoon Hussain. Militants stormed the school on Dec 16, 2014, killing at least 144 people — most of whom were children. In the wake of the APS carnage, military courts were set up for trying terrorists under amendments made to the Constitution and the Army Act. This was the first sentence approved by the army chief following the Supreme Court’s August 2015 judgement giving legal cover to the establishment of military courts.28

7. Political Consensus on setting up Military Courts to try Terror Suspects:

Political parties in Pakistan had unanimously agreed over the issue of setting up military courts to tackle terrorism cases in the country following the gruesome attack on the Army Public School in Peshawar on 13 December 2014, following which the Parliament passed the 21st constitutional amendment in January 2015 to set up the said courts. President Mamnoon Hussain had also promulgated an ordinance further revising the recently amended Army Act to ostensibly aid the functioning of military courts by allowing for trials in camera, i.e without the presence of the public or the media, and over video link if necessary. The Supreme Court in a majority ruling upheld the establishment of military courts in Pakistan. Petitions challenging the 21st amendment were dismissed in August 2015 in a majority 11-6 vote of the 17-member SC bench. Chief Justice Nasirul Mulk and Justice Dost Muhammad announced the verdict. In a 14-3 majority vote, petitions challenging the 18th amendment were also dismissed by the bench. Judges provided seven opinions and two additional notes on the ruling.29

8. War Crimes Trials in Bangladesh:

For last few years Bangladesh has been in news for war crimes trials. It is a highly controversial issue in Bangladesh. It may be pertinent to look at it in brief. The

---

International Crimes (Tribunals) Act, 1973 (Act No. XIX of 1973), was enacted by the sovereign parliament of Bangladesh to provide for the detention, prosecution and punishment of persons responsible for committing genocide, crimes against humanity, war crimes and other crimes under international law. The Tribunal constituted under the Act has the power to try and punish any individual or group of individuals or organizations, or any member of any armed, defence or auxiliary forces irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after commencement of this Act, any crimes mentioned in sub section [2] of section 3 of the Act. Under section 6 of the Act the government may, by notification in the official gazette, set up one or more tribunals each consisting of a Chairman and not less than two and not more than four other Members.

On 22/3/2012 government by official gazette notification established another tribunal namely International Crimes Tribunal-2. Thus, two tribunals were established under the ICTA (1973) with the same jurisdiction mentioned in section 3 of the ICTA (1973). The ICT-1 and the ICT-2 has separate rules of procedures of its own. Tribunal, on hearing both sides and on perusal of materials, documents, statement of witnesses, DVDs may frame charge(s), if it is satisfied that there is reasonable ground to believe, prima facie, that the accused committed the offences as enumerated in the Act of 1973. After framing charge, trial commences and both sides shall have rights to adduce and examine witnesses in support of their respective cases and defense. Under section 21(1) of the Act a person convicted of any crime specified in section 3 and sentenced by a Tribunal shall have the right to appeal to the Appellate Division of the Supreme Court of Bangladesh, the highest judicial forum of the country, against such conviction and sentence. Under section 21(2) the government or the complainant or the informant also shall have the right of appeal against an order and verdict of acquittal or an order of sentence.

The Tribunal is a domestic judicial mechanism set up under national legislation and it is meant to try internationally recognized crimes and that is why it is known as 'International Crimes Tribunal’. Despite the fact that ours is a domestic Tribunal set up under International Crimes (Tribunal) Act, 1973, a domestic legislation, the Tribunal shall never be precluded to seek guidance from the universally recognized norms and principles laid down in international law and International Criminal Law with a blend of national law, in trying the persons responsible for perpetration of crimes enumerated in the Act of 1973. All

---

30 Since 15.9.2015 only Tribunal-1 has been functioning on being reconstituted and Tribunal-2 remains non-functioning. International Crimes Tribunal-1, Bangladesh <http://www.ict-bd.org/ict1/index.php> accessed 2 June 2016
31 Since 15.9.2015 only Tribunal-1 has been functioning on being reconstituted and Tribunal-2 remains non-functioning. International Crimes Tribunal-1, Bangladesh <http://www.ict-bd.org/ict1/index.php> accessed 2 June 2016
possible provisions ensuring adequate rights of defense have been enshrined in the ICTA and the Rules as well.\textsuperscript{32}

Despite these legal and procedural assurances, Bangladesh government of Prime Minister Sheikh Hasina Wajed has been criticised at home as well as abroad. Western human rights activists, jurists and Pakistan have been overseas critics while opposition parties in Bangladesh have roundly condemned the war crimes trials. All the opposition political parties in Bangladesh have accused PM Sheikh Hasina Wajed of vendetta and revenge. Sir Desmond de Silva\textsuperscript{33} acknowledges and reminds us that Bangladesh was born in violence. He says the civil war between those who wanted the country to remain as East Pakistan were ranged against those who sought independence. The Liberation War as it is now known, left according to many estimates nearly three million dead, a death toll higher than the Rwandan Genocide, the Yugoslav wars of the 1990s and the Sierra Leonean and Liberian civil wars all put together.\textsuperscript{34} He concedes that it is beyond doubt crimes were committed on a massive scale in Bangladesh and many of the victims as well as perpetrators of serious crimes are still alive, it is still possible to bring to justice those from all sides accused of committing atrocities during the conflict. As the trial of Charles Taylor, former President of Liberia, by the Special Court for Sierra Leone for which I was Chief Prosecutor underlines is the need to ensure the hammer of international justice is seen to be brought down on those who commit the most egregious crimes by impartial and independent judges.\textsuperscript{35} For him what is also clear to many inside and outside the country is the government of Bangladesh is not attempting to use the Tribunal to deliver justice for victims, as was their election pledge, but to target its political opposition that it repeatedly labels as anti-liberation.\textsuperscript{36}

\textsuperscript{32} Since 15.9.2015 only Tribunal-1 has been functioning on being reconstituted and Tribunal-2 remains non-functioning. International Crimes Tribunal-1, Bangladesh <http://www.ict-bd.org/ict1/index.php> accessed 2 June 2016

\textsuperscript{33} Sir Desmond de Silva QC, former Prosecutor of the Special Court for Sierra Leone (\textit{No Peace Without Justice Newsletter}) <http://www.npwj.org/ICC/Bangladesh-War-Crimes-Tribunal-should-be-internationalised-sake-nation%E2%80%99s-future.html> accessed 2 June 2016

\textsuperscript{34} Sir Desmond de Silva QC, ‘The Bangladesh War Crimes Tribunal should be internationalised for the sake of the Nation’s Future’ (\textit{No Peace Without Justice Newsletter}) <http://www.npwj.org/ICC/Bangladesh-War-Crimes-Tribunal-should-be-internationalised-sake-nation%E2%80%99s-future.html> accessed 2 June 2016


Kristine A. Huskey\textsuperscript{37} points out almost 40 years later, the people of Bangladesh will finally see justice done for war crimes and other atrocities committed during the 1971 War of Liberation. Or will they? She argues, justice can only be done for the victims, their families, and the perpetrators, if the Tribunal is fair and is seen as being fair by the people of Bangladesh and the international community, of which Bangladesh is a key participant as the first nation in South Asia to become a state party to the Rome Statute (for the International Criminal Court) and a signatory to the International Covenant on Civil and Political Rights (ICCPR).

The diplomatic relations with Pakistan also dipped to the lowest ebb over May 2016 Supreme Court’s war crimes verdict against Motiur Rahman Nizami, chief of Bangladesh Jamaat-e-Islami. Bangladesh once again snubbed Pakistan for meddling in its internal affairs. Pakistan’s denial of war crimes in Bangladesh triggered diplomatic outrage. State Minister for Foreign Affairs Shahriar Alam made the statement on 5 May reacting to Pakistan’s expression of concern over the dismissal of Motiur Rahman Nizami review plea against capital punishment verdict for crimes against humanity he committed in 1971 as chief of death squad al-Badr, responsible for killing of intellectuals. The country has also asked Pakistan "to stop misinterpreting" the April 1974 ‘tripartite agreement’ signed by Bangladesh, India and Pakistan.\textsuperscript{38}

Conclusion:

The case of Bangladesh war crimes trials being held after 40 years and awarding death penalty to opponents of country’s independence from Pakistan who indulged in unpardonable war crimes clarifies the point that it is not merely an abstract legal issue. Law and justice do not operate in vacuum. Another point in this controversy is the criticism emanating from Pakistan which itself is sentencing an unprecedented number of people to death. Therefore Bangladesh is justified in sharply objecting to Pakistani reaction as an interference in its internal matters. Thus, justice is most of the time a zero-sum game. That us even more so if the parties insist on death penalty to the culprit. Jurisprudence is not yet settled over superiority of theories of retribution, deterrence, reform and forgiveness. Thus, terrorism and death penalty seem to be congenital Siamese twins. They have a symbiotic relationship.

\textsuperscript{37} Kristine A. Huskey is an attorney and consultant on matters of national security law and policy and international humanitarian and human rights law.\textsuperscript{} \textless{}http://www.crimesofwar.org/commentary/the-international-crimes-tribunal-in-bangladesh-will-justice-prevail\textgreater{} accessed 3 June 2016

\textsuperscript{38} Saleem Samad, ‘Bangladesh snubs Pakistan over war crimes trial remarks’ \textit{Asian Age} (Dhaka, 09 May 2016) \textless{}http://dailyasianage.com/news/18392/bd-snubs-pak-over-war-crimes-trial-remarks\textgreater{} accessed 3 June 2016
CAPITAL PUNISHMENT- A CONTROVERSIAL ISSUE

Narois Arora & Sabiha Tariq
B.A.LL.B. (Hons.) | Faculty of Law, Aligarh Muslim University, Aligarh

In recent times there is much debate on capital punishment. The hanging of Ajmal Kasab, Afzal Guru and Yakub Memon give us a good reason to discuss more about the practice of capital punishment in our country and in other countries as well. Therefore, it is important for us to know that there are number of people who consider capital punishment as inhumane whereas the advocates of capital punishment consider it a just penalty for the crimes such as serial killing, terrorism, murders, etc. However this article deals with number of cases following with laws that are made by various legislative bodies and a remarkable conclusion.

Introduction

Life is precious,
Simply because it’s a gift from
GOD

The lines quoted above clearly throws light on the importance of one’s life and no one has the right to take it easily. Even the framers of Constitution of India gave importance to LIFE under Article 21 which reads as, “no person shall be deprived of his life or personal liberty except according to a procedure established by law.” Even though one’s life is crucial but when it defeats the life of another or gives harm to his nation than his life’s thread goes in hands of Court that decides his further life. Since the dawn of the civilization stoning, hanging and killing were a part of life. Either it is ancient period or medieval such practices had been in motion. However, the origin of capital punishment can be traced by the late 1800s capital punishment was Code of Hammurabi, introduced by the employees of Thomas Edison which contains 282 laws including the theory of “eye for an eye”. Even in modern or in British regime, death penalty is strictly followed.

In India, no doubt after our independence, death penalty rate has been declined but our constitution has secured the provisions of death penalty or capital punishment.

1. Capital Crimes

Crimes for which death penalty is awarded are known as “Capital Offences” or “Capital Crimes”. However capital crimes vary from state to state and country to country. For e.g. in many countries sexual crimes such as rape, adultery, etc. carry the death penalty, whereas in some countries drug trafficking, serious corruptions, white collar crimes, etc. are

1Quotesempire.com (last visited on 11july, 2016)
punished by death. Other than this crime against humanity, economic crimes, etc. are also punishable by death.

2. Capital Punishment

Capital Punishment is also known as “Death Penalty”. It is a government sanction practice by which a person is put to death as a punishment for a crime committed by him which is considered as a capital offence or a capital crime. The sentence by which a person is put to death as a punishment is known as “Death Sentence” and the act of carrying out such a sentence is known as an “Execution”.

3. Methods of Capital Punishment/Execution

Beheading- Beheading is one of the method of capital punishment and is also known as Decapitation which associated with sharia law and is actively used in Saudi Arabia.

Hanging- Hanging as a capital punishment which is common in many countries of the world like India, Afghanistan, Japan, Iran, Kuwait, Nigeria, etc.

Stoning- Stoning is also a method of capital punishment in which stones are thrown at a prisoner until he dies. This type of capital punishment is used in many countries around the world, especially in Middle Eastern countries.

Electric Chair- Electric chair is also one of the methods of death penalty in the United States. In this method of capital punishment prisoners are killed by a strong source of energy attached to their body parts. However its use is declined after the introduction of “Lethal Injection”.

Thus there are many other methods of capital punishment like slow slicing, firing squad, etc.

4. Statistical Data

Many countries have abolished capital punishment despite some countries are still practicing it. In 2015, at least 25 countries have practiced judicial executions.

[According to Amnesty International, 140 countries have abolished the death penalty in law or practice in 2015].

5. Position in India

From 2004-2013, Delhi, Jharkhand, Uttar Pradesh, Bihar and West Bengal were the 5 states that comprised almost 57% of all death sentences awarded in the country among which Uttar Pradesh and Jharkhand were second where death sentences were commuted

---

to life imprisonment. In 2014 Indian courts sentenced 64 people to death while at least 607 people were executed worldwide. In 2015, 1 person was executed in India.

6. Position in Other Countries

In China, data regarding death penalty is considered as State secret. However, Iran, Pakistan and Saudi Arabia contributed the rate of 89% of all executions recorded in 2015. In Saudi Arabia 158 people were put to death in 2015. Iran also executed juvenile offenders whereas in Pakistan 326 people were put to death in 2015 according to Amnesty International. In 2015, Fiji, Madagascar, The Republic of Congo and Suriname, abolished the death penalty. Indonesia carried out 14 executions for drug related offences.

7. Cases

i. India

Dhananjoy Chatterjee was hanged on 14 August, 2004 for rape and murder. Seema Gavit and Renuka Shinde’s mercy pleas were rejected by the President after the Supreme Court confirmed their death sentence. However, 24 mercy pleas were rejected by the President Pranab Mukherjee including that of Ajmal Kasab, Afzal Guru and Yakub Memon.

Ajmal Kasab

Ajmal Kasab was a Pakistani militant who was convicted for murder, waging war on India, possessing explosives and other charges by Mumbai Special Court for which he was sentenced to death by Bombay High Court on 21 February, 2011 and by Supreme Court on 29 August, 2012. At last Kasab was hanged on 21 November, 2012 in Yerwada Central Jail in Pune. This hanging was the death penalty to be implemented in India since 2004.

Afzal Guru

Afzal Guru was convicted of 2001 Indian Parliament Attacks for which he was sentenced to death. He was scheduled be hanged on 20 October, 2006 however, he was hanged on 9 February, 2013 at Delhi’s Tihar Central Jail.

Yakub Memon

---

3In 10 Years, Indian Courts Handed Down 1,303 Capital Punishment Verdicts by Chaitanya Mallapur, available at: scroll.in/article/744...punishment-verdicts (last visited on 9 july, 2016)
4India One of Top 10 Nations Where Death Sentences were Handed Out Last Year by Kounteya Sinha and Anahita Mukherji, available at: m.timesofindia.com/...handed-out-last-year-... (last visited on 9 july, 2016)
13 serial explosions were given the name of Bombay Bombings that took place in March 12, 1993. Yakub Memon was the brother of Tiger Memon who was one of the prime suspects of these bombings and Yakub Memon was convicted for these Bombay Bombings of 1993 and was hanged on 30 July, 2015 in Nagpur Central Jail.

8. International Cases

i. Saudi Arabia

Saif al-Hadissan was found guilty of smuggling a large amount of hashish for which he was executed in the Al-Asha region of eastern Saudi Arabia.8

Abdullah al-Zaher, A teenage boy was arrested at the age of 15 years and was the youngest in a group of juvenile offenders who was put on death row as part of a crackdown on political dissent.9

ii. United States

George Stinney Jr. became the youngest person in the 20th century to be executed in US over the killing of 2 white girls aged 11 and 7.10

iii. California

Clarence Ray Allen, 76, was executed at San Quentin in California for triple murder. He received three lethal injections and then he was given an extra dose of potassium chloride that stops the heart and was declared dead.11

iv. Iran


Reyhaneh Jabbari was a woman who was convicted for murdering Morteza Abdolali Sarbandi, a former intelligence ministry worker in Iran for which she was executed by hanging on 25 October, 2014 in a Tehran prison.12

9. Legislative Comments

The Indian Penalty code, 1860 provides the following laws which covered the death penalty which are-

According to Sec.120B of IPC, reads as anyone who commits an offence of criminal conspiracy shall be punished with death, or imprisonment for life, or imprisonment for a term of 2 years or upwards.

According to Sec. 121 of the IPC, says that anyone wages war or attempt to wage against the government of India, shall be punished with death or imprisonment for life & shall also be liable to fine.

If mutiny is committed by an officer, soldiers, sailors or airman, in army Navy or Air force of the Government by India, in consequence of that abetment, shall be punished with death or with imprisonment for life or imprisonment of either description for a term which may extend to 10 yrs, and shall also be liable to fine according to Sec 132 of IPC.

According to Sec.194 of IPC, states that if anyone fabricates false evidence intending to cause any person to be convicted of an offence which is capital by the laws, shall be punished with imprisonment for or with imprisonment for a term extent to 10 years, shall also be liable to fine, if such innocent person be convicted and executed in consequence of false evidence, the person who gives such false evidence shall be punished either with death or the punishment herein before described.

Anyone who commits murder shall be punished with death or imprisonment for life and shall also be liable to fine under Sec 302 of IPC.

Under the Section 305 of IPC, if any person under the age of 18 years of age or any insane person or any person in state of intoxication commits suicide, whoever abets the suicide, shall be punished with death or imprisonment for life, or imprisonment for a term not exceeding 10 years, and shall also be liable to fine.

Section 307 of IPC, says that whoever does an act with such intention that if he does an act that caused him death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may be extend to 10 years, and shall also be liable to fine, and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishments is hereinbefore mentioned.

---

Attempts by life convicts: When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death.

If anyone causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with a term which included imprisonment for a term which shall not be less than 20 years, but which may extend to imprisonment for life, or with death under section 376A of IPC.

If anyone who has been previously convicted for an offence punishable under section 376 or 376A or 376D and is subsequently convicted for an offence punishable under said sections shall be punished with imprisonment for life which mean imprisonment for the remainder of that person’s natural life, or with death under section 376E.

Under Section 396 of IPC, if 5 or more persons, who are conjointly committed dacoity, commits murder in doing dacoity, shall be punished with death, or imprisonment for life, or imprisonment for a term which may extend to 10 years, and shall be liable to fine.

Under section 364A of IPC, anyone kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international intergovernmental organization or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death or imprisonment for life, and shall also be liable to fine.

The Section 303 of IPC says that anyone, being under sentence of imprisonment for life, commits murder, shall be punished with death. This section was struck down as unconstitutional by the Supreme Court in Mithu v State of Punjab in 1983.  

10. Anti-Terror Legislations:

Under The Explosives Substances Act, 1908, Sec. 3(b) says that anyone for causing an explosion which is likely to endanger life or to cause serious injury to property, shall be punished with death, imprisonment for life, and shall also be liable to fine.

Under The Arms Act, 1959, section 27(3) says that anyone uses, acquires, possess or sell the prohibited arms resulting the death of any person, for such act or use shall be punishable with death. But this section was repealed and was declared unconstitutional in State of Punjab v. Dalbir Singh.

Unlawful Activities Prevention Act, 1967, section 10(b)(1) says that anyone aiding or promoting illegal association or possesses unlicensed firearms, ammunition, explosive or other instrument which can cause significant damage to any property, or resulted with an injury, shall be punished with death or imprisonment for life, and shall also be liable to fine.

---

13 Bare Act of Indian Penal Code, 1860
According to Section 5 of the Defence of India Act, 1971 says that if anyone contravenes, with the intent to wage war against India or to assist any country committing external aggression against India, shall be punished with death or imprisonment for life, or imprisonment for a term which may extend to 10 years and shall also be liable to fine.

Under Army Act, 1950, Section 34, offences include an abandoning one's post, discouraging others from acting against the enemy; casting away one's arms; communicating with the enemy, assisting the enemy; treacherously waving a flag of truce; false alarm during war; leaves his post without relief; being a POW, voluntarily aiding the enemy; sleeping at the post as a sentry, imperiling success of army, navy, air force; causing capture of aircraft; using false air signals; failing to fully carry an order into effect. Any person does, he shall be punished with death. Army Act also includes section 37 and 38(1) for mutiny act and desertion and aiding desertion respectively.

Section 3(1)(i) of the Maharashtra Control of Organised Crime Act, 1999 says that any person commits an offence of organized crimes resulted in the death of any person, shall be punished with death or imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees 1 lakh.

Such Sections are also includes in Karnataka Control of Organised Crime Act, 2000 and Andhra Pradesh Control of Organised Crime Act, 2001.

11. Laws Made in other countries regarding Death Penalty

In China, lethal injection and shooting are the methods which are authorized by China's Criminal Procedure Law, 1996. Shooting execution was discontinued in 2010. For a meanwhile, they used firing squad which is a mixture f barbiturates and potassium chloride. But due to the cost of firing squad, they were switchover to lethal execution. In China, crimes punishable by death were aggravated murder, homicide murder, causes explosion, spreads poisonous, radioactive substance, rape resulted to death, fake medicine, robbery which resulted to death, military offenses, terrorism offenses, arson, kidnapping results in death, drug trafficking, economic crimes such as graft and bribery, treason, etc. It excludes juvenile offenders, pregnant women, elderly and mentally ill.

In Saudi Arabia and many gulf countries, crime and punishment is based on Sharia law i.e. based on Quran and Hadith which specified the punishment in different crimes such as rape, murder, blasphemy, armed robbery, repeated drug, apostasy, adultery, witchcraft and sorcery. For instance, adultery is death by stoning. The methods they used were stoning, firing squad, beheading with a sword, crucifixion and lashing. Executions may occur within prison boundaries or in a public square, depending on court ruling. In Saudi, death is awarded in such offences such as murder, seclusion, treachery, acts of terrorism i.e. corruption on Earth, consumption of alcohol, rape resulting to death, arson, burglary, drug

trafficking, drug possession, adultery, apostasy, treason depending to king, espionage, military offenses, etc.

Capital punishment is also used currently in U.S.A and 32 States In 1972, death penalty was struck down in Furman v Georgia case. But in Gregg v Georgia case, it starts the legality of capital punishment again.

In California, under the Criminal Practices Act of 1851, death penalty was a part of a punishment awarded in the specified crimes. Earlier persons were also mentioned at the time of execution but in 1891 the place of execution i.e. within the walls of one of the State prisons designed by the Court, prisons were San Quentin State Prison and Folsom Prison, and warden replaced the sheriff. In 1937, capital punishment replaced with the legal gas. For 25 years, there were no execution and in 1973, death penalty became unconstitutional, made mandatory for criminal cases. In 1977, it specified the special circumstances especially the matters involve in penal code. In 1993, it allows to choose either lethal gas or lethal injection as a method of execution. In 21st century, after the long debate and the method of legal injections and death penalty, on 8th November, 2016 California Death Penalty will be repealed.

Conclusion

Life is one time offer, Use it well.\textsuperscript{15}

It is appropriate to say this line as God has gifted us a life. It is we who decide to choose our way of living. Some people spend their whole life to serve another. But some people give troubles to the society. To overcome such things, every country steps up to establish laws which are strict in nature. For these reasons, death penalty becomes one of the debatable subjects whose end can still not be achieved. The favour of death penalty is that citizen of our country needs a tough action which can secure their fundamental rights and order of the society. They consider it as fair conclusion made for the sufferers. But some people consider it inhumane, cruel to humanity. It considers as a third degree torture.

At last, we are of the view that capital punishment should be estimated according to the situation and circumstances of the matter.

\textsuperscript{15} \url{www.pinrerest.com} (Last Visited on 13 July, 2016)
LEGAL STATUS OF ILLEGITIMATE CHILDREN:
A CRITICAL ANALYSIS OF PERSONAL LAWS IN INDIA VIS-À-VIS RIGHTS OF THE CHILD

Nikita Swamy

What is against the law is considered to be illegitimate or illegal. Such was the status of the illegitimate child until recently when the laws underwent a change due to social and political evolution and a shift in the thoughts of the people. In the present post-modern world, there is considerably less stigma attached to such terms. In progressive nations like the United States of America society is generally receptive to such children and the laws imposed also ensure that their rights are protected. Off late in countries like India there has been a change in the personal laws to incorporate this development, the most recent being the amendment of Section 16 of the Hindu Marriage Act and several judicial decisions. This paper attempts to track these changes among the three major personal laws in our country i.e. Hindu, Muslim and Christian.

Introduction

Throughout history, there is probably no other word associated with such contempt as bastard or bastardry. Early common law treatment of the same is without regard to the social implications of the same. They were not recognised in polite society and were granted no rights. As early as 1235, the Earls and Barons refused to accept their illegitimate offspring. Rights over property were an unachievable dream, when they were not even granted maintenance. This treatment of illegitimate children has been uniform throughout the world, with a few inconsistencies. It is not possible to ignore certain notable bastards who changed the course of history. But notwithstanding these exceptions, there has always been a social stigma associated with illegitimate children. Society has always ostracized such children, who through no fault of their own were treated as unacceptable among other members of society.

Very often a dominant group loses its primacy over other groups in view of the ever changing socioeconomic scenario and the consequential vicissitudes in human relationship. Law takes its own time to articulate such social changes through a process of amendment. That is why in a changing society law cannot afford to remain static. And hence, we observe that various personal laws have undergone a change.

In the late 20th century, with the progression of society, there was an attitudinal and behavioral change towards the illegitimate issue. This change was ushered in with social and political changes along with society’s transformation from a primitive agrarian society.

to a modern urbanized, industrial nation. With the change in society's behavior, the laws were amended to incorporate the same. The concept of legitimacy stems from social consensus, in the shaping of which various social groups play a vital role. In several countries, laws have been implemented and the legal position of illegitimate children has vastly improved.

1. India

In India, until recently, the law did not recognize the rights of illegitimate children over the property of their parents. With the amendment of Section 16 of the Hindu Marriage Act, the law now recognises an illegitimate child's right over the property of its parents. Children born out of wedlock in live-in-relationships also acquire a right over the property of their parents.

Hindu Law

The rights of illegitimate children under Hindu Law have undergone a drastic change due to the Marriage Laws (Amendment) Act, 1976 which amended Section 16 of the Hindu Marriage Act, 1955. Prior to this amendment only certain rights relating to Sudras had been recognised. With regard to maintenance, Section 20 of the Hindu Adoptions and Maintenance Act, 1956 states that a Hindu is bound to maintain his/her illegitimate children.

Illegitimate sons of a Sudra

The illegitimate son of a Sudra by a permanently kept concubine has the status of a son and is a member of the family. But he does not acquire on his birth a joint interest with his father in the ancestral family property. He also cannot enforce partition against his father during his lifetime. If a partition is made during the father’s lifetime, he may be allotted a share “by the father’s choice”. But if a partition is made after the father’s death, the ‘brethren should make him a partner of the moiety of a share’.

Thus regarding the illegitimate sons of the Sudras, the Court's view can be summarized as follows. The illegitimate son cannot enforce partition during father’s lifetime. If there is a partition during the father's lifetime then he ‘may’ be allotted a share. But if there is a partition after the father’s death then the legitimate sons should give him share of the property.

When a legitimate son and an illegitimate son succeed to their father's separate estate, they take as coparceners with mutual rights of survivorship. But the illegitimate son of a Sudra is not a coparcener with his father, though he may be a coparcener with his father's

2 Vellayappa v. Natarajan, (1931) 58 IA 402: 55 Mad 1
3 Munnuswami v. Swaminathan, AIR 1953 Mad 25
4 Karuppannan v. Bulokam, (1990) 23 Mad 16
5 Gurunarayandas v. Guruthaldas, AIR 1952 SC 225
legitimate son, and he is entitled to demand partition against the legitimate son. This position is not affected by the Hindu Succession Act.

**Inheritance law post amendment to Section 16 of the Hindu Marriage Act**

The Amendment Act of 1976 (Act 68 of 1976) amended Section 16 of the Hindu Marriage Act, 1955. By this amendment, irrespective of whether marriage is null and void under Section 11, any child of such marriage whether born before or after the commencement of the Amendment Act shall be legitimate. Sub section 3 of this section also grants a right to property of the parents, to such illegitimate children.

By the use of the word ‘property’ the section has kept the meaning general and broad.

The amendment to Section 16 has been introduced and was brought about with the obvious purpose of removing the stigma of illegitimacy on children born in void or voidable marriage.

The issues relating to the extent of property rights conferred on such children under Section 16(3) of the amended Act were first discussed in detail in the case of Jinia Keotin and Ors. v. Kumar Sitaram Manjhi and Ors. The main contention in this case was whether the term property in Section 16(3) included self acquired property as well as ancestral property of the parents. The Supreme Court, repelling such contentions held that in the light of the express mandate of the legislature there is no room for according upon such illegitimate children more rights than envisaged. Doing so would amount to violence of the provision and would attempt to the court re-legislating on the subject under the guise of interpretation. This view of the Supreme Court was followed in several other cases.

Thus the Supreme Court by its narrow interpretation limited the scope of the section. Fortunately, successive decisions of the same court held the view to be narrow and even provided reasons to justify the same. In the case of Revansiddappa & Ors v. Mallikarjuna & Ors the Supreme Court stated that the section restricted the rights of such illegitimate children with respect to property other than that of their parents. However, the said prohibition does not apply to the property of the parents. Clauses (1) and (2) of Section 16 expressly declare that such children shall be legitimate. If they have been declared legitimate, then they cannot be discriminated against and they will be at par with other legitimate children, and be entitled to all the rights in the property of their parents, both self-acquired and ancestral.

---

7 Thangavelu v. Court of Wards, Madras, (1946) 2 MLJ 143
9 Suryaprakasa Rao (R.) v. Venkateswarlu (R.), AIR 1992 AP 234 (DB)
10 Revansiddappa & Ors v. Mallikarjuna & Ors, (2011) 4 SCR 675
11 Jinia Keotin and Ors. v. Kumar Sitaram Manjhi and Ors, (2003) 1 SCC 730
12 Neelamma and Ors. v. Sarojamma and Ors. (2006) 9 SCC 612, Bharatha Matha and Anr. v. R.Vijaya Renganathan and Ors., AIR 2010 SC 2685
13 Revansiddappa & Ors v. Mallikarjuna & Ors, (2011) 4 SCR 675
The constitutional validity of Section 16(3) of Hindu Marriage Act was challenged before this Court and upholding the law, this Court in *Parayankandiyal Eravath Kanaprvan Kalliani Amma (Smt.) and Ors. v. K. Devi and Ors.*\(^{14}\), held that Hindu Marriage Act, a beneficial legislation, has to be interpreted in a manner which advances the object of the legislation. The Court also recognized that the said Act intends to bring about social reforms and further held that conferment of social status of legitimacy on innocent children is the obvious purpose of Section 16. Thus through a series of legislations the Supreme Court interpreted the section in the light of its true object which is to protect innocent children from the status conferred to them by society thereby promoting their interests.

In the case of *Revansiddappa & Ors v. Mallikarjuna & Ors*\(^{15}\) the Supreme Court elaborated on the crux of the amendment in Section 16(3), “The Court has to remember that relationship between the parents may not be sanctioned by law but the birth of a child in such relationship has to be viewed independently of the relationship of the parents. A child born in such relationship is innocent and is entitled to all the rights which are given to other children born in valid marriage.”

Thus, under Hindu Law the illegitimate children are deemed to be legitimate and are granted a right to inherit the property of their parents. This is the current legal position on right to inheritance as upheld in the above mentioned case and has been followed in several other decisions.\(^{16}\)

**Muslim Law**

In the Muslim law, as in other systems of law, parentage involves certain rights and obligations. By and large there are two modes of filiation known to the law: as a rule the law treats the natural father as the father of the child; sometimes, however, adoption leads to the result that someone who is not the father of the child acquires rights similar to those of the father.\(^{17}\) Adoption is not recognised in Islam\(^{18}\), as it was disapproved by the Quran. In addition to filiation the other form is ‘acknowledgement of paternity’. The peculiarity of Muslim law is that in certain cases where it is doubtful whether a person is the child of another, the acknowledgment of the father confers on the child the status of legitimacy.\(^{19}\)

What is important to know is the difference between legitimacy and the process of legitimation. Legitimacy is the status which results from certain facts. Legitimation is a proceeding which creates the status of legitimacy which did not exist before and in the proper sense of term, there is no legitimation in Muslim law.\(^{20}\)

\(^{14}\)Parayankandiyal Eravath Kanaprvan Kalliani Amma (Smt.) and Ors. v. K. Devi and Ors. (1996) 4 SCC 76
\(^{15}\) Revansiddappa & Ors v. Mallikarjuna & Ors, (2011) 4 SCR 675
\(^{16}\) Kanthamma v. K. Shettappa and Ors, 2014(1) RCR(Civil)573
\(^{17}\) Mulla, Principles of Mahomedan Law, (20\(^{th}\) ed., Lexis Nexis Butterworths Wadhwa, 2013)
\(^{18}\) Muhammad Allahdad v. Muhammad Ismail, (1888) 10 All 289
\(^{19}\) Kutty, Faisal, Islamic Law and Adoptions (June 20, 2014)
\(^{20}\) Syed Habibur Rahman v. Syed Altaf Ali, AIR 1922 PC 159
Acknowledgement of paternity or Iqrar is a kind of legal evidence. It is practically the most conclusive and un-controvertible means of creating an obligation on the person who makes it. In Muhammad Allahdad v. Muhammad Ismail, the Court observed:

“Where the paternity of the child that is, his legitimate descent from his father cannot be proved by establishing a marriage between his parents and at the time of his conception of birth, Muslim Law recognized ‘acknowledgement’ and legitimate descent can be established as a matter of substantive law for purposes of inheritance.”

The doctrine of acknowledgement or iqrar confers a status of legitimacy on a child whether son or a daughter. Mulla explains the same in Section 342 of Principle of Mohamedan Law. The much followed case on the doctrine of acknowledgement is the decision of the Privy Council in Sadik Hussain Khan v. Hashim Ali Khan, wherein it was established that in cases of uncertainty of legitimate descent, an acknowledgement by the father raises the presumption of legitimacy unless the other side can prove that the child whose paternity was acknowledged was of illegitimate descent.

This doctrine can be invoked only where the factum of marriage or the exact time of marriage has not been proved. It is based on the assumption of a lawful union between the parties of the acknowledged child. The doctrine of acknowledgement however cannot be where the lawful union between the parents of the child is not possible as in the case of incestuous intercourse or adulterous connection. The doctrine is also not applicable where the marriage necessary to render the child legitimate is disproved. An acknowledgement need not necessarily be express. It may be presumed from the treatment and conduct leading to an inference of acknowledgement. It is an essential condition to the validity of an acknowledgement that the physical relation of father and child should not be a matter of impossibility. The presumption of paternity arising from acknowledgement can be rebutted by proof that physical relationship is a matter of impossibility.

In a decision by the Privy Council it stated that where there is a question of the existence of a marriage between the parents, something more than the acknowledgement of paternity is required. This principle has also been utilized in the case, Abdool Razack v. AGA Mohomed Jaffer Bindaneem, where Lord Macnaghten states the following:

“On the other hand, where no marriage is shown to exist or where the concubine is not a slave concubine, the mere admission of paternity is not enough for the purpose of affording

21 Muhammad Allahdad v. Muhammad Ismail, (1888) 10 All 289
22 Sadik Hussain Khan v. Hashim Ali Khan, AIR 1916 PC 27
23 Dr. H.D.Kohli, Muslim Law Cases & Materials (Universal Law Publishing Co., 2012)
25 Golstaun v. Mirza Abid Hussain, AIR 1924 Oudh 19
26 Zakir Ali v. Sogradi, Indian Cases 883
27 Fatima Binti Hafidh v. The Administrator- General, Zanzibar Protectorate, AIR 1949 PC 254
28 Abdool Razack v. AGA Mohomed Jaffer Bindaneem, (1894) 21 Ind App 56
proof of legitimacy; the treatment must be such as to convey the fact that the child is acknowledged not merely as the off-spring of the father but as his legitimate offspring.”

Thus where there is a doubt regarding the existence of marriage then mere acknowledgement of paternity is not sufficient. But in cases where the marriage is irregular or voidable, the acknowledgement of paternity by the father, provided the same is valid, is sufficient proof for the legitimation of the child’s status. Under Muslim law illegitimate child has no right of inheritance from either of the parents under both Shia and Sunni schools though such children can claim maintenance from mother only under Sunni law upto the age of seven years.

Right to Inherit Property

Under Muslim Law, the illegitimate child has no right to inherit property from the father. Under the Hanafi law the mother and her illegitimate children have mutual rights of inheritance. The illegitimate child inherits not only the property of its mother but also the property of all other relations with whom it is related through the mother. In Pavitri v. Katheesumma30 Vaidialingam J. held, “Mohommadan law appears to impose no burden upon the natural father of an illegitimate child...”

Muslim Law also does not confer any right to maintenance to the illegitimate child, though the Hanafis recognize the obligation to nurture the child till age 7. But such children can seek remedy under Section 125 of the Cr.PC which should ensure that all such illegitimate children are maintained by their parents. The same has been recognized by the Courts in several cases. 30

Christian Law

Under Christian Law, an illegitimate child is recognized as ‘fillius nullius’ which means child of no one. Unlike Hindu Law, which creates a status of legitimacy on the child (Section 16 of HMA, 1955) there is no provision in Christian Law which corresponds to the same.31 The property rights of Christians are covered under the Indian Succession Act, 1925.

The term ‘child’ as used in this Act, does not include illegitimate children. Section 37 of the Act specifically precludes illegitimate children from inheriting property of the father. But this does not restrict such children from claiming maintenance under Section 125 of the Cr.PC. Similar to Hindu and Muslim Law, the custody of the child is solely with the mother and her relations. 32 The putative father has no say in this matter. This is provided in Section 8 of the Indian Succession Act. Through several decisions of the Court, we can observe that if the two parents have co habited for a long period or if the man treats the

29 Pavitri v. Katheesumma, AIR 1959 Ker 319
woman as his wife, then the children are considered legitimate. This was held in the case of *Rameshwari Devi v. State of Bihar*\(^3\) and *Vidhyadhari and others v. Sukhrana Bai*\(^4\) and several other cases.

Thus under Christian Law, illegitimate children are excluded from right to inherit property of the parents but are granted a right to maintenance under the secular law i.e. Section 125 of the Cr.PC.

**Conclusion**

Children born illegitimate, irrespective of the current progressive society suffer social stigma and this has an impact on their status in society. Society, in countries like ours, still discriminates against such children. Even with the changes in the law, due to the influence of deep set religious thinking and prejudices that influence our behavior, the Indian society is not very accepting towards such illegitimate issue. Added to such trauma it seems unfair that such children are not granted the right to succeed to their parents' property. Fortunately, the Courts through their decisions have expressed concern and sufficiently spoken about how they should not be unfairly punished for the acts of their parents. In the case of *Revansidappa v. Mallikarjuna & Ors* the Supreme Court expressed its sympathy for such children.

The Hindu Law provides sufficient protection for the rights of such children. But other personal laws like Muslim Law or Christian Law are not so elaborate. As observed earlier, Muslim Law restricts it to property of the mother and Christian Law does not give any such rights. It was considered that debarring the illegitimate child from inheriting the property of its parents would deter further generations from entering into a sexual relationship outside marriage and would enforce a strict regime of proper sexual mores in society. However, trends and statistics have shown that the problem of illegitimate births in the country has been increasing at an alarming rate; hence the above argument to justify the exclusion of illegitimate children from inheriting property of parents cannot be bought and falls flat.

This issue requires immediate attention and proper legislation to remedy the anomalies in law and something must be done to solve the problem of illegitimacy in India by conferring rights of property and maintenance on them. It is, therefore, an urgent need to analyze the various provisions relating to the position of illegitimate children - their right to property and their right to maintenance - under various personal laws in India in order to avoid confusion regarding the same. A viable remedy in this situation could be provision of secular laws relating to inheritance to avoid confusion between the personal laws. The implementation of a uniform secular law to protect the rights of such children will ensure that there is no discrimination against such persons, legally as well as socially. This will correct the various differences in the personal laws.

\(^3\) Rameshwari Devi v. State of Bihar, 2000 (2) SCC 431
\(^4\) Vidhyadhari and others v. Sukhrana Bai, 2008 (2) SCC 238
A decade after the economic reforms process, today the Indian market is profoundly dominated by "consumerism"; a social movement seeking to augment the rights and powers of buyers in relation to sellers. From a predominantly sellers’ market it is being circumspectly transformed into buyers’ market where the exercised choice by the consumers depends upon their awareness echelons. Every citizen of the country is a consumer in one way or the other and thus ensuring consumer welfare is the paramount responsibility of the government. In a competitive economy the consumer rights could be protected only when the right standards for goods and services are secured by evolving a network of legal protection systems and institutions. The forthcoming article attempts an analytical, synthetic and critical examination of the ‘evolving trends in the consumer protection law’ by reflecting upon the major developments in the field of consumer protection in India since 1984, when for the first time the statutory provisions for regulating unfair trade practices were consolidated in the statute book. It highlights the strengthening of provisions for consumer protection through amendments to the Act which have regulated the restrictive and monopolistic trade practices (the MRTP Act) and also surveys the major developments during the recent years which shall be considered as milestones in the history of consumer protection in India.

In the 19th century consumer emerged as a counterpoint to the term producer and this view has survived in most capitalist democracies. Since the consumers are forced to live with and through the goods and services which they themselves did not create, they have a "secondary relationship" with such goods and services. Thus in today’s dominant market economy of the world the consumer still remains as a marginal group. Although Mahatma Gandhi believed that the 'Consumer Is the King' of the market yet the consumers are being dethroned every day. The owner of a departmental store in America is said to have remarked that "God created the masses of mankind to be exploited. I exploit them. I do His will". In India exploitation of the people by the people is everyday experience. Unscrupulous market practices made their way into consumer homes thus violating consumer rights and jeopardizing their safety.

Every person who buys goods for private, though not necessarily personal, use or consumption or hires any service for a price, is a 'consumer'. We all are consumers, irrespective of what we buy; be it food or clothes, by what means we travel, consume electricity or air, avail the services of a lawyer or a doctor; the only possible exception being Robinson Crusoe. The phrase 'consumer' goes with every person from cradle to grave.

---

2 Dr. Rifat Jan, “Consumerism and Legal Protection of Consumers” (2007)
The Thalidomide (Expectant mothers who used this drug gave birth to deformed children) tragedy of Britain and payment of compensation to victims, even though on extra-legal grounds is a proof of the fact that we all are consumers even at the pre-natal stage. The position of consumers in the market place is completely unenviable.

The need for the empowerment of consumers is well recognized all over the world. The level of awareness of the consumers is a key indicator of progress of a country. From electronic goods to medicines, fast moving consumer goods or services rendered, all demand that the consumers become aware of their rights. If one knows about his or her rights before they are infringed upon then he or she shall be in a better position to avoid problems or obtain redress. Forewarned is forearmed when it comes to protection of one’s rights. Six consumer rights were initially envisioned by the consumer rights activists of the West in order to safeguard consumer interest, namely: Right to Safety, Right to Choice, Right to Information, Right to be Heard, Right to Redress and Right to Consumer Education. Later on two more important rights were added viz: Right to a Healthy and Sustained Environment and Right to Basic Needs. Various issues concerning the consumers included high prices, high cost of distribution, shoddy or unsafe products, product safety, harmful and low benefit products, poor service to the disadvantaged and much more. Thus need was felt to provide legal protection to the consumers from excessive consumerism. It has been rightly said that the “Consumer is the sole end and purpose of all production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer”.

Prior to the last half of the 20th century the ethic was ‘Caveat Emptor’-buyer beware. This worked well in the old days where the sale transactions took place in the markets where the consumer would see the goods before purchasing. The buyer had the opportunity to exercise his discretion and there was no question of any question to be asked later. Thus the maxim "Caveat Emptor" reflected the actual practice in the market place. Yet the buyer had a remedy if he were deceived or was a victim of fraud. But the law does not give him any further protection as the Judge has said in a 19th century case:

"The relation of buyer and seller, unlike that of cestui que trust, attorney and client, or guardian or ward, is not a confidential one, and if the buyer, instead of executing an explicit warranty, chooses to rely on the bare opinion of one who knows no more about the matter than he does himself, he is himself to blame for it. If he will buy on the seller’s responsibility, let him have it by demanding proper security, else let him to be taken to

---

4 *praemonitus praemunitus*


have brought his own. He who is so simple as to contract without specific action of the terms is not fit subject of judicial guardianship"

Due to the growing complexities and variety of goods and services being introduced in the marketplace by the modern technology, conditions have undergone a sea-change.

One of the Directive Principles of State Policy as enshrined under Article 47 of the Constitution of India lays down as under:7 "The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health".

Well being of the society is the correlative of "social welfare". A consumer gets satisfaction or welfare from the goods and services he consumes but the idea of welfare may differ from consumer to consumer. A resident of South India would get more satisfaction or welfare from consumption of coffee than tea while on the contrary; a person belonging to North India may get more utility or welfare from consumption of tea than coffee. Money or wealth is the means through which people may buy goods and services and the utility or the welfare derived from its enjoyment is the end. Yet there may even be such goods and services which may be injurious to public health or may be deficient and not yield welfare to the consumers.

In order to protect the consumers from being exploited at the hands of the traders and using adulterated and sub standard articles and for the better protection of the interests of consumers the government took up the responsibility of consumer welfare and enacted The Consumer Protection Act, 1986. A separate Department of Consumer Affairs was also created under the Central and State Governments which focused exclusively on ensuring the rights of consumers as enshrined in the Consumer Protection Act, 1986.8 The enactment of the Consumer Protection Act, 1986 has been regarded as the 'Magna Carta' in the field of consumer protection to keep a check on the unfair trade practices and deficiency in goods and services.9

Consumer protection is an off shoot of industrial revolution as the growth of trade and commerce generated a profit motive which led to a quest for earning wealth through any means, be it fair or foul. Consumer law in the 21st century gives both rights and remedies which were not found in an earlier era. A society without consumer protection would have to come across a variety of systematic frauds. The present day laws which afford protection to the consumers are an outcome of large social movements by consumer activists,

7 The Constitution of India,1950
muckraking journalists and brave individuals striving to uncover predatory practices which aim at targeting the low-income and middle-income consumers. The overreaching theme of consumer protection is to punish and deter unfair or deceptive acts and practices that cause a substantial harm to the consumers. It lends a signal that the society will not tolerate unfair treatment to the consumers and shall scrutinize those sellers, merchants, or creditors who do not treat the consumers fairly.

The Consumer Protection Act, 1986 has enabled the consumers to participate directly in the market economy in order to promote the welfare of the society. It thrives to remove the helplessness of the consumers which they face against powerful business, often described as the society in which, 'the producers have secured power' to 'rob the rest'. Instead of bothering, complaining or fighting for the malady which is becoming so rampant, widespread and deep in the society, it is being accepted as a part of life.

"The enactment of Consumer Protection Act in these unbelievable yet harsh realities appears to be a silver lining, which may in the course of time succeed in checking the rot".

The legislation being directed towards achieving public benefit has thus become a milestone in the history of socio-economic legislation.

The present economic environment and rapid societal and technological changes have led to new trends in consumer habits and evolved new challenges for consumer protection. One of the major outcomes of the last few decades which have had a huge impact on the consumers is the technological and digital development. The lifestyle of the consumers has become increasingly 'digital' with the emergence of new digital products and services coupled with increasing privacy protection. The rapid development of the internet has evolved various new information tools which are being used for making purchasing decisions, which provide consumers with a wider choice in consumer goods however requiring them to manage the vastness of the information. Ensuring the reliability, independence and transparency of the digital comparison tools such as comparison websites is of key importance. Various other new types of commercial practices linked to the internet like behaviour profiling, personalized pricing etc, are raising questions of data transparency and protection. Thus the most significant and outstanding trends have emerged from the digital environment also raising issues with regards to consumer protection.

The increasing complexities of some products and services(e.g. in the financial sector), also concern the increasing non-digital trends associated with the consumers' willingness to look out for the products having specific characteristics such as the green products and also the need for better information related to such products.

10 Lucknow Development Authority v. M.K Gupta 1994 SCC(1) 243
The new digital consumer trends and challenges are closely linked with the development of the internet and new technologies leading to the emergence of new online services like the multichannel distribution of the TV programmes and videos through the Over-The-Top Technology (OTT)\(^{11}\) where the public internet is used to deliver television or other audio/video services at the doorstep. What is debatable is their liability and capacity to manage the content which the consumers can access. Emergence of cloud computing and big data is also a part of the big revolution in the development of internet, though not deprived of challenges. Taking an example of internet of things (IoT), consumers are largely facing security and privacy issues which include unauthorized access to personal data, infection by malware, data losses, unlawful surveillance and intrusive use of wearable devices. Through IoT, various objects of everyday use such as clothes, medical devices etc are connected and made identifiable by other devices. However it requires increased privacy protection as it involves the collection and control of data by the private sector. Approximately 30 million devices are expected to be connected to the IoT by 2020. According to a 2011 Eurobarometer,\(^{12}\) the consumers are held back from taking part in e-commerce and accepting new online services due to lack of trust with regard to the safety of personal data. Therefore in order to avoid abuses it is necessary to tackle with the vulnerability and lack of sufficient security of these devices, because as the technology is developing, more and more fraudulent practices are emerging, affecting the consumer trust. Emergence of the new services using OTT, and the use which the consumers make of it also raises the question of appropriate application of regime to the user-generated content with regard to copyright.

The copyright related (e.g. reusing a song for a video created by a user /consumer and uploading it on the computer) issues are coming forth in the context of copyright reform. Other new consumer trends also have implications with regard to intellectual property rights along with certain security concerns\(^{13}\). Though the concerns may not be directly linked with consumer protection yet they have a huge impact on citizens, businesses and society in general. The Intellectual Property Rights have become corner stones of modern economic policy at the national level, as it is an important tool for sustainable development in the knowledge based society. Thus, understanding and appreciating the main foundations of the Intellectual Property Rights regime is an important pre-requisite for comprehending its immense importance and role in national strategies for enhancing competitiveness and accelerating the socio economic development. It not only protects the innovative and creative capacity of the competitors and owners of Intellectual Property Rights who supply goods and services, but also concerns itself with the interests of the consumers who purchase such goods or services, directly or indirectly. The Intellectual Property Rights help the consumers in buying quality products and protect them from the use of substandard products which are likely to cause health and safety hazards. It is also the core of the IP regime that the people must be protected from unfair competition.

---

\(^{11}\) OTT is a system of audio and video distribution using open internet.

\(^{12}\) \url{http://www.europarl.europa.eu/studies} 

\(^{13}\) e.g. the possibility of producing 3D firearms may raise obvious security problems
Existence of such rights is necessary for the overall development of society. The IPR’s protection policy is meant to foster innovation and it not only protects the innovators but also the consumers and helps to spur the economic growth.

Besides the digital reformation, several non-digital consumer concerns (e.g. safety of goods) are also increasing rapidly but are to be seen through the prism of common characteristics which involve lack of consumer information and knowledge. The consumers demand accurate information to decide and purchase correctly as per their needs and also to be sufficiently confident about their purchases. To face new complex products and services, the consumers need minimum skills and literacy especially in the financial and insurance sectors. The need for special information arises from the new requirements of the consumers e.g. demand for green products. A New type of consumer has emerged who lay greater emphasis on environmental, social and ethical aspects. However, this has also led to the emergence of a new category of vulnerable consumers. Therefore, it is necessary to have transparency and trust in the information so that the consumers are able to identify their sustainable, environmental and ethical choices through clear, reliable, relevant, transparent and comparable information. By ensuring better transparency and also developing meaningful logos and labels in a coherent and rational way the consumers get the information they need and it also increases consumers' skill and ability in making informed choices. The rapid growth in the rural markets is marked by an alarming increase of the exploitation of the rural consumers due to poor knowledge about their rights and lack of skills for taking rational decisions that are based upon information related to the goods and services. The rural consumers being a part of the vulnerable category are exposed more to the sub-standard products and services, adulterated foods, exorbitant prices, short weights and measures, endemic shortages leading to black marketing and profiteering, hazardous drugs and host of other ills. They are usually dependent on the weekly markets for the purchase of essential things and are often cheated due to lack of choice. Ignorance of the rural consumers is one of the root cause for their exploitation at the hands of sellers, traders and the service providers. In an industry where there is extreme rivalry, there is an inclination that the business would turn out to be better and efficient. This happens in the light of that competition dispenses of poor people performing items or administrations and leaves just great and remarkable items for general masses to consume. This advantage of competition is more likely to give advantage to the all-inclusive community since they would have better quality products for less expensive prices. As there is competition in business sector, the business players attempt their best to give consumers what they require. Buyers require good quality items at lower costs. If there is competition in the business sector, the players in order to survive will be compelled to bow down to the demands of the consumer i.e. good quality products at lesser prices. It is believed that competition law is concerned with the interests of the consumers, consumer welfare being one of the prime goals. There is a strong inter-relationship between Consumer Protection and Competition law, as both are complimentary and mutually reinforcing. Competition policy and
Consumer policy both pursue similar objectives, though from different perspectives and rely on different instruments to achieve those goals.

Liberalization and globalization have increased vast opportunities for rural marketing as the rural markets in India are the largest potential markets in the world. The traders and manufacturers take advantage of the deplorable conditions of the rural consumers as they are largely exploited due to lack of competition among the sellers and also face problems like short weighing and measuring, adulteration, lack of safety and quality control in appliances, unfair warranties and guarantees, imitation and unreasonable pricing.

In the emerging scenario, educating the rural consumers about their rights and empowering them to make decisions based on information about the goods and services have also become the need of the hour. It has become very important to spread awareness among the rural consumers. The consumer movements which are confined to the urban areas need to shift their focus towards the expanding rural markets to protect the rural consumers. As the largest consumer base is in the rural areas, protection of the rural consumers must be the prime focus of all consumer oriented strategies.14

The growing trends in the consumer protection regime are indicative of the fact that financial consumer protection, supervision and regulation is on the rise in the developing countries. The focus of the regulators has shifted towards measures that enable the consumers to protect themselves through disclosure rules and complaints mechanisms. The past few years have seen a rise in the enactment of ambitious sets of consumer protection laws and provisions, although its implementation has remained a task to be. The consumer-focused researches show that the consumers need trust and confidence so that they are willing to try out formal providers and products and only if they have some basis for believing that they will not be mistreated. Better informed and more confident consumers signal the growth of a healthier marketplace. Development in the international trade and commerce as an outcome of industrial revolution has led to vast expansion of business and trade as a result of which a variety of consumer goods appear in the market catering to the requirements of the consumers and also a host of services such as housing, electricity, transport, insurance, finance and banking. For the welfare of the people, the glut of substandard articles and adulterated goods in the markets must be checked. Protection of consumers from nefarious designs of unscrupulous manufacturers and traders can be achieved only through the participation of the people or else the exploitation of the consumers would remain inevitable.

Future consumers have to be aware of the varied phenomena like the social networks, advertisements, free economy and scientific as well as technological advances. The "haves" of the future shall strongly be controlled by the digital economies and those who stay offline

shall be the ones in the category of "have-nots".\textsuperscript{15} A radically different world awaits the future consumers where they will utilize different tools and techniques to work, enjoy leisure time and find success and content. It is the today’s consumers, policy makers and markets who can provide safe and healthy lifestyle to the future consumers. Strengthening the existing redressal mechanisms and supplementing them with Alternate Dispute Resolution (ADR) Mechanism is the core for strengthening the consumer fora.

It may be concluded that despite of the several laws and provisions that protect the consumers from unfair trade practices, their exploitation remains to lie at the root. A healthy and meaningful life for India’s 'tomorrow' customers can only be assured when the nature, women, youth and the rural populations are accommodated in every consumer protection-oriented planning. Implementation of the Consumer Protection Act, 1986 reveals that the interests of the consumers are better protected than ever before. In order to make consumer protection movement a success in the country, consumer awareness through consumer education and actions by the government, consumer activists and associations are most needed.

REGULATORY FRAMEWORK OF SECURITISATION COMPANIES
AND RECONSTRUCTION COMPANIES IN INDIA

Dr. Rajesh Kumar
Assistant Professor, NUSRL, Ranchi

For providing solutions against the rising Non Performing Assets (Hereinafter referred as NPA), the government has constituted Narshimahan Committee, which has recommended for creation of Assets Recover funds to deal with the problem of NPA and bad debts. Accordingly, the Indian Parliament has created regulatory platform for Securitisation Companies and Restructuring Companies (hereinafter referred as SC/RC) under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (`SARFAESI Act`) with an aim to provide a statutory framework to banks for recovery of bad debt and NPA.

Introduction

At present following 15 SC/RC companies are working in India.¹

1. Alchemist Asset Reconstruction Company Limited
2. ASREC (India) Limited
3. Edelweiss Asset Reconstruction
4. Asset Reconstruction Company (India) Limited
5. Assets Care and Reconstruction Enterprise Ltd
6. India SME Asset Reconstruction Company Limited
7. International Asset Reconstruction Company Private Limited
8. Invent Assets Securitisation & Reconstruction Private Limited
9. JM Financial Asset Reconstruction Company Private Limited
10. Meliora Arc
11. Pegasus Asset Reconstruction Private Limited
12. Phoenix ARC Private Limited
13. Pridhivi Asset Reconstruction and Securitisation Company Limited
14. Reliance Asset Reconstruction Company Limited

¹ Details available at http://www.arcindia.co.in/.
15. UV Asset Reconstruction Co. Ltd

It is an important contradiction that the business of these securitisation companies are growing and the problem of NPA is also growing in our country. Further, we are hoping to accept BASEL III norms in near future, which will further put more pressure on these securitisation companies to reduce the burden of rising NPA in a systematic manner. Reserve Bank of India (Hereinafter referred as RBI) is the registering and regulating agencies for these securitisation companies. In this light, it is important to see that whether the regulatory framework of these securitisation and reconstruction companies (Hereinafter referred as SC and RC) and the role played by RBI is effective enough to manage the problem of rising NPA.

1. Establishment of Securitisation/ Assets Reconstruction Companies

Securitisation company is defined as "securitisation company" means any company formed and registered under the Companies Act, 1956 (1 of 1956) for the purpose of securitisation. "Reconstruction company" means a company formed and registered under the Companies Act, 1956 (1 of 1956) for the purpose of asset reconstruction. An SC or RC are established and recognised under Sec 3 of SARFESI Act, 2002, which provides following requirements for such companies:

(i) Obtaining the certificate of registration under this section

(ii) Every securitisation company or reconstruction company shall make an application for registration to the Reserve Bank in such form and manner as it may specify.

(iii) The Reserve Bank may, for the purpose of considering the application for registration require to be satisfied, by an inspection of records or books of such SC or RC, or otherwise, that the following conditions are fulfilled, namely: (a) that the SC or RC has not incurred losses in any of the three preceding financial years; (b) that such SC or RC has made adequate arrangements for realisation of the financial assets acquired for the purpose of securitisation or asset reconstruction and shall be able to pay periodical returns and redeem on respective due dates on the investments made in the company by the qualified institutional buyers or other persons; (c) that the directors of SC or RC have adequate professional experience in matters related to finance, securitisation and reconstruction; (d) that the board of directors of such SC or RC does not consist of more than half of its total number of directors who are either nominees of any sponsor or associated in any manner with the sponsor or any of its subsidiaries; (e) that any of its directors has not been convicted of any offence involving moral turpitude; (f) that a sponsor, is not a holding company of the SC or RC, as the case may be, or, does not otherwise hold any controlling interest in such securitisation company or reconstruction company; (g) that SC or RC has complied with or is in a position to comply with prudential norms specified by the Reserve Bank. (h) That SC

---

2 SARFESI Act, 2002, Sec 2 ZA.
3 Ibid, Sec 2 V.
or RC has complied with one or more conditions specified in the guidelines issued by
the Reserve Bank for the said purpose.

(iv) After being satisfied of above said conditions, a certificate of registration may be
granted to the SC or the RC to commence or carry on business of securitisation or
asset reconstruction, subject to such conditions which it may consider, fit to impose.

(v) The Reserve Bank may reject the application on the basis of non fulfilment of said
conditions; however, before rejecting the application, the applicant shall be given a
reasonable opportunity of being heard.

(vi) Any substantial change in its management or change of location of its registered office
or change in its name of SC or RC can be done on prior approval of the Reserve Bank.  

Establishment norms are stricter and RBI has been empowered to register or not to register
any SC or RC for the business of securitisation. Further, RBI Guidelines on The
Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and
Directions, 2003, further provides detailed procedure with respect to their
establishment. It provides following essentials:

(i) Every Securitisation Companies(SC) / RC( Reconstruction Companies) shall apply
for registration in the form of application specified vide Notification
No.DNBS.1/CGM(CSM)-2003 dated March 7, 2003 and obtain a certificate of
registration from the Bank as provided under Section 3 of the Act;

(ii) The SCs / RCs seeking registration from the RBI shall submit their application in the
format (Annexed to Notification No. DNBS.1/CGM(CSM)-2003 dated March 7,
2003) specified by the Bank, duly filled in with all the relevant annexures / supporting
documents to the Chief General Manager-in-Charge, Department of Non-Banking
Regulation, Central Office, Reserve Bank of India, Centre 1, World Trade Centre,
Cuffe Parade, Colaba, Mumbai 400 005.

(iii) A SC / RC, which has obtained a certificate of registration issued by the Bank under
Section 3 of the Act, can undertake both securitisation and asset reconstruction
activities;

(iv) (a) A SC/RC shall commence business within six months from the date of grant of
Certificate of Registration by the Bank; Provided that on the application by the SC /
RC, the Bank may grant extension for such further period, not exceeding 12 months
from the date of grant of Certificate of Registration.

(b) Provisions of section 45 -IA, 45-IB and 45-IC of RBI Act,1934 shall not apply to
non-banking financial company, which is a SC / RC registered with the Bank under
Section 3 of the SARFAESI Act, 2002.

---

4 Ibid. Sec 3.
(v) Any entity not registered with the Bank under Section 3 of the Act may conduct the business of securitisation or asset reconstruction outside the purview of the Act.\(^5\)

However, RBI is further empowered to cancel the certificates granted under sec 3, if such company—

(a) Ceases to carry on the business of securitisation or asset reconstruction; or

(b) Ceases to receive or hold any investment from a qualified institutional buyer; or

(c) Has failed to comply with any conditions subject to which the certificate of registration has been granted to it; or

(d) at any time fails to fulfil any of the above said conditions referred to section 3 or fails to— (i) comply with any direction issued by the Reserve Bank under the provisions of this Act; or (ii) maintain accounts in accordance with the requirements of any law or any direction or order issued by the Reserve Bank under the provisions of this Act; or (iii) submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank; or (iv) obtain prior approval of the Reserve Bank required under subsection (6) of section 3.

However, before cancelling a certificate of registration on the ground that the SC or RC has failed to comply with the said provisions or has failed to fulfil any of the conditions referred, the Reserve Bank, unless it is of the opinion that the delay in cancelling the certificate of registration granted under subsection (4) of section 3 shall be prejudicial to the public interest or the interests of the investors or the securitisation company or the reconstruction company, shall give an opportunity to such company on such terms as the Reserve Bank may specify for taking necessary steps to comply with such provisions or fulfilment of such conditions.\(^6\)

A securitisation company or reconstruction company aggrieved by the order of cancellation of certificate of registration may prefer an appeal, within a period of thirty days from the date on which such order of cancellation is communicated to it, to the Central Government.\(^7\)

RBI is empowered to regulate such companies under Sec 12 and 12 A of the Act. Under sec 12 of the Act, Reserve Bank can determine policy and issue directions in matters relating to income recognition, accounting standards, making provisions for bad and doubtful debts, capital adequacy based on risk weights for assets and also relating to deployment of funds by the securitisation company or reconstruction company, as the case

\(^5\) The Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003, Guidelines 4.

\(^6\) Supra Note 2, sec 4.

\(^7\) Ibid, Sec 4.
may be, and such company shall be bound to follow the policy so determined and the directions so issued.\(^8\)

Further, the RBI may give directions to any SC or RC generally or to a class of securitisation companies or reconstruction companies or to any securitisation company or reconstruction company in particular as to— (a) the type of financial asset of a bank or financial institution which can be acquired and procedure for acquisition of such assets and valuation thereof; (b) the aggregate value of financial assets which may be acquired by any securitisation company or reconstruction company.\(^9\)

Under Sec 12A of the Act, RBI is empowered to call for statements and information. It may direct RC and SC to furnish any information it within such time as may be specified by the Reserve Bank, with such statements and information relating to the business or affairs of such securitisation company or reconstruction company (including any business or affairs with which such company is concerned) as the Reserve Bank may consider necessary or expedient to obtain for the purposes of this Act.\(^10\)

The above said provision provides sufficient control of RBI over these SC and RC. From registering to regulating, the RBI possesses all the important powers to deal effectively with these RC and SC.

2. Functions of Securitization and Assets Reconstruction Companies

A securitisation company basically performs the very important function of converting bad debt into negotiable securities, which is known as securitisation. As per Guidelines, It can only commence / undertake only the securitisation and asset reconstruction activities and the functions provided for in Section 10 of the Act and it shall not raise monies by way of deposit.\(^11\)

Securitisation is defined as “"securitisation" means acquisition of financial assets by any securitisation company or reconstruction company from any originator, whether by raising of funds by such securitisation company or reconstruction company from qualified institutional buyers by issue of security receipts representing undivided interest in such financial assets or otherwise;”\(^12\)

So, SC or RC firstly acquires financial assets from any originator (Bank and financial Institution). It is also known as assets reconstruction. It is defined as “asset reconstruction” means acquisition by any securitisation company or reconstruction company of any right

---

\(^8\) *Ibid*, Sec 12.

\(^9\) *Ibid*.

\(^10\) *Ibid*, Sec 12 A.

\(^11\) *Supra Note 5*, Guideline 6.

\(^12\) *Supra note 2*, Sec 2 Z.
or interest of any bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance;”

To carry out the process of assets constructions SC and RC can take following measures:

(a) The proper management of the business of the borrower, by change in, or takeover of, the management of the business of the borrower;

(b) The sale or lease of a part or whole of the business of the borrower;

(c) Rescheduling of payment of debts payable by the borrower;

(d) Enforcement of security interest in accordance with the provisions of this Act;

(e) Settlement of dues payable by the borrower;

(f) Taking possession of secured assets in accordance with the provisions of this Act.

However, The SC / RC shall take the measures specified in Sections 9(a) of the Act, in accordance with instructions contained in Circular DNBS/PD.(SC/RC)No.17/26.03.001/2009-10 dated April 21, 2010 as amended from time to time.

Certain measures like Sale or Lease of a part or whole of the business of the borrower cannot be taken without Bank issuing necessary guidelines in this behalf.

After acquiring the financial assets, it converts those assets into securities to be sold to qualified institutional buyers, which includes Bank, financial institution and others. As per Sec 7 of the Act, any securitisation company or reconstruction company, may, after acquisition of any financial asset under sub-section (1) of section 5, offer security receipts to qualified institutional buyers (other than by offer to public) for subscription in accordance with the provisions of those Acts.

A securitisation company or reconstruction company may raise funds from the qualified institutional buyers by formulating schemes for acquiring financial assets and shall keep and maintain separate and distinct accounts in respect of each such scheme for every financial asset acquired out of investments made by a qualified institutional buyer and ensure that realisations of such financial asset is held and applied towards redemption of investments and payment of returns assured on such investments under the relevant scheme.

However, Issue of Security Receipts shall be done through one or more trusts set up exclusively for the purpose. The SC/RC shall transfer the assets to the said trusts at the

---

13 Ibid, Sec 2 b.
14 Ibid, Sec 9.
15 Supra Note 5, Guideline 2.
16 Ibid.
17 Supra note 2, Sec 7.
18 Ibid.
price at which those assets were acquired from the originator if the assets are not acquired directly on the books of the trust-

(i) The trusts shall issue SRs only to QIBs; and hold and administer the financial assets for the benefit of the QIBs;

(ii) The trusteeship of such trusts shall vest with the SC/RC;

(iii) A SC/RC proposing to issue Security Receipts, shall, prior to such an issue, formulate a policy, duly approved by the Board of Directors, providing for issue of security receipts under each scheme formulated by the trust;

(iv) The policy referred to in sub-paragraph (iii) above shall provide that the SRs issued would be transferable / assignable only in favour of other QIBs.\(^{19}\)

It may invest a minimum of 15% of the Securities receipts of each class issued by them under each scheme on an ongoing basis till the redemption of all the Securities receipts issued under such scheme.\(^{20}\)

Further, a SC/RC can utilize a part of funds raised under a scheme from the QIBs for restructuring of financial assets acquired under the relative scheme subject to following conditions:

(i) SCs/ RCs with acquired assets in excess of Rs. 500 crore can float the fund under a scheme which envisages the utilization of part of funds raised from QIBs in terms of Section 7(2) of the SARFAESI Act, 2002, for restructuring of financial assets acquired out of such funds.

(ii) The extent of funds that shall be utilized for reconstruction purpose should not be more than 25% of the funds raised under the scheme in terms of Section 7(2) of the SARFAESI Act, 2002. The funds raised to be utilized for reconstruction (within the ceiling of 25%) should be disclosed upfront in the scheme. Further, the funds utilized for reconstruction purposes should be separately accounted for.

(iii) Every SC/RC shall frame a policy, duly approved by the Board of Directors, laying down the broad parameters for utilization of funds raised from QIBs under such a scheme.\(^{21}\)

So, the prime function of SC or RC is securitisation. The business of securitisation is growing though it is restricted to Qualified Institutional Buyers.

For the debtor, Bank and financial organisation are substituted with SC and RC. The bank or financial institution may, if it considers appropriate, give a notice of acquisition of financial assets by any securitisation company or reconstruction company, to the concerned

\(^{19}\) *Supra* Note 4, Guidleine 8.

\(^{20}\) Ibid.

\(^{21}\) Ibid.
obligor. The obligor, on receipt of such notice, shall make payment to the concerned securitisation company or reconstruction company, as the case may be, and payment made to such company in discharge of any of the obligations in relation to the financial asset specified in the notice shall be a full discharge to the obligor making the payment from all liability in respect of such payment.\textsuperscript{22}

SC and RC can perform following other functions:

(a) Act as an agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fee or charges as may be mutually agreed upon between the parties;

(b) Act as a manager referred to in clause (c) of sub-section (4) of section 13 on such fee as may be mutually agreed upon between the parties;

(c) Act as receiver if appointed by any court or tribunal: PROVIDED that no securitisation company or Reconstruction Company shall act as a manager if acting as such gives rise to any pecuniary liability.\textsuperscript{23} Save as otherwise provided in sub-section (1), no securitisation company or reconstruction company which has been granted a certificate of registration under sub-section (4) of section 3, shall commence or carry on, without prior approval of the Reserve Bank, any business other than that of securitisation or asset reconstruction: PROVIDED that a securitisation company or reconstruction company which is carrying on, on or before the commencement of this Act, any business other than the business of securitisation or asset reconstruction or business referred to in sub-section (1), shall cease to carry on any such business within one year from the date of commencement of this Act. Explanation : For the purposes of this section, "securitisation company" or "reconstruction company" does not include its subsidiary.\textsuperscript{24}

Disputes relating to securitisation or reconstruction or non-payment of any amount due including interest arises amongst any of the parties, namely, the bank or financial institution or securitisation company or reconstruction company or qualified institutional buyer shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996 (26 of 1996), as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly.\textsuperscript{24}

Conclusion

The success of SC and RC shows efficient regulatory framework and effective regulation by RBI. The business of selling and purchasing bad debt and risk requires Proper management of the SR and RC. These companies are mandated to remain themselves away from insolvency and bankruptcy so that they can effectively deal in debt market. Till

\footnotesize{\textsuperscript{22} Ibid, Sec 6.} \\
\footnotesize{\textsuperscript{23} Ibid, Sec 10.} \\
\footnotesize{\textsuperscript{24} Ibid, Sec 11.}
date, there has not been any substantive dispute arisen between banks and these SC and RC. However, the problem of rising NPA remains as it is. This shows that Success of these SC and RC have made little impact on Management of NPA in our country. Before implementing BASEL-3 norms, more structural and functional changes are required in the working of these SC and RC.
AN ANALYTICAL STUDY OF RECENT TRENDS IN TRADE UNIONISM

Rashmi Gogoi
Research Scholar, PG Department of Law, Guwahati University

The present phase of globalisation is marked by the introduction of the new economic policy in India in July, 1991. It resulted into the emergence of the state with an investor-friendly face, pro-employer posture and reduced role in industrial relations. Public sector which had been happy hunting ground of the trade unionists had now fallen from commanding heights and public employment has become scarce. At present the market in India, as in many other countries, is going through an uneasy phase of recession.¹

Introduction

The new emerging economic environment revolves around the concepts of liberalisation, privatisation, globalisation, flexibility and reorganisation of work, along with stiff economic competitiveness and free interplay of market forces at national and international levels. This phenomenon saw increasing linkages between markets across countries and across regions as result of which workers and enterprise in the remote rural areas of the developing countries were affected.²

The last few years have witnessed much advancement in labour and employment practices in India, especially in the fields of trade unions, telecommunicating and contract labour regulation among others. The growth and development of trade unions has been a major factor in changing the labour scenario and the trade union movement has leapfrogged from the periphery to the centre-stage in a remarkable manner thereby affecting the decision-making of potential investors. Similarly, the telecommunicating practice, even though in its embryonic stage in India, has been rapidly gaining momentum and is definitely an example of adaptation of the ‘best from the west’. While some feel that there is still a long way to go before telecommuting is widely accepted, others believe that it has the potential of altering the pattern of urbanisation in India.³

In India, trade unionism is over a century old. Although Mahatma Gandhi advocated trusteeship based trade unionism, it did not emerge that way in India, where the twin aspects of the Indian trade union movement, labour organisations for industrial bargaining and its ideological orientation and heavily patronised by the political parties. The first four

¹ Mukherjee Debabrata, Globalisation and Trade-Unionism in India Today
² Bhangoo Kesar Singh, Trade Unions in Globalised Economy of India, IJIR, Vol. 41 No. 4, April 2006, p.398
³ Supra note 2
decades in the post-independence pre-liberalisation period were marked by a social cohesion between the state and the trade unions to improve the conditions of the working class. The arm of the state was in favour of the working class. However, the economic reform process has led to a pro-management environment, weakening the labour class.

1. Constitutional Provisions and Trade Unions

With respect to the liberties of individual workers and trade unions, the most significant rights are those enumerated in Article 19(1) which includes the ‘freedom of speech and expression’, the ‘freedom to assemble peacefully without arms’, the ‘right to form associations or unions’ and the ‘freedom to pursue a livelihood’. While ‘freedom of speech and expression’ is usually understood as a guarantee against the curtailment of citizens’ rights by the State, it is also possible to describe the methods adopted by trade unions such as demonstrations, picketing and strikes as forms of expression which can be subjected to ‘reasonable restrictions’ by the State.4

**Right to demonstrate:** The question of the ‘right to demonstrate’ can be understood both in light of Article 19(1) (a) as well as Article 19(1) (c) in the Indian context. At one level the right to demonstrate can be understood as a form of expression since it draws attention to the grievances of workers and can facilitate ‘collective bargaining’ with the employers. Peaceful and orderly demonstrations enable workers to effectively communicate their demands not only to the employers but also to governmental agencies as well as the general public. The right to demonstrate can also be viewed as part of the ‘right to form associations or unions’ since such activities aid unionisation by way of drawing more members into the fold of the agitating union. Quite clearly, the government is within its powers to impose restraints on demonstrations, picketing and strikes with respect to the grounds enumerated in Article 19(2), 19(3) and 19(4).

It is quite understandable that for a demonstration to be effective it ordinarily has to be conducted in close proximity to the workplace. In **Kannan v. Superintendent of Police Cannanore**,5 it was observed that a lawful demonstration or ‘satyagraha’ would lose all significance if workmen are asked to choose a place far away from the business premises of the employer. In **Kameshwar Prasad v. State of Bihar and Others**,6 it was observed that to ban every type of demonstration would be a breach of the freedom of expression. However, reasonable restrictions can be imposed to prevent such demonstrations as would cause breach of public tranquility. It must also be borne in mind that such activities can directly interfere with the employer’s business, especially when the workplace is a location for commercial exchanges. For example, when employees’ unions engage in picketing in a shopping area, they directly discourage potential customers thereby affecting the employers’ business. In the context of a manufacturing unit, a demonstration conducted

---

4 Dr. B.R. Ambedkar Foundation lecture on Constitutional values and the promotion of labour welfare by Hon’ble Mr. K.G. Balakrishnan, Chief Justice of India (New Delhi – November 30,2009)

5 (1975) 1 LLJ 83 (Kerala HC)

6 (1962) 1 LLJ 294 (SC)
within working hours would obviously lead to loss of profits for the employers. Such a situation clearly involves a consideration of the employer’s right to conduct and continue trade or business, which is constitutionally protected under Article 19(1) (g).

As far as the ‘right to strike’ is concerned, it should not be understood as an absolute right which is an extension of Article 19(1) (c) since it is subject to statutory controls. Section 22 of the Industrial Disputes Act, 1947 lays down a prohibition against strikes in public utility services, except in circumstances where statutory notice has been given. Section 23 of the same legislation prescribes a general prohibition of strikes in all industries, during the pendency of conciliation proceedings, arbitration or litigation between the workers and the management, concerning the issue at hand.

Right to form associations or unions: The ‘right to form associations or unions’ has several dimensions, such as an individual worker’s right to join or leave an association, the freedom for a group of workers to organise and that of an existing trade union to expand its membership or dissolve itself. At the same time, the exercise of Article 19(1) rights by the workers’ are to be scrutinised and balanced with their impact on the employer’s right to conduct business or trade which is protected under Article 19(1) (g).

It was the Trade Unions Act, 1926 which was the first legislation to recognize the workers’ right to organise and it immunised the office-bearers of trade unions from exposure to charges of ‘criminal conspiracy’ and civil liability that could arise as a result of collective action. The procedure for registration of unions and the grant of ‘legal personality’ was laid down to enable the exercise of the ‘Right to form associations or unions’. However, a significant question which remains outside the statutory purview till date is that of how to ensure the ‘recognition of unions’ by employers. In order to ensure that workers’ interests are protected and pursued where there is a ‘multiplicity of unions’ in the same establishment, it is desirable for the employer to engage with a union that is truly representative of the workforce.

In industrial relations, it is a usual ploy for managements to follow a ‘divide and rule’ policy by conferring benefits on one union and extending ‘step-motherly’ treatment to others. The provision of basic facilities to unions can be seen as an essential limb of the ‘right to form associations or unions’ since the same enables unions to expand or ‘unionise’ further by enrolling more members. In the English decision in Crouch v. The Post Office and Another, it was held that a smaller union should not be denied facilities by an employer, since granting exclusive privileges to larger unions creates an environment where the leaders of the recognised union can dictate terms to the rest of the workforce. This problem can become magnified if the leaders of the recognised union are outsiders who are likely to push their own agenda at the expense of the legitimate interests of the workers.

---

7 Section 22 (1), Industrial Disputes Act, 1947
8 Supra note 7
dilemma from the standpoint of an individual worker seems to be that even though it is desirable for an employer to recognise one representative union to ensure effective ‘collective bargaining’, there is also a need to ensure a level-playing field among unions in order to protect the diverse interests present in the workforce.\(^\text{10}\)

In the past, there have been several legislative attempts such as In the Pre-Constitutional era, the recommendation of the Royal Commission on Labour (1929) for granting recognition to unions was sought to be implemented by the Trade Unions (Amendment) Act, 1947 which was never brought into force. Subsequently, the Trade Unions Bill introduced in Parliament in 1950 proposed a mechanism for recognition, but the bill lapsed. Another failed attempt was made in the form of the Trade Unions and Industrial Disputes (Amendment) Bill, 1988 which proposed the creation of industry-level bargaining councils whose membership would be proportionate to the relative strength of various trade unions to incorporate provisions for the recognition of unions, but barring the exception of a few State-level legislations, there is no central legislation which lays down definitive criterion for granting recognition to a union such as Some States have enacted law on the point such as the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1972 which provides for the recognition of trade unions for certain undertakings and confers certain rights and obligations upon recognised trade unions while at the same time conferring certain powers on unrecognised trade unions as well. In the absence of any Central legislation on the point, employers have traditionally refused to recognize trade unions mainly on five grounds:

(i) Cases where office-bearers of the union were outsiders

(ii) Trade Unions involved in political activities and with ex-employees and outsiders who are disapproved of by the management

(iii) Unions that consist of only a small segment of the workforce in a particular industry and are hence unrepresentative

(iv) Existence of several rival unions, i.e. the problem of ‘multiplicity of unions’

(v) Non-registration of Trade Unions under the Trade Unions Act, 1926.

The distinction between the fundamental right ‘to form associations or unions’ given by Article 19(1)(c), and the concomitant right to attain the objectives of forming such a union can be discussed in the matter of All India Bank Employees Association v. National Industrial Tribunal.\(^\text{11}\) In this case, the appellant union had argued that they had a fundamental right to compel the employers (Banks) to disclose the status of ‘undisclosed reserves’ whose secrecy was protected by Section 34A of the Banking Companies Act, 1949. The employees’ union argued that knowledge of these reserves was needed to make a case for better wages for the bank employees. It was argued that the attainment of the

\(^{10}\) Supra note 7

\(^{11}\) AIR 1962 SC 17; (1961) 2 LLJ 385 (SC)
legitimate objectives of a union such as bargaining to ensure better wages was a constitutionally protected right under Article 19(1) (c). The Supreme Court rejected this contention and held that while the ‘right to form unions’ was constitutionally protected, the attainment of the union’s objectives was a concomitant right, which could not be enforced by disregarding statutory provisions. In other words, workers have the constitutionally protected freedom to form a union, but no such right exists to compel the employer to recognise the union and engage in ‘collective bargaining’ with the same.

However, with the evolution of industrial jurisprudence, it is incumbent upon employers to ensure effective and genuine communications with the employees on the situation of the undertaking and about decisions which may affect their interests. This position is also in consonance with Article 43-A in the Directive Principles of State policy which emphasizes the need to secure the participation of workers in the management of undertakings. In *National Textile Workers’ Union v. P.R. Ramakrishnan*, the Supreme Court had relied on this provision to uphold the right of workers to be heard in the winding up proceedings of a company.

2. International Conventions and Recent Trends on Trade Unionism in India:

All human rights are universal, indivisible, interdependent and interrelated. However, some of these rights are of special importance for the workers. Major human rights documents like *Universal Declaration of Human Rights* (1948), *International Covenant on Economic, Social and Cultural Rights* (1966), *International Covenant on Civil and Political Rights* (1966), *Convention on the Elimination of All Forms of Discrimination Against Women* (1979), etc. contain a series of rights which can be termed as human rights of workers such as right to form trade union, right to work, right to humane conditions of work, right to equal pay for equal work, right to fair wage, right to decent living for workers and their families, right to equal opportunity for promotion subject to no consideration other than those of seniority and competence, right to rest, leisure and reasonable limitation of working hours and periodic holidays with pay as well as remuneration for public holidays, etc.  

3. Liberalization and Impact of International Aspects in the Organized and Unorganized Sector

During 2001 the Labour movement celebrated 100 years of its existence in India. However, the ground realities show that in the years following India’s independence, the Indian Trade Union Movement has remained stagnant, if not declining. Its activities have been more or less confined to the organized sector, more so to the public sector enterprises. Further the state ownership on the one hand and trade unions closeness to political parties made not only the unionization work but also made easier securing non productivity related financial benefits in the public sector establishments. With the onset of the liberalization

---

12 AIR 1983 SC 75
13 Meenu Paul, Labour and Industrial Law
process that included disbanding of the public sector and the coalition form of government, the Indian Trade Union Movement capacity to influence political leadership in securing undue demands weakened, causing the labour movement to move from on stage of marginalization to the other. Since the focus of Indian Trade Union Movement was the workers in the organized sector, more so those employed in the government-owned establishments, the mass of workforce engaged in the unorganized sector remained not covered by the trade union movement.14

The labour laws in India do not make a distinction between the organized and unorganized sector, yet the resources of the government and trade unions are directed mainly towards this section of workforce. The real exploitation of the worker and his/her family takes place in the unorganized sector where unions are conspicuously absent. Of recent, the international pressure and the shift of workforce from the organized to the unorganized sector, etc., have generated renewed interest in the unorganized sector. The government has repeatedly made announcements about its intention to shift the focus of its activities towards workers in the unorganized sector.15

4. Globalization and its impact on Trade Unionism

The term globalization can be used in different contexts. The general usages of the term globalization can be interactions and interdependence among countries, integration of world economy, deterritorisation etc. By synthesising all the above views globalization can be broadly defined as a process whereby there are social, cultural, technological exchanges across the border.16

The term globalization was first coined in 1980’s. But even before this there were interactions among nations. But in the modern days globalization has touched all spheres of life such as economy, education, technology, cultural phenomenon, social aspects etc.17 The term “global village” is also frequently used to highlight the significance of globalization and with the advent of globalization and liberalization, there has been a major policy shift in India from import substitution to export-oriented growth and from a mixed economy to corporate-led economic growth. These policies of liberalization are meant to remove all barriers in all possible ways to exploit nature and human labour and to promote easy transfer and the centralization of ownership of natural resources and other means of production in corporate hands. Privatization of the public sector, the opening of the economy to foreign capital, liberalization of trade, the transfer of vast tracts of agriculture land to industrialists by uprooting hundreds of thousands of people, and efforts to amend the labour laws to make hiring and firing smoother and easier are all parts of the policies of liberalization.18

14 www.iariw.org, accessed on 19.10.2014
15 ibid
17 eujournal.org, accessed on 18.10.2014
18 ibid
5. Role of NGOs and their Effect towards Trade Unionism

NGO’s are important partners and collaborators of government. The partnership should not be symbolic and ritualistic but one that flows naturally and easily from both sides. There should be an open-minded dialogue between the government and non-governmental organisations to plan out a strategy and methodology of partnership.\(^{19}\)

Non-governmental organizations may play an important role in the enforcement of the laws. They can provide assistance to the government by supplementing and complementing governmental action in areas of social concern.

The role of trade unions in the era of globalization should be to protect and provide assistance to workers to the extent of entire basic material and other requirements of human dignity including human rights, eradication of poverty. But it has been observed in the recent time that NGO’s have stepped in where trade unions have proved unsuccessful. Even there are cases where public spirited citizens had to step in.\(^ {20}\)

Non-governmental organisations and trade unions are different and have roles that competent each other but they should not stop at their differences but start with their complementarities. NGOs and trade unions need to identify their good and bad practices and set up joint activities on all grounds of discrimination and on strategic proposals. Similarly it is essential for both to work together with the national equality bodies at local, regional and national level.\(^ {21}\)

An efficient way of making antidiscrimination rights effective is litigation. Although NGOs and trade unions are often best placed to initiate complaints of discrimination, they are very often not able to do so because they lack human or financial resources. Also, in order to be able to litigate, both NGOs and trade unions must have legal standing, the right to initiate a law suit in court.\(^ {22}\)

In addition to initiating and supporting individual complaints in court, trade unions and NGOs can make use of other procedural tools to advance non-discrimination rights, such as collective action and class action. In order to help clarify concepts deriving from anti discrimination law, trade unions and NGOs should also become more strategic in their casework and cooperate on strategic litigation.\(^ {23}\)

Conclusion

With the rise in informalisation of the workforce in India, workers are increasingly realizing from their own experiences that only by forming trade unions and compelling

\(^{19}\) Mishra Lakshnidhar, (2000); Child Labour in India, Oxford University Press, Delhi, p. 271
\(^{20}\) ibid
\(^{22}\) ibid
\(^{23}\) ibid
factory management to provide space for collective bargaining they can convert informal employment to formal employment and insure better wages and working conditions.

In this environment, a new wave in the labour movement in India is emerging from below for unionization. All demands of regularization of the workforce and better wages are now always linked with the larger issue of the formation of a trade union and its recognition. This is also reflected in the rise of independent trade unions in India.

On the other hand, industrialists are not ready to accept trade unions in their factories. They are unleashing unimaginable repression on workers and trade union leaders when the efforts to form trade unions are uncovered in their factories. Even after the trade unions are formed, managements are not ready to recognize them and deny them space for collective bargaining. Trade union leaders and workers associated with them are facing intense and large scale of victimization by managements. Multinationals seems to be at the forefront in exercising repression of trade unions and their members.

It is clear that the entire machinery of government, the labour departments and police are largely acting in favour of managements and against the workers.

In such an environment, only the united action of trade unions in different industrial centres can guarantee the security of trade union leaders and success of the workers struggles in individual factories. Therefore, from their own experience, the trade unions in different industrial centres are forming joint trade union committees and councils. There are such joint committees and councils in Gurgaon, Faridabad and Rudrapur-Pantnagar of Uttaranchal and other manufacturing centres. These joint trade union committees ensure collective protest of workers in the entire industrial-region when the workers or trade union leaders of any individual factory face any kind of repression or victimization.

24 ibid
AN UNPUBLICISED WAR: A CRITICAL ANALYSIS OF THE PUBLIC SAFETY ACT AND ITS AFTERMATH ON THE DETAINEES OF JAMMU AND KASHMIR

Ruchika Bhaskar & Juhi Srivastava
Army Institute of Law, Mohali

The eminence of the state of Jammu and Kashmir has been politically controversial for decades. Since 1989, there has been a turbulent political movement in the Kashmir Valley for self-determination and independence, alongside a conflict between state forces and armed separatist groups, in which both sides have committed acts of violence against civilians. The state police and security forces are permitted to use broad powers under laws such as the PSA and Armed Forces Special Powers Act to maintain “public order” or the “security of the state”. The author, acknowledges the right, indeed the duty of the state to defend and protect its population from violence. However, this must be done while respecting the human rights of all concerned. There are accounts of prisoners languishing behind bars for several years awaiting their day in court are not uncommon. Many prisons are between 100% and 200% over capacity, where milieus are squalid and the weaker inmates face serious physical harm among other anguish. In this study, we examine the current state of the Criminal Justice System prevalent in the state of Jammu and Kashmir and its treatment and causes towards its detainees. Furthermore, we examine one of the most draconian laws applicable in Jammu and Kashmir, Public Safety Act that is being liberally used as a repressive measure to scuttle any dissent, often also victimizing innocent youth. The practice of this Act proves to be a contravention of the prevalent human rights. This paper is an attempt to recognize that delay in process is denial of justice.

Introduction

“Where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is in an organized conspiracy to oppress, rob, and degrade them, neither persons nor property will be safe.”

-Frederick Douglass

Sixty-Eight years since the birth of independent India torture, disappearances and killings sanctioned by the state remain prevalent. ‘India is a vibrant electoral democracy with an abysmal human rights record’ was the 2008 assessment of the Human Rights Watch in relation to the state’s failure to provide adequate redress for victims, and the continuing culture of impunity for security forces responsible for grave human rights violation. The use of such extra judicial measure still pervades every facet of criminal justice system in every Indian state, remaining an enduring legacy and everyday reality for millions of citizens.

Brutal methods are deployed by the police and security forces on the pretext of maintaining the ‘unity and integrity’ of the country. The experiences in Punjab, Kashmir, the Northeast and the so called Naxal affected areas, sanctioned arbitrary powers and draconian laws as a
tool of suppression in the pursuit of law and order and the perceived threat to national security. The courts, the criminal justice system and commissions have consistently failed to deliver justice and strengthen the human rights and constitutional safeguards of victims.

Since early 1990, the valley of Kashmir in the north Indian state of Jammu and Kashmir has been the site of a vicious conflict between Indian security forces and Muslim insurgents demanding independence or accession to Pakistan. In their efforts to crush the insurgency, Indian forces in Kashmir have engaged in massive human rights violations, including extrajudicial executions, rape, torture and deliberate assaults on health care workers. In late 1992 and early 1993, human rights conditions further deteriorated as Indian troops embarked on a "catch and kill" campaign against suspected militants. Since then, summary executions of detainees by security forces have sharply increased.

From the outset, that crackdown was marked by brutality against civilians, including the shooting of unarmed demonstrators, civilian massacres and summary executions of detainees. At the same time, militant groups - who received arms and training from Pakistan - stepped up their attacks, murdering and threatening Hindu residents, carrying out kidnappings and assassinations of government officials, civil servants and suspected informers and engaging in sabotage and bombings. In the three and a half years since the conflict began, at least 6,000, and possibly twice that number, have been killed by all sides and well over 100,000, mainly Hindus, have fled the valley. In 1992 alone, at least 2,000 were reported to have been killed - most of them civilians. Despite the escalation of violence, militant groups continue to command popular support throughout the valley, not necessarily for ideological reasons but because they are seen to represent the only alternative to the government's repressive policies and widespread abuses by the security forces.

The Public Safety Act was brought into effect in 1978, primarily to adopt a tough measure against timber smuggling in the state. It was much later that the act was frequently used to control militancy-related incidents. Under this act, the government can declare any area as 'protected' and exercise authority to regulate entry of any citizen in the protected area. Attempts to forcefully enter the designated areas invite prosecution.

---

1 The valley of Kashmir lies between the PirPanjal and Karakoram mountain ranges. The term refers to the area that includes the towns and villages along the Jhelum River, from Handwara in the northwest to Anantnag in the southeast.

2 No precise figure of the number killed is available. The U.S. State Department Country Report for 1990 sites press figures of 1214 civilians, 189 security forces and 890 militants killed. For 1991, the figures were 900 civilians, 1305 alleged militants and 55 security forces. For 1992, the figures were 1106 civilians and 982 militants. However, the figures cannot be considered accurate because official sources cited in such press accounts often describe civilians killed by the security forces as militants. As the Country Report for 1992 notes, many of the alleged militants "died in encounters with security forces or under other suspicious circumstances." See U.S. Department of State Country Report on Human Rights Practices for 1992, February 1993. P. 1134. In early 1993, press reports citing records maintained by local hospitals and journalists and lawyers reported that more than twelve thousand people may have been killed since 1989. See, for example, Molly Moore and John Ward Anderson, "Kashmir's Brutal and Unpublicized War." Washington Post, June 7, 1993.
The PSA gives J&K government the power to detain anyone who acts “in any manner prejudicial to the maintenance of public order”. To be precise, an individual faces the risk of being detained if he or she is found “promoting, propagating, or attempting to create feelings of enmity or hatred or disharmony on grounds of religion, race, caste and community”. This detention without trial happens under the pretext of maintaining public order. Because these issues are fundamental to any efforts to provide basic human rights protections in Kashmir, we have chosen to highlight them here. The report concludes with a set of specific recommendations and suggestions for amendments to be made in the Public Safety Act, 1978 for all parties and the international community.

1. Article 370: Special Status to the State of Jammu & Kashmir

At the time of independence in August 15th 1947, the State of Jammu and Kashmir decided not to join either India or Pakistan. However, soon Pakistan attempted to annex the State military. Meanwhile, Maharaja Hari Singh signed the “Instrument of accession” with India along with certain concessions for the autonomy of the State. Article 370 in Part XXI of the Indian Constitution grants a special status to Jammu & Kashmir. It is perhaps the most controversial provision of the Constitution of India. It deals exclusively with J&K state that came under the administrative control of the Government of India after the country’s 15-month war that Pakistan started in 1947 to grab sovereignty over that State.3

Termed as the ‘umbilical cord’ of the Indian Constitution, it is the only link between J&K and India. Under Part XXI of the Constitution of India, which deals with the “Temporary, Transitional and Special provisions”, J&K has been accorded special status under Article 370. Even though included in 1st Schedule as 15th state, all the provisions of the Constitution which are applicable to other states are not applicable to J&K. Further the State has a separate Constitution known as ‘The Constitution of Jammu and Kashmir’, its own State Flag and its own Anthem called ‘QuamiTarana’. “Article 370 of the Constitution would disappear by being eroded progressively.” That hope of Nehru hasn’t been fulfilled till date. Instead, Article 370 has become permanently ‘Temporary’.7 The

---

3Legally and constitutionally the State comprises the territory which, immediately before the commencement of the Constitution of India, constituted what was formerly the princely State of Jammu & Kashmir. However, after the 1947 war, Pakistan came to occupy 1,15,669 sq. kms. Of the State out of which it gave China 37,555 sq. kms. Through the 1963 Sino–Pakistan Border Agreement. As a result, the control of the Government of India extends to 1,06,567 sq. kms or 48% of the state’s total area of 2,22,236 sq. kms.

4Originally, Article 370 fell under the Constitution of India’s Part XXI called ‘Temporary and Transitional Provisions’ and Article 370 itself was dubbed as ‘Temporary provisions with respect to the State of Jammu and Kashmir.’ From 1st December 1963, under the Constitution (Thirteenth Amendment) Act, 1962, the title of Part XXI of the Constitution was changed to ‘Temporary, Transitional And Special Provisions’, the word ‘Special’ being the significant addition to the previous title.

5Jawaharlal Nehru in Delhi Agreement of 1952

6‘The Daily Excelsior’, June 24, 2002

Supreme Court five-judge bench without referring to *Prem Nath Kaul v. State of J&K,* pronounced a strange decision in *Sampat Prakash. State of J&K* ruled that (i) the wording of Article 370 makes no mention of the completion of work of the Constituent Assembly or its dissolution and (ii) the Constituent Assembly recommended that Article 370 should continue with one modification. The modification that the Court alluded to was the ‘Explanation’ of 15th November 1952. The apex court’s verdict implied that just because the J&K Constituent Assembly had so recommended, way back in November 1952, Article 370 should continue. The content of Article 370 restricts the applicability of parliamentary legislation on J&K depending either on the consultation or concurrence. This phenomenon of certain laws of the Indian Parliament not being applicable at all or applicable only in part to J&K is extraordinary.

Following Parliamentary laws are not at all applicable to J&K:

- *Indian Penal Code 1860.*
- *The Delhi Special Police Establishment Act, 1946.* — An exclusion which ‘may possibly have serious consequences for India and Kashmir’.

---

81959 AIR 749; A Constitution Bench consisting of five judges unanimously held that Article 370 (2) “shows that the Constitution-makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of powers conferred on the Parliament and the President by the relevant temporary provision of Article 370 (1) is made conditional on the final approval by the said Constituent Assembly in the said matters”. It referred to Clause 3 and said that “the proviso to Clause (3) also emphasizes the importance which was attached to the final decision of Constituent Assembly of Kashmir in regard to the relevant matters covered by Article 370”. The court ruled that “the Constitution-makers were obviously anxious that the said relationship should be finally determined by the Constituent Assembly of the State itself.”

9 *Mohammed Maqbool Dammu v The State of J&K, AIR 1970, SC 1118*

10 In the USA in contrast, each of the 50 constituent States has its own Constitution, but every Federal law is applicable to all the 50 States by virtue of Article VI of Part IV of the USA Constitution.

11 Jammu and Kashmir has Ranbeer Penal Code

12 This law prohibits religious institutions from allowing their premises for the promotion of political activity and for storing of arms and ammunition.

13 The legal powers of investigation of Central Bureau of Investigation (CBI) are derived from this Act. The CBI is today the country’s foremost criminal investigation agency. CBI is entry number 8 in the Union List but this entry is, by a Constitution order under Article 370, excluded from Parliament’s purview in respect of Jammu & Kashmir.


15 It does not extend to Jammu & Kashmir in respect of subjects under List II of Seventh Schedule.
The Representation of the People Act, 1950.\textsuperscript{16}

The Representation of the People Act, 1951.\textsuperscript{17}

In the same manner certain Constitutional Provisions are exempted from being applicable to J&K:

- Article 31C\textsuperscript{18}
- Articles 36 to 51\textsuperscript{19}
- Article 51A\textsuperscript{20}
- Article 134A\textsuperscript{21}
- Articles 153 to 217\textsuperscript{22}
- Article 360\textsuperscript{23}

Further, the word ‘secular’ was added to the Preamble of Indian Constitution by the 42nd Constitutional amendment in 1976; it is meant to be omitted in respect of J&K. The Constitution of J&K therefore does not proclaim itself to be ‘secular’. What has been ruled by SC as part of ‘basic structure’ of the country’s constitutional framework\textsuperscript{24} is thus not true of J&K.

2. What is Public Safety Act, 1978?

"There is no justice, no law and order. A security person can do what they want to catch any person. I am not a militant. I just want to study.” – Sultan said as he recovered from his injuries, at the Bone and Joint Hospital, which were sustained during an alleged shootout by the Indian Security Forces.

The PSA, 1978 is one of the most stringent laws to be ordained in J&K, which was primarily brought into the effect to adopt a tough measure against timber smuggling in the

\textsuperscript{16}Jammu & Kashmir State has its own “People’s Representation Act, 1957” and “Representation of People (Conduct of Elections and Election Petitions) Rules, 1957

\textsuperscript{17}The Representation of the People Act, 1951

\textsuperscript{18}Prohibits challenge on certain grounds to laws giving effect to Directive Principles of State Policy set out in Part IV of the Constitution of India.

\textsuperscript{19}These contain directive principles which need to be applied in making laws. One such directive is to secure a uniform civil code throughout the territory of India

\textsuperscript{20}Lays down 10 fundamental duties of every citizen of India

\textsuperscript{21}Empowers the High Courts to give certificate for appeal to the Supreme Court

\textsuperscript{22}These constitute Chapters II, III and IV of Part VI titled ‘The States’. The provisions lay down procedures, rules, authority etc. relating to the Governor, the Council of Ministers, the State Advocate General, High Courts, and all aspects of State Legislature.

\textsuperscript{23}Empowers the President of India to make a Proclamation of Financial Emergency if, in his opinion, the financial stability or credit of India or any part thereof is threatened.

state. It was much later that the Act was frequently used to control militancy-related incident. Endorsed with great love and affection by the Abdullah government, this act gives unquestionable power to the state authorities to arrest and jail persons without a trial for two years on mere suspicion that he/she may disrupt law and order in the state or may act in a manner prejudicial to the security of the state. The Act bypasses all the institutional procedures and human rights safeguards of ordinary criminal justice system in order to secure a long detention term. Many human rights activists maintain that this Act gives blatant leeway to the authorities to do as they please, often resulting in extreme violence and tortures of the worst kind.

3. Main Cause of the Origin

Omar Abdullah’s love for the PSA perhaps stems from the family lineage the law has with. The law was promulgated by the chief minister’s grandfather Shaikh Abdullah in 1978 essentially to target Jamaat-e-Islami, which was the principal opposition party at that time. Even though the official use of the Act, albeit on paper, was to prevent timber smuggling, the main ulterior motive was to arm the National Conference Party with immense power against any obstruction. Despite the voices of disagreement with this Act, Shaikh Abdullah got the bill passed on the strength of the brute majority his party enjoyed in the Assembly.

The first person arrested under PSA was a private bus driver Gulam Nabi of Batamaloo, Srinagar. He was President of Kashmir Motor Drivers Association (KMDA) which was a private bus drivers’ union. KMDA had fervently supported the opposition Janata Party against Shaikh Abdullah’s National Conference in the assembly elections a year earlier (1977). There could hardly be a few dozen forest-looters who might have been arrested under this law but those arrested for voicing against the government ran in thousands. In the pre-militancy era, when political dissent was restricted to contesting elections and opposition to government policies, the frequency with which this law was used is daunting. Many leaders of the Jamaat-e-Islami were picked up on mere press statements, and jailed for years. Syed Geelani, as stated by his close aides, has been jailed under PSA for 103 months since the Law came into force in late 70s. Ashraf Sahrayee, another Jamaat leader has spent 112 months in jail on different occasions. Shabir Shah is reported to have spent over 130 months in jail under PSA.

It should not surprise anyone to say that the National Conference leadership enjoys using this Act against its rivals. And much to their joy, no other chief minister has used it as arbitrarily as the Abdullahs’.

In 1987, Farooq Abdullah used PSA capriciously against his political rivals who had gathered under Muslim United Front (MUF) to oppose him in the Assembly elections. The elections were not only largely rigged by the state administration to the advantage of the National Conference but the government also made a massive use of its administrative power to detaining opposition MUF candidates, leaders and activists under PSA.

Omar Abdullah’s indiscriminate use of PSA against people—young and old, minors and otherwise—has made the world cry. According to The Economic Times in 2012, 1,332
people have been detained under this Act since 2009. However, despite the numerous
protests made for repealing this Act, Omar Abdullah not only remains adamant but also
tight lipped about the causes of preserving his alleged legacy. Senior Supreme Court lawyer
and BJP leader Ram Jethmalani once blasted Omar Abdullah’s government as “Nazi outfit”
for making excessive use of PSA.

4. Amendments to the Public Safety Act, 1978

In April 2012, the J&K Government amended the PSA through Jammu and Kashmir
Public Safety (Amendment) Act, 2012. The most notable amendment was that no person
could be detained under the age of 18.

The following five amendments to the PSA came into force on 18 April 2012,

(i) Section 8 of the PSA was amended to provide that no person under the age of 18 may
be detained under the PSA for offences under sections 8(a) and (a-1) of the PSA.

(ii) Section 13 was amended to add that the grounds of detention have to be communicated
to the detainee within 10 days from the time of arrest and in a language that he or she
understands.

(iii) Section 14 was amended to introduce a maximum term of office for the Chair and
members of the Advisory Board. Now, they can hold office for a maximum of three
years, which will be extendable for a further period of two years. Prior to the
amendments, there was no maximum term.

(iv) Following the amendment to section 16, the Advisory Board must submit its report
to the Government within a period of six weeks from the date of detention. They had
eight weeks to do so prior to the amendments.

(v) Section 18 was amended to reduce the maximum period of detention under the PSA.
This was reduced from 12 months to three months, extendable to 12 months, in the
case of persons “acting in any manner prejudicial to public order”. It was reduced from
two years to six months, extendable to two years, in the case of persons acting in “any
manner prejudicial to the security of the state”.

The J&K Law and Parliamentary Affairs Minister, Ali Mohammad Sagar has described
these amendments as a “remarkable achievement”. People of J&K welcome
the repeal of
the powers to detain children under the PSA, and believes that the amendments, if applied
in practice, would improve the current situation. However, Amnesty International
reiterates that the amendments are far from adequate in their present form. As part IV of
this briefing indicates, several provisions in the PSA still do not comply with India’s

25 “Govt reacts to Amnesty’s allegations, terms amendments a remarkable achievement” Rising
26 Amnesty International, Amendments not Enough, Repeal the Jammu and Kashmir Public Safety
international law obligations. However, the amendments do not even go as far as the recommendations made by the Interlocutors in their report.

5. Violation of International Rights

In the 2011 report, Amnesty International explained how the PSA violates India’s obligations under international human rights law. In particular, the PSA is inconsistent with provisions of the International Convention of Civil and Political Rights (ICCPR).27 The PSA violates several provisions of article 9 of the ICCPR, which protect the right to liberty. At the time of accession, India made a reservation to article 9 of the ICCPR, declaring that it “shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India.” Articles 22(1) and 22(2) of the Constitution provide robust protections for persons arrested in India. However, article 22(3) weakens these protections for persons’ subject to administrative (or “preventive”) detention. The rights to be produced before a magistrate within 24 hours of arrest and to consult and be represented by a lawyer of choice are thus available to persons ordinarily arrested in India, but are unavailable to persons under administrative detention. Under international law, India’s reservations to the ICCPR, including its reservation to article 9, must not be “incompatible with the object and purpose of the treaty.”28 The UN Human Rights Committee has clarified that to reserve the right “to arbitrarily arrest and detain persons” would be incompatible with the object and purpose of the ICCPR.29 Similarly, in 2008, the UN Working Group on Arbitrary Detention concluded that 10 individuals detained under the PSA in J&K had been arbitrarily detained in violation of articles 7, 9, 10 and 11(1) of the Universal Declaration of Human Rights and Articles 9 and 14 of the ICCPR.30

Provisions of the PSA violate international human rights law because:

(i) According to article 9(1) of the ICCPR “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” In the context of national security laws, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has made reference to the principle of legality, and stated that legal provisions “must be

---

27 For a detailed discussion on this topic, see Amnesty International, A ‘Lawless Law’ – Detentions under the J&K Public Safety Act, AI Index: ASA/20/001/2011, page 15
29 Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para 8.
framed in such a way that: the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct.”31 The PSA does not define “security of the state”, and provides a vague and over-broad understanding of what “public order” is.32 Thus the PSA violates the principle of legality.

(ii) According to article 9(2) of the ICCPR “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” The UN Human Rights Committee has stated that this must also apply to preventive and administrative detentions.33 Section 13 of the PSA allows the detaining authority to not communicate grounds of detention for up to 10 days of detention, and also to withhold any information that it considers “to be against the public interest to disclose”.

(iii) Articles 14(3)(b) and (d) of the ICCPR provide for the right to communicate with and be represented by counsel of one’s choice. However, Section 16(5) of the PSA explicitly stipulates that legal counsel cannot represent a detained person before the Advisory Board.

(iv) All individuals have the right to a remedy under article 2(3) of the ICCPR. Section 22 of the PSA enables impunity and prevents individuals from accessing their right. In its 2005 Basic Principles covering the right to reparation, the UN General Assembly has emphasized that states have the duty to “investigate and, if there is sufficient evidence,
the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him” 34

(v) When the PSA is used as an informal justice system, persons suspected of, and sometimes charged with violating human rights, are detained for long periods of time without being prosecuted through a fair trial in a court of law. Where such administrative detention replaces proper investigations and trial, the risk of the real perpetrators remaining free is much greater. This also violates the rights of victims to see the person responsible for violations against them promptly and duly prosecuted and punished, and denies them the right to participate in this process.

6. Violation of National Law

Legal experts say that PSA differs from the act operating in rest of the country. They maintain that Jammu and Kashmir Public Safety-1978 was amended in the year 1990 which made it possible for extending the operation of act beyond the state, enabling the State machinery to keep detainees in the jail of India, outside of state.

Experts opine that state government can recommend review of Public Safety Act but the same has never been done. They add that respective governments since 1978 have used the law to their fullest advantage but have never sought a review of this Act.

Furthermore, once the High Court has quashed a PSA detention order, the detaining authority continues to hold the detainee by issuing a new detention order on the basis of “new grounds,” which are often made up of extremely vague allegations. This practice appears to be unique to J&K: lawyers defending those detained under similar legislation in other parts of India expressed astonishment that the J&K authorities could issue new detention orders for the same individual based on “new grounds” immediately after a detention order had been quashed by the High Court. 35 This has been the fate of many detainees in J&K. Shabir Ahmad Shah, Masarat Alam Bhat and others referred to above have been detained under up to eight successive PSA detention orders. A senior lawyer explained the process: The detaining authorities know well that the detention orders will be challenged in the High Court and will be often quashed, but they also know that the entire process will usually take about six months. Earlier, detention used to be one year, but it doesn’t really matter to the police – if they want to hold the person further, they will get another detention order passed. The order may be for two years but even if it gets


35 Amnesty International conducted interviews with lawyers in Manipur State where administrative detentions under the National Security Act are common.
quashed, their objective will be achieved as the person is in jail for six months. They can keep on doing this as no one holds them accountable.\textsuperscript{36}

7. Present Scenario- Implementation of the Act

‘Since independence, Kashmir has seen more red than ever.’

-Anonymous

“Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law.” Justice ArijitPasayat, Supreme Court of India, judgment in Union of India v. YumnamAnand M,\textsuperscript{37}

Kashmir has been a contested state split between India and Pakistan and has seen violent clashes over the past 20 years. The Kashmiri people have been subjected to the worst kind of human rights abuses ever since the British sold Kashmir to the Dogra Maharaja Gulab Singh. Mass killings, forced disappearances, torture, rape and sexual abuses to political repression and suppression of freedom of speech have become an integral part of their day to day life. The Indian Central Reserve Police force, Border Security personnel and various militant groups have been accused and held accountable for committing severe exploitations against Kashmiri Civilians. However, the fact worth mentioning is that perhaps, PSA is the most misused law of J&K. More than five thousand were arrested during the uprising of 2008 and again many others were arrested in 2010. Contrary to the amendment introduced in the Act, minors below the age of 16 are currently behind the bars. Many people have fallen into destitution and often remain without the knowledge whether their family members are dead or alive. To put it lightly, the situation is critical.

In 2010, after the discovery of the bodies of three civilians alleged to have been killed by the Army caused many young men to take to the streets, pelting stones at the Indian Forces. When the smoke cleared, over 4000 policemen and soldiers were found to be injured and 118 Kashmiris were dead, many of whom were children. About a 1000 people had been detained and when they emerged they told chilling tales of brutal torture revealing a practice that goes back almost two decades. “They cut my flesh, put salt and chili on it and put it in my mouth,” said one of the detainees. Another lamented, “They ripped my nails out with pliers and tortured my private parts.” As has been correctly said by an eminent Kashmiri human rights lawyer, “torture is not a historical issue. It is happening right now in Kashmir Valley.”

\textsuperscript{36} When a writ petition challenging a detention order is filed in the High Court, it takes two days for the judge to decide whether to admit the petition or not. Almost all petitions in PSA cases are admitted. They are then listed two weeks later and the state is asked to respond to the petition. Invariably the state seeks more time to reply and petitions get delayed by weeks at a time. A rebuttal is then permitted to the petitioner before a date is fixed for final arguments.

The main reason that torture is practiced is to coerce detainees to reveal information about suspected militants or to confess to militant activity. It is also used to punish detainees who are believed to support or sympathize with the militants and to create a climate of political repression. The practice of torture is facilitated by the fact that detainees are generally held in temporary detention centers, controlled by the various security forces, without access to the courts, relatives or medical care.

Methods of torture include severe beatings, electric shock, suspension by the feet or hands, stretching the legs apart, burning with heated objects, sexual molestation and psychological deprivation and humiliation. One common form of torture involves crushing the leg muscles with a heavy wooden roller. This practice results in the release of toxins from the damaged muscles that may cause acute renal (kidney) failure. This report documents a number of such cases which required dialysis. Since 1990, doctors in Kashmir have documented 37 cases of torture-related acute renal failure; in three cases the victims died.

This state has brought India and Pakistan to war three times. Because of this reason, Kashmir is now one of the most heavily occupied areas by the Armed Forces. Today there are 700,000 troops and policemen in the State, one for every seventeen Kashmiris. By the beginning of 2011, with the insurgency at its lowest ebb, the Indian Security Forces were playing cat and mouse with the new generation of protesters armed only with rocks. India claims that these stone pelters are funded and organized by terror groups in Pakistan. The government says that the damage and losses to the economy caused by the riots have cost the state more than 20 crores.

Lawyers in J&K have consistently challenged specific PSA cases in the courts, but the government has blatantly disregarded court orders quashing detention orders or granting bail. Such disregard completely undermines the role of the courts to protect human rights. According to a human rights activist, J&K uses PSA “to keep people they can’t or won’t convict through proper legal channels locked up and out of the way.

8. Recommendations

Propositions for the Government of Jammu and Kashmir:

1. Repeal the J&K Public Safety Act and any other legislation facilitating the use of administrative detentions;

2. Abolish the system of administrative detentions in J&K and either release or charge persons accused of committing criminal acts for recognizably criminal offences and try them in a regular court with all safeguards provided;

3. Implement court rulings ordering release of detainees without delay;

4. Immediately and unconditionally release all detainees deprived of liberty solely for the peaceful exercise of their rights of freedom of thought, conscience, religion, opinion or expression;
In the period before repealing the PSA, strengthen protection during detention by:

1. Ending immediately the use of incommunicado detention;
2. Ending detention in unofficial places of detention;
3. Ensuring officers carrying out the initial arrest inform the families of the place where the detainee is held;
4. Ensuring all detainees are brought before a judicial magistrate within 24 hours of arrest;
5. Ensuring that the families of those detained are informed of subsequent transfers to other places of detention without delay.
6. Maintaining a centralized register of all detainees available for public access, detailing the date of order or arrest and detention, authority issuing such orders and all transfer, release and revocation orders;
7. Take all necessary measures to improve prison conditions, including by ending overcrowding and providing adequate food and medical care, in accordance with the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
8. Amend the J&K Juvenile Justice Act to make it compatible with the UN Convention on the Rights of the Child and implement its provisions in full.

Conclusion

The Indian Supreme Court’s observation in the case of Jaya Mala v. Home Secretary, Government of Jammu and Kashmir (1982) about the PSA detention case in 1982 – well before the eruption of the popular uprising and armed movement for independence – was prophetic. As said by Justices D.A. Desai and P. N. Bhagwati “the PSA is a ‘lawless law’” that has largely supplanted the normal criminal justice system in J&K.

Hundreds of people are detained under the PSA in J&K, many of them political activists and youth. Instead of charging and trying persons suspected of committing offences in a fair trial in a court of law, the J&K authorities continue to circumvent the rule of law by resorting to the PSA. Repeal of the PSA would send a strong signal to the residents of J&K about the government’s commitment to the rule of law and human rights and it would also bring India into conformity with its international human rights legal obligations.

However, India has so far chosen to ignore the calls of UN human rights mechanisms in relation to its administrative detention regime. In response to concerns raised about human rights violations by UN human rights mechanisms, the Government of India recently claimed, “… despite continuing provocations, the security forces continue to exercise their utmost restraint because of the Government’s emphasis on human rights protection and
the adverse impact that human rights violations by security forces can have on the work being done by them in countering terrorism in the State.” Yet, these claims do not appear to be backed up by the J&K authorities. In a meeting with Amnesty International delegates in Srinagar in May 2010, where concerns about PSA detentions were raised, the then Additional Director General of Police (Criminal Investigation Department) of J&K asked, “What rights are you talking about? We are fighting a war – a cross border war.”

Such opinions, and the practices that result, run directly counter to commitments made by India in ratifying international human rights treaties, and assertions regularly made by government officials at both the state and central level that democracy and the rule of law should prevail in J&K. The widespread and abusive use of the “lawless” PSA further risks undermining the rule of law and reinforcing deeply held perceptions that police and security forces are above the law. “It is not security that we feel, but insecurity at the hands of the Indian Security Forces,” said a Kashmiri civilian.

Today Kashmir stands all alone as world awareness is being kept at a distance while the reality in Kashmir remains shrouded. Behind the smoke screen of Indian propaganda, children are killed for crimes not committed, girls are raped and young men tortured and slain to death for nothing but a surge for freedom. It is unfortunate to say but factually Indian administered portion of Kashmir suffers with every moment death of human rights.

“You want that India should defend Kashmir, India should develop Kashmir, and Kashmiris should have equal rights as the citizens of India, but you don’t want India and any citizen of India to have any rights in Kashmir. I cannot betray the interest of my country.”

-Dr.B.R.Ambedkar
AN ANALYSIS OF SEX SELECTIVE ABORTION IN INDIA: ITS LAWS AND TRENDS

Saloni Gupta & Mahak Paliwal
Symbiosis Law School, Pune

In a land where sex selective abortion prevails and where the society is swallowed by the myth surrounding the birth of a girl child, we bring to light the adversities inflicted upon a girl even before she is born, violating her basic human right. Section 3 of the Medical Termination of Pregnancy Act, 1971 legalizes abortion under certain conditions in India. Section 3A of the Pre Conception and Pre Natal Diagnostic Techniques Act, 1994 prohibits the act of sex selection by doctors or patients. We also provide recent case laws and judgments governing the same. This paper seeks to identify the extent to which implementation of PNDT Act, 1994 and MTP Act, 1971 has influenced sex ratio all over India. The authors aim to discuss whether these stringent laws have had any impact on sex ratio. Based on the recent Census of India and the National Family Health we give a detailed analysis of the current scenario regarding sex determination in India.

Keywords: PCPNDT, MPT, Sex determination, Sex ratio

Introduction

The just-released data from the National Family Health Survey-4 (2015-15) certainly grabs the world's attention on the dark side of India’s demographic change -- a falling ratio of girls to boys. Amartya Sen, Nobel Prize Laureate coined the term “missing women” which rightly defines the growing demographic deficit of women. Declining sex ratio depicts the adversity prevailing towards the girl child. If we look at the census it is quite evident that even though there has been a favorable growth in sex ratio from 933 in 2001 to 943 in 2011, the child sex ratio has shown an unfavorable growth i.e. from 927 in 2001 to 918 in 2011. Despite the drastic increase in economic growth in the recent years, gender inequality remains a major affair. None the less this skewed sex ratio is one of the greatest threats to our contemporary civilization. India, among other developing nations is infamous for low a literacy rate and sex ratio. The World Economic Forum Gender Gap Report 2015 has ranked India at 108 out of 145 countries. According to this report, India’s rank has increases by 2 or 3 ranks each year in the last decade. This shows that India’s sex ratio has reached “emergency proportions” and requires thorough review and change. It also indicates how deeply gender inequality is integrated in our country.

This paper focuses on the PCPNDT Act, 1994 that primarily banned doctors from revealing the sex of the fetus to the parents and MTP Act, 1971 which made abortion legal in India. We observe the salient features, penalties and remedies provided by the law.

---

1 Census of India 2001, 2011
2 World Economic Forum Gender Gap Report 2015
We also observe statistics from the censuses conducted in the past and also examine the trend shown in the previous National Family Health Surveys (NFHS). Moreover, we give a detailed analysis of the latest NFHS-4 and study its impact on the Indian demographic. To our knowledge, one of the ways in which our paper is unique is that we identify the myths surrounding the depleting the sex ratio and enumerate on its causes.

1. Objectives

- To shed light on the Indian laws governing sex determination and sex selective abortion in India with the help of recent landmark cases and judgments.
- To measure the statistical trends in sex ratio, which is a major indicator of family welfare and health at national and state level.
- To study the myths that are strongly hold in India and bring the material facts and problems it might lead to light.
- To recommend future directions to be taken to combat the prevailing situation.

2. Myths

A. Reality

One of the major causes governing the increasing gap between the number of females per thousand male or the decreasing number of girl child are the Myths surrounding girls in society. Myths have always played an important role in the Indian society right from the ancient era and have always led to destruction.

Similarly, various myths contributing to the declining sex ratio involves the belief that if a boy child is born he will take the family name forward whereas if a girl child is born she would eventually have to marry and settle in her husband’s house. The very made up belief that it is only a boy child who can take the family name forward is contradicted by the fact that the world has always remembered those who have done something which makes people remember them or worth remembering. We are born in a country where women’s like Rani Lakshmi Bai, Lata Mangeshkar, Sania Mirza, Mary Kom, P.T Usha and Kalpana Chawla are born. They are all women’s and there is no suspicion on the extent to which they have taken their family name forward.

Also, People strongly believe that a boy or a male child would act as an old age security for them and they won’t have to worry about his physical security whereas if it’s a girl child it would impose a very big liability on them whereby they will have to worry about her physical security due to the increasing number of rapes and mishaps happening with the girls nowadays. Rapidly increasing number of old age homes in the country and the increase in number of registrations or applications for the same is good enough a point to contradict the view. Physical security of the girl child is always made an issue due to the increasing number of rapes especially in the recent years. It is believed that if a girl child is born she might become a victim of social abuses like rape and eve teasing because of which eventually
family will have to suffer and face societal constraints whereas in reality there are several significant cases which shows the physical abuse that the boys have to go through. Hence, more than physical security it is the societal constraints which debar them from giving birth to the girl child. Dowry is another major concern for huge masses. They consider it as a burden. However, when we talk about the current scenario, it is quite evident that people’s perspective has changed with each generation. Today’s Generation is very much against this system and several strict laws have been made to deal with the same. Talking about last rights, media which is the fourth pillar of our democracy can be of great helpfulness to contradict this view. Very often we see daughters performing the last rights. Hence, none of myths prevailing in the society is not far from reality.

B. Consequences

The rapidly increasing sex ratio would certainly curtail the much needed growth leading to various early marriages, whereby people will start marrying their children at a very early stage which would act as a hurdle to much needed upbringing and awareness regarding various aspects of the society.

Declining sex ratio is leading to increase in violence against the women’s rapidly. Day by day the no. of cases relating to sexual harassment at work place, rape, kidnapping, murder, dowry death, domestic violence and many other kind of violence against women are registering speedy growth. If the condition continues to be the same for a longer period of time we would very soon be struck in a condition where no prospect of growth would be seen.

This is not the only imbalance causing a lot of destruction. Very often we come across newspaper headlines being loaded with the cases of bride trafficking. Business in brides is booming in north-west India as a result of female foeticide. Also, the women bought and sold are often trapped in lives of slavery and abuse. In one of case that happened in thriving city of Gurgaon, near Delhi the facts involved a women being shared by 7 brothers. The reason behind the same was a dearth of young women in the village for the marital relation.

It has been seen that populations with more number of males remain at risk of social unrest and their also exists a risk of polyandry. Female feticide is rampant because people bitterly oppose the laws which demand equal rights for both girl and a boy child. Various other common problems faced by the country due to the increasing sex ratio involve Women’s being treated as slaves. Though quiet a improvement can be seen in the sex ratio of the

---


4 Singh D, Kumar A, Vij K, Skewed Sex Ratio In Punjab-A Demographic Catastrophe, Department of Forensic Medicine, Govt. Medical College, Chandigarh, Vol 2, 2004
recent years condition of our country is getting worst day by day. It is high time government must intervene or take some tremendous steps.

3. Laws & Judgements

_The Medical Termination of Pregnancy Act_- This Act provides for the termination of certain pregnancies by registered medical practitioners. It was enacted by the Parliament in tin 1971. The Act aims to improve the maternal health scenario by preventing large number of unsafe abortions and consequent high incidence of maternal mortality & morbidity. It was the first act in India to legalize abortion services and promotes access to safe abortion services to women. It also offers protection to medical practitioners who otherwise would be penalized under sections 3015-316 of the Indian Penal Code.

(i) Objectives

- It aims to regulate and ensure access to safe abortion care and defines ‘when’, ‘where’ and under what circumstances abortions are permissible.
- It provides for termination of certain pregnancies by a registered medical practitioner.

(ii) Salient Features

- Section 1 of the act defines guardian, Lunatic and minor and registered medical practitioner.
- Section 3 lays down provisions that allow abortion by a registered medical practitioner as follows:
  - This section provides that doctors may not be held liable if he participates in an abortion if it’s in accordance with the law.
  - An abortion can only take place if the length of the pregnancy is between twelve and twenty weeks.
  - It can also take place if the pregnancy involves a risk to the life of the mother or if there is risk of the child being born with physical or mental abnormalities.
  - If the pregnant woman is below 18 years of age or is a lunatic, an abortion cannot be done on her without the consent her guardian.
  - Consent of the pregnant women is essential for the termination of her pregnancy.

5 The Medical Termination Of Pregnancy Act, 1971
Section 8 of the said act talks about the protection that is granted to the medical practitioner when the action is taken in good faith. No suit for other legal proceedings shall lie against any registered medical practitioner for any damage caused likely to because by anything which is in good faith done or intended to be done under this act.

Pre Conception-Pre Natal Diagnostic Techniques Act, 1994- In response to the introduction of ultrasound scanning in India in the 1980s, the national government passed this piece of legislation making determination of fetal sex illegal. This act provided for the prohibition of sex selection, before or after conception, and for regulation of prenatal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders and for the prevention of their misuse for sex determination leading to female feticide. The PNDT Act prohibited the use of diagnostic methods to diagnose the sex of an unborn child.

Recently, PNDT Act and Rules have been amended keeping in view the emerging technologies for selection of sex before and after conception and problems faced in the working of implementation of the act. Certain directions by the Supreme Court were given after a PIL was filed in 2000 by CEHAT and Others, an NGO on slow implementation of the Act. These amendments have come into operation with effect from 14th February, 2003.

(i) Objectives

- Prohibition of sex selection in the country.
- Regulation of prenatal diagnostic techniques for detecting the chromosomal abnormalities or genetic metabolic disease or haemoglobinopathies or sex linked genetic diseases or congenital anomalies or any other abnormalities or diseases as may be specified by the Central Supervisory Board.
- Also, the act puts emphasis on prevention of such techniques which are used for the purpose of sex determination for female feticide.

---

6 Pre Conception-Pre Natal Diagnostic Techniques Act, 1994

7 Arindam Nandi and Anil B. Deolalikar, Does a Legal Ban on Sex-Selective Abortions Improve Child Sex Ratios? Evidence from a Policy Change in India, April, 2011

8 Dr. Prativa Panda, Female Feticide in India, University Law College, Utkal University, BBSR- 4, Vol 5, Issue 2, Feb, 2016

9 It is a kind of genetic inherited single-gene disorder.
(ii) Salient Features

- Section 3 of the Act talks about the regulations of genetic counseling centres, genetic laboratories and genetic clinics. Also, it involves sub section 3A which deals with the prohibition of sex selection whereby any specialist or team of specialist in the field of fertility is allowed to conduct or aid in conducting the sex selection and sub section 3B which deals with provisions related to prohibition on sale of ultrasound machines, etc., to persons, laboratories, clinics, etc which are not registered under the Act.

- Section 4 (2) deals with the abnormalities for the detection of which Pre-natal diagnostic techniques can be used, such as:
  - Chromosomal abnormalities;
  - Genetic metabolic diseases
  - Hemoglobinopathies;
  - Sex-linked genetic diseases or;
  - Congenital anomalies.

- Sec 4(3) deals with the circumstances or the conditions under which diagnostic techniques can be used:
  - Age of the pregnant woman is above thirty-five years;
  - The pregnant woman has undergone of two or more spontaneous abortions or foetal loss;
  - The pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;
  - The pregnant woman or her spouse has a family history of mental retardation or physical deformities such as, spasticity or any other genetic disease;
  - However, the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic in such manner, as may be prescribed, and any deficiency or inaccuracy found therein shall amount to contravention of provisions of section 5 or section 6.
  - The Act also provides for the constitution of a Central Supervisory Board to monitor and regulate this act in the country. It also lays down rules for appointment of its members, their eligibility, meetings of the board and disqualification.
• It makes it mandatory of Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic to get a certificate of registration.

• It must be noted that the central and the state supervisory board will have representatives of woman welfare organizations, obstetricians, social scientists as well as medical experts like gynecologists and radiologists as the Appropriate Authority.

(iii) Registration of Genetic Counseling Centers, Genetic Laboratories and Genetic Clinics:

No person shall open any Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic or any other technology capable of undertaking determination of sex of fetus after the commencement of the PNDT Amendment Act, 1994 unless such centre, laboratory or clinic is duly registered under the Act.10

(iv) Certificate of registration:

The Appropriate Authority shall, after holding an inquiry and after satisfying itself that the applicant has complied with all the requirements of this Act and the rules made there under and having regard to the advice of the Advisory Committee in this behalf, grant a certificate of registration as the case may be and every certificate of registration shall be renewed in such manner and after such period and on payment of such fees as may be prescribed.

(v) Offences and Penalties

If any person is found advertising for the pre-natal and pre-conception facilities in the form of any wrapper, document or advertises through the internet or through the medium of any other electronic or print media he can be imprisoned for up to three years and a fine of Rs. 10,000. Also, if any of the medical geneticist, gynecologist, registered medical practitioner or any other person who owns a genetic counseling centre, a genetic laboratory or genetic clinic where test is conducted can be imprisoned for up to three years of imprisonment and is required to pay Rs. 10,000. Further if he commits any subsequent offence then he can go up to Rs. 50,000 and imprisonment up to seven years. Any person who seeks to aid sex determination for the purpose, other than mentioned in Section (2), through any of the techniques with the help of any of the clinic or laboratory might have to face an imprisonment for up to three years and be required to pay Rs. 10,000 and for any subsequent aid a compensation amounting Rs. 50,000 and an imprisonment for up to five years.

Landmark Judgments- The Preconception and Prenatal Diagnostics Techniques (Prohibition of Sex Determination) Act 2003, with Rules made there under is an act to safeguard the girl child. The Courts have delivered judgments which indicate that the PC-
PNDT Act is actually a whip to penalize those indulging in sex determination and to serve as a deterrent to others. Some of the landmark cases involve-

**Centre For Enquiry Into Health And Dr Sabu George v Union of India and others**<sup>11</sup>

A petition, was filed and it was inter alia prayed that as the Pre-natal Diagnostic Techniques contravene the provisions of the PNDDT Act, the Central Government and the State Governments be directed to implement the provisions of the PNDDT Act (a) by appointing appropriate authorities at State and District levels and the Advisory Committees; (b) the Central Government be directed to ensure that Central Supervisory Board meets every 6 months as provided under the PNDDT Act; and (c) for banning of all advertisements of pre-natal sex selection including all other sex determination techniques which can be abused to selectively produce only boys either before or during pregnancy.

Supreme Court of India directed all the State Governments/Union Territory administrations to create public awareness against the practice of pre-natal determination of sex and female feticide through advertisements in the print and electronic media by hoardings and other appropriate means.

**Qualified Private Medical Practitioners and Hospitals Association Vs State of Kerala**<sup>12</sup>

In the aforementioned case there was a common prayer for a declaration that laboratories and clinics which do not conduct pre-natal diagnostic, test using ultrasonography shall not come within the purview of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (and for a direction to the respondents not to insist for registration of all ultrasound scanning centers irrespective of the fact as to whether they are conducting ultrasonography, under the Act, 1994.

It was declared that laboratories and clinics which do not conduct pre-natal diagnostic, test using ultrasound will not come within the purview of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.<sup>13</sup> A similar view was taken in the case of **Malpani Infertility Clinic Pvt. Ltd. and Others Vs Appropriate Authority, PNDT Act and Others**<sup>14</sup>

**Vinod Soni and another Vs Union of India**<sup>15</sup>

By this petition, the petitioners who are married couple, seek to challenge the constitutional validity of Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994 (hereinafter referred to Sex Selection Act of 1994). The petition contains basically two challenges to the enactment. First, it violates Article 14 of the Constitution and second, that it violates Article 21 of the Constitution of India. In order to decide the case reliance was placed on supreme court’s judgment of **Shantisttar Builders**

---

<sup>11</sup> AIR 2003 SC 3309
<sup>12</sup> 2006 (4) KarLJ 81
<sup>13</sup> Supra note 10
<sup>14</sup> AIR 2005 Bom 26
<sup>15</sup> 2005 (3) MhLj 1131
It was held that the Right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself to be a right.\(^{17}\)

Dr Smt Pooja Agrawal Vs. Shivbhan Singh Rathore & another\(^{18}\)

It was held that Act of 1994 and rules made there under to be strictly implemented.\(^{19}\) The State Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for the whole or part of the State for the purposes of this Act under Section 17(2) having regard to the intensity of the problem of pre-natal sex determination leading to female feticide.\(^{20}\)

4. Data Analysis & Methods

A. Research Methodology

The census of India is conducted every 10 years by the Registrar General and Census Commissioner of India. This census gives us statistical data on the sex ratio in India in rural and urban areas. Sex ratio is used to describe the number of females per 1000 of males. Sex ratio is a valuable source for finding the population of women in India and what is the ratio of women to that of men in India. In the latest Population Census of 2011 it was revealed that the population ratio in India 2011 is 940 females per 1000 of males. The human sex ratio is of particular interest to anthropologists and demographers. However, sex ratios at birth may take an oblique course due to factors such as the age of mother at birth, by sex-selective abortion and female feticide, especially in India.

In this paper we use secondary sources of data from the two decennial Indian censuses of 2001 and 2011. We use a graphical representation to compare the general sex ratio with the Rural and Urban Sex Ratios and try to analyse the trend in the data and the causes for it. We also study the pattern of sex ratios from the last 12 census conducted in India and comment on whether the introduction of the PCPNDT Act 1996 and MPT Act 1971 has made any impact on the sex ratio.

\(^{16}\) AIR 1990 SC 630
\(^{17}\) Supra note 10
\(^{18}\) AIR 1992 sc 637
\(^{19}\) Supra note 10
Another source of data we have used is the National Family Health Survey-4 (NFHS-4) that is conducted by the Ministry of Health and Family Welfare. It is associated with International Institute for Population Sciences. It is also supported by UNICEF for survey implementation. This national survey covers all 29 states in India and 99 percent of India’s population. NFHS collects information from a nationally representative sample of 109,041 households, 124,385 women age 15-49.21

Through the NFHS data collected over the years, we examine the sex ratio of different states in India through a map of India. So far, four such surveys have been conducted: NFHS-1(1992-93), NFHS-2 (1998-99) and NFHS-3 (2005-06). We also look at the latest NFHS-4 (2014-15) and examine the current situation in India.

NFHS-4 is the first of the NFHS series that provides estimates of most indicators at the district level for all 640 districts of the country included in the 2011 Census. In NFHS-4, women aged 15-49 years and men aged 15-54 years were interviewed. NFHS-4 sample size is expected to be approximately 568,200 households. In these households information on 265,653 children below age 5 was collected in the survey. The survey covered a range of health-related issues, including fertility, infant and child mortality, maternal and child health etc. 22

The statistical information on 13 states and 2 Union territories (Andaman and Nicobar Islands and Pondicherry) has been made available. This data has been plotted and analyzed in depth.

B. Data analysis

1. Comparison Of Sex Ratios As Per Census Of India23

![Figure 1.1 (Source: Census of India 2001) | Figure 1.2 (Source: Census of India 2011)](http://www.dataforall.org/dashboard/censusinfoindia_pca/)

---

22 National Family Health Survey 4 (2015-16)
23 Census of India 2001, 2011
http://www.dataforall.org/dashboard/censusinfoindia_pca/
The above figures (1.1, 1.2, 1.3 and 1.4) present the decadal sex ratio from recent Indian censuses. The graphs clearly show a drastic rise by 10 points in total overall sex ratio (OSR) from 933 (females per 1000 males) in 2001 to 943 in 2011. However, there is a fall in the child sex ratio (CSR) from 927 in 2001 to 913 in 2011. Since the last five decades the sex ratio has been moving around 930 of females to that of 1000 of males.

In rural areas, statistics shows that the OSR has increased by 3 points and CSR had reduced by 11 points. On the contrary, in urban areas, the OSR has shown tremendous increase by 29 point and CSR has reduced by only 1 point. The increase of OSR in urban areas is owed to the educated and working class that usually have 2 children per household and have a lesser prejudice towards a girl child than in rural areas if India.

The major cause of the decrease of the female birth ratio in India is considered to be the violent treatments given to the girl child at the time of the birth. The Sex Ratio in India was almost normal during the phase of the years of independence, but thereafter it started showing gradual signs of decrease. Though the Sex Ratio in India has gone through commendable signs of improvement in the past 10 years, there are still some states where the sex ratio is still low and is a cause of concern for the NGO organizations.24 The state with the highest sex ratio is Kerela with 1084 of overall sex ratio and 964 as child sex ratio. The Union territory of Daman & Diu suffers from the worst sex ratio of the nation. Its overall sex ratio is 618 and child sex ratio is 904.25

The main cause of the decline of the sex ration in India is due to the biased attitude which is meted out to the women. The main cause of this gender bias is inadequate education. Pondicherry and Kerala houses the maximum number of female while the regions of Daman and Diu and Haryana have the lowest density of female population.26

---

24 Census of India 2011
25 Supra note 28
26 Supra note 28
Figure 1.5 gives us the all India statistical picture from 1951 to 2011.28 The sex ratios in the country, taken as a whole in the last half century, declined slightly from 946 in 1951 to 927 in 1991 and have been slowly rising since then. Most demographers are in agreement that the more recent improvements in overall sex ratios point to the increasing life expectancy among the women, who are born, which, in the past and contrary to all other parts of the world, were lower than that of men due to processes of premature aging. Women in India now outlive men, as improvements in male life expectancy appear to have been slowed down by factors such as life styles and diseases that take a greater toll on them.29

The pattern of CSRs is in marked contrast to overall sex ratios as Figure 1.5 clearly shows. They have been declining and the rate of decline has in fact worsened in the very years when overall sex ratios began to improve. This corresponds to the decades following 1981 and offers incontrovertible evidence of the effects of resorting to sex determination testing and the selective elimination of female fetuses prior to birth, along with possible female infanticide, and skewed infant and child mortality. However, the final population figures of 2011 census were 918, making for a nine point decline from 2001 compared to that of 18 points in the previous decade. This would indicate a slowing down in the rate of decline in the practice of sex selection, and clearly calls for further investigation. These figures also need to be interpreted in conjunction with changing patterns of OSRs which have also shown small improvements since 2005 in several states.30

Furthermore, we observe that after the enactment of the Pre Natal Diagnostic Technique Act, 1994 (PNDT) the Overall Sex Ratio has steadily risen, however, the Child Sex Ratio has drastically fallen. This can be credited to the stringent laws that this Act imposes on private doctors who allow their patients to know the sex of the fetus. This act criminalized doctors from revealing the sex of the fetus and also put a ban on sex selective abortion.

27 Sex Ratios and Gender Biased Sex Selection, UN Women, United Nations Population Fund (2014)
28 Refer to Appendix, Table for Figure 1.5
29 Supra note 31
30 Supra note 31
Therefore, after this act the sex ratio gradually started to rise as sex selective abortion became rarer occurrence.

Following to the Medical Termination of Pregnancy Act, 1971 (MTP), the OSR remained more or less steady from 930 in 1971 to 927 in 1991, following which it steadily rose to 943, its highest in 2011. On the other hand, the CSR continued to decline from 964 at the time of enactment of the MTP Act, 1971 to 927 in 2001, which was after the implementation of the PCPNDT Act, 1994. The primary function of this act was to make abortion legal in India. Ensuring this act, we see the descent of the CSR due to the increased number of abortions taking place in the nation.

2. State Wise Comparison of National Family Health Surveys (NFHS) 1, 2, 3

![State level analysis of Sex ratio at Birth (SRB) in India, NFHS 1 (1992-93)](image)

*Figure 2.1 State level analysis of Sex ratio at Birth (SRB) in India, NFHS 1 (1992-93)*

Figure 2.1 depicts a map of India and the Sex ratio at Birth (SRB) all over the country as per the National Family Health Survey 1 (1992-93). It shows in a limpid manner that the

---

Supra note 25
South Indian states such as Kerala, Tamil Nadu, Karnataka, West Bengal, Andhra Pradesh as well as North Eastern states such as Assam and Sikkim have the highest sex ratio above 950 (females per 1000 males). This can be attributed to the high literacy rate of the southern region of India. However, the states with lower sex ratios between 900-925 tend to be in the Northern region due to lack of development and low literacy rate.

Figure 2.2 State level analysis of Sex ratio at Birth (SRB) in India, NFHS 2 (1998-99)

In Figure 2.2, NFHS 2 that was conducted 5 years after NFHS 1, we see that the sex ratio remains above 950 in Tamil Nadu and Kerala, however it has decreased in the other southern states such as Karnataka. Moreover, states such as Goa, Nagaland, Manipur, Mizoram and Tripura have seemed to have increased their sex ratio above 950. On the other hand, the sex ratio of northern states remains the same with the exception of Himachal Pradesh and Bihar.

32 Supra note 25
In Figure 2.3 we observe that 6 years after NFHS 2 was conducted, new states that have emerged with high sex ratio are New Delhi, Himachal Pradesh, Nagaland and Manipur. Earlier, Himachal Pradesh and New Delhi had a low sex ratio of 900-925, however, in 2005 it has drastically increased to above 950.

A general distribution of SRB among the states in India based on NFHS 3 data can be categorized in three groups:

**High:** Tamil Nadu, Kerala, Delhi, Nagaland, Manipur, Himachal Pradesh

**Medium:** Andhra Pradesh, West Bengal, Karnataka, Sikkim, Maharashtra

**Low:** Punjab, Rajasthan, Haryana, Bihar, U.P., Chhattisgarh

---

33 Supra note 25
34 Supra note 25
State wise Analysis of NHFS-4 (2014-15)

Figure 2.4 (Source: National Family Health Survey- 4 (2014-15))

Figure 2.4 represents the Overall Sex Ratio in Rural and Urban areas of 18 different states and Union Territories as per the latest NFHS-4 (2014-15). We observe that Uttarakhand (1,015 females per 1,000 males) and Meghalaya (1,005 females per 1,000 males) are having higher sex ratio and remaining states saw a disturbing fall in sex ratio. In these 18 states, on an average, there are 985 females per 1,000 males in 2014-15 compared to 1,000 females per 1,000 males in NFHS-3 (2005-06).

The states with total sex ratios above 1000 are Andhra Pradesh, Bihar, Goa, Manipur, Meghalaya, Tamil Nadu, Telangana, Uttarakhand, West Bengal and Puducherry. The highest being Puducherry with a sex ratio of 1068.

The states with Urban sex ratio above 1000 are Andhra Pradesh, Manipur, Meghalaya, Tripura and Pondicherry. The highest among them is Pondicherry at 1083.

The states with Rural sex ratio above 1000 are Andhra Pradesh, Bihar, Goa, Manipur, Tamil Nadu, Telangana, Uttarakhand, West Bengal and Puducherry. Bihar having the highest rural sex ratio of 1075 females per 1,000 males. However, the lowest sex ratio was observed in Haryana with only 876 in total, 846 in urban and 895 in rural areas.

35 National Family Health Survey 4 (2014-15)
36 Supra note 25
37 Refer to Appendix, Table for Figure 2.4
Figure 2.5 represents the Child Sex Ratio in Rural and Urban areas of 18 different states and Union Territories as per the latest NFHS-4 (2014-15). We observe that the child sex ratio (children below 5 years) is quite varied in each state. The only state with total Child sex ratio above 1000 is Meghalaya at 1009. The states with Urban CSR above 1000 are Andhra Pradesh at 1010 and Tripura at 1100. The states with Rural CSR above 1000 are Goa at 1109 and Meghalaya 1030. However, the state with the lowest CSR is Sikkim with its total ratio at 809 females per 1000 males.

Conclusion

Using the urban and rural, national and state data from the 2001 and 2011 census, we have analyzed sex ratios over the years. Also, we examined data from NHFS 4 (2014-15). It reveals quiet a positive and significant impact of PNDT Act 1994 on sex ratio. In our analysis of case laws and judgments, we see that all the courts have upheld the fact that choosing sex of a fetus cannot in itself be a right. This is gross violation of basic human right to life and no one has the authority to decide on one life over the other. Various

38 Supra note 25
39 Refer to Appendix, Table for Figure 2.5
landmark cases have been discussed above. The main cause of sex selective abortion is the societal pressures on households. It is evident that the myths influence the minds of people very aptly and certainly have a great impact. Also, implications of declining sex ratio lead to lack of women in society which in turn results in violence against the women.

Statistical data has shown that over the last decade even though the overall sex ratio has been gradually rising, the child sex ratio has continued to decline. One of the major trends we noticed is that the conditions in urban areas is much worse than in rural areas. The general perception is that educated people in urban areas are more aware and are against such practices; However, through our research we see a data that supports the contrary. Sex Ratio in urban areas is much less than in rural areas, which contradicts the view held by the majority of society.

Recommendation
To combat the problem of decreasing sex ratio, a few steps need to be taken. It is recommended that the literacy rate be increased so that awareness can be created through the education system. Children 70% of their time in school and often come across various aspects of life. Right from childhood they nurtured in such a way that they have no gender bias in their mind. Gender Equality and the importance for women in society must be imbibed in them from the very beginning. Government has a very significant role to play in the same.

Setting up self-help groups among women, targeting educated women, rewarding all girl families, setting up help-lines adopting new social customs, banning dowry stringently, registering and taking care of expectant mothers including postpartum follow-up, rewarding voluntary sterilization in girl dominating families etc. are some other measures that the government can take.40 People these days are highly influenced by movies and T.V series. Majority if the older population in India was television channels such as “Aastha” and “Sanskar”. These can contribute and spread awareness about importance of a girl child and laws regarding sex selective abortion.

However, the most important step has to be taken by girls themselves. Girls should be taught to live with self-esteem and say “NO” to anything that goes against her dignity. It is only when they voice their opinions against the injustice that is being done to thousands of girls that this country will have hope to have a better demographic.

Appendix
Table for Figure 1.5
Comparative Trends in Overall Sex Ratio and Child Sex Ratio

<table>
<thead>
<tr>
<th>CSR and OSR</th>
</tr>
</thead>
<tbody>
<tr>
<td>40 Supra note 6</td>
</tr>
</tbody>
</table>
### Table for Figure 2.4

Sex ratio of the total population (females per 1,000 males)

<table>
<thead>
<tr>
<th>State/ UT</th>
<th>Urban</th>
<th>Rural</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Andhra Pradesh</td>
<td>1,027</td>
<td>1018</td>
<td>1020</td>
</tr>
<tr>
<td>Assam</td>
<td>996</td>
<td>993</td>
<td>993</td>
</tr>
<tr>
<td>Bihar</td>
<td>977</td>
<td>1075</td>
<td>1062</td>
</tr>
<tr>
<td>Goa</td>
<td>996</td>
<td>1054</td>
<td>1018</td>
</tr>
<tr>
<td>Haryana</td>
<td>846</td>
<td>895</td>
<td>876</td>
</tr>
<tr>
<td>Karnataka</td>
<td>963</td>
<td>990</td>
<td>979</td>
</tr>
<tr>
<td>Madhya Pradesh</td>
<td>933</td>
<td>955</td>
<td>948</td>
</tr>
<tr>
<td>Maharashtra</td>
<td>935</td>
<td>967</td>
<td>952</td>
</tr>
<tr>
<td>Manipur</td>
<td>1081</td>
<td>1030</td>
<td>1049</td>
</tr>
<tr>
<td>Meghalaya</td>
<td>1062</td>
<td>991</td>
<td>1005</td>
</tr>
<tr>
<td>Sikkim</td>
<td>936</td>
<td>944</td>
<td>942</td>
</tr>
<tr>
<td>Tamil Nadu</td>
<td>1020</td>
<td>1047</td>
<td>1033</td>
</tr>
<tr>
<td>Telangana</td>
<td>976</td>
<td>1035</td>
<td>1007</td>
</tr>
<tr>
<td>Tripura</td>
<td>1051</td>
<td>978</td>
<td>998</td>
</tr>
<tr>
<td>Uttarakhand</td>
<td>921</td>
<td>1070</td>
<td>1015</td>
</tr>
<tr>
<td>West Bengal</td>
<td>991</td>
<td>1020</td>
<td>1011</td>
</tr>
<tr>
<td>Andaman &amp; Nicobar Islands</td>
<td>966</td>
<td>984</td>
<td>977</td>
</tr>
<tr>
<td>Puducherry</td>
<td>1083</td>
<td>1033</td>
<td>1068</td>
</tr>
</tbody>
</table>
Table for Figure 2.5
Sex ratio at birth for children born in the last five years (females per 1,000 males)

<table>
<thead>
<tr>
<th>State/ UT</th>
<th>Urban</th>
<th>Rural</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Andhra Pradesh</td>
<td>1010</td>
<td>880</td>
<td>914</td>
</tr>
<tr>
<td>Assam</td>
<td>794</td>
<td>945</td>
<td>929</td>
</tr>
<tr>
<td>Bihar</td>
<td>942</td>
<td>933</td>
<td>934</td>
</tr>
<tr>
<td>Goa</td>
<td>894</td>
<td>1109</td>
<td>966</td>
</tr>
<tr>
<td>Haryana</td>
<td>785</td>
<td>867</td>
<td>863</td>
</tr>
<tr>
<td>Karnataka</td>
<td>875</td>
<td>935</td>
<td>910</td>
</tr>
<tr>
<td>Madhya Pradesh</td>
<td>899</td>
<td>937</td>
<td>927</td>
</tr>
<tr>
<td>Maharashtra</td>
<td>920</td>
<td>927</td>
<td>924</td>
</tr>
<tr>
<td>Manipur</td>
<td>962</td>
<td>962</td>
<td>962</td>
</tr>
<tr>
<td>Meghalaya</td>
<td>891</td>
<td>1030</td>
<td>1009</td>
</tr>
<tr>
<td>Sikkim</td>
<td>632</td>
<td>911</td>
<td>809</td>
</tr>
<tr>
<td>Tamil Nadu</td>
<td>972</td>
<td>939</td>
<td>954</td>
</tr>
<tr>
<td>Telangana</td>
<td>884</td>
<td>865</td>
<td>874</td>
</tr>
<tr>
<td>Tripura</td>
<td>1100</td>
<td>925</td>
<td>966</td>
</tr>
<tr>
<td>Uttarakhand</td>
<td>817</td>
<td>924</td>
<td>888</td>
</tr>
<tr>
<td>West Bengal</td>
<td>902</td>
<td>984</td>
<td>960</td>
</tr>
<tr>
<td>Andaman &amp; Nicobar Islands</td>
<td>708</td>
<td>978</td>
<td>859</td>
</tr>
<tr>
<td>Puducherry</td>
<td>786</td>
<td>992</td>
<td>843</td>
</tr>
</tbody>
</table>
EMPOWERMENT OF MARGINALIZED SECTION (WOMEN, DALIT, TRIBAL) AND THEIR PARTICIPATION

Saransh Chaturvedi
Law School, Banaras Hindu University

The basic purpose of the Indian Constitution was to uplift the marginalized community. The constitution indeed works for that and realise fundamental rights to empower the people which would ensure economic and social democracy. The work for the benefit of the people should be at first hand and it is essential to have community of purpose, desire for welfare, loyalty to public ends and morality of co-operation as roots of democracy and in this democracy the incoming of the 73rd constitutional amendment has indeed worked a lot. Through this intense effort has been made to guarantee equality to the disadvantaged sections of the population through constitutional provisions aimed at preventing discrimination and promoting social justice. The concept of micro-management and bringing good governance was the primary aim and moreover bringing it to the remotest corner was the biggest challenge in this country. The concern of social justice implied the absence of discrimination on the ground of caste, race, religion, sex etc. in present scenario. This all perspective somehow or the other meant for giving equal opportunity to each and every person in every sphere to develop their total personality which also should work for removing the imbalance of society in socio-economic and political life. Today, in this political lifestyle the competent person is always left behind whereas the incompetent person leads the front. It is indeed the irony that we in live in this democratic country but we tend to live in an undemocratic society whereby the social justice becomes a distant dream. The Panchayati Raj system has to fulfil its aim for what it comes for and for this we indeed require the support because as soon as the conflict between parties comes to existence we start losing the track. This research paper tries to check out the challenges in effectively implementing the constitutional provisions.

Keywords- Fundamental rights, Social Justice, Good Governance, Public ends, Challenges.

Introduction

Empowerment is the enhancement of the political, social, economic or spiritual strength of individuals and communities. Empowerment envelops developing and building capacities of individuals, communities to make them part of the main stream society. Education is the means by which societies have been known in history, to grow out of oppression to democratic participation and involvement. It is a powerful tool for empowerment of individual. It is intrinsic to human personality. It carries both intrinsic as well as instrumental values. This empowerment should be there for all. Speaking precisely, the marginalized community has been the most affected in the whole process. It’s not that the government has not done anything but what can be the very base is the fact that the implementation at the very ground level is very poor. Today, the incoming of panchayati raj system has somehow given various kinds of opportunities to the marginalized community. But still they are affected by the vicious circle of the society.
The idea of empowerment in its current usage is new, yet it is frequently used in recent discourses on development. It may be invoked in virtually any context: in speaking about human rights, about basic needs, about economic security, about capacity building, about skill formation or about the conditions of a dignified social existence. This idea is also used in the context of the upliftment of the marginalized, unorganized and other disadvantaged sections of society. After all, oppressed groups such as unorganized workers, poor peasants, tribal people, dalits and women are all engaged in a struggle for power and judge the development process for their own experiences. Thus empowerment represents the hopes and dreams of the marginalized groups for a social environment free of inequalities disfavouring them in different spheres of life. The deprived people and their organisations at grassroots level are striving relentlessly to realize their dreams and hopes for a better future and empowered life. This study seeks to relate the dynamism of Dalit organizations with the empowerment of Dalit and develop a theoretical framework to analyse their dialectical interaction.

Empowerment refers to creating capacities in the individuals or groups to participate actively in their own welfare. Theoretically, empowerment should be a process that helps people to gain control over their lives through raising awareness, taking action and working in order to exercise greater control. As Jo Rowlands says, ‘it is about the individuals being able to maximize utility and use the opportunities available to them without or despite constraints of structure and state’. According to Gutierrez, ‘it is the process of increasing personal, interpersonal or political power so that individuals, families and communities can take action to improve their situation’. Thus empowerment refers to building capabilities among individuals and groups through which they become self-reliant and organized.

Empowerment is related to certain context in Indian society. In a nutshell, that context is the contradiction between a hierarchical social order and a democratic political system. Implicit in the idea of empowerment is certain theory of social change, in particular of change from a hierarchical to an egalitarian type of society or in a slightly different language, from an aristocratic to a democratic type of it. Thus empowerment presupposes social change through the rearrangement of power. Among the different means suggested to achieve this goal, empowerment through the expansion of the civic, political and social rights of citizenship is important. It is a way of seeking empowerment within the democratic political process. Another way, as in our country, is by providing as extensively as possible, quotas on the basis of community, caste and gender. If we analyse empowerment of the weaker sections in the light of the above mentioned ways, we find that the government and civil society have often made earnest efforts in guaranteeing these rights to them. However, they continue to remain disempowered and one of the main hurdles in their empowerment is the traditional social ethos which restricts their involvement in public decision making process.

1. Types of Empowerment
Empowerment is multi-dimensional in the sense that it occurs within social, economic, political and cultural spheres. These dimensions do not necessarily move together at the same pace or even in the same direction. Two studies can look at the same phenomenon, yet come up with different conclusions depending on the dimensions of empowerment they measure. Empowerment also occurs at various levels such as individual, group and community.

**Social Empowerment** - The focus of social empowerment is on building up social capabilities, social status and opportunities among individuals, classes and communities who are denied access to these vital components of social life. The origin of marginalization in Indian context is deeply rooted in the social structure of Indian society where discrimination based on caste, class and gender is largely prevalent from time immemorial. Deep-rooted ideas of purity and pollution governed the social standings of different castes and sexes; men and women were deemed to be of unequal moral worth as were the different ‘varnas’; and the social hierarchy was underpinned by a legal order in which privileges and disabilities were carefully modulated according to caste and gender. Social empowerment is aimed at social change from a hierarchical to a democratic type of society where the equal rights of all individuals are recognized. It is about the transformation of the existing social structure by providing better education, healthcare system, employment opportunities, social security measures etc to those people who are deprived of these benefits.

**Economic Empowerment** - It is the process by which better economic growth and access to economic resources are generated and enhanced. An economically backward society lacks all those dynamic qualities that support and sustain economic growth. This is very much true with regard to the plight of disadvantaged sections of society who are kept away from the ownership of economic resources. Though society, social groups, NGOs etc can play a major role in economic development, there is no doubt about the key role of the state as the most effective and suitable agency of sustained economic development. It acts as the biggest agency which manages and mobilizes resources including infrastructural and others for promoting and sustaining growth in the economic sphere. However, even the state-sponsored, supported and supervised process of development has made only a slight dent in the dense structure of inequality, exploitation and oppression that have played havoc with the lives of marginalized people for centuries. This situation calls for empowerment of the weaker sections sought within the framework of democratic process, as a remedy for them to get their due share in public economic resources. It is in this context that Max Weber’s suggestion that the poor, who constitute a majority, can use their own resource, their number, to influence political and legislative decisions for radically changing socio-economic conditions in their favour, merits consideration. In the democratic process, political mobilization of the poor and deprived, acts as a powerful weapon, to influence political decisions which determine the modes of distribution of wealth.
Political Empowerment- Political Empowerment is the process of equipping the people with political resources and enabling them to actively participate in the shaping and sharing of power. It increases the potential of the people to effectively control or influence the decision-making process of the state. In fact, the core of the idea of empowerment itself is its political dimension which highlights the concept of power. In this sense, empowerment conceived as a process which endows individuals, groups and communities with power. They acquire the capacity to make free choices and transform them into desired actions or outcomes. It enables them to influence the course of their lives and the decisions that affect them. As far as the empowerment of the marginalized groups is concerned, their political mobilization has been counted as the most effective way to solve their socio-economic, educational or other backwardness. They should become politically organized as to exercise their franchise for the empowerment of the community. It is a part of the endeavour of the state to empower them that reservation of seats in Parliament and state Legislatures as well as in local bodies is assured. The decentralization of power to Panchayati Raj Institutions by the 73rd and 74th amendments of the Indian constitution is counted as an attempt to politically empower people at the grassroots level especially the weaker sections.

Cultural Empowerment- Culture may be described as the organic whole of ideas, beliefs, values and goals which condition the thinking and acting of a community or people. Understood thus, culture finds conceptual expression in ethics, philosophy and law: symbolic expression in art, literature, myth and cult. It is the normative consciousness of a community inherited from the past and transmitted, with or without modification to coming generations. Cultural empowerment is a process which strives to protect and reconstruct the cultural identity of the people. Viewed from a subaltern perspective, cultural empowerment of Dalits is a challenging task. Compared to the dominant culture which is governed by economic and political elites, the subaltern culture is a counter-cultural movement and a protest culture. It represents the antagonism of dalits against the dominant class structures and their struggle to assert equality and human dignity. Empowerment of the marginalized groups entails sincere pursuits for perspective cognition and analysis of the composite processes of new identity formation, concretization of these groups for the demolition of the structure of the subordination imposed on them and finally the sharing of power with this powerless lot.

2. Importance of Education

The development of any nation depends on its educational system and it is proved that education is the key to human progress and social change. Education is a powerful tool for empowerment of individual. It helps in developing confidence in individual and community about their own capacities, inherent strengths to shape their lives and thus enhance the inner strength intellectual, political, social and economic against oppression, exclusion and discrimination. The education forms the most important and this is the particular thing which forms the base of the nation’s development.
If look back in to the history of India, education was never in reach of its entire people. Unequal access to education has been rampant in India. Discriminatory order in the caste system has been instrumental in perpetuating this. Over the generations one section of the society were enjoyed the fruits of the education and remaining majority of Indian communities particularly marginalized sections like Scheduled Castes (SC), Scheduled Tribes (ST), Other Backward Classes (OBC), Religious Minorities and Women were denied the opportunity. Right since Jotirao Phule, Narayan Guru, early education movements to present day, education campaigns all are non-Brahmin in origin and they strongly believe that ‘education is enlightenment and enlightenment is empowerment’. It helps to make for a better future society.

Some Facts- Indian constitution recognizes socially marginalized communities based on the Caste they belong to. On the basis of caste, Scheduled Castes (SC), Scheduled Tribes (ST), Other Backward Classes (OBC) and the religious minorities, and also women are marginalized in the field of education. According to census of India 2001, the total population of SC account for 16.2% of Indian population, ST account for 8.1% of the total. Though there is no official head count for OBCs the National Surveys suggest that the population of OBCs form 41% of the population. Literacy data by social group are available from the 55th Round of National Sample Survey (NSS), which was conducted just 7 months before the Census, 2001. As per NSS, 55th round, the literacy rate of SCs in rural India was 46.6%. In urban India, the literacy rate was 66.2%. The literacy rate of ST population was 42.2% in rural areas, and in urban areas, it was 70%. The literacy rate of Other Backward Class (OBC) was 54.8% in rural India. In urban India, the literacy rate of OBC was 75.3%. The enrolment of SCs up to Class 8 was 19.87%; for STs It was 10.69%. Among OBCs, the figures were 42% in the primary classes and 41.23% at the upper primary level.

Government data on the Muslim community's enrolment in schools, collected for the first time, confirms what the Sachhar Committee (2006) report indicated about their educational status. The findings showed that Muslims were the most educationally backward community in the country. Comprising nearly 13% of India's population, Muslim enrolment at the primary school level (Class 1-5) was a meagre 9.39% of total enrolment figures for 2006-07, The national educational policy (1986) stressed the need of the liberalization of education to liberate marginalized sections of the society. The policy recommended for the use of distance education media in a massive way to reach those unreached. A large majority of our people SC/ST's, backward classes, Women and physically disabled remained for reaching out of educational institutions. Distance education provides them with new avenue for getting education (Hemalatha, 1992).

Education is a very powerful agent of social change. If the higher education system is not streamlined or improved according to the needs of the present day, the primary promise of justice- social, economic and political, equality of status and of opportunity, liberty of
thought, faith and worship will ever remain unfulfilled. Education should aim at socialization and democratization in true sense of the word. It is clearly evident that Education in India is playing a vital role in catering the higher education to the needs of diversified groups of students including socially disadvantaged sections. Marginalised communities in India are suffering with lack of access to education in India for generations. For a quite long time Dalits were not allowed to enter to the doorsteps of educational centers and institutions. With different policy in India working for bringing education virtually to the door steps of several disadvantaged sections including Dalits and women, the brighter days are coming. If this system has more accessible the marginalized communities especially Dalits will definitely emancipate themselves from traditional bondages, exploitations and humiliations.

3. Elimination of Caste System- Vision of Dr. B.R. Ambedkar

Touching this aspect in this paper is important because of the reason that undoubtedly the aspect of caste is still with us in this society and we approaching 70 years of independence have not been able to eradicate this. These are indeed not been touched by any of the government but in a true sense the caste division is a great hindrance in the development process. We live in 21\textsuperscript{st} century but there are some intricacies which is difficult to understand when it comes to caste differences. Today, in India a child work is decided before birth seeing his or her caste. The question is that whether we can imagine a Brand India where still the caste system is prevalent. The Branding in a true sense does not check the caste of a person but on the ground level this is always asked upon. My whole perception lies on the assumption that we live in Good Society and there is society where the work is not defined according to caste. Dr. B. R. Ambedkar, who chaired the Drafting Committee, is notably considered as the Father of the Indian Constitution and played a very pivotal role in the constitution-making. Though when the leadership in the Constituent Assembly selected him to be the Chairman of the Drafting Committee, B.R. Ambedkar was very pleasantly amazed at the choice and said that came into the Constituent Assembly with no greater aspiration than to safeguard the interest of the Scheduled Castes greatly surprised when the Assembly elected me to the Drafting Committee. I was more than surprised when the Drafting Committee elected me to be its Chairman. Through these words one can easily denote the exact purpose that led Dr. Ambedkar thought. He precisely worked for the downtrodden class and what he expected was the constitution with everybody co-operation and co-ordination because he knew that he cannot dream of a brand India without the support of all and which was easily understood by Dr. Ambedkar. \textit{The demon in this part is the inhumane treatment given to the marginalised community and we still fight the demon.}

Caste-system in India assigns particular sets of functions and roles even before one’s birth, and also provides specific economic, civil, cultural and educational rights to one without a freedom to change. It ignores therefore an individual capability, preferences and choices.
In this regard, the social order prevail in the Indian society provides no entailments, social and economic rights and freedoms to lower castes, and in contrary, gives manifold opportunities, privileges and rights to the higher castes, particularly the Brahmans. Therefore, the fact was much known to the Constituent Assembly that the constitution was going to be introduced in a deeply unequal and discriminatory society. This is probably why its member greatly debated and drafted the constitution with the explicit purpose of dislodging the status.

B. R. Ambedkar, undoubtedly and noticeably, was the man who borne the responsibility to fight against the untouchability and exploitation based on Hindu caste system, and struggled for the untouchables ‘rights and carved for them a place in the Republican Constitution of India. B.R.Ambedkar though managed to include certain provisions in the Constitution of India for empowering lower castes, but the fact was much known to him that establishing equal human and civil rights for depressed classes’ was not sufficient in ensuring justice and welfare to them unless it would be accompanied by the legal provisions and safeguards to uphold those rights in the case of its violation and denial. He believed that providing rights to all citizens would not enough because the more powerful, the highly privileged higher classes might be able to deny them to lower strata of society. Law therefore should provide remedies against the invasion of fundamental rights. B.R.Ambedkar said in the Constituent Assembly that all of us are aware that rights are nothing unless remedies are provided whereby people can seek to obtain redress when rights are invaded. Within this background, constitutional remedies have been arranged in the Constitution of India. Article 32 provides the right to all citizens of the country to approach the Supreme Court, if their fundamental rights and constitutional privileges are violated by any state institution or individual. This is perhaps why B.R.Ambedkar considered this provision as the very soul of the Constitution and the very heart of it. It is important to note; the Supreme Court later has declared that Article 32 is a part of basic structure of the Constitution.

The caste division can only be change when we change the mentality. When a child is big and he starts understanding the situation then it becomes difficult to extract the character of caste system because it mixes with the blood. What is necessary is to have a system where the education should be given at a very base level that the caste system should be never taken into consideration. The Brand India that we dream of will be only possible when we are free from this thinking of caste else it will surely be a hindrance. Seeing the current scenario, we can say that we have moved into the direction where we don’t give much importance to the caste but this environment is not prevalent everywhere in the country and our aim should be to touch it everywhere.

4. Women in Panchayat Raj Institution and Participation in Politics
Political system and decision making process in seen clearly in the changes incorporated in the Panchayati Raj Institution. The objective of bringing improvement in the socio-economic condition of women could be successful only by taking suitable initiatives and measures for empowering them. Empowerment of women will not be possible unless they are provided proper representation in the political system. This objective should be achieved at desired level through making the provision of linking and associating maximum number of women in political affairs even at the lowest level of political activity. In recently introduced Panchayati Raj Institution, the policy for reservation in favour of women has therefore, been thought as an important approach to maximize their participation in the local level. Political system and decision making process in the activities of rural area. Under the 73rd amendment of constitution of Panchayati Raj Institution, one third of the total seats for scheduled caste, backward class, scheduled tribes and general caste women members in Grampradhan of village Panchayat, Block Panchayat, District Panchayat are reserved for women candidate. Conceptually, providing representation to women in Panchayati Raj Institution could be accepted as an important planning approach regarding minimizing the traditional felling of people about the status of women in our society, particularly in terms of keeping women under the subjugation of men, imposing restrictions by the households and society against them in the availment of certain opportunities and several other social, cultural and traditional binding disfavoring them for improving personal life style and status in existing social and economic setting. Consequently this newly introduced policy would enhance the possibilities of increasing equalities in the process of socio-economic development, participation in different activities in mutual understandings, status and role to pay in the house hold and the activities performed outside households and different decision making processes of the family among men and women. This would also develop the understanding of women regarding their duties and right about national welfare and its integrity and they will be able to contribute effectively along with their male counterparts. A general perception in societies around the world is that women’s major role is to cook food, take care of the children and the household. Different societies have different social norms and values. In some societies both men and women are assigned specific roles and duties. In most of developing countries, only the reproductive role of women is recognized. Under such circumstances, it is not possible for women to participate in the public sphere of life. Cultural factors therefore offer constraint to women participation in politics. Institutional factors may also impact women’s political participation. Electoral system with more seats per district and proportional formula for allocating seats can enhance women’s participation (Darcy et al., 1994). Quota system is another important institutional device that can guarantee a minimum number of women seats-holders in legislature.

It has to be considered that the inclusion of well qualified women in village Panchayat at the initial state of the interlocution of Panchayati Raj Institution in rural areas would be an important instrumental measure in planning for improving social status and empowering
women. This group of women, if provided representation at village Panchayat level can strongly rise in the issues related to the betterment of women, can play dominant role in decision making process and make suitable recommendation for improving the status of women in the meeting. It creates opportunities for women to exercise more control over design and provisions of services and the management of resources it may benefit. Good number of women competing with men in local politics, forwarding gender related agendas is looked as a way towards gender equity.

**Conclusion**

Seeing the current perspective, we reach to a conclusion that it is indeed very important to have a system where the participation of different communities should be appreciated. We have policies but the implementation is very poor. What is the need of the time is to work for that. We should not always rely on the government for the work but our duty is to do something what is in our hand. For example, we can slowly eliminate the caste system from the society as the caste system starts from our house. What can be done by ourselves should be done in that sense. Empowerment of marginalized is at the current agenda of international political and social reformers. According to them the empowerment of marginalized is a key to inclusive democracy. It is an established fact that government in state or centre provides mechanism to empower marginalized, because, this institution operates as an agent of politico, economic and social development at grassroots level in contemporary age. In this capacity, it empowers the marginalized, no need to mention that it is essential for positive social change. The goal of inclusive growth as envisaged by the government cannot be achieved without the effective participation of local people and the Panchayati Raj Institutions and these institutions should be considered as an integral part of the governance of the country.
EUTHANASIA- THE POSITION IN INDIA

Sai Shambhavi Singh

School of Law, University of Petroleum and Energy Studies, Dehradun

At the point when a man closures his life by his own demonstration it is called "suicide" however to end life of a man by others however on the solicitation of the expired, is called "willful extermination" or "benevolence executing". This paper looks to examine what killing is and its conceivable application in three distinct events of a living individual since very birth. In antiquated social orders of the nations like Greece and India how the act of self-obliteration was a standard, what was the demeanor towards the destruction of life of various religions like Hindu, Muslim, Christian and Sikh. Despite the fact that the reason for suicide and killing is self-annihilation however there is clear distinction between the two. Willful extermination might be characterized in five classes furthermore there are different routes for its application. These separated the assessment of sociologists in regards to willful extermination, its lawful position in India in perspective of the Constitution of India, Indian Penal Code and different laws in vogue, so additionally the position of various nations of the world are all taken for dialog. Despite the fact that the Supreme Court has effectively given its choice on this point yet at the same time a few questions emerge in our point which we have to break down deliberately. In conclusion, contentions are advanced for and against authorizing willful extermination and this article has been closed with a clear remark for sanctioning detached killing in India.

Introduction

“Never to be born is best, ancient writers say; never to have drawn the breath of life, never to have looked into the eye of day; the second best’s a swift goodnight and quickly turn away.”

EUTHANASIA or “mercy motivated killing” has remained a vigorously challenged point given its closeness to "murder" and the particular plausibility of "abuse". One may consider the act of killing to be as old as human advancement itself, with its roots immovably put in old Greek and Roman customs. The recharged enthusiasm for the level headed discussion is activated by the catapulting propels in life-maintaining medicinal innovation.

“I'm not afraid of being dead. I'm just afraid of what you might have to go through to get there.”

1 Sophocles (495-406 B.C.) (As expressed in Oedipus Coloneus).
This quote gives us a reasonable thought regarding the way that occasionally individuals with terminal disease might rather want to grasp demise "gently" than sticking on to life loaded with recalcitrant torment and endurance.

Euthanasia is described as the deliberate and intentional killing of a person for the benefit of that person in order to relieve him from pain and suffering. The term ‘Euthanasia’ is derived from the Greek words which literally means “good death” (Eu= Good; Thanatos=Death)

According to Oxford English dictionary, Euthanasia means, ‘the painless killing of a patient suffering from an incurable and painful disease or a person who is in irreversible coma.’

Historical Background

In antiquated Greece and Rome, willful extermination was a typical practice with numerous inclining toward intentional demise over interminable distress. This across the board practice was tested by the minority of physicians who were a piece of the Hippocratic School and had sworn "never [to] give a destructive medication to anyone if requested, nor ... make a recommendation to this impact". The climb of Christianity, with its view that man’s life was a trust from God, fortified the Hippocratic position on willful extermination/euthanasia and prompted a finish of steady restriction to killing among doctors. Willful extermination supporters picked up point of preference in the nineteenth century with the departure of the utilization of anesthesia. In 1870 came Samuel Williams’ proposition to utilize soporifics and morphine to deliberately put a conclusion to a patient’s life. Accordingly, in the 1890s, the killing level headed discussion blasted to reach past the restorative calling and to incorporate legal counselors and social researchers. The most eminent occasion happened in 1906 with the presentation of the Ohio Bill in the United States to sanction killing, which was at last vanquished. Two Parliamentary

---


7 Ezekiel J. Emanuel, The History of Euthanasia Debates in the United States and Britain, 121 ANNALS OF INTERNAL MEDICINE 793, 800 (1994).

8 Emanuel, supra note 13, at 795.


Bills were presented in Britain in 1936\(^\text{13}\) and in this manner for a moment time in 1969.\(^\text{14}\) Both the Bills did not discover support before the House of the Lords, finding broad feedback for giving insufficient shields to the patients, and were at last crushed.

1. Concept of Euthanasia in India

The significance of willful extermination in India is "flexibility to leave," which allowed the sick and hopeless to end their lives. When one methodologizes the theme of death in the established Indian connection, one experiences three fundamental sorts of death: characteristic, unnatural (being killed), and stubborn (slaughtering oneself). With reference to regular passing we find that there was a solid Brahmanical Hindu prescription to carry on a hundred years or if nothing else to the end of the normal life range. Other than common passing and unnatural savage demise, there additionally built up an acknowledgment of a few types of obstinate demise. This classification of obstinate passing included three unique sorts: suicide, deliberate demise and religious self-willed.

Suicide, which was disallowed, was obstinate demise provoked by enthusiasm, melancholy, or wild situation. Deliberate demise, discovered for the most part in the surroundings of the warriors in old times, was an approach to dodge disaster, as when a warrior maintained a strategic distance from catch and a lady kept away from assault or subjection by a vanquisher through self-willed death. It was a substitute for gallant passing in fight that brought about paradise and an approach to permit quiet progression to the throne. Self-willed death was firmly related both truly and reasonably to brave. It was painstakingly recognized from suicide, that is, enthusiastic, stubborn demise for reasons neither chivalrous nor religious.

2. Ethical, Religious Values and Practices

Vaidya’s vow, which is dated 1500 BC, taken by Ayurveda doctors requires doctors not to eat meat, drink or submit infidelity. Vaidya’s vow implores doctors not to hurt their patients and be exclusively dedicated to their consideration regardless of the fact that this puts their lives in threat. Most religions dislike willful extermination. Religious individuals allude to the sacredness of life. God gives individuals life; so just God has the privilege to take it away. Roman Catholic Church views willful extermination as ethically off-base. Muslims are against killing as they trust that human life is consecrated in light of the fact that it is given by Allah. Sikhs have high regard forever - an endowment of God and enduring is a part of the operation of Karma. Buddhism considers suicide a shocking demonstration. Buddhism places extraordinary weight on no-damage (Ahimsa) and on maintaining a strategic distance from the closure of life. The way life closes profoundly affects the way the new life will start as death is a move and the perished individual will be reawakened to


another life whose quality will be directed by his Karma. Most Hindus would say that a specialist ought not to acknowledge a patient's solicitation for killing as the outcome will harm the karma of both the specialist and the patient; others trust willful extermination ruptures the instructing of ahimsa yet some say by consummation an agonizing life, a man is playing out a decent deed. A few Eastern religions trust that we live numerous lives and the nature of every life is set by the way we experienced our past lives. Enduring is a piece of good constrain of the universe and by stopping it, a man meddles with their advancement towards extreme freedom. Hindus have faith in the rebirth of the spirit (Atman) through numerous lives - a bit much all human—extreme go for freedom (Moksha). In India, intentional willful extermination was and maybe is, in vogue for extremely matured and weak especially when they stop to be beneficial and feel they are a weight to others in the public eye. They quit drinking water and eating sustenance or vanished into the forested areas or suffocated themselves in water of waterways. They considered that it is not a transgression to end one's life under such circumstances. (Parameshvara V. The subject of killing; The Hindu, ninth July 2001). There is a Jaina ethic of intentional demise through fasting for occurrence. Prayopavesha or fasting to death is an adequate path for a Hindu to end his life in specific circumstances. It is unique in relation to suicide. Prayopavesha is just for individuals who are satisfied, who have no craving or desire left and no obligations staying in their life. It is peaceful and utilizes normal means not at all like the suddenness of suicide. Prayopavesha is a slow procedure. Conditions set down for prayopravesha are:

1. Inability to perform ordinary real cleaning,
2. Death seems inescapable or the life's delights are nil,
3. Decision is openly proclaimed,
4. The activity must be done under group control.

3. Active Euthanasia

At the point when a man straightforwardly and intentionally accomplishes something which results in the demise of patient. Here particular strides/strategies are embraced (by the outsider) like the administration of a lethal drug. This is a crime in India (and in many parts of the world) under the Indian Penal Code section 302 or 304.15 There are nations which have passed enactment allowing helped suicide and dynamic killing/active euthanasia. The contrasts between them are in the previous, tolerant himself regulates deadly prescriptions and in the later specialist or some other individual does it. In Netherlands, willful extermination is authorized by the entry of "End of Life on Request and Assisted Suicide (Review Procedures) Act" 2002 giving all around characterized rules to the same. Belgium was the second country to stand firm in this heading.16

15 The Indian Penal Code 1860 (Ind) s 302 & 304
4. Passive Euthanasia

It involves withholding of medical treatment or withdrawal from life support system for continuance of life (like removing the heart–lung machine from a patient in coma). Hence in passive euthanasia death is brought about by an act of omission.

**Passive euthanasia is legal in India.** On 7 March 2011 the Supreme Court of India legalized passive euthanasia by means of the withdrawal of life support to patients in a permanent vegetative state. The decision was made as part of the verdict in a case involving Aruna Shanbaug, who has been in a vegetative state for 37 years at King Edward Memorial Hospital.

In March 2011, the Supreme Court of India, passed a notable judgment—law allowing Passive Euthanasia in the nation. This took after Pinky Virani’s request to the most astounding court in December 2009 under the Constitutional procurement of "Next Friend". It’s a point of interest law which puts the force of decision in the hands of the person, over government, restorative or religious control which sees all affliction as "fate".

The Supreme Court indicated two irreversible conditions to allow Passive Euthanasia Law in its 2011 Law:

(I) the brain-dead for whom the ventilator can be switched off

(II) Those in a Persistent Vegetative State (PVS) for whom the feed can be tapered out and pain-managing palliatives be added, according to laid-down international specifications.

The same judgment-law additionally requested the scrapping of 309, the code which punishes the individuals who survive suicide-endavors. In December 2014, administration of India announced its aim to do as such.

Furthermore, on December 23, 2014, Government of India embraced and re-accepted the Passive Euthanasia judgment-law in a Press Release, in the wake of expressing in the Rajya Sabha as takes after: that The Hon’ble Supreme Court of India in its judgment dated 7.3.2011 [WP (Criminal) No. 115 of 2009], while rejecting the request for benevolence executing in a specific case, set down complete rules to process cases identifying with latent willful extermination. From there on, the matter of leniency murdering was inspected in counsel with the Ministry of Law and Justice and it has been chosen that since the Hon’ble Supreme Court has effectively set out the rules, these ought to be taken after and regarded as law in such cases. At present, there is no proposition to institute enactment on this subject and the judgment of the Honble Supreme Court is official on all.

The high court rejected dynamic killing by method for deadly infusion. Without a law directing killing in India, the court expressed that its choice turns into the rule that

---

everyone must follow until the Indian parliament establishes an appropriate law. Dynamic willful extermination, including the organization of deadly mixes with the end goal of closure life, is still unlawful in India, and in many nations.

5. Voluntary & Non-Voluntary Euthanasia

Euthanasia can be further classified as ‘voluntary’ where euthanasia is carried out at the request of the patient and ‘non-voluntary’ where the person is unable to ask for euthanasia (perhaps because he is unconscious or otherwise unable to communicate), or to make a meaningful choice between living and dying and a surrogate person takes the decision on his behalf. Legally speaking voluntary euthanasia is illegal as it can be interpreted as attempt to commit suicide which is punishable under Indian Penal Code section 309.

The same was advocated by the judgment from the Constitution Bench of the Apex Court in the year 1996 in Gian Kaur vs. State of Punjab where it stated that the right to life guaranteed by Article 21 of the Constitution does not include the right to die.

Notwithstanding these legal predicaments, passive euthanasia is not illegal in most parts of the world including India; provided certain standard safeguards are present as demonstrated by Supreme Court in Aruna Shanbaug case.

To put things into right perspective let us ask ourselves a simple question, what is the need of Euthanasia? Before the industrial and scientific revolution, the scientists had not invented the artificial ways of keeping a terminally ill patient alive, like ventilators, heart lung machines, artificial feeding, etc. Such patients would have naturally died during the ordinary course of nature. With the scientific revolution, there was better and in-depth understanding of the human body. Simultaneously there was advent of new technology and machines, through which it is possible to prolong the life. Even though the patients are kept alive, often they will be in extreme physical pain and suffering (emotional, social and financial). At this stage let’s reiterate that these advanced intensive care procedures which I am referring here, will by no means cure/control the disease, but it will only prolong the agony as well as existence of terminally ill patients.

Next logical question will be when can we classify a patient as terminally ill? According to The Medical Treatment of Terminally ill patients (Protection of Patients and Medical Practitioners) Bill 2006, ‘terminal illness’ means —

---

20 . The Indian Penal Code 1860 (Ind) s 309.
(i) such illness, injury or degeneration of physical or mental condition which is causing extreme pain and suffering to the patients and which, according to reasonable medical opinion, will inevitably cause the untimely death of the patient concerned, or

(ii) Which has caused a ‘persistent and irreversible vegetative condition’ under which no meaningful existence of life is possible for the patient. Thus according to it, the patient must be suffering some ailment causing extreme pain and suffering, which according to equitable and unbiased medical opinion, will lead to his death sooner or later. Second scenario is when the patient has slipped into Irreversible Permanent Vegetative State. These patients without active lifesaving mechanisms or life prolonging procedures will die a natural death. Thus one would like to ask would it be reasonable to simply keep the patient alive if he is suffering from intractable pain, psychological and emotional distress just for the sake of keeping him alive.

If we widen the ambit of discussion, can we ignore the impact on his family/friends? What about their socio economic problems? Their emotional sufferings? And in a place like India where most of its citizens meet their health expenses from their own pockets, continuing such expensive treatments results in considerable financial burden on poor households, often pushing them deeper into poverty. Even if the patient is having medical insurance it is usually inadequate. Poignantly our government health sector spending is perilously inadequate and is over burdened by huge population putting strain on the limited government resources.

The WHO Report mentioned that in India about 87% of total health expenditure is from private spending, out of this, 84.6% is out-of-pocket expenditure.

The World Bank in its annual report in the year 2002 came up with some other startling observations that more than 40% individuals who are hospitalized in India in a year borrow money or sell assets to cover the cost of health care as well as hospitalized Indians spend more than half of their total annual expenditure on health care16. Thus one cannot disagree from the fact that there is genuine need for Passive Euthanasia with definitive, unbiased protocols and safeguards.

6. Euthanasia & Suicide

Suicide and willful extermination/euthanasia can’t be dealt with as one and the same thing. They are two distinct acts. Accordingly, we might need to make a refinement amongst "willful extermination" and "suicide." Suicide as said in Oxford Dictionary implies the demonstration of murdering yourself purposely. Consequently, suicide could be termed as the purposeful end of one’s life without anyone else’s input impelled means for different reasons, for example, disappointment in adoration, disappointment in examinations or in landing a decent position, yet generally it is because of melancholy. Willful extermination has not been characterized in the religious books but rather since it is near idea of suicide, along these lines it can be assumed that it is restricted by all religions. In Indian law goal is the premise for punitive risk. A demonstration is not criminal act in the event that it is carried out or excluded without the expectation and law of wrongdoings in India depends
on the well-known Roman saying, "Actus non facit reum nisi men sit rea." Now applying the above saying in instances of willful extermination one may reason that since the casualty has given the consent to bite the dust consequently, the charged is not at risk for any offense. However, does giving an assent for executing a man exonerate the wrongdoer from his criminal obligation is essential inquiry. In the event that response to this inquiry is in agreed then willful extermination is not an offense. Be that as it may, the Indian law is sure about this point. One may contend that giving the assent acquits a man from obligation or he may argue the protection of "volenti non fit injuria." Law identifying with assent as contained in Indian Penal Code is exceptionally comprehensive and leaves no vagueness to clarify it. Section 87 of the Indian Penal Code plainly sets out that assent can’t be argued as a protection on the off chance that where the consent is given to bring about death or intolerable hurt. The Bombay High Court in Maruti Shripati Dubal case has endeavored to make a refinement amongst suicide and willful extermination or kindness murdering. As per the court the suicide by it’s exceptionally help from others. In any case, killing means the intercession of others human organization to end the life. Kindness executing along these lines can’t be considered in the same balance as on suicide. Leniency slaughtering is only a manslaughter, whatever is the condition in which it is conferred. In another case the Bombay High Court additionally watched that suicide by it’s exceptionally nature is a demonstration of self-murdering or self-obliteration, a demonstration of ending one’s own demonstration and without the guide and help of whatever other human office. Willful extermination or leniency murdering then again implies and infers the intercession of other human organization to end the life. Benevolence slaughtering is along these lines not suicide. The two ideas are both truly and lawfully unmistakable. Willful extermination or leniency murdering is only manslaughter whatever the circumstances in which it is influenced.

Our Supreme Court in Gian Kaur v. Condition of Punjab, plainly held that willful extermination and helped suicide are not legitimate in our nation. The court, in any case, alluded to the standards set around the House of Lords in Airedale case, where the House of Lords acknowledged that withdrawal of life supporting frameworks on the premise of educated therapeutic feeling, would be legitimate in light of the fact that such withdrawal would just permit the patient who is past recuperation to bite the dust a typical demise, where there is no more any obligation to draw out life.

7. Legal Aspects of Euthanasia in India

The legitimate position of India can’t and ought not to be considered in seclusion. India has drawn its constitution from the constitutions of different nations and the courts have over and over alluded to different remote choices. In India, willful extermination is without a doubt unlawful. Since in instances of willful extermination or benevolence murdering there is an aim with respect to the specialist to execute the patient, such cases would unmistakably fall under provision first of Section 300 of the Indian Penal Code, 1860. Be that as it may, as in such cases there is the substantial assent of the perished Exception 5 to the said Section would be pulled in and the specialist or leniency executioner would be
culpable under Section 304 for at fault manslaughter not adding up to kill. Yet, it is just instances of intentional killing (where the patient agrees to death) that would pull in Exception 5 to Section 300. Instances of non-intentional and automatic willful extermination would be struck by stipulation one to Section 92 of the IPC and in this way be rendered illicit. The law in India is likewise clear on the part of helped suicide. Right to suicide is not an accessible "right" in India – it is culpable under the India Penal Code, 1860. Procurement of rebuffing suicide is contained in areas 305 (Abetment of suicide of youngster or crazy individual), 306 (Abetment of suicide) and 309 (Attempt to submit suicide) of the said Code. Area 309, IPC has been conveyed under the scanner as to its dependability. Right to life is an imperative right revered in Constitution of India. Article 21 ensures the privilege to life in India. It is contended that the privilege to life under Article 21 incorporates the privilege to bite the dust. Accordingly the kindness executing is the legitimate right of a man. After the choice of a five judge seat of the Supreme Court in Gian Kaur v. Condition of Punjab it is all around settled that the "privilege to life" ensured by Article 21 of the Constitution does exclude the "privilege to bite the dust". The Court held that Article 21 is a procurement ensuring "security of life and individual freedom" and by no stretch of the creative energy can eradication of life be perused into it. In existing administration under the Indian Medical Council Act, 1956 additionally by chance manages the current issue. Under segment 20A read with area 33(m) of the said Act, the Medical Council of India may endorse the models of expert behavior and decorum and a code of morals for therapeutic specialists. Practicing these forces, the Medical Council of India has revised the code of therapeutic morals for medicinal experts. There under the demonstration of killing has been delegated dishonest with the exception of in situations where the life emotionally supportive network is utilized just to proceed with the cardio-aspiratory activities of the body. In such cases, subject to the accreditation by the term of specialists, life emotionally supportive network might be expelled.

In Gian Kaur's case section 309 of Indian Penal Code has been held to be intrinsically substantial however the time has come when it ought to be erased by Parliament as it has gotten to be chronologically erroneous. A man endeavors suicide in a despondency, and consequently he needs assistance, as opposed to discipline. The Delhi High Court in State v. Sanjay Kumar Bhatta22, in managing a case under section 309 of IPC watched that section 309 of I.P.C. has no avocation to proceed stay on the statute book. The Bombay High Court in Maruti Shripati Dubal v. State of Maharashtra23 analyzed the protected legitimacy of segment 309 and held that the segment is violative of Article 14 and in addition Article 21 of the Constitution. The Section was held to be oppressive in nature furthermore discretionary and abused correspondence ensured by Article 14. Article 21 was translated to incorporate the privilege to bite the dust or to take away one's life. Therefore it was held to be violative of Article 21.

8. Should Euthanasia be Legalized in India?

22 1985 Cri.L.J 931 (Del.).
23 1987 Cri.L.J 743 (Bom.)
In India euthanasia is undoubtedly illegal as in cases of euthanasia there is an intention on the part of the doctor to kill the patient. Euthanasia or mercy killing is nothing but homicide whatever the circumstances in which it is affected. Assisted suicide which amounts to abetment of suicide is an offence expressively punishable. However, following legalization of euthanasia in Holland there has been extensive public debate and coverage by mass media on the issue of euthanasia in India. A large number of people expressed their views and among them quite a few were, in favor of euthanasia. In response to an opinion poll conducted by Doctor NDTV on the topic “Should euthanasia (mercy killing) be legalized In India?” 67% said ‘Yes’ and 33% ‘No’. In Indian subcontinent, culture and faith are interwoven and many moral decisions are influenced by a particular culture. The issue of euthanasia first hit the headlines in recent past when a mathematics teacher in Lucknow, terminally ill, had his family to submit petition the President of India in 2001 seeking to end his life. (The Times of India 1st August 2006). “Two cases of Indian courts turning down requests of the patients to die were reported in the year 2001. The Patna High Court dismissed Tarakeshwar Chandravanshi’s plea seeking mercy killing to his 25 year old wife Kanchan who had been comatose for 16 months. Kerala High Court said ‘No’ to the plea of BK Pillai who had a disabling illness, to die (The Hindu; 25th November 2005). Ostracised AIDS couple pleaded for euthanasia - (The Time of India; 12th August 2007). Ramgarh (UP) suffering from AIDS has asked the Country’s President to allow them and their daughter to die through euthanasia as they were being harassed in their village. “We are tired of going to the administration. That is why we have sent a plea to the President to grant the entire family euthanasia”, Pandy who has sold a quarter of his farm land for treatment, said. “A 79 years old freelance journalist has petitioned the Rajasthan High Court seeking permission for euthanasia, saying he wants to die with dignity” — (RxPE NEWS – 28th April 2007)

9. Views of the Government of India

A) A genuine political open deliberation about willful extermination has started in India after a Federal Law Commission prescribed enactment to permit benevolence murdering. "We are investigating the suggestions. The proposition has been sent to Health Ministry for their sentiment" HR Bharadwaj, the Federal Law Minister.

B) Government has no arrangements to legitimate willful extermination: (The Times of India; first Aug, 2006). "Notwithstanding solid requests from various corners for willful extermination, union government on Monday said it had no arrangements to give lawful status to what is prevalently known as 'leniency killing'.

Essentially, it pummeled a full stop on future hypothesis saying that it would not consider any such application. Clergyman of State for Law and Justice K. Venkatapathy told RS (Rajya Sabha), Government is not considering to give legitimate status to willful extermination; till date law has not allowed and utilization of the same can't be entertained."
MAHARASHTRA CONTROL OF ORGANISED CRIME ACT, 1999 - SPECIAL LEGISLATION TO COMBAT ORGANISED CRIME

Shwetank Singh
Symbiosis Law School, Pune

In order to deal with the threat and menace of Organised Crime, the Bombay legislature enacted the Maharashtra Control of Organised Crime Act in the year 1999. The aim of this Act was to make sure that criminals who were operating through the loopholes of the general penal code and criminal provisions could be apprehended by addressing such loopholes. It gives special powers to police to investigate and makes it difficult for the Courts to grant bail to the accused if the crime comes under the purview of this Act. The aim of this article is to provide clarity to the various concept and definitions so as to understand which crime comes under the purview of this Act. Further it analyses the new powers which have been granted to the Police for investigation and checks and balances adopted to prevent the misuse of such Act. Finally, through various judgements it has been analysed the scope and ingredients under which the Court may apply the provisions of this Act and the cases where bail may be granted by such Courts.

Introduction

Organised crime has been for quite some years now come up as a very serious threat to our society. It knows no national boundaries and is fuelled by illegal wealth generated by contract, killing, extortion, smuggling in contrabands, illegal trade in narcotics kidnappings for ransom, collection of protection money and money laundering, etc. It was seen that the organised criminal syndicates made a common cause with terrorist gangs and foster narco-terrorism which extend beyond the national boundaries. There was reason to believe that organised criminal gangs have been operating in the State of Maharashtra and thus, there was immediate need to curb their activities.

The existing legal framework i.e. the penal and procedural laws and the adjudicatory system were found to be rather inadequate to curb or control the menace of organised crime. Government, therefore, decided to enact a special law with stringent and deterrent

---

3 Ranjitsing Brahmejeetsingh Sharma Vs. State of Maharashtra (2005) 5 SCC 294
provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised crime.4

To cope with the problems of Organised Crime and illegal activities related to it, especially in a city like Mumbai, which is the economic capital of India and has witnessed a rise in the number of gang related crimes5, the legislature passed this Act strengthening the state police’s power to carry out investigation and setting up special courts to expedite such trials. It was hoped that with the passing of this law, unlawful elements spreading terrorism in the society can be controlled to great extent and it will go a long way in minimizing the feeling of fear spread in the society6.

1. Definition

Section 2 of the MCOCA act lays down the definition of various crimes which are covered by this legislation and hasn’t been provided under any penal provisions of the IPC. These crimes are

(i) Continuing unlawful activity- It means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such, syndicate in respect of which more than one charge-sheets have been field before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence;7

(ii) Organised crime means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any person or promoting insurgency;8

(iii) Organised crime syndicate means a group of two or more persons who, acting either singly or collectively, as a syndicate of gang indulges in activities of organised crime.9

2. Salient Features

6 Supra 1
7 S. 2(d) MCOCA Act, 1999
8 S. 2(e) MCOCA Act, 1999
9 S. 2(f) MCOCA Act, 1999
Through these definitions one can infer that continuing unlawful activity evidenced by more than once charge-sheet is one of the ingredients of the offence of organised crime. The purpose of thereof is to see antecedent of the criminal and not to convict without proof of other facts which constitute the ingredients of organised crime.\textsuperscript{10}

The expression "organised" in Section 2(e) of the act is very important. It means a crime done by a single person in a planned way, as well as, crime committed, with the help of others in an organised way. It presupposes that the criminal, before committing the crime, has obtained complete information regarding the economic as well as social status of the person against the crime of is committed.\textsuperscript{11}

A gang indulging in organised crime, consists of two or more persons, indulge in continuing unlawful activities with objective of gaining pecuniary benefits for promoting insurgency\textsuperscript{12} Such unlawful activity can include use of violence or coercion. An organised crime syndicate is a gang which indulges in organised crime.\textsuperscript{13}

The unlawful activity alleged in the previous charge-sheet should have nexus with the commission of the crime which MCOCA act seeks to protect and should be filed before the competent court against the members of the gang either jointly or individually within the preceding 10 years\textsuperscript{14}. The provision only defines what is continued unlawful activities and refers to whether a person has been charged over a period of 10 years for the purpose of seeing whether the person has been charged for the first time or has been charged often. The conviction or acquittal that follows the charge are not material. The limited purpose is to see antecedents of the person, not to convict\textsuperscript{15}

These would have to be some act or omission which amounts to organised crime after the MCOCA act came into force, in respect of which the accused is sought to be tried for the first time in the court.\textsuperscript{16} If he has been tried before for the crimes accused of in the charge-sheet, and if facts do not show such act or omission which would include it within the four walls of the definition, then the wider protection provided by Section 300 of the Code of Criminal Procedure could be invoked by the accused to avoid such double jeopardy\textsuperscript{17}. The MCOC Act provides for modified application for certain provisions of the Cr.P.C. It neither modifies Section 300 Cr.P.C. nor makes it inapplicable to trial against MCOC Act. The settled law is that the provisions of MCOC Act are to be strictly construed. Thus,

\textsuperscript{10} Jai Singh S/o Ashrafilal Yadav and ors v. State of Maharashtra 2003 BomCr (Crl.) 1606
\textsuperscript{11} Supra 1.
\textsuperscript{12} Supra 4 at 69.
\textsuperscript{13} Sher Bahadur Akram Khan and Ors v. State of Maharashtra 2007(1)Mh LJ (Cri)1
\textsuperscript{14} State v. Satya Prakash 2011 (10) LRC 318 (Delhi)
\textsuperscript{15} State of Maharashtra v. Bharat Shantilal Shah 2008 AIR SCW 6431
\textsuperscript{16} Supra 4 at 74.
\textsuperscript{17} Kapur v. State AIR 1960 SC 866
Section 300 Cr.P.C. cannot be violated in the absence of any express provision in MCOC Act.\(^\text{18}\)

3. Punishment for Organised Crime

Section 3 for the MCOCA act lays down the punishment for commission caused due to person committing organised crime and is relative to the damage caused due to such crime. According to Section 3 whoever commits an offence for organised crime shall

(i) if such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees one lac;\(^\text{19}\)

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.\(^\text{20}\)

Apart from the commission of offence of organised crime, Section 3 provides punishment for crimes related to offence of commission of offence of organised crime such as

Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organised crime or any act preparatory to organised crime, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to imprisonment for life, and shall also be liable to a fine, subject to a minimum of rupees five lacs.\(^\text{21}\)

Whoever harbours or conceals or attempts to harbour or conceal, any member of an organised crime syndicate; shall be punishable, With imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.\(^\text{22}\)

Any person who is a member of an organised crime syndicate shall be punishable with imprisonment for a term which shall not be less, than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.\(^\text{23}\)

Whoever holds any property derived of obtained from commission of an organised crime or which has been acquired through the organised crime syndicate funds shall be punishable with a term which, shall not be less than three years but which may extend to imprisonment.

\(^{18}\) Ibid
\(^{19}\) S. 3(1)(i) MCOCA Act, 1999
\(^{20}\) S. 3(1)(ii) MCOCA Act, 1999
\(^{21}\) S. 3(2) MCOCA Act, 1999
\(^{22}\) S. 3(3) MCOCA Act, 1999
\(^{23}\) S. 3(4) MCOCA Act, 1999
for life and shall also be liable to fine, subject to a minimum fine of rupees two lacs.\(^{24}\) Section 4 of the Act provides Punishment for possessing unaccountable wealth on behalf of member of organised crime syndicate. It states that if any person on behalf of a member of an organised crime syndicate is, or, at any time been, in possession of movable or immovable property which he cannot satisfactorily account for, he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to ten years and shall also be liable to fine, subject to a minimum fine of rupees one lac and such property shall also liable for attachment and forfeiture, as provided by section 20.

Organised criminals are undoubtedly hard core criminals. They have no dearth of most modern weapons. Extorting money by spreading terrorism in society is their aim. The money is not spent on just causes but to derail state economy. It is therefore, essential to provide for strictest punishment. Punishment envisaged in the Act is 3 to 10 years of imprisonment which can be extended to life imprisonment. Death penalty can also be imposed on the criminals kill any one. So also a fine of 3 to 10 lacs can also be imposed.\(^ {25}\)

4. Special Powers for Investigation

It was also noticed that the organized criminals have been making extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission would be an indispensable aid to law enforcement and the administration of justice.\(^ {26}\)

Section 14 takes this factor into account and allows for authorisation of interception of wire. A Police officer not below the rank of Superintendent of Police Supervising the investigation of an organised crime under this Act may submit an application in writing to the Competent Authority for an order authorising or approving the interception of wire, electronic or oral communication by the investigating officer when such interception may provide or has provided evidence of any offence involving an organised crime.\(^ {27}\)

Upon such application, the Competent Authority may after recording the reasons in writing reject the application, or issue an order, as requested or as modified, authorising or approving interception of wire, electronic or oral communications, if the Competent Authority, on the basis of the facts submitted by the applicant that\(^ {28}\)

---

\(^{24}\) S. 3(5) MCOCA Act, 1999  
\(^{25}\) Supra 1  
\(^{26}\) Ibid  
\(^{27}\) S. 14(1) MCOCA Act, 1999  
\(^{28}\) S. 14(4) MCOCA Act, 1999
(a) there is a probable cause for belief that an individual is committing, has committed, or is about to commit a particular offence described and made punishable under section 3 and 4 of this Act;  

(b) there is a probable cause for belief that particular communications concerning that offence will be obtained through such interception;  

(c) normal modes of enquiry and, intelligence gathering have been tried and have failed, or reasonably appear to be unlikely to succeed if tried or to be too dangerous or is likely to expose the identity of those connected with the operation of interception;  

(d) there is probable cause for belief that the facilities from which, or the place where, the wire, electronic or oral communications are to be intercepted or be used or are about to be used, in, connection with the commission of such offence, leased to, or are listed in the name of or commonly used by such person.  

However not withstanding anything contained in any other provision of Section 14 of MCOCA act, an Officer not below the rank of Additional Director General of Police who reasonably determines that an emergency situation exists that involves,  

(i) immediate danger of death or serious physical injury to any person;  

(ii) conspiratorial activities threatening the security or interest of the State; or  

(iii) conspiratorial activities, characteristic of organized crime, that requires a wire, electronic or oral communication to be intercepted before an order from the Competent Authority authorizing such interception can, with due diligence, be obtained, and  

Further there are grounds upon which an order could be issued under this section to authorize such interception, may authorise, in writing, the investigating Police Officer to intercept such wire, electronic or oral communication, if an application for an order, approving the interception is made in accordance with the provisions of sub-sections (1) and (2) within forty-eight hours after the interception has occurred, or begins to occur.  

These are most important provisions in this Act. Though the police have been granted to police to intercept the messages by various methods, a committee to review every order  

29 S. 14(4)a MCOCA Act, 1999  
30 S. 14(4)b MCOCA Act, 1999  
31 S. 14(4)c MCOCA Act, 1999  
32 S. 14(4)d MCOCA Act, 1999  
33 S. 14(10)(a)(i) MCOCA Act, 1999  
34 S. 14(10)(a)(ii) MCOCA Act, 1999  
35 S. 14(10)(a)(iii) MCOCA Act, 1999  
36 S. 14(10)(b) MCOCA Act, 1999
passed by the competent authority has been provided. It is a precaution carefully provided by the lawmakers to have check at every stage, against the misuse of law. Because, interception of messages is multi-faceted weapon and any possibility that at same stage it can be misused cannot be ignored. Therefore it is essential to have control over the machinery who are allowed by law to use these methods to obtain information.\(^{37}\)

Apart from these investigative powers MCOCA Act has also provided more scope to adduce evidence which is not provided for in the Indian Evidence Act. Section 25 of the Indian Evidence Act bars any confession made under police custody to be presented as evidence before the Judge. However under Section 18 of the MCOCA act a confession made by a person before a police officer not below the rank of the Superintendent of Police and recorded by such police officer either in writing or on any mechanical devices like cassettes, tapes or sound tracks from which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator, provided that, the co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

5. Important Judicial Decisions

The Apex Court along with the High Court of Delhi and Bombay have laid down various important judicial precedents to provide clarity about the provisions of the MCOCA Act whether it be with respect to grant of bail or scope of judicial review by the court.

6. Rejection of Bail

Section 21(4)(b) mandates that there should be reasonable grounds for believing that the applicant is not guilty of an offence under MCOCA act for granting of bail. It is not necessary to find out at this stage whether the offence alleged is punishable under Section 3(2) or Section 4 of the act. Prima facie case should be established for the bail application to be rejected.\(^{38}\)

In absence of any allegation that incident occurred with a motive of gaining pecuniary benefits, bar of Section 21(4) of Act is not attracted to accused gainfully engaged in business of chillies and also an income tax payee.\(^{39}\)

When a public servant had failed to take lawful measures under MCOCA, he attracts the Section 24 of MCOCA Act.\(^{40}\) Having reached this conclusion and bearing in mind the fact that the appellant has been in judicial custody for over three years, the maximum period

\(^{37}\) Supra 1.

\(^{38}\) Anil Murlidhar Deshmukh v. State of Maharashtra 2006(1) Mh LJ (Cr) 385

\(^{39}\) Sanjay Vithalrao Bhadre v. State of Maharashtra 2006 All MR(Cri) 1001

\(^{40}\) Section 24 MCOCA Act
of sentence contemplated under Section 24 of MCOCA, Court is of the view the appellant deserves to be released on bail

7. Scope of Judicial Review

The Bombay High court has held with respect to its power of judicial review that while evidence cannot be analysed and issues not prejudged; but disputed points can be adjudicated and FIR can be considered while determining whether any offence under MCOCA act has been committed

For proving the involvement in the continuing unlawful activity, it is not necessary to prove the past crime, but only the fact that a charge-sheet has been filed in respect of that crime, but only the fact that a charge-sheet has been filed in respect of that crime, that the crime bears punishment of more than 3 years and that the court has taken cognizance of the same. Therefore examining witnesses in proof of past crime is unnecessary and also undesirable, because it is not the requirement or ingredient offence under MCOCA Act

Where in FIR details of all activities prior to 1999 i.e. before the commencement of the act and after 1999 have been given showing continuous chains, links of event fulfilling requirements of organised crime or continuing unlawful activities petition challenging applicability of Act fails

In Saju v. State of Maharashtra, the court states that Section 3(2) of the MCOCA act inter-alia covers the facilitating conspiracy or commission of an offence knowingly or any performance preparatory to commission of organisation. It has held that once there is direct nexus with the offence committed by the organised crime syndicate, in as much as the persons investigating the said offence knew that the activities were unlawful and have overlooked and ignored them intentionally as alleged then it is not possible to accept the contention that the abetment in this case was not before the commission of the offence.

Further it laid down the ingredients for the application of the MCOCA act as follows

(i) Evidence must have prima-facie evidence affording reasonable ground to believe that two or more person are members of conspiracy.

(ii) If so proved beyond anything done or written by any of them will be evidence against the case.

(iii) Such action was taken after formed by any one of the accused.

---

41 Gokul Bhagaji Patil v. State of Maharashtra, 2007 All MR (Cri) 573 (SC)
42 Atlaf Ismail Sheikh v. State of Maharastra 2005 (1) Bom Cr (Cri) 833
43 Madan Ramkisan Gangwani v. State of Maharashtra 2009 All MR (Cri) 1447(Bom)
44 Appa v. State of Maharashtra 2006(2) Mh LJ (Cri) 205
45 AIR 2001 SC 175
46 Supra 4 at Pg 77
(iv) Evidence can be used against co-conspirators and not in his favour.

Every ingredient of offence has to be established by prosecution by evidence and court cannot assume the fact, which is one of ingredients of offence under Section 3 of Maharashtra Control of Organised Crime Act47

Conclusion

MCOCA Act is a very important legislation as the menace of Organised Crime were able to use the loop holes in the penal provisions and wreak havoc in the society. However the increased power to the police of interception of telephonic conversation and custodial confession has met their share of criticisms and were also struck down by the Bombay High Court48 before it was repealed by the Supreme Court at appeal49. The decision was widely accepted to boost the criminal investigation and control the growth of organised crime in the city however it comes with the added burden and responsibility of the police to not misuse such power50.

47 Shabbir Mohammed Hussain Sheikh @ Matin v. State of Maharashtra 2006 All MR (Cri) 2751
48 Bharat Shantilal Shah v. State of Maharashtra 2003 All Mh (Cri) 1061
49 Supra 15.
THE SURVEILLANCE OF ELECTRONIC COMMUNICATIONS VIS-À-VIS RIGHT TO PRIVACY

Sourabh Vasant Ubale
Assistant Professor, D.E.S.'s Shri Navalmal Firodia Law College, Pune & Ph.D. Scholar, Department of Law, University of Mumbai, Mumbai

Sthiti Dasgupta
PhD Scholar, Department of Law, Tripura University

The article discusses about the concepts of Electronic Communication, Surveillance, Security and Privacy. It discusses the challenges in striking the right balance between the surveillance of electronic communications and right to privacy. It tries to find out various keys to make that balance through Constitutional Key, Legislative Key, Judicial Key and finally the comparative analysis to search for adoptive keys by comparing the same with laws of United Kingdom, U.S.A. and other International Laws and instrument.

Key Words: Electronic Communication, Surveillance, Security, Privacy

Introduction

“The concept of surveillance is ingrained in our beings.

God was the original surveillance camera”

- Hasan M. Elahi (Researcher)

And this ingraining of surveillance is seen with the growth of science and technology and with the growing of IT sector, surveillance technologies, internet surveillance, CCTV surveillance, telephone/ telecommunication, e-mail id surveillance and all types of electronic communications. It therefore brings the threats and problems in the society as the development in such technologies takes place every day. Thus there arises a need to control and regulate this surveillance. India has brought various policies, laws and especially amendments to tackle the ambiguities which come out of the same. The interpretations and judicial precedents also work as an aid to find a solution. The Constitution of India and the Indian legislations are sufficiently striking the right balance between security and the privacy right in the context with the surveillance of electronic communications.

Before going to discuss the issues and solutions thereof, we need to understand the essential terms and their credentials.
**The Electronic Communication**

The term electronic communication is defined as passing of information from one individual to another by use of computers, fax and phones. In general, electronic communication is the communication by or through the computer. It relates to and includes transmission which is a communication by means of transmitted signals; data communication, digital communication which is an electronic transmission of information that has been encoded digitally (as for storage and processing by computers); e-mail, electronic mail, email – which is a system of world-wide electronic communication in which a computer user can compose a message at one terminal that can be regenerated at the recipient’s terminal when the recipient logs in; electronic messaging which means the sending and processing of e-mail by computer.\(^1\)

According to The Electronic Communications Privacy Act, 1986 enacted in the United States defines ‘electronic communication’ as any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system that affects interstate or foreign commerce, but does not include

(i) any wire or oral communication;

(ii) any communication made through a tone-only paging device;

(iii) any communication from a tracking device; or

(iv) Electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.\(^2\)

**Surveillance**

Surveillance means close observation of a person or a group especially the one who is under suspicion or the act or observing or the condition of being observed.\(^3\) Here, close observation and suspicion are the important aspect of surveillance.

Surveillance according to Indian Privacy Bill, 2011 is covertly following a person or watching a person, placing secret listening or filming devices near him, or using informants to obtain personal information about him.\(^4\)

**Security**

---


\(^4\) The Privacy Bill (India), 2011, Section 2 (o) (pending)
The Oxford Dictionary gives the meaning of security as the state of being free from danger or threat or the safety of a state or organization against criminal activity such as terrorism, theft, or espionage.

*Privacy*

The right to privacy can be defined as the right of a person to enjoy his own presence by himself and decide his boundaries of physical, mental, and emotional interaction with other. A private individual has the right to limit sharing his personal information with other individuals or entities or the media. Article 12 of Universal Declaration of Human Rights (1948) defines Right to Privacy as- No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence not to attack upon his honour and reputation. Everyone has the right to protection of law against such interference or attack.

In India again there is no express provision and no law on to it, but it is given by interpreting Constitution of India. Article 21 of it talks about protection of life and personal liberty and right to privacy is implicit to this article.

1. Challenges in Striking the Balance

Right to Privacy, Security and the Surveillance of electronic communications are the three angles of same triangle. And thus equilibrium should be achieved. The Constitution of India, its interpretation and the judicial trends established the principle that fundamental rights are subject to restrictions. As we know, right to privacy is a part and parcel of Art.21. When the right comes into conflict with security of nation, definitely, security is the prime concern of the nation. The question arises regarding balance between Security and the privacy right. Here Security has two folds, one that is security of sovereignty of State and second is the data security, data free from danger that may be tampering and the misuse of the same. The responsibility in both the cases as well as in securing right to privacy is on the shoulders of the state. Right to privacy is an inborn right of every individual. It is the State’s duty to protect the individual right. Thus, problem arises when these come into conflict with each other and it creates imbalance. The surveillance of electronic communications gives birth to controversies. When Privacy and (two folds of) Security comes in conflict in context with surveillance of electronic communications, State has to choose one, and mostly it chooses security. As the security is the prime concern of the state to keep integrity of the nation. Anything which in conflict with security gets eclipsed and this lead to the issue. There is a need to strike the correct balance between privacy and security in surveillance of electronic communication, and to fulfil this need, do we need reforms? Before directly going towards reforms, it is a significant step to first of all look into the solutions which are present right now. Proposing reforms without seeing the possible solutions from what we have in our hands today is of no use. Hoping the reforms proposed to come into existence, it is better to put the present laws into process and motion.

---

to see the significant changes and achieve correct balance. Thus, let us think, do we really need reforms? Or we need something else, in context with striking the correct balance between privacy and security. There should be correct balance between individual rights and social rights as well.

‘Every problem has its solution’, and thence we are having ample of solutions for the same; only the need is to reveal them focusing onto its application and implementation. Yes. We need some more as development is taking place but let us uncover what we have.

2. Constitutional Key

It is said that, “privacy is the quietest of our freedoms...privacy is easily frowned out in public policy debates...privacy is most appreciated by its absence, not its presence.” Indian constitution is also textually silent on the right to privacy and doesn’t grant in specific terms. It is not enumerated as a fundamental right. But the apex court has read this right under the canopy of Art 21 and several other provisions of the constitution along with the directive principles of state policy. This is the result of judicial interpretation. Since last few decades, Indian constitution has seen the development of various implicit rights which and the reason behind this development is that, enumerated right would be useless without providing these new implicit rights. And as said above right to privacy is also result of the same. Subba Rao,J in his minority opinion in the case of Kharak Singh vs. State of Uttar Pradesh7 had uttered the words that: “Further, the right to personal liberty takes in not only a right to be free from restriction placed on his movements, but also free from encroachments on his private life. It is true our constitution does not expressly declare a right to privacy as a fundamental right, but said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life...”

Right to privacy and its scope is very wide if we look into it intricately, there are several provisions in which it plays a pivotal role. We can analyse that it is present implicitly in Art.219, in Art.19 (1) (a)10 and also in Art.19 (1) (d)11. The development of right to privacy is from judicial pronouncements which has determined its status in the Indian context.

While dealing with the constitutional guarantee of right to privacy and security of India in the line of surveillance mechanism of government we can say that definitely the right to privacy has been said to be present in India but national security is also a major necessity as unity and integrity of India remains at constant danger from various terrorist groups and other such disturbing beings.

---

7 AIR 1963, SC 1295 (1964)1 SCR 332
8 M.P. Jain, Indian Constitutional Law, 1236 (6th ed., 2012)
9 Constitution of India, Article 21
10 Ibid, Article 19(1) (a)
11 Id, Article 19(1) (d)
If we talk about surveillance, it is in a way necessary as Art.51A(c) which imposes a fundamental duty upon us to uphold and protect the sovereignty, unity and integrity of India and we must give space to the government to work for this cause. But how much the government can interfere into this right to have a room for ourselves?

Privacy can be deduced from the scrutiny of the various judicial pronouncements. As we talk about right to privacy and judicial development we must keep in mind that surveillance has been very much rampant in India in the name of security. As in an article named “People under Surveillance, Privacy law for whom”[12], it was reported that Justice (Rtd) A.P.Shah committee’s report and frivolous exercise of RTI on which even P. M. Manmohan Singh expressed concern can be said to be a sarcasm as it was reported in the Hindu’s New Delhi edition that about 10,000 phones, 1000 e-mail IDS are under the scanner of government. It is also reported that all the state governments tap phones of innumerable opposition leaders and activists. In Aug 2011 it was reported by Mr. Milind Deora, the Central Minister of state for Communication in a written statement in Rajya Sabha that the Central Government has started full surveillance of Facebook and Twitter walls and friend circles. It shows that the government is into each and every bit of our private life. Now to what extent is it allowed to do so? And where does our right lie? With all these points in mind let us ponder upon the legislative avenues available in this context.

3. Legislative Key

The Indian Telegraph Act, 1885 had also given power to central or state government to intercept any message if it is against public safety and since then, as various laws came into force, the government has got power. And thus it creates power and accountability at same point.

Information Technology Amendment Act, 2008 in Section 69 says that the central Government or a State Government, if is satisfied that it is necessary or expedient to do in the interest of the sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may, subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information transmitted received or stored through any computer resource.[13] Thus, on one hand it controls the misuse of the power and regulates the cause and on the other hand it makes the authority and the usage of power accountable.

Information Technology (Procedure and Safeguard for interception, monitoring and decryption of information) Rules, 2009 has laid down that no person shall intercept, monitor or decrypt any information available on any computer resources except an order

[13] The Information Technology Amendment Act, 2008, Section 69
from Home Secretary or Joint Secretary, Ministry of Home Affairs has been obtained to do so.\textsuperscript{14} It also has been laid down that the competent authority may authorise an agency of the Government to intercept, monitor or decrypt information generated, transmitted received or stored in any computer resource for the purpose specified in subsection (1) of section 69 of the Act.\textsuperscript{15}

Information Technology (Procedures and Safeguards for blocking for access of Information by Public) Rules, 2009 has been passed by parliament in order to block access of any information on any computer resource by public. According to Rules\textsuperscript{16}, the government has power to block any information whether generated, transmitted, stored or received or hosted by any computer resource for any reasons mentioned in section 69A of the Information Technology Act, 2000 i.e. sovereignty and integrity of India, defence of India, friendly relation with foreign state, security of state etc.

The Privacy Bill, 2011 in India is an attempt which has been made by government as to define privacy. If the bill gets the status of the statute, it will help in deciding the scope of governmental powers to conduct surveillance and protecting the misuse of such information got from it. It will also provide the penalising provision which will keep check onto it. Only Home Secretary, Ministry of Home Affairs, Government of India will be able to grant permission for such surveillance.

4. Judicial Key

The very first case of its kind was the case of,

\textit{Kharak Singh vs. State of Uttar Pradesh}\textsuperscript{17}

Wherein the court held Regulation 236(b) of the Uttar Pradesh Police Regulations as invalid, the court had clearly pointed that there did exist a right to privacy within the scope of Art.21. The court while in this judgement was inspired by two judgements of America i.e. of

\textit{Munn vs. Illinois}\textsuperscript{18}

It had an opinion that right to life consists of much more than mere animal existence. And the secondly the case of

\textit{Wolfe vs. Colorado}\textsuperscript{19}

\textsuperscript{14} Information Technology (Procedure and Safeguard for interception, monitoring and decryption of information) Rules, 2009, Rule 3

\textsuperscript{15} Ibid, Rule 4

\textsuperscript{16} Information Technology (Procedures and Safeguards for blocking for access of Information by Public) Rules, 2009, Rules 9, 10, etc

\textsuperscript{17} AIR 1963,SC 1295 (1964)1 SCR 332


\textsuperscript{19} 338 US 25
In which it was held that “security of one’s privacy against arbitrary intrusion by the police is a basis of free society.” In the case of Kharak Singh court also took into consideration an English case named Semayne which had held that an individual’s home is an inviolable place and that a person has right to privacy. But a noteworthy thing to be mentioned about these judgements was that neither of the decisions denied the violations of privacy on sanction of law. Surveillance per se may not violate individual or private rights including the right to privacy as this right is not enumerated in the constitution but is a result of elaborate interpretation by judiciary in the above mentioned case.

Govind vs. State of Madhya Pradesh

The court considered the constitutional validity of a regulation which provided for surveillance by way of several measures as was given in the regulation. The court upheld the regulation as it was of the view that the said regulation didn’t violate constitutional validity under Art.21 being ‘procedure established by law”. The court didn’t hesitate to accept the emanation of the right to privacy from Art.21,Art.19(1)(a) and (d), but also held it not to be absolute, where reasonable restriction can be imposed for public interest under Art.19(5).

R.Rajagopal vs. State of Tamil Nadu

Held this right to have attained a constitutional status; wherein the apex court has come up with various propositions which include that the right to be let alone.

P.U.C.L. vs. Union of India

The court looked into the constitutionality of sec.5(2) of the Telegraph Act,1885 and found to be constitutionally valid, honourable court was of the view that telephone tapping can be done only on some grounds like sovereignty and integrity of India, the security of state, friendly relations with foreign states, public order, or for preventing incitement to the commission of an offence which are also mentioned in Sec.19(2).Court had held that telephone conversations are exclusive privacy of a person and they can be intruded only in special circumstance with a just, fair and reasonable procedure. In the course of giving the said judgement, International Covenant on Civil and Political Rights, 1966; Universal Declaration of Human Rights, 1948 was looked into, and Art.21 was found to be in conformity with this international law and this right to privacy too as being guaranteed under Art.17 and Art.12 of the above mentioned international documents respectively.

Let us find some more solutions in other States where we can adopt the same if finds suitable for Indian circumstances by analysing the comparative study.

5. Comparative Analysis: Search for Adoptive Keys

20 (1604)5 Co Rep 91
21 AIR 1975 SC 1378
22 AIR 1995 SC 264(1994) 6 SCC 632
23 AIR 1997 SC 568(1997) 1 SCC 301
United Kingdom

A comparative analysis of the right to privacy along with security and electronic communication surveillance is done hereunder starting with the United Kingdom. Despite the pertinent comment in the Canadian case, R vs. Duarte24

That ‘one can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance’, such activities have been lawful within the UK even in the absence of legal regulation.25

Art.8 of the European Convention on Human Rights provides for respect for private life but these remains in jeopardy in UK due to state surveillance. With regard to right to privacy, in the landmark case of Melone vs. Metropolitan Police Commissioner26

The European court pronounced that laws must be clear in its terms when surveillance or intrusion can be done. Result was the Interception of Communications Act, 1985. Later on due to various criticisms, came the Regulation of Investigatory Powers Act, 2000. But there was still the lack of a comprehensive legislation. After the case of Khan vs. UK27

When government became sure of losing the case, came up with Part III of the Police Act, 1997 which was designed to regulate surveillance techniques that would otherwise involve unlawful conduct on the part of the police such as trespass or criminal damage. But again this Act was found to be insufficient to achieve the minimum standard of Art.8 of the European Convention on Human Rights thus The Regulation of Investigatory powers Act, 2000 represented a legislative attempt to provide a comprehensive legislation. It is debated that the European Convention has not yet been successfully realised in the area of public space surveillance.28 The recent legislative piece of the Data Protection Act, 1998 is an endeavour into this arena but is criticised to be unsatisfactory. But the concept of privacy is now developing domestically through the Human Rights Act, basing on the principles of Art.8 of the European Convention.

The U.S.A

Privacy is a value that is highly esteemed in the American society, yet its meaning especially for policy purposes is often unclear. The American constitution makes no explicit mention

24 1990 65 DLR(4th)240,at 249
26 (1979) 2 WLR 700
27 (2001) 31 EHRR 1016
28 Supra 25
of the right to privacy. But surveillance is seen to be part of the security mechanism of American government and major technological advancements are also a magic wand for this. The fourth amendment is vastly related to the jurisprudence of the right to privacy. Its “search and seizure” provision protects a right of privacy by requiring warrants before government may invade one’s internal space or by requiring that warrantless invasions be reasonable. But it is seen that technological developments have at times challenged the limits of the jurisprudence of fourth amendment. In the case of

*Gouled vs. United States*\(^\text{29}\)

Justice Clarke didn’t find any difference between intrusions by force, coercion or stealth as all violated privacy and security interests of the citizens and implicated the fourth amendment. Justice Clarke stated about privacy and security as inseparable facets of the interests protected by the provision but the cases which came later on didn’t maintained the same stand regarding security. It was seen in the developments of privacy right in the America that the conception of the said amendment as an extension of one’s property rights continued until 1967, when the court decided

*Berger vs. New York*\(^\text{30}\)

It struck down a New York statute which had permitted law enforcement to eavesdrop electronically. It represented a break from the trespasser analysis mandated by the case of *Olmstead.*\(^\text{31}\)

*Katz vs. U.S.A*\(^\text{32}\)

The court decided that future intersections of government, and citizen interests would be regulated by a new barometer–the “reasonable expectation of privacy”. After this decision the fourth amendment could apply to intangible interests and thus placed a significant impact upon electronic surveillance. In case of,

*Smith vs. Maryland*\(^\text{33}\)

Court equated privacy right with secrecy. Likewise after Katz several cases came into existence which gave a new light to this right. Some statutory developments in this regard is the Communications Act of 1934 which prohibited the interceptions of wire communications, which in principle if not in practice, eliminated the use of wiretaps from law enforcement’s repertoire. The Omnibus Crime Control and safe Streets Act, 1968(Title III), it relaxed the restrictions on law by banning sec.605 of the Communications Act and even on all kinds of disclosure of intercepted communications. The Foreign Intelligence Surveillance Act, 1978 created a legal mechanism to intercept the

\(^\text{29}\) 255 US.305–06(1921)

\(^\text{30}\) 388 U.S.41(1967)

\(^\text{31}\) 277 US 438

\(^\text{32}\) 389 U.S. 347 (1967)

\(^\text{33}\) 442 US 735(1979)
communications of foreign powers and also of American people. The Electronic Communications and Privacy Act (EPCA) divided and separated electronic surveillance into three different sections i.e. the Wiretap Act which covered interception of wire communications, the Stored Communications Act which dealt with communication storage during or after transmission. The EPCA also covered mail. The USA Patriot Act, 2001 has now amended the EPCA to a larger extent. The situation of high level of legislative regulation shows the concern and demand of people to have privacy along with security. But to what extent this balance is maintained is question as the major surveillance information leakage by Snowden puts the trust of whole world against the America.

**International Laws**

The Universal Declaration of Human Rights, 1948 in its Art.12 recognises the right to privacy in the words that arbitrarily no one shall be subjected to interference with his privacy. The International Covenant on Civil and Political Rights under Art.17 protects the right to privacy and it also covers correspondence of people which are to be protected from arbitrary interference. Art.8 of the European Convention on Human Rights contains a similar provision for privacy which includes correspondence. The Council of Europe, in European Code of Police Ethics protects right to privacy. The EU Convention on Mutual Legal Assistance in Criminal Matters provides for multilateral cooperation in cross border surveillance. Likewise some other networks like The Cross Border Surveillance Working Group, International Surveillance Committee, European Electronic Surveillance Working Group etc. are all working regarding surveillance and security keeping in mind the right to privacy of people in general.

**Conclusion**

*Koo-ṭi-bharaḥ Samarthanam... – Sanskrit Saying
(There is nothing impossible for those who are competent)*

And same is in the case with India. Indian Laws governing the surveillance of electronic communications strike the right balance between security and the right to privacy. But to achieve the correct balance, need is to look into the subject matter and solutions deeply. By focusing onto the present legislation, its interpretation and judicial precedents we can find various solutions on the same. The Constitution of India which is considered to be the Law of the land also gives us the solutions. The comparative analysis of various foreign legislations and judicial decisions gives some reformatory solutions where we can adopt those which are suitable in the Indian context. But the foremost thing is that the awareness about these avenues available to us and reacts accordingly wherever it is needed. Then we can have a proper triangular balanced structure of privacy, security and surveillance.

---

34 UNODC, available at [https://www.unodc.org/documents/.../Law.../Electronic_surveillance.pdf](https://www.unodc.org/documents/.../Law.../Electronic_surveillance.pdf), last seen on 30/01/16
Corporate criminal liability came to the limelight with the enhancing prejudicial impact of the corporations in the society. With the increase in industrial accidents, environmental concerns, financial crimes associated with corporations etc. the need was felt under various jurisdictions to deal with their hazardous consequences. Though most of the jurisdictions had recognized the civil liability of the corporations, the dissent lied in respect of the criminal liability of the same. The judiciary has played a significant role in establishing doctrines for dealing with the criminal liability of the corporations but further steps are paramount for filling the empty space and to strengthen the deterrent effect.

Introduction

Corporations are an incumbent part of the society without which steady economic growth is unattainable. They are a significant and indispensable part of our lives everywhere and anywhere. Globalization, information and technological developments have contributed in the expansion of the corporate sector across the globe resulting in the establishment of the multinational corporations. These multinational corporations having immense power are controlling and influencing the economic, industrial and sociological sectors. However, the corporations apart from being an asset, can have a hazardous impact on the society. These corporations can be a boon as well as a bane for the society. The expansions in the corporate activities have even aggravated the commission of the white-collar crimes. This all led to the development of Doctrine of Corporate Criminal Liability. From the times in 16th and 17th century where no criminal liability was attached to the corporations, we have come to a situation where the corporations can be prosecuted and held liable for maximum of the crimes. This is important to achieve the objective of the criminal laws of deterrence.

2 ibid
3 G. Stessens, ‘Corporate Criminal Liability: A Comparative Perspective’ (1994) 43 ICLQ 493
which is not only applicable to the natural persons but also the corporations as even they have the capacity to inflict harm\(^6\).

Corporate crime can be referred to as the liability imposed on the corporation or the members of the corporation for the acts or omissions punishable under the law\(^7\). The liability of a corporation under the criminal law is decided on the basis of the extent to which the company can be held responsible for crimes of its employees and members\(^8\). This doctrine has now been translated into a prevailing rule\(^9\).

1. Problems in the Evolution of the doctrine of Corporate Criminal Liability

Corporations are the legal persons and are separate from the people working within the company\(^10\). But attaching criminal liability to the corporation has not been a smooth process. Starting with the 16th and 17th century, there were nebulous and ambivalent issues existing then in respect of corporate criminal liability which lead to the acceptance of non-imposition of any criminal liability on corporations. The principle of "societas delinquire non potest"\(^9\) which means that the legal person can't be blamed\(^11\) was implemented. However with the passage of time, there was a change in the traditional belief of shielding the corporations from the criminal liability\(^12\). Corporations must be held liable under the law for the purposes of deterring these powerful entities\(^13\). Despite of the necessity to hold the corporations criminally liable, the courts were reluctant to do so because of the following major problems:

- The corporations didn’t possess the *mens rea* which is an essential element to be held liable for an offence of intent.
- Imposing of sentences was another problem. As the corporations didn't possess any body, it was impossible to put them behind the bars\(^14\).

Thus as a corporate body didn’t have any soul or body, the criminal law was not applicable to it\(^15\). However, these problems which very well existed till the early 21st century have been resolved with the help of the judicial decisions which shall be discussed under the second chapter.

---

\(^6\) C Kennedy, Criminal Sentences for Corporations: Alternative Fining Mechanism (1985) 73 Calif Law Review 443
\(^9\) ibid
\(^11\) Bernard (n 6)
\(^12\) Amanda Pinto Q.C. & Martin Evans, *Corporate Criminal Liability* (3rd edn, Sweet & Maxwell 2013)
\(^13\) *Gt Northern Railway CO. Case* [1846] 9 Q.B. 315
\(^14\) Engobo Emeseh, 'Corporate Responsibility For Crimes - Thinking Outside The Box' (2005) 1 U.B.L.J. 28
\(^15\) ibid
2. Jurisprudence developed in UK

The origin of concept of corporate criminal liability can be traced to the United Kingdom. The concept is more settled there than in any other country. The inception of the corporate criminal liability in UK can be traced back to the case *Royal Mail Steam Packet v. Braham*\(^\text{16}\) where the company was said to be a person. In another landmark case, it was held that the business of the company could not be considered as the business of defendant because the company possesses a separate legal personality if company is duly established under the law\(^\text{17}\). Hence, attributing a separate corporate personality to the company is the cornerstone of the doctrine of corporate criminal liability.

To deal with the problems specified above in the first chapter, the courts developed two doctrines i.e.

- **The Doctrine of Vicarious Liability:** Under the doctrine, the principal/company could be held civilly responsible for the wrongful acts committed by their servants/employees provided the condemned act is done within the course of employment\(^\text{18}\). Doctrine of vicarious liability also known as respondent superior was applicable under civil law but didn’t find any place under the criminal law as the criminal law provided that every person must be liable for their own acts and behavior and not for the acts of others\(^\text{19}\). However, it was a matter of time when it was extended to the criminal law for determining the corporation's liability.

- **The Doctrine of Identification:** Under this doctrine, the acts of the corporate officers are identified with that of the company. As a company is an impalpable fictious entity having no brain or body, the guilt of the senior officers of the company who are its embodiment are said to be of the company for which the company is accountable\(^\text{20}\).

**Vicarious Liability for the Offences Requiring Mens Rea: Scenario Before 1944**

Holding companies absolutely or strictly liable didn’t pose much difficulty before the courts as the strict liability offences imposing absolute duties lacked the requirement of *mens rea*. Issue arose with regard to holding the company liable for the offences requiring the criminal intent. This hindrance was further resolved as the court while interpreting the statute held that there is nothing which prohibits the company to be held liable as a principal for the prohibited acts requiring *mens rea* of its employees working within the course of employment\(^\text{21}\). Hence, a time was reached where the corporations were vicariously liable for the strict offences as well for the offences necessitating criminal state of mind.

**Personal Liability of the Corporations: Scenario after 1944**

\(^\text{16}\) [1877] 2 App Cas 381  
\(^\text{17}\) *Salomon v. Salomon & Co Ltd* [1897] AC 22  
\(^\text{18}\) *Ranger v. The Great Western Railway Company* [1854] 5 HLC 72  
\(^\text{19}\) *Gunston and Tee Ltd v. Ward* [1902] 2 KB 1  
\(^\text{20}\) *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham and sons Ltd.* [1957] 1 QB 159  
\(^\text{21}\) *Mousell Bros Ltd. v. London & North West Ry Co. Ltd* [1917] 2 K.B. 836
Doctrine of Identification: *actus reus* attributed - In 1994, there were three revolutionary cases which settled the principle of indicting a corporate body even for the non-regulatory offences demanding in tent as the intent of the managing or controlling officers of the company were attributed to the company. The corporations were held personally liable for the offences of intent.

The origin of the doctrine can be traced back to 1915 i.e. *Lennard’s Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*. In this case the question before the court was if the fault of Mr. Lennard who was the director as well as the managing owner could be equated to the fault of the company. The company was considered liable on the ground that when the agent in question is such that he is the brain and will of the company then the company can be very well identified with him.

Another landmark case is the *Tesco Supermarkets Ltd. v. Nattrass*. This case specifically provided the limited persons within the company whose actions could be assigned to the corporations in accordance with the identification principle. It was held that the people who actually have control and who are not answerable to anybody else within the company must be considered the company as they are performing as the same. They are the ones directing the company. It is settled that the doctrine of identification is applicable in respect of all the offences whether regulatory or non-regulatory offences on the fulfillment of the condition i.e. when the acts or omissions of the one in question can be attributed to the company itself. The courts have now adopted a more liberal approach for recognizing the directing mind of the company i.e. the MOA or AOA of the company must be taken into account and the statutory context must be given due importance.

Hence, the doctrine of identification is the well-settled principle and the basis for the corporate criminal liability in UK. The corporations can be indicted for the offences that provide for punishment with fine. The punishments that can be inflicted on corporations are fines, compensation orders, restitution order, confiscations, remedial orders etc.

**Corporate Manslaughter**

From the times when it was considered that corporations can't be charged, we have come to the time where the western countries have adopted and purported the concept of corporate manslaughter. UK can be regarded as the one who initiated corporate manslaughter. The judge agreed to apply the doctrine of identification to hold the

---

23 [1915] A.C. 705
24 ibid
25 [1971] UKHL 1
26 Board of Directors, the Managing Director as well as superior officers of the company
28 *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 2 AC 500
corporation responsible for the manslaughter\textsuperscript{30}. In 2008, UK even passed the Corporate manslaughter and corporate homicide Act (CMCHA) to prevent the miscarriage of justice.

3. Jurisprudence as developed in India

The concept of corporate criminal liability in India came to light much later than in the other western countries\textsuperscript{31}. The economic development of India depends on the industries to a much greater extent. With the rise in the companies establishing business, the need was felt to control and regulate their activities as they have the potential to endanger the life, health of the people not only who are engaged in the factory but also of the society. Section 9 of Companies Act 2013 recognizes company as a separate juristic entity\textsuperscript{32}. The concept of corporate criminal liability evolved in the following stages:

\textit{Limited Application}

\textit{Offences Requiring the Intent: Issue Of Mens Rea}

Initially the corporations were not held responsible for the crimes of intent under the criminal law. The courts opined that as company doesn’t possess the mental element, they couldn’t be punished for the crime demanding \textit{mens rea}\textsuperscript{33}. It was pursued that there are certain crimes which can never be committed by the company. These included certain crimes such as rape as the company can’t be fitted within the requirements of sections contemplating such crimes\textsuperscript{34}. It was considered impossible to hold the corporations responsible for committing fraud under IPC because of the very nature of the corporate bodies as they being legal persons neither could have had the indispensable criminal intent nor be imprisoned\textsuperscript{35}.

\textit{Imposing Sanctions}

The corporations can be easily punished for offences punishable with fine. But the dilemma arose in respect of offences imposing imprisonment as well as fine. The court held that the juristic person’s culpability could be restricted to only few offences where the element of intent is not required and where the court is capable of imposing fine\textsuperscript{36}. The corporations were not prosecuted for the violation of those sections of statutory acts if their violation imposed compulsory imprisonment as punishment\textsuperscript{37}. This was opined on the view that the courts have been empowered to interpret the statues but they can’t do so in a way so as to

\textsuperscript{30}R v. HM Coroner ex parte Spoon [1987] 88 Cr App 418
\textsuperscript{32}Companies Act 2013, s 9
\textsuperscript{34}Amanth Bandhu v. Corporation of Calcutta (1952) AIR 759 (Cal)
\textsuperscript{36}Badsha v. ITO (1987) 168 ITR 332 (Ker)
\textsuperscript{37}Modi Industries Ltd. v. B. C. Goei (1983) 54 CompCas 835 (All)
\textsuperscript{37}Kusum Products Ltd. v. S.K. Sinha (1980) 126 ITR 806 (Cal)
limit the minimum punishment provided for a statute\textsuperscript{38}. Also implementing the rules of strict construction requires deciding in the favour of the accused when two absurd interpretations are possible\textsuperscript{39}. Hence, the rule was laid down that if the offence for which the artificial persons are prosecuted calls for mandatory imprisonment then in such a scenario, no responsibility could be attributed to them, as they are incapable of being imprisoned\textsuperscript{40}.

\textit{Evolving Scenario}

However, eventually the above-mentioned situations underwent a change with the jurisprudence developed by the courts as the combination of the vicarious liability and doctrine of identification was followed. Though the corporation were not capable of committing certain crimes such as rape, bigamy as they can be committed by a natural person only but they were indicted for crimes of intent as the corporations perform their functions through the directors and other agents whose belief, actions or intent can be attributed to the company\textsuperscript{41}.

The advancement of the recent landmark judgment in the \textit{Iridium India Telecom Ltd v. Motorola Incorporated & ors}\textsuperscript{42} has further confirmed the above judgment. In this case the complainant company instituted a case under section 420 and 120-B of IPC against the other company. The Supreme Court applying the Doctrine of attribution and principle of alter ego said that the company can be indicted even in cases of offences mandating the criminal state of mind by attributing the actions and the mind of those who have such enormous control over the company such that their mind, knowledge and actions can be considered as that of the company itself\textsuperscript{43}.

Further with regard to the imprisonment, the view was implemented that the court inflicting more than what is stated is prohibited but it can impose lesser punishment. Hence, in cases of imprisonment and fine, only fine may be imposed on the company\textsuperscript{44}. \textit{Standard Chartered Bank and Ors v. Directorate of Enforcement}\textsuperscript{45} has further unfolded and settled the issue of prosecuting the corporations when mandatory imprisonment is provided in the statute. The court expounded the intention of legislature in respect of prosecuting the company on the grounds that the intention of the legislature can never be to prosecute the corporations only for minor offences which gives the discretion to the court to impose imprisonment or fine and not for graver offences requiring the obligatory imprisonment as companies can’t be jailed. It was held that the companies could be prosecuted and held liable for the offences providing for compulsory imprisonment by

\begin{thebibliography}{9}
\bibitem{38} Assistant Commissioner, Assessment-II, Bangalore & Ors. v. Velliappa Textiles Ltd & Or (2005) AIR 2622 (SC)
\bibitem{39} ibid
\bibitem{40}Municipal Corporation of Delhi v. J.B. Bolting Company (P) Ltd (1978) RLR 94 (Del)
\bibitem{41}State of Maharashtra v. Messrs Syndicate Transport Co. (P) Ltd. (1964) AIR 195 (Bomb)
\bibitem{42} (2011) 1 SCC 74 (SC)
\bibitem{43} ibid
\bibitem{44} Oswal Vanaspati & Allied Industries v. State of U.P (1992) 75 CompCas 770 (All)
\bibitem{45} (2005) 4 SCC 530 (SC)
\end{thebibliography}
simply imposing fines on them on the proof of the guilt. Hence, the concept of corporate criminal liability is here to stay. This is evident from the judgment given in the Bhopal gas tragedy case\textsuperscript{46} where one of the accused was itself the corporation i.e. Union Carbide India Ltd. and was held liable\textsuperscript{47}.

Hence the present framework in respect of corporate criminal liability states:

- Corporations can be punished for the \textit{mens rea} offences for the fault of the people who are said to be the alter ego or the organs of the corporation as they are the ones directing the day-to-day matters of the company but this is not applicable vice-versa.\textsuperscript{48}

- The penalty that can be imposed on the corporations is fine\textsuperscript{49}.

- The corporations can’t be indicted for certain offences by their very nature like murder, rape etc\textsuperscript{50}.

- Corporations are not only liable under the Indian Penal Code but under multifarious enactments specifically imposing liabilities on the company\textsuperscript{51}.

4. Analysis of Laws under Companies Act, CrPC & IPC

Due to the vital role played by the corporations and increasing scandals in the corporate world along with the hazardous impact of industrial accidents, stringent laws were required to protect the society as well as the interests of the shareholders and investors. Scandals like Satyam scam shook the whole corporate sector and threw light on the inadequacy of the existing laws to protect the concerned interest. Hence, the legislature passed the \textbf{Companies Act 2013} to introduce the corporate criminal liability and intensify the corporate governance.

\textbf{Indian Penal Code 1860 (IPC)} is the substantive criminal statute of India consisting of the offences for which the punishment may be imposed including on the corporations\textsuperscript{52}. \textbf{Code of Criminal Procedure 1973 (CrPC)} prescribes the procedure that is to be followed in case of a violation of any criminal law i.e. IPC or any other statutory law\textsuperscript{53}. Section 63 of the CrPC provides the manner in which the summon is to be served in case of company

\begin{itemize}
  \item \textsuperscript{46} Union Carbide Corporation v. Union Of India Etc (1990) AIR 273 (SC)
  \item \textsuperscript{47} IPC 1860, s 304-A, s 336, 337, s 338
  \item \textsuperscript{48} Sunil Bharti Mittal v. Central Bureau of Investigation ("CBI") and Others (2015) AIR 923 (SC)
  \item \textsuperscript{49} Prateek Andharia 'Corporate Criminal Liability: Finding Settled Shores?-A Comment On Iridium India Telecom v. Motorola Inc' [2011] NALSARStuLawRw 57
  \item \textsuperscript{50} ibid
  \item \textsuperscript{51} Negotiable Instruments Act, 1862, s 141; The prevention of food adulteration act 1954, s 17; Essential Commodities Act 1955, s 7 ; The Income Tax Act 1961, s 276-B
  \item \textsuperscript{52} IPC 1860, s 11: The word “Person” encompasses Company.
  \item \textsuperscript{53} CrPC 1976, s 4
\end{itemize}
defendants. Also section 305 provides for the appointment of a representative in case of company defendants.

Just like CrPC provides for the classification of offences as bailable and non-bailable, compoundable and non-compoundable, cognizable and non-cognizable, the Companies Act 2013 has even classified the offences as the same. The Companies Act 2013 provides a provision for the constitution of the National Company Law Tribunal and Appellate Tribunal which are required to follow the Code of Civil Procedure 1908. Chapter 28 further provides for the establishment of the Special Courts by the Central Government which follows the procedure as laid down in Code of Criminal Procedure. As recently laid down by the supreme court, only the Special Courts have the power of not only trying the offences under the Companies act but also under IPC.

Following table depicts the criminal liability of the corporation under the companies act 2013, Indian Penal Code and Code of Criminal Procedure:

<table>
<thead>
<tr>
<th>Companies Act 2013 (sections)</th>
<th>Indian Penal Code 1860</th>
<th>Code Of Criminal Procedure 1973</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 provides the documents to be filed with the registrar for the purpose of the incorporation of the company. It provides the punishment in case the incorporation is done on untrue basis.</td>
<td></td>
<td>Non-bailable, cognizable and Non-compoundable</td>
</tr>
<tr>
<td>34 provides for the liability of the company in case of false information stated in the prospectus.</td>
<td>418 provides for cheating having the knowledge that wrongful loss may be caused to another person whose interest is required to be protected by the offender</td>
<td>Non-cognizable, Bailable and Compoundable</td>
</tr>
<tr>
<td></td>
<td>420- Cheating</td>
<td>Cognizable, Non-bailable and Compoundable</td>
</tr>
</tbody>
</table>

54 CrPC 1976, s 63
55 CrPC 1976, s 305
<table>
<thead>
<tr>
<th>Under the act: Cognizable, Non-bailable and Non-Compoundable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cognizable, Non-bailable and Compoundable</td>
</tr>
<tr>
<td>Under the act: Cognizable Non-bailable and Non-compoundable</td>
</tr>
<tr>
<td>Non-cognizable, Bailable and Compoundable</td>
</tr>
</tbody>
</table>

36 deals with punishment in case of inducing people fraudulently in investing money.

418 provides for cheating having the knowledge that wrongful loss may be caused to another person whose interest is required to be protected by the offender.

420 - Cheating

46(5) - Certificate of shares. The corporation is under a duty to issue certificate of shares to the shareholders but if they issue duplicate share certificate to deceive, the company can be held criminally liable for the same.

418 provides for cheating having the knowledge that wrongful loss may be caused to another person whose interest is required to be protected by the offender.

420 - Cheating

406 - Criminal breach of trust

53(3) prohibits the company from issuing shares at discount. If the company violates the
provision, it shall be liable for the same.

<table>
<thead>
<tr>
<th>66(10) provides the manner in which the company may reduce its share capital. If it contravenes the provision it shall be held liable.</th>
<th>418 provides for cheating having the knowledge that wrongful loss may be caused to another person whose interest is required to be protected by the offender 426- Mischief</th>
<th>Non-cognizable, Bailable and Compoundable</th>
</tr>
</thead>
<tbody>
<tr>
<td>68(11) emanates the requirements for the buy back of shares, the non-compliance of which imposes liability on the company.</td>
<td>Non-cognizable, Bailable and Compoundable</td>
<td></td>
</tr>
<tr>
<td>74(3) imposes a liability on the company if it neglects to repay the deposits to depositors.</td>
<td>406- Criminal breach of trust</td>
<td>Cognizable, Non-bailable and Compoundable</td>
</tr>
<tr>
<td>86 imposes penalty on the corporation for not complying with the provisions mentioned under chapter IV with regard to registration of charges.</td>
<td></td>
<td>Non-cognizable, Bailable and Compoundable</td>
</tr>
</tbody>
</table>
92(6) emanates the annual return to be filed by the company. If the company doesn’t do so in accordance with the section, it is criminally liable.

<table>
<thead>
<tr>
<th></th>
<th>Non-cognizable, Bailable and Compoundable</th>
</tr>
</thead>
<tbody>
<tr>
<td>128</td>
<td>demands the company to maintain a book of accounts as the book of accounts is essential for the purposes of acknowledging the transactions and affairs of the company.</td>
</tr>
<tr>
<td>129(7) and 134- These sections focus on the financial statements of the company i.e. the manner in which they are to prepared and laid down. The financial statements must provide the true affairs of the company for protecting the interests of the shareholders. If they are untrue the companies can be held responsible.</td>
<td>420- cheating</td>
</tr>
<tr>
<td></td>
<td>477A- Falsification of account</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>135 is titled as Corporate Social Responsibility. This is the new and significant development made for the purposes of enhancing the liability of the company towards the society and the environment.</td>
<td>269-Public nuisance</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>147(1) provides for punishment for non-observance of chapter X relating to audit and audit</td>
<td>406- Criminal breach of trust</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
committee. This is important as the auditors have a cardinal role to oversee the financial statements for the purposes of preventing any accounting fraud.

<table>
<thead>
<tr>
<th>182 requires the company to communicate the political contributions made by them in accordance with the provision. The violation of which leads to imposition of fine on the company.</th>
<th>403- Dishonest misappropriation of property</th>
<th>Non-cognizable, bailable and compoundable</th>
</tr>
</thead>
<tbody>
<tr>
<td>406- Criminal breach of trust</td>
<td>Non-cognizable, bailable and non-compoundable</td>
<td></td>
</tr>
<tr>
<td>477-A Falsification of accounts</td>
<td>&quot;</td>
<td></td>
</tr>
<tr>
<td>Under the act : Non-cognizable, bailable and compoundable</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>185 deals with the loan to directors.</th>
<th>403- Dishonest misappropriation of property</th>
<th>Non-cognizable, bailable and compoundable</th>
</tr>
</thead>
<tbody>
<tr>
<td>186 provides the manner in which the loan and investment shall be done by the Company.</td>
<td>406- criminal breach of trust</td>
<td>Cognizable, Non-bailable and Compoundable</td>
</tr>
<tr>
<td>187 demands that the investment must be done its own name. The infringement of any of these sections can lead to imposition of fine on the company.</td>
<td>418 provides for cheating having the knowledge that wrongful loss may be caused to another person whose interest is required</td>
<td>Non-cognizable, Bailable and Compoundable</td>
</tr>
</tbody>
</table>
This is important for the purposes of preventing any confusions and opportunity to defraud the concerned persons.

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>420</td>
<td>Deals with Cheating to be protected by the offender</td>
</tr>
<tr>
<td>477-A</td>
<td>Falsification of accounts</td>
</tr>
<tr>
<td>Under the act:</td>
<td>Non-cognizable, bailable and non-compoundable</td>
</tr>
<tr>
<td>204</td>
<td>Requires the company to prepare a secretarial audit report to be attached with the board’s report, the contravention of which leads to imposition of fine on the company. This is another tool to strengthen corporate governance.</td>
</tr>
<tr>
<td>251</td>
<td>Provides penalty in case of an application is filed for the purposes of changing the name of the company with the fraudulent intention.</td>
</tr>
<tr>
<td>406-</td>
<td>Criminal breach of trust</td>
</tr>
<tr>
<td>418</td>
<td>Provides for cheating having the knowledge that wrongful loss may be caused to another person whose interest is required to be protected by the offender</td>
</tr>
<tr>
<td>422-</td>
<td>Dishonestly or fraudulently preventing debt being available for creditors</td>
</tr>
<tr>
<td>Non-cognizable, bailable and compoundable</td>
<td>Non-cognizable, bailable and compoundable</td>
</tr>
<tr>
<td>Cognizable, Non-bailable and Compoundable</td>
<td>Non-cognizable, bailable and non-compoundable</td>
</tr>
<tr>
<td>Act</td>
<td>Under the act:</td>
</tr>
<tr>
<td>-----</td>
<td>----------------</td>
</tr>
<tr>
<td>339(3)</td>
<td>Cognizable, Non-bailable and Non-compoundable</td>
</tr>
<tr>
<td>406</td>
<td>Cognizable, Non-bailable and Compoundable</td>
</tr>
<tr>
<td>418</td>
<td>Non-cognizable, Bailable and Compounding</td>
</tr>
<tr>
<td>420</td>
<td>Cognizable, Non-bailable and Compoundable</td>
</tr>
<tr>
<td>447</td>
<td>Under the act: Cognizable Non-bailable and Non-compoundable</td>
</tr>
<tr>
<td>448</td>
<td>Under the act: Cognizable Non-bailable and Non-compoundable</td>
</tr>
<tr>
<td>449</td>
<td>Under the act: Non-cognizable, bailable and non-compoundable</td>
</tr>
<tr>
<td>193</td>
<td>Non-cognizable, bailable and non-compoundable</td>
</tr>
</tbody>
</table>
450 imposes a penalty on the company in case no specific punishment is provided under the act for the breach of its provisions.

<table>
<thead>
<tr>
<th>Law</th>
<th>Description</th>
<th>Nature</th>
</tr>
</thead>
<tbody>
<tr>
<td>450</td>
<td>Non-cognizable, bailable and compoundable</td>
<td></td>
</tr>
<tr>
<td>120B</td>
<td>Criminal Conspiracy</td>
<td>Non cognizable, bailable and non-compoundable</td>
</tr>
<tr>
<td>304A</td>
<td>causing death by negligence</td>
<td>Cognizable, bailable and non-compoundable</td>
</tr>
<tr>
<td>336-</td>
<td>Act endangering life of others</td>
<td>Cognizable, bailable and Non-compoundable</td>
</tr>
<tr>
<td>337 and 338</td>
<td>which deals with causing hurt or grievous hurt respectively by act endangering life or personal safety of others</td>
<td>Cognizable, bailable and Compoundable</td>
</tr>
</tbody>
</table>

Conclusion

The concept of corporate criminal liability has grown by leaps and bounds in all the countries. Though the judiciary and the legislators have even played a significant role in imposing liabilities on the corporations to deter them from committing crime, more concrete steps must be taken in this regard. Despite of the devastating effect of industrial accidents, there is no legislation on it in India. The 47th report of the Law Commission of India suggests that criminal liability should not only be imposed on the few officers but
even on the company. The 41st report of the Law Commission of India specifically dealt with the hindrances faced during prosecutions and punishments and suggested that amendment should be made in the IPC in such a way that if the offence is the one punishable only with imprisonment or imprisonment as well as fine then the court must be in a position to impose fines on the corporation. However these recommendations have not been adopted. Moreover another lacuna is the only punishment that can be imposed is of fine on the company which apart from being a weak penalty is also detrimental to the interests of all the innocent employees working in the company. Hence, new forms of sanctions must be developed to achieve the desired objective which can include negative publicity, dissolution of the company (corporate death), confiscation, restitution etc. Moreover better models must be adopted by the other countries such as the aggregation theory of US and corporate culture specified under the model criminal code of Australia. As evident in the Tata-Ulfa Nexus case where the whole corporate culture was involved in the heinous crime of aiding the terrorist group, considering the actions of a single controlling person is of less importance. Hence, the Courts must exploit the opportunity of filling the vacuum in the world of corporate criminal liability.

57 Law Commission of India, Trial and Punishment of Socio-Economic Offences (Law Report 47, 1972)
60 ibid
61 Baudh (n 32)
62 ibid
UNDERCUTTING OF FARES IN THE AVIATION INDUSTRY

Terence Benedicto Sequeira & Tarun
Research Associate & Teaching Assistants, Gujarat National Law University, Gandhinagar

Predatory pricing is defined as pricing a commodity below an appropriate measure of cost with the intention and purpose of eliminating a competitor. Essentially, in cases of predatory pricing, the predator forgoes his present revenues by lowering the prices of the commodity supplied by him in order to drive a competitor out of the market. In the aviation industry, the allegations of predatory pricing arise when a major airline, while operating from its hub airport, in response to the entry of a low-fare carrier, lowers its price aggressively and also adds capacity. Such targeted response of major airlines usually forces the exit of the low-cost airlines from the market. Anti-trust law requires to prove that the predator priced the fares below its costs and selectively accepts losses in the market and later cushions such losses by imposing high fare and hub traffic in a comparatively lesser competitive market. The researchers will try to examine these concerns from a legal lens. Moreover, the researchers will give reasonable solutions to these pathologies by comparing the system adopted by other jurisdictions.

Introduction

The price of an air ticket largely comprises of

- The Base Fare,
- Taxes and Airport Fees and
- Fuel Surcharge

Firstly, the airlines determine what type of plane they will be using for a flight. This helps in determining the number of seats in each travel class. While a Travel Class indicates the quality of the class, for example, First Class, Business, Economy, etc, a Booking Class, also known as Fare Class or Fare Bucket, indicates the type of ticket. Each Booking Class has different rules and restrictions and hence a different price. The reason behind having various Booking Classes is to maximize profit by targeting the two main types of travelers: Leisure Travelers and Business Travelers. The Leisure Traveler is flexible with dates as compared to Business Travelers and hence they buy up the cheaper booking class while Business Travelers are willing to pay more for a ticket due to the spontaneous and urgent nature of their trips.

Generally, when cheaper tickets aren’t completely sold out, the airline comes up with a discounted booking class to cover the cost of the flight.2

1. How is Airfare Determined

Before 1978, in the USA, the government determined whether a new airline could fly to a given destination or charge a certain price, or be in operation. This resulted in limited competition; airlines were guaranteed a profit as the tickets were expensive. The vast majority of Americans couldn’t afford to fly, at all.3 Prior to 1978, there were 10 big carriers known as trunk lines which controlled almost 90 percent of the American market alongside 8 smaller regional carriers. The Civil Aeronautics Board—the controlling authority for airlines guaranteed the airlines a 12% return on flights which were 55% occupied.4

The prices skyrocketed during the energy crisis of the 1970s, and a team of senators and economists decided to withdraw government control over the airlines. Once deregulation was effected, the ticket prices fell drastically as barrier to entry was lowered drastically. As a result, the aviation industry saw a 30% increase in the number of passengers from 1965 to 2000 and between 1970s and 2011, the number of passengers tripled. The main rationale behind deregulation resulting in lower prices was that since flying is not a life necessity therefore, it is a price sensitive product and when there is intense competition for a price sensitive product, it always leads to falling prices.5 Subsequently, the aviation industry was deregulated all over the world. In India, the Directorate General of Civil Aviation (DGCA) sets a lower ceiling on the airfares for all airlines. If the airlines charge lower fares than that, the matter is referred to Competition Council. Internationally, the International Air Transport Association was formed in 1945 and subsequently, in 1947, it was given the responsibility of setting a coherent fare structure in order to eliminate cut-throat competition and secure the interest of the consumers.

2. Predatory Pricing in the Aviation Industry

Predatory pricing is defined as pricing a commodity below an appropriate measure of cost with the intention and purpose of eliminating a competitor6. Essentially, in cases of predatory pricing, the predator forgoes his present revenues by lowering the prices of the commodity supplied by him in order to drive a competitor out of the market. He recovers

---

2 Ibid.
6 Camp-All Corp v Cast Iron Soil Pipe Inst., 851 F.2d 478.
the revenue that is lost by making higher profits after he has succeeded in driving away the competitor and making the market less competitive.\(^7\)

For predatory pricing to succeed, the predator must ensure that

- Below cost production must not continue for an indefinite period.\(^8\)
- It must take place in a concentrated market where the predator has some sort of monopoly power.\(^9\)
- There must be a reasonably high barrier on market entry so that the predator gets a certain stable period of monopoly returns.

In the aviation industry, the allegations of predatory pricing arise when a major airline, while operating from its hub airport, in response to the entry of a low-fare carrier, lowers its price aggressively and also adds capacity. Such targeted response of major airlines usually forces the exit of the low-cost airlines from the market. Anti-trust law requires to prove that the predator priced the fares below its costs and selectively accepts losses in the market and later cushions such losses by imposing high fare and hub traffic in a comparatively lesser competitive market.

In the airline industry, the classical understanding of predatory pricing involves standby fare. Standby fare means that an airline that has unsold seats may offer a deeply discounted fare to passengers in order to make comparatively higher profits than it would if they left those seats empty. This is wrongly understood as predatory pricing because such fares are not predatory as they are not intended to and neither do they have the effect of monopolizing the passenger market of a certain airlines or displacing it from the market. By offering standby fare, the airlines simply try to maximize its revenue and utilize the excess capacity of seats at its disposal.\(^10\) Setting a standby fare is therefore a harmless practice. However, there is an alternative form of predatory pricing that occurs in low-fare airline market, known as “Targeted Response to Entry”. It happens when an airline responds to the entry of a low-fare airline by aggressively lowering its prices and adding capacity.\(^11\) Although, the claims of predatory pricing are usually tenuous under the current anti-trust laws because the major airlines can limit price-matching to the price-sensitive markets where they face competition, while remaining profitable by combining passengers from various routes and cushioning losses with hub traffic not subject to the new price competition. Thus, the major airlines can avoid censure under the antitrust laws by pricing

---

\(^7\) Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vt., Inc., 845 F.2d 404


\(^11\) Ibid.
above-cost on the route as a whole, while at the same time pricing low enough on certain passenger markets to force the exit of a low-fare entrant.\textsuperscript{12}

A plaintiff seeking to establish competitive injury resulting from a rival’s low prices “must prove that the prices complained of are below an appropriate measure of its rival’s costs.”\textsuperscript{13}

The standby fare is largely considered the reason behind why below-cost prices don’t seem predatory. The standby fares are exempt from any antitrust liability because the purpose of such fares is to cover the incremental passenger variable cost.\textsuperscript{14} Once an airline commits to flying a certain route and sinks the bulk of its major flight variable costs which includes the cost of the plane, its fuel, and crew, the cost of serving one additional passenger becomes negligible.\textsuperscript{15} The prerequisite in such conditions is that the standby fare must only cover the passenger variable cost of the airlines, which includes processing the ticket, in-flight meals, incremental fuel, etc. The rationale behind this is that the seat is going out anyway, either full or empty, and any price above the cost of serving the additional passenger will make the additional sale profitable.\textsuperscript{16} The standby fare is considered non-predatory because it is generally priced above short-run marginal cost. This standby fare only covers the marginal costs of serving one additional person therefore; the standby fare is legal despite the fact that it is typically priced below average variable cost (AVC).\textsuperscript{17}

A major airline that engages in a targeted response to entry does not use a yield management policy to use up excess capacity or to charge each individual passenger as close as possible to the maximum they are willing to pay. Rather, it engages in a deliberate campaign to divert passengers away from a low-fare entrant by making more seats available at lower prices. Such targeted response can only be described as “discriminatory sharp-shooting”.\textsuperscript{18} Predation means deep, pinpointed, discriminatory price cuts by big companies aimed at driving price cutters out of the market, in order then to be able to raise prices back to their previous levels. An increase in capacity to divert low-fare passengers away from an entrant is crucial to an airline’s predatory campaign. Without increasing capacity and providing more low-fare seats, a major airline may not be able to accommodate a sufficient number of low-fare passengers to force the entrant from the market.\textsuperscript{19}

Although major airlines do selectively accept the losses in the market in which they compete with a low-fare entrant, they can do so with impunity under the law because they cushion such losses with high fares that are not subject to competition.\textsuperscript{20} Most courts that evaluate predatory pricing in the airline industry adopt an Average Variable Cost (AVC)

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{12} Ibid.
\item \textsuperscript{13} Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574
\item \textsuperscript{14} Robenalt, James L. "Predatory Pricing in the Low-Fare Airline Market: Targeted, Discriminatory, and Achieved with Impunity." Ohio State Law Journal 68:64.
\item \textsuperscript{15} Ibid.
\item \textsuperscript{16} Ibid.
\item \textsuperscript{17} Ibid.
\item \textsuperscript{18} Ibid.
\item \textsuperscript{19} Ibid.
\item \textsuperscript{20} Ibid.
\end{enumerate}
\end{footnotesize}
benchmark and determine whether the total number of passengers on a route, on average, is flying at prices above or below AVC.\textsuperscript{21} Therefore, even though the airline is not engaged in maximizing its profit by increasing both its capacity and proportion of low-fare passenger revenue, the airline can still reap profits by utilizing the high-fare passenger revenue. Despite the fact that most passengers will gravitate toward the airline’s lower fares during the predatory campaign, the airline can still price above costs by using its economies of scale and combining passengers from various routes.\textsuperscript{22}

3. Competitive Pricing in Immediate-Response Oligopoly Markets

In a market where a small number of firms sell a homogeneous good and can monitor each other’s prices and respond to the price changes almost immediately, the likely outcome is collusive pricing. Collusive Pricing can result even without any sort of explicit communication among the firms. Acting unilaterally, each firm recognizes that price cuts will be matched immediately, so cutting price makes sense only if the firm would prefer an equilibrium in which all firms charged the new lower price. This greatly reduces the incentive to compete on price.\textsuperscript{23}

Robert H. Gertner, in his work titled, ‘Communication among Competitors: Game Theory and Antitrust’ explored the outcome in such a market when firms have different costs and capacity constraints. According to him, the outcome in immediate-response markets will still be close to the collusive outcome and the price will be dictated by the firm that prefers the lowest price. This occurs because higher cost firms have nothing to offer a low cost firm in return for it agreeing to a price above its own profit-maximizing levels. Of course, if which firm prefers the lowest price differs across markets, then there may well be room for trades in which each firm agrees to a higher price than it would like in one market in return for increasing price closer to its preferred level in another market.\textsuperscript{24}

If the competing firms differ sufficiently in costs or other attributes, one firm may be able to sustain a lower price than others with none wanting to change its price given the prices charged by others. Such an outcome relies on the lower cost firm having a capacity constraint. In such a case, the higher cost firms are better off allowing the low-cost firm to fill its capacity and then selling to the remaining demand than matching the price of the lower cost firm and gaining a higher market share.\textsuperscript{25} Thus, even though the airlines differed in costs and other attributes, the ability to monitor one another’s prices closely and respond very quickly could still result in prices well above the competitive level.\textsuperscript{26} This, however, affects anti-trust in different ways. On the one hand, low-cost monitoring and quick

\textsuperscript{21} Ibid.
\textsuperscript{22} Ibid.
\textsuperscript{25} Ibid.
\textsuperscript{26} Ibid.
response raises concern that prices will end up at supra competitive levels and will harm consumers. On the other hand, this may happen without any further facilitating circumstances, that is, without any actions that are clearly in violation of antitrust laws.\(^\text{27}\) It is not an antitrust violation for a firm unilaterally to charge high prices. Not only does such a circumstance present a dilemma for the prosecution of an antitrust case, it also makes it difficult to devise a remedy to the situation. Neither “charge lower prices” nor “stop responding to the actions of other firms” are realistic remedies under the antitrust law.\(^\text{28}\)

4. The Airline Tariff Publishing Company Case

On December 21, 1992, the U.S. Department of Justice filed antitrust charges against ATPCO and eight major airlines.\(^\text{29}\) The complaint charged that the airlines, through ATPCO, had colluded to raise price and restrict competition in the airline industry. The Justice Department argued that the airlines had carried on detailed conversations and negotiations over prices through ATPCO. It pointed to numerous instances in which one carrier on a route had announced a fare increase to take effect a number of weeks in the future. Other carriers had then announced increases on the same route, though possibly to a different fare level. In many cases cited, the airlines had interacted back and forth until they reached a point where they were announcing the same fare increase to take effect on the same date.\(^\text{30}\) In cases where one airline did not announce that it would post the same fare increase as the others, the increase generally did not take place. In such situations it was common for carriers to “roll” their fare increases -- that is, to move the effective date further into the future, in order to give the carrier that had not announced a matching fare increase more time to do so.\(^\text{31}\)

The DOJ’s case also was based on patterns of multimarket coordination that it claimed to have identified. The complaint argued that the carriers were using fare basis codes and footnote designators to communicate to other airlines linkages between fares on different routes.\(^\text{32}\)

For example, let’s assume that airline A1 has a hub at city C1 from which it serves a route to city C3 with nonstop flights, as illustrated in Figure 1. Airline A2 has a hub at C2, which is between C1 and C3. Airline A2 is offering a relatively low fare in the C1-C3 market with service that requires a plane change at C2. This low fare is siphoning off customers from the nonstop service that A1 offers on the route. A1 would like A2 to raise its fare on the C1-C3 route. If that were the whole story, however, A1 would not have much ability to bribe or coerce A2. However, A2 serves C2-C4 with nonstop service, and A1 offers

---


\(^\text{28}\) Ibid.


\(^\text{31}\) Ibid.

\(^\text{32}\) Ibid.
change-of-plane service on that route over its hub at C1 -- exactly the reverse of the previous situation. A1 could strike a deal with A2 in which each carrier agrees not to undercut the other’s nonstop service with its own fares that require a plane change at its own hub.  

The DOJ argued that in such situations the ATPCO system of fare basis codes and footnote designators offered the sort of sophisticated communication necessary to spell out and agree upon such a deal. DOJ expressed that it would work in the following manner:

A1 would institute a new fare on C2-C4 that undercut A2’s fare on that route, and A1 would give this new fare the same or a similar fare basis code as A2 was using for the fare A1 was unhappy with on C1-C3, thus signal A2 the connection between the two fares. A1 would then put a short last-ticket date on this new fare, indicating that it would be available for only, say, two weeks. It would also put in a fare on the C2-C4 route that matched A2’s current fare and would give that fare a first-ticket date that was the same as its last-ticket date for the cheaper fare. A1 would then wait to see if A2 got the message. If it did, A2 would put a last ticket date on its fare on C1-C3 that was the same as the last ticket date A1 had put on its cheap C2-C4 fare and would add a new fare that matched A1’s fare on C1-C3 and had the same date for its first ticket date. If that happened, then two weeks hence each carrier, without further action, would raise its fare on the other’s nonstop route so that it was no longer undercutting the nonstop route with change-of-plane service. If A2 did not get the message or respond in the way that A1 wished, A1 could roll forward its last-ticket date on its cheap C2-C4 route. By re-filing the fare with a different last ticket date, A1 could also make sure that this fare again showed up on A2’s daily list of new fares, just in case A2 overlooked it the previous time. The DOJ argued that the combination of future first ticket dates and fare basis codes or footnote designators that allowed an airline to highlight a link between two fares on different routes made it much easier than it would otherwise be for two airlines to “negotiate” over fares on different routes. With these facilitating devices, the Department asserted, the airlines could make clear the “trades” they were offering: raising price on one route in return for a rival raising price on another route. 

Along with filing the case, the Justice Department also announced a settlement with United Airlines and USAir. Under the settlement, the airlines did not admit guilt on any of the charges, but they agreed to abide by the DOJ’s proposed remedies. In particular, United and USAir agreed to stop announcing most price increases in advance of the date on which they took effect. Instead, most price increases would have to take effect at the time they were announced. The other six airlines agreed to nearly the same restrictions as had United Airlines and USAir.

5. The Spirit Case

33 Ibid.  
34 Ibid.  
35 Ibid.  
Spirit filed its complaint against Northwest under Section 2 of the Sherman Antitrust Act and alleged that Northwest targeted certain of the routes on which it and Spirit competed and substantially increased capacity and began pricing below Northwest’s average variable cost. Northwest’s conduct follows a classic pattern of predatory pricing. The pattern of successful predation is well known: a “single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market or perhaps to deter potential entrants from coming in”.

In this case, the magnitude and scope of Northwest’s response is rather stark. On the Boston route, Northwest was the only carrier prior to Spirit that provided non-stop service. Northwest held an 89% market share on this route and offered an average of 8.5 flights per day with a lowest unrestricted fare of $411. In response to Spirit’s entry, however, Northwest sharply reduced its fares and added capacity to accommodate more low-fare passengers. Northwest dropped its lowest fare to $69, increased its daily nonstop flights on the route from 8.5 to 10.5, and added a 289-seat DC-10 airplane that had triple Spirit’s entire daily capacity.

As a consequence, Spirit’s load factors plummeted and it was eventually forced to exit the market. On the Detroit to Philadelphia route, Northwest’s only competitor on this route prior to Spirit was United Airways, which was described as a “compliant” competitor. Northwest held a 72% market share on this route and its lowest unrestricted fare was $355. But once Spirit entered and began achieving high load factors, Northwest dramatically reduced fares and increased capacity. Northwest reduced its lowest unrestricted fares from $355 to $49 on all flights for this route. In addition, it added another flight to the route and dramatically increased its number of low-fare passenger seats. Spirit soon left the market, and in response, Northwest increased its lowest unrestricted fare from $49 to $271 and later to $461. Yet despite the predatory pattern in this case, Spirit’s claim of predatory pricing is difficult to prove under the current legal framework. Spirit must show that Northwest priced below its cost on these routes with the expectation of later recouping its losses with monopoly profits. The law governing claims of predatory pricing entails a two-part test set out by the United States Supreme Court in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. Under this test, a plaintiff must prove that

1. The prices complained of are below an appropriate measure of its rival’s costs,”

and

2. The defendant had a dangerous probability of recouping its investment in below-cost prices.

38 Ibid.
39 Ibid.
The first part of the Brooke Group test—below-cost pricing—is the only disputed issue in the Spirit case because it is clear that Northwest had a dangerous probability of recouping its investment in predatory pricing.41

Northwest had substantial market power in a highly concentrated market in which there were high entry barriers. Northwest had a monopoly position on the two geographic routes with little to no competition. Northwest also had a virtual stranglehold on access to gates at the Detroit Airport, controlling sixty-four of Detroit’s seventy-eight gates under a long term lease. Due to its monopoly power in the market and high barriers to entry, Northwest had ample time to recoup its investment: upon Spirit’s exit, Northwest enjoyed nineteen months of monopoly pricing before another entrant arrived. Therefore, because Northwest had a reasonable prospect of recouping its losses, the critical question is whether Northwest engaged in below-cost pricing.42

The issues raised in the Spirit case provide a helpful insight into the nature of predatory pricing in the low-fare airline market. The two central issues raised in the Spirit case are:

1. Whether it is appropriate to separate out a distinct low-fare market on Northwest’s flights, and
2. How to allocate common costs to this segmented product market, if it does exist.43

Spirit’s price-cost comparison reveals the difficulty in assessing predatory pricing claims against multi-product firms. If Northwest had separated its “multiple products” that is, multifare passengers, into separate planes, it would be relatively simple to conduct a price-cost comparison. For instance, if Northwest had created a separate line of flights for low-fare passengers exclusively, a fact-finder could simply measure the low-fare revenue against the cost of operating these flights.44 Yet despite the cost allocation problems rooted in predatory pricing claims against multi-product firms, it is an economic reality that most firms sell multiple products in the same facility with shared common costs. Indeed, most major airlines sell tickets at different fares for the same flight. An airline’s multi-layered fare structure typically promotes greater competition among the airlines for different segments of the passenger market. Thus, combining multi-fare passengers on the same flight is not considered to be a predatory tactic. However, as the next section points out, a major airline’s campaign to divert low-fare passengers away from an entrant may require a different set of economic assumptions.45

Conclusion

42 Ibid.
43 Ibid.
44 Ibid.
45 Ibid.
These major airlines are pricing above costs on routes as a whole, but they are sacrificing profits and pricing low enough to drive out entrants. If the law fails to recognize these low prices as predatory because they are above cost, consumers become the unambiguous losers. Although consumers benefit in the short run as a major airline and low-fare entrant engage in a price war, the consumer ultimately suffers once the entrant is forced from the market and the major airline resumes monopoly pricing. The difficulty in punishing unfair conduct in the airlines industry has caused a great deal of criticism. There are many commentators who have called for a reexamination of the predatory pricing doctrine. They argue that the antitrust laws, as currently administered and interpreted, do permits major airlines to engage in unfair tactics without sanction. The next section discusses proposed alternatives to a below-cost rule.

A below-cost test has been criticized for providing too strict a standard for distinguishing the exceedingly thin line between vigorous price competition and predatory pricing.

To remedy this concern, the circuit courts in the USA and commentators have proposed alternative tests for evaluating predatory pricing claims. These proposals include qualitative assessments of a major airline’s predatory intent, as well as a mandated price freeze to prevent drastic price cuts in response to entry. Both proposals seek to promote consumer welfare by deterring major airlines from engaging in unfair pricing tactics in response to entry. Most flights carry a range of passenger fares, and it will not be easy to distinguish incremental from non-incremental revenue. However, capacity increase plays a key role in targeted response to entry, and a cost-standard that evaluates investment in capacity increment may help to promote competition in airline market.

---

46 Ibid.
47 Ibid.
48 United States v. AMR Corp., 335 F.3d 1109, 1121.