Volume 4 | Issue 1 | November 2012
ISSN 2231-1157

Dehradun Law Review

A Journal of
Law College Dehradun
Uttarakhand

Volume 4 Issue 1 November 2012
ISSN 2231-1157

Dehradun Law Review

A Journal of
Law College Dehradun
Uttarakhand

EDITORIAL BOARD

EDITORIAL

I feel exalted to present the fourth successive volume of the journal – Dehradun Law Review- an intellectual –cum epistemological procreation of Law College Dehradun. This is to our great satisfaction that the journal, unlike a rudderless vessel, continues to sail successfully towards its well cherished objectives in the academic ocean. Critical acclaims from academicians, constructive and invaluable suggestions from the readers as well as benevolent exchange proposals from the editorial boards of some of the reputed journals are testimonies to this fact. An intellectual or academic endeavour has dynamic periphery as it further propels the team towards the goal of constructive academic activism .We , so far, have attempted our best to live upto the expectations of the readers.

Like the previous issues, the current issue, too, consists of articles of academicians and intellectuals from across the academic spectrum. Contributors have attempted to address important and pressing legal issues which are beneficial both for law students and society at large. Prof. S.D. Sharma has analysed the role of civil society on protection of human rights and curbing terrorism. Dr. Akhilendra K. Pandey has thrown valuable insights with regard to the judicial stand over the offence of rape under alcoholic influence. Mr. Sujith Koonan comprehensively deals with the farmer's rights in India and issues related to its implementation. In the successive pages, Mr. Anjum Parvez discusses the causes of river pollution and its impact on social as well as economic development . In the same vein, Mr Pramod Tiwari's conceptual analysis of victimology as a new sub- discipline of criminology deserves

attention. At length, an analytical explanation of the principle of double jeopardy and the protection of human rights in criminal justice administration by Mr. Vijoy Vivekanand also stands as a valuable contribution.

This also gives us a special satisfaction that His Excellency Dr. Aziz Qureshi, Governor of Uttarakhand has kindly consented to release Dehradun Law Review Volume 4, Issue 1, November 2012 on the auspicious occasion of National Law Day to be celebrated on 26th November, 2012.

No intellectual endeavour, however sincere, is immune from criticism and conceptual inconsistencies. Admitting the same, I sincerely look forward to constructive and valuable suggestions from academic quarters. This, in fact, is an essential pre-requisite for the journal's journey towards perfection.

God Speed!

Prof. (Dr.) RAJESH BAHUGUNA
EDITOR-IN-CHIEF

Dehradun Law Review

CONTENTS

ARTICLES

Cite this volume as 1 DLR (2012)

EFFECT OF ALCOHOL IN OFFENCE OF RAPE: THE JUDICIAL RESPONSE

Akhilendra K. Pandey*

Abstract

Under certain circumstances intoxication on the part of the accused may be pleaded as a defence against criminal liability. The intoxicated condition of the victim usually does not affect the liability of the victim. In cases of sexual assault against women, the intoxication of the accused and the intoxicated state of victim both are pleaded as a defence. While intoxicated women are regarded as available women and expressed her volition by consuming intoxicating substance, intoxicated accused is, on the other hand, is treated as if he was prone to commit mistake due to intoxication.

Key words: *Rape – Intoxication – of accused – of victim - Feminism*

The reaction of law and societal attitude in cases of sexual assault involving alcohol is viewed in such a way that puts women in disadvantageous position. Intoxication on the one hand excuses man but an intoxicated woman at the time of rape is received with greater responsibility for the offence committed upon her. Culture confirms that the society views woman who has taken alcohol as sexually promiscuous and a target of sexual assault. In other words, where the prosecutrix is in habit of consuming liquor, such a habit may go against her in cases of rape. It is based on the myth that a woman signals her sexual availability by a holding drink in her hand, particularly in acquaintance[1] and date rape. Such a myth is prevalent.

The legal feminists claim that the modern jurisprudence is masculine. The values, the dangers and the fundamental contradiction that characterizes women's live are not reflected at any level whatsoever. The feminism aims at bringing change so as to transform the relation between women and men and also to provide autonomy on their body. Unfortunately, the institutions created and constructed by man have put the women as body for terrorization, sexualization

* Associate Professor, Faculty of Law, Banaras Hindu University, Varanasi – 221001

[1] Acquaintance rape is sexual by an assailant known to the victim and the date rape is where there has been a social connection between the parties but never a sexual one it is a situation where the victim and the assailant are acquainted but just barely.

and maternalization.[2] In this paper an attempt has been made to highlight the contradiction in law in relation to sexual assault against women.

The law of rape stands diluted where the assailant is acquainted and alcohol is a factor. In *Kamaraju Patro v. State of Orissa*,[3] the prosecutrix in her evidence had stated that she was administered liquor by the petitioner and she voluntarily took liquor where after she was raped. It was also admitted by the prosecutrix that she was used to take liquor regularly. The prosecutrix was mother of three or four children and was suffering from venereal disease. The medical report revealed the presence of contusion and abrasion on the back and other part of prosecutrix's body. The court while holding that the prosecutrix had agreed to become partner in the act of sexual intercourse, observed that:

> The facts and circumstances and broad probabilities of the case, would go to indicate that…the prosecutrix herself of her own volition accompanied the petitioner and others to take liquor as also to be raped by them. Nowhere in her evidence she had stated that she struggled to get rid of the accused person. She did not even breathe a word that before the attempted commission of rape she started to run away or that she struggled to get rid of the petitioner….[4]

This case suggested that consumption of liquor with the petitioner and other accused was tantamount to giving consent. It is quite understandable that to give consent for taking liquor by no imagination could be stretched to consent for being sexually assaulted also. Moreover, the expectation of law that a woman in state her soberness and while drunk will react and response similarly does not appear to be a sound proposition.

In *Gaurish v. State of Goa*,[5] the prosecutrix had come to the accused on her own accord and she deposed that the accused offered her cold drink and after having that she became giddy. She fell down on a cot and lost her senses. When she returned to her senses, she found herself naked. She inquired the accused as

[2] See, Mary Joe Frug, A Postmodern Feminist Legal Manifesto (Unfinished Draft) (1992) 105 Harv L Rev 1045
[3] 1991 Cri LJ 2009 (Ori.)
[4] Id. at 2011
[5] 1997 Cri LJ 1018 (Bom)

to what he did to her. The accused replied "not be worried, he would marry her". She had also deposed she did not know what the accused did to her. The accused, however, told to her that he committed mistake. On the basis of this evidence, the court failed to infer that any offence under section 376 of the Indian Penal Code, 1860 was made out. The Public Prosecutor argued that this evidence of the prosecutrix made out the guilt of the accused for having committed an offence but rejecting the argument, the court observed:

She did not say whether the accused had committed a rape on her. She says that she did not know anything what had happened to her.[6]

The presumption of the court that because the prosecutrix did not say anything about the act done by the accused, though the fact of sexual intercourse was established by the medical report, therefore no offence was committed appears to be quite peculiar in view of the fact that in other kind of offences the victim is not required to tell what offence against him was committed. The expectation of the court and the law that a person in state of intoxication would depose that the accused committed rape upon her does not appear to be sound. It may be suggested that in such situations the court should rely upon the circumstantial evidence in order to arrive at a conclusion.

The approach of the courts and the law in other jurisdictions are also not appreciable. In *State v. Oltarsh*[7] (1989), *State v. Draghi, Garbrinowicitz and Grandinetti*[8] (1991) the accused and the victims were known to each other. The accused got the victim intoxicated on friendly terms and then sexually assaulted. In Oltarsh case, the defence counsel advanced the theory of consent. It was argued that as the victim had affinity for group sex and had consented to have sex. The counsel tried to establish the fact of consent by equating the woman's intoxication with consent despite the fact that an unconscious victim cannot give consent. The judge however did not accept the argument forwarded by the

[6] Id. at 1021
[7] See, Karem M. Kramer, Rule by Myth: A Social and Legal Dynamics Governing Alcohol Related Acquaintance Rape (1994) Stanford L R 115
[8] Id.

counsel. The counsel then sought to mitigate the sentence on the ground of intoxication of the accused at the time of commission of offence. It was held that the fact that both the accused and the victim were intoxicated will not diminish the responsibility. The court thus confirmed that intoxication is not a defence to a charge of rape. None the less, the court declined to label the offence as sexual assault instead convicted the accused for battery. This view of the court did not ventilate the cause of victim as the judge did not acknowledge the offence committed by the accused involved her right to sexual autonomy.

In *State v. Draghi, Garbrinowicitz and Grandinetti*[9], both the prosecution and the defence focused on the complainant's intoxication. While the prosecution emphasized that the victim because of intoxication was incapable of giving consent, the defence used her intoxication to suggest that the victim consented to the activity and also questioned her credibility. The defence took the stand that women need alcohol to express their true sexual desires. It was also argued that the victim was not too drunk to consent. The victim in this case therefore, according to defence, took alcohol because she wanted to participate in group sex but she needed alcohol to convey. The defence thus wanted to prove either she was sober enough to have effectively resisted had she so wished or that she was so drunk that her testimony lacked credibility. The behaviour of the accused were found to be 'obnoxious' but were acquitted on the ground of minor contradiction and infirmities. Such an approach of the court suggests that women do not enjoy their sexual autonomy in state of intoxication. It sounds quite strange that intoxication of the accused at the time of offence may be argued for mitigation of sentences, same intoxication on the part of the victim of sexual assault is pleaded as if there were consent on her part.

Under existing law, a man or woman under state of intoxication cannot give valid consent but whenever the issue of non consent in offence of rape due to intoxicated state of the victim has arisen, the court has leaned in favour of the accused and did not treat the autonomy of women body. It may be thus suggested that in such circumstances the court should not presume the consent of the victim instead it may be deemed to prove the non consent on the part of the victim.

[9] Supra

CIVIL SOCIETY ON PROTECTION OF HUMAN RIGHTS AND ITS DEDICATION IN CURBING TERRORISM

Prof (Dr) S.D. Sharma*

"We must establish the independent power of the people-this is to say, we must demonstrate a power opposed to the power of violence and other than the power of punish."

Acharya Vinoba Bhave

Abstract

The efforts and role of the society in vital for the protection of Human rights and combating other problems. Non Governmental Organisations (NGOs) are doing a commendable job for ensuring the justice to individuals. In this modern time, it is necessary that society should itself be encouraged to tackle the challenging problems in prevailing in world like terrorism and communal disharmony. It has been observed that administrative machinery, so far, has not prove so effective in dealing with such problems because of lack of public awareness, with which no human values can be secured. Therefore, social participation, in the form of NGOs and international NGOs are a welcome step for dealing with various aspects of human rights.

Introduction

Social organizations are totally dedicated to the welfare and protection of the human rights of human beings. Whenever, any activities of the law enforcement agencies are against the human rights, the real feelings and thoughts of the social organizations convert into the real activities for the protection of human rights. Non Governmental organizations (hereinafter NGO) are performing wonderful job for the protection and promotion of the human rights, whether it may be the rights of the general public, criminals and terrorists, because, NGO's are totally dedicated to protect the rights of the mankind. Whenever, there is a problem of any violation of human rights, Social

* M.A., LL.M., Ph.D. (Law), Professor of Law, Former Dean, Faculty of Law, Kumaon University Campus Almora 263601, Uttarakhand; Former Head, Department of AU (Central University); Residence 372 Hind Nagar Lucknow 226012, Uttar Pradesh, India.

organizations are playing very active, vital and pivotal role in protection of these rights. They are dedicated to create favourable social environment for protection of human rights in the human society. The NGO's main function is to protect the dignity, liberty, life and identification as natural rights of human beings.

The state has not provided any rights to human race, but simply recognized these rights because nature has automatically granted these rights. Nature created different organs of human beings for eating, speaking, and thinking, sleeping, walking and working. At the time of creation of these organs nature has also provided the means of the enjoyment to all the organs by providing natural rights in the proper manner as per the requirement of all the organs of the body. In this way, all the human rights are the boons of the nature and as per the social contact theory the responsibility has given to the NGO to protect these natural rights in the form of human rights. This method of protection is called the common social efforts of the masses to protect the human rights of the entire human race. It will not be any hyperbole to say that NGOs have the practical experience according to the order of the nature. The order of the nature cannot be disobeyed by any human creature. In violation of any natural rights the duty of the impartial social organization is to protect all these rights.

Historical Back Ground of Social Organization in Protection of Human Rights- The history of the social organization to protect the human rights is not new. In India, in the ancient period, there were number of social organizations, which had performed noble job for the betterment of the society, because, India was divided into small states and law was based on the religious and moral principles of social recognitions. The social organizations were only the social institutions where law was enforced on the basis of right and wrong in the interest of the public.

International Civil Society in Curbing of Terrorist Activities and Protection of Human Rights- At International level numbers of NGOs are working and dedicated in the protection of the human rights of human being in the matters of preventing of terrorist activities, the Amnesty International is one of them, this organization is playing vital and pivotal role for prevention of global terrorism

problem, in another way, organizations also criticized the terrorists activities prevention legislations which are against the human rights, e.g. Amnesty International criticized India's new anti-terror legislation (ULAPA 2008) and urged President of India in this regard in December 20, 2008, that some of its provisions were "too sweeping" and in breach of international human rights treaties. The Amnesty said that "while we utterly condemn the Mumbai attacks and recognize that the Indian authorities have the right and duty to take effective measures to insure the security of the population, security concern should never be used to jeopardize people's human rights," Amnesty said in a statement.[1]

Madhu Malhotra, Deputy Director Asia Pacific Programme at Amnesty said the experience of other countries which had "rushed" to pass sweeping anti-terror increase the minimum legislation in response to terrorists' attacks had shown that such measures undermined the rule of law and reject for human rights internationally without necessarily enhancing security. India's own experience with previous anti-terrorism laws had shown they could lead to "abusive practices" she said. Listing amnesty concerns over the proposed amendments, which was in 2008, the President of India said the definition of "acts of terrorism" were too sweeping; and there was, "no clear" definition of what constituted "membership" of a terrorist organization. President of India also criticized the move to increase the minimum period of detention of those suspected in acts of terrorism.[2]

Amnesty International is totally committed to protect the human rights of the mankind, it had recommended repealing the anti human rights protection act, e.g. Amnesty international urge members of the U.K. parliament and peers to repeal the Prevention of Terrorism Act 2005 on the ground that it is in violation of human rights of human beings. Apart above recommendations organization also rejected the new administrative or "civil preventive" measures proposed by the Terrorism Prevention and Investigation Measures Bill. Amnesty

[1] The Hindu, December, 21, 2008.
[2] Ibid.

recommended that terrorist matters should be fully investigated, the people who are suspected of involvement in terrorism-related activities, and where sufficient evidence exists to prosecute them in the ordinary criminal courts, in conformity with international fair trial standards.[3]

The above International organization also recommended that it is necessary to refrain from bypassing the ordinary criminal justice system, including by seeking the enactment of secretive administrative procedures for imposing restrictions on individual rights of liberty, freedom of movement, association and privacy. Ensure access to effective remedy for anyone who alleges to have been subjected to human rights violations as a result of control order, and ensure that any one established as having been subject to such violations receives full reparation.[4]

Principles of Barcelona Meeting for Curbing Terrorism Vis a Vis Protection of Human Rights- The role of the social organizations and the civil societies may be relevant on the basis of the following reasonable points, which were discussed in Barcelona meeting [-5]

1. The importance of involving civil society in a comprehensive and multidimensional

Response to the threat of terrorism has been stressed by various international documents at the international regional and United Nations (UN) levels. General Assembly, for instance, in its resolution adopting the UN Global Counter-Terrorism Strategy on 8 September 2006, affirmed the determination of Member States to "further encourage non-governmental organizations and civil society to engage, as appropriate, on how to enhance efforts to implement the Strategy."

2. The approach taken in the Barcelona meeting was to enquire, as a first step; Whether NGO representatives themselves envisaged a role for civil society in the prevention of terrorism. As a second step, it was then explored how

[3] http//www.osce.org/odihr/25142: EVR45007, 2011 STPM Bill 2011 as available on 25th February 2011.
[4] Ibid.
[5] Ibid.

and to what extent civil society and NGOs might practically work in the prevention of terrorism.

3. Participants agreed that civil society and NGOs had an important and meaningful role to play in the prevention of terrorism. They have valuable expertise and experience in addressing conditions conducive to the spread of terrorism. Specific reference was made to civil society institutions and NGOs working on strengthening respect for human rights and the rule of law and on promoting democratic accountability. Participants also referred to civil society and NGO activities aimed at fostering social inclusion as well as efforts in addressing socio-economic factors.

4. Notwithstanding that day one of the meeting largely focused on the role that civil society can play in preventing terrorism with day two mainly examining obstacles that civil society and NGOs faced while working on issues related to terrorism, participants stressed that the two issues were closely interrelated. The discussions made clear that the question of civil society and NGO involvement was primarily a question of genuine partnership between civil society and government. It was stressed that it was vital to avoid instrumental sing civil society for political or intelligence gathering purposes.

5. Participants pointed out that the possibilities for genuine partnerships between civil society and government were dependent on the different circumstances and political realities in the respective OSCE participating States. The role of civil society in preventing terrorism and the possibilities for partnering with government in this regard were very limited in countries.[6]

[6] 1 UN General Assembly, The United Nations Global Counter-Terrorism Strategy, Doc. A/RES/60/288, 8 September 2006, operative paragraph 3 (d). 2 OSCE Charter on Preventing and Combating Terrorism, MC(10).JOUR/2, 7 December 2002, Annex 1, Para. 20, http://www.osce.org/documents/odihr/2002/12/1488_en.pdf The 2001 Bishkek Programme of Action on Strengthening Comprehensive Efforts to Counter Terrorism also stressed the importance of promoting active civil society engagement in the fight against terrorism. In addition, the 2001 OSCE Bucharest Plan of Action for Combating Terrorism directly mandated the ODIHR to continue developing projects to solidify democratic institutions, civil society and good governance.

Where, civil society structures were weak or non-existent. Reference was also made to legislation in some OSCE participating States that places limits on civil society and NGOs activity in the form of laws and practices that restrict registration and operation of NGOs. It was stressed that such legislation and

Practices were counter-productive because, they prevented civil society and NGO's from contributing to prevention efforts.

6. Participants suggested more generally that a lack of political pluralism, a lack of channels to convey messages and a lack of independent media were among factors that needed to be taken into account when discussing and exploring the role of civil society and NGOs in preventing terrorism in the OSCE region. In this context, participants also pointed to the difficulties for civil society and NGOs to play a positive and meaningful role in preventing terrorism when circumstances require them to put major resources into defending and protecting their own rights and existence, including at times their own physical integrity.

7. The discussions proceeded to addressing the question of how civil society and NGOs might work practically in the prevention of terrorism. Participants were encouraged to share good practices and to explore human rights-based approaches to preventing terrorism. Participants were also asked to present and discuss grass-roots and other national initiatives, projects and experiences. The discussions identified several possible roles for civil society and NGOs in the prevention of terrorism. a. Advisory, educative and community roles.

8. Participants discussed the possibilities for civil society and NGOs to provide policy advice and expertise on aspects of preventing terrorism which, in many cases, is not available within government. It was stressed that in order for civil society and NGOs to play a meaningful advisory and partnership role in the prevention of terrorism they needed to be given a sense of

ownership of the problems and processes. In many cases, however, partnership with government was unbalanced and one-sided as civil society organizations were not regarded and treated as equal partners competent of addressing security issues of common concern. It was argued further that political pressure by governments to provide "quick fix" solutions to security threats and issues contributed to the difficulties faced by civil society and NGOs in providing valuable advice and assistance.

9. Participants argued that it was vital responsibility of civil society and NGOs to explain human rights as a useful framework for developing effective counter-terrorism strategies rather than as an impediment. Specific activities identified in this regard included providing information to students as well as to youth workers and police and law enforcement. With regard to the latter, it was pointed out that civil society and NGOs may partner with law enforcement to develop targeted programs of cooperation focusing, for instance, on increasing Awareness and understanding, of the diversity, of communities. Reference was made to a project where civil society and government linked up to develop a training DVD to enhance the understanding of different cultures and communities among law enforcement officers, outlining aspects of the culture, religious customs and traditions of certain communities, in addition to their historical and geographical origins.

10. Participants further mentioned the importance of providing alternative appropriate language and terminology to public officials in addressing issues related to terrorism and security. In order to strengthen cooperation with government, it was suggested that civil society and NGOs may also find it appropriate to acknowledge positive steps or measures taken by law enforcement officials and government where they occur. In addition, it was pointed out that civil society and NGOs may have a positive advisory role in providing concrete alternatives to counter-terrorism policies and measures considered to be ill-conceived. It was nevertheless imperative that civil society and NGOs were given relevant information in order to understand the reality of threats and provide adequate suggestions for response.

11. Participants agreed that civil society institutions and NGOs are catalysts for opinions and ideas which were vital for building strong and vibrant communities. By creating safe spaces for dissent and by providing a forum where experiences can be shared on a personal level, civil society institutions and NGOs may contribute to healing community rifts and tensions. It was also suggested that civil society and NGOs may engage in outreach activities and take proactive steps to address root-causes of terrorism. Participants advocated activities that strengthened human rights and the rule of law in

particular. It was argued that the promotion and protection of human rights and the rule of law contributed to building strong democratic societies in which citizens were free to participate in the political process and exercises their rights. Reference was made to the essential need to provide practical and effective support to human rights defenders.

12. The discussions touched further on the question of whether civil society and NGOs should attempt to engage in dialogue with individuals and groups involved in and perpetrating acts of violence and "terrorism." An argument was made that for various reasons it was easier for civil society and NGOs to engage in such dialogue than for governments. Stressing that dialogue did not imply affording any form legitimacy to the perpetrators of violence and affirming that a human rights-based approach was essential, participants made reference to positive experiences of the peace process in Northern Ireland.

13. It was emphasized that civil society and NGOs should condemn all acts of violence against civilians regardless of the motivation for those acts. Positive measures identified in the discussions in the area of advocacy also included writing open letters and statements to armed groups condemning terrorist tactics and maintaining a principled approach to the applicability of human rights standards, i.e. that these standards apply to both perpetrators and victims of violence. Participants further pointed out that there may be a role for civil society and NGOs in reducing the emotional and psychological impact of terrorism. In particular, it was stressed that civil society and NGOs

may engage in activities amplifying the voices of the victims of terrorism as well as of persons affected by unlawful counter-terrorism operations.

14. Other aspects of an effective advocacy role discussed by participants included the issue of engaging with the media to shape the public discourse around "terrorism". It was argued that it was essential to establish a constructive relationship with the media in order to provide reliable information, challenge negative or unbalanced portrayals of parts of the community and initiate public debate on issues of public security and human rights. Participants also pointed out that it was important to encourage debate within the media profession on the image that is conveyed of minority groups in connection with the fight against terrorism and the responsibility to avoid perpetuating prejudices, stereotypes or inaccurate and/or incomplete information.

15. Participants pointed out that high quality research in the area of terrorism, political violence and the respective root-causes was vital for effective and credible advocacy as well as for prevention efforts. It was suggested that civil society and NGOs conduct research in a variety of areas. This included conducting studies and surveys on the impact of counter-terrorism measures and legislation, on conditions conducive to the spread of terrorism, and in other areas where little or no research was available to date. Stressing the importance of a practical and not only theoretical approach, special emphasis was placed on the value of statistical and empirical research. Participants reported on experiences in documenting terrorism incidents as well as on fact finding missions and field work. Participants also recalled the dangers associated with engaging in such activity, especially threats and dangers to physical integrity.

16. Participants further suggested that an increase in statistical and monitoring work would also enable civil society to engage with government in an open and facts-based dialogue about the effectiveness of counter-terrorism measures. This included a frank and open debate on funds spent on counter-

terrorism measures. It was pointed out further that in order for civil society and NGOs to play a meaningful role in preventing terrorism it was imperative to de-mystify public security issues. In particular, it was essential to recognize that public security issues were of concern to a variety of actors and should not be left to be discussed and addressed by security experts alone. In this context, participants recalled the importance of governments accepting and treating civil society representatives and NGOs as partners rather than as suspects or obstacles in the fight against terrorism.

17. The work of civil society and NGOs on legal issues related to terrorism and counter-terrorism contributes to the strengthening of international and national legal frameworks in counter-terrorism, especially as they relate to the promotion and protection of human rights and the rule of law. Particular reference was made during the discussions to the need for expanding the work of civil society institutions and NGOs on technical questions of definition of terrorism in and scope of application of, domestic laws, international treaties and other instruments dealing with terrorism; accountability of perpetrators and redress for victims of terrorist acts and of unlawful counter-terrorism practices, in both the domestic and international law dimensions; educating decision-makers about the nature and extent of complementarily among different legal frameworks, including international humanitarian law, international human rights law and domestic criminal and civil law; and translating complicated legal arguments for wider public mobilization. Participants pointed out that the lack of an agreed definition of "terrorism" or of "terrorist acts" was itself one of the key challenges for civil society and NGOs working on those issues.

18. As concerns the call for effective prosecutions of perpetrators of acts of terrorism and violence, it was expressed that trials be conducted in accordance with fair trial and due process standards. Participants stressed that it was vital for proceedings in criminal matters related to terrorism to fully adhere to international human rights and rule of law standards. It was

suggested that human rights compliant prosecutions also contributed to preventing radicalization and terrorism. Participants further agreed that regular criminal justice systems made ample provision for addressing the criminal responsibility of terrorists and that it was counter-productive to create parallel systems dealing specifically with terrorism and "terrorism-related" matters. Refraining, from awarding terrorist acts special status as and categorizing such acts as simply a crime de-legitimized the very use of that tactic.

19. As concerns individuals deprived of their liberty in connection with suspected terrorism-related activity but not criminally charged, it was expressed that protections against arbitrary detention, including the right to challenge the legality of detention in an independent court, be respected.

20. The second day of the meeting allowed for identifying challenges for civil society and NGOs working on issues related to terrorism and counter terrorism, both at a national and international level. In addition, participants discussed some implications of governmental counter-terrorism law and policy on freedom of expression, association, assembly and on civil society in general. This included issues related to the vulnerability of human rights defenders. Participants re-emphasized that the obstacles and challenges civil society and NGOs face in working on issues related to terrorism had direct implications on the role they could play in the area of prevention.

21. It was stressed that it was very difficult for civil society and NGOs to play any meaningful role in those countries where there was little political pluralism and where civil society structures were weak. A lack of political pluralism in itself contributed to creating conditions conducive to terrorist recruitment. In this context, participants also noted with concern that in some OSCE participating States fundamental changes to the political system were made under the pretext of security and counter-terrorism.

22. Participants further expressed concern that the discourse on terrorism had called into question principles and standards that were previously thought

inviolable. Particular reference was made to the absolute prohibition on torture. This presented enormous challenges for the NGO community in that the value and relevance of previous advocacy and research was effectively questioned. It was also pointed out that counter-terrorism policies affected democratic means of dissent – in particular as they impacted on NGOs and the mass media – and that this made it very difficult for civil society institutions and NGOs to engage meaningfully with both government and the community.

23. Another closely related major challenge identified by the discussions was the problem that civil society institutions and NGOs were seen as obstacles to governments in the fight against terrorism. Participants were concerned that efforts to promote respect for human rights and the rule of law as key elements of an effective strategy to prevent terrorism were in fact being portrayed as "pro-terrorist". Participants also reported on accusations against NGOs in some OSCE participating States that they represented "foreign interests" rather than local communities. Participants further reported on civil society organizations being targeted by governments with their funding cut for perceived connection to "terrorists".

24. Participants expressed concern that in a number of OSCE participating States human rights defenders were harassed or persecuted in the name of counterterrorism. In some cases this harassment included threats to their physical integrity. Preoccupied with physical danger, human rights defenders had difficulties to devote efforts to articulating ways in which the international community could offer assistance and support. Another major challenge was finding ways and means to build support for human rights defenders in volatile regions.

25. The discussions also touched on the problem that attempts by civil society organizations to investigate and discuss the causes of terrorism were mistaken for justification of terrorism. It was agreed that this undermined the possibility for serious debate on prevention and root causes. In many cases it was difficult to engage in research due to criminalization of contact with

"terrorist groups"; research into root causes was restricted as NGOs were expected to address acts of terrorism only. Participants also noted that the secrecy around security issues made it very difficult to engage effectively and practically in the debate.

26. Participants pointed out that newly enacted legislation in a number of OSCE participating States adopted very broad definitions of "terrorism" and "extremism" which was held to have a chilling effect on civil society and NGO activity, in particular in relation to activities aimed at the prevention of terrorism. The inclusion of overly broad definitions in anti-terrorism legislation made it very difficult for civil society and NGO actors to engage in legitimate activity. It was reported that so-called 'terrorism-related' offences targeted freedom of expression as well as freedom of association and put civil society organizations and NGOs in danger of persecution.

27. In addition, participants were concerned that a number of OSCE participating States had adopted restrictive NGO legislation. Such legislation, it was argued, was not only unhelpful as it limited the role of civil society and NGO in the prevention of terrorism, but was also a potential catalyst of conflict, including terrorism, by potentially outlawing legitimate forms of political expression and association.

28. Participants discussed challenges in relation to engaging and mobilizing public opinion. These included a massive information gap in the area of terrorism and counter-terrorism: large parts of the community lacked an understanding of, and access to, relevant information. Civil society organizations needed to underline the quality of their information as well as improve ways and means of disseminating it. It was essential to build broad common political fronts and to strengthen coalitions in support of democratic values and human rights. This was particularly vital in order to address disillusionment of youth.[7]

[7] Supra Note 3.

The above discussion and discourse at international level in the different conferences is fruitful and relevant for the protection of human rights in the matters of terrorists activities, it is also germane to point out here that purpose of law is "minimum of fraction with the maximum of satisfaction" hence, it is suggested that protection of the human rights of the terrorists should be considered in the law but at the same time, it is also relevant that safety of the people is also the paramount in civilized and democratic society. Considering the above facts it is apt to think the reality of the societies and act accordingly.

Efforts of the Government for the Protection of Human Rights in Relation to Combating Terrorism- The Indian democratic government is totally dedicated to the welfare of the people of India and to maintain the security and peace in Indian society. It is the supreme and paramount function of the government to provide all round development to the people. It is also the duty of the government to follow the civilized norms of the society. These norms are related to the protection of human rights. This function is being carried out by the government by constituting the Human Rights Protection Commission at National and State level under "Protection of Human Rights Act 1993 (PHRA)." Commissions are performing noble functions in the interest of the general people for protection of human rights.

(i) Training Programme for Police Administration- There are some problems of fake encounter by the police, therefore, there is a need of human rights training to the police personnel, and such type of program is being organized by the National Human Rights Commission under Section 12 (h) of PHRA. In this connection, it is relevant to point out the activities of NHRC for protection of human rights. The National Human Rights Commission, (NHRC) on the 8th June, 2011 organized, in the first time, an interactive session with a group of the Delhi Police Officers and its present and former group of interns of Human Rights Training Program. A paper on "The Human Rights and Police" was presented by Mrs. Arya Priya, a former NHRC intern, which triggered the session. Several direct questions were raised on the methods of policing and violation of human rights, including its alleged unconstitutional and forceful eviction of the people in

the people in the middle of night on the 4-5 June, 2011 from the Ramlila Ground in New Delhi, who were gathered there as part of a peaceful protest. In reply to a question, a police officer was of the irrespective of the orders from the senior officers, keeping in the law, human rights and the situation on the ground. Addressing the gathering, Mr. P.C. Sharma, Member, NHRC said that it is a wrong perception in the minds of some of the police officials that the Commission by raising issues of violations of human rights, at times, tends to obstruct them in their duty. He said that the police are the first custodian of the human rights and the Commission is there to rather guide and help them in this endeavor. He emphasized that investigation should never be done by the police officials under any kind of pressure or bias as it may amount to irreparable loss to the victims of such an action. Mr. Sharma also added that the Commission recognizes that the police personnel are also entitled to the human rights like any other citizen and has raised its voice time and again in this regard.[8]

Mr. Sunil Krishna, Director General (Investigation), NHRC said that the police officers need to be more sensitive towards the people approaching them for registering their complaints. He hoped that this interaction will help them in passing out the message to their colleague about the importance of human rights and expectations of the people from them. Some of the police officials also shared their practical difficulties and experience, including the process of investigation and handling of the witnesses.[9]

(ii) Control on Fake Encounters- The another legal duty of the government is to protect the human rights of the alleged criminals in the matters of fake encounter, number of times NHRC order the enquiry in the fake encounter and sent the team in the incidental places. In this context, The Hindu, a reputed News Paper has written editorial on February 25, 2012 that "fake encounters," said Justice Markandey Katju and C.K. Prasad in ringing Supreme Court Judgment last August "are nothing but cold-blooded, brutal murders by

[8] The Human Rights Newsletter, vol.18 No. 7 July-2011 p. 1-2.
[9] Ibid.

persons who are supposed to uphold the law." They went to prescribed death penalty for those involved- a punishment which policeman ought to keep in mind whenever their superiors seek to involve to them in an act of extra-judicial killing. Such instances, as the cases pilling up in the Supreme Court demonstrate, are Far from infrequent. As a way of dealing with the perceived pressure of public opinion, following terror strikes or violent crimes, police forces across India sometimes resorts to the custodian murder of prime suspects, often with a nudge and a wink from the top. Thanks to the judiciary's intervention, policemen who take the law into their own hands can no longer to assured of impunity. This is not to say genuine encounters never happen. They do, and the police, like ordinary citizens, enjoy the right of self defence. What must be demonstrated each time deadly force in used, however, is the necessity of the police response in the face of violence in their victims?[10]

(iii) Award and Prize to the Active Police Personnel- The police in Chennai deserve praise for quickly identifying the suspects thought to be behind two recent Bank robberies in the city. But the manner, in which the five men died in an encounter on 23 February 2012, raises a host of questions about the nature of the operation. Little about the official account, from the time of the operation details of the killing, neatly adds up. While the police Commissioner claimed the force got a tip-off around midnight and that his men knocked at the door of the suspects at about 1.00 a.m., area residents said they were asked to remain indoors by the police as early as 10.00 p.m. in Wednesday. Other contradictions include the absence of aural and visual effects normally associated with several minutes of "indiscriminate" firing: neighbours heard a few individual shots and just two bullet holes were visible to reporters who got a peek at the crime scene. None of this necessarily means the encounter was fake. Only an independent judicial probe can help establish what really happened. Such a probe must be conducted in a speedy, transparent and professional manner so that public apprehensions can be allayed. If the official story checks out, the city will heave a sigh of relief. But if there is any evidence that the five suspects were in custody at the time they

[10] The Hindu, February 25, 2012, p. 10.

were killed, all those involved must be charged with murder. If the law does not deter criminal acts by those in authority, we are in deep trouble as a society.[11]

(iv) Duty of the Government to Strengthened Federal Character- It has also come into the notice the efforts of the union government and the state government for combating terrorism and protection of the human rights. There is conflict between the governments on the basis of the federalism. Normally, there is an issue that if centre government directly interferes in the affairs of states for maintaining the law and order, the issue of the interference of the union government comes in the light that union has disturbed the federal character of the democratic republic of India.

It is a general parlance that the preservation of the federal character of India, is essential, because, according to the item 1 of the state list of the seventh schedule of the Constitution, to maintain public order (but not including the use of any naval, military or air force or any other armed force of the union of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power) is the duty of the state government.[12]

Latest controversy about the federal character of India arose, when centre government through the home minister said that "Centre intends to work with States to tackle terrorism" in this connection, union home minister wrote to 10 chief on the proposed National Centre for Counter Terrorism (NCTC). The news which has published in this regard is as follows[13]:-

"Even as non congress Chief Ministers are up in arms against the centre's move to set up the National Centre for Counter Terrorism (NCTC) on the grounds that it infringes upon the powers of the states, Home Minister P. Chidambaram on 10 February 2012, wrote to 10 Chief Ministers assuring to them

[11] Ibid.
[12] The Constitution of India, item, 1 of second list of the Seventh Schedule.
[13] The Hindu, February 25, 2012, P.12.

that "the intention of the Centre government is to continue to work with the State governments in order to meet the challenges of terrorism."[14]

"All of us are agreed that terrorism is a great threat to our country and our way of life. Countering terrorism is, therefore, a shared responsibility," Mr. Chidambaram said in his letter. He wrote identical letters to the Chief Ministers of Bihar, Gujarat, Himachal Pradesh, Jharkhand, Karnataka, Madhya Pradesh, Odisha, Tamil Nadu, Tripura and West Bengal. Incidentally West Bengal Chief Minister and Trinamool Congress supremo Mamata Benerjee was the first to oppose the plan to set up the NCTC. A key ally of the UPA government, she met Prime Minister Manmohan Singh earlier and demanded that the NCTC be put on hold. Other Chief Ministers have also written to the Prime Minister, opposing the counter terror hub on the ground that it violated the principle of federalism and encroached upon their turf. Seeking to allay their fears, the Prime Minister wrote to seven of them on 7th February 2012, assuring to them that the centre was committed to protecting the principles of federalism. Mr. Chidambaram said he had been asked by the Prime Minister to "address the concern expressed by you and to consult with you on this matter which, I am sure, you will agree in a matter of national importance and should be kept above parties and politics." He told the Chief Ministers that "we had, working together, decided to amend the Unlawful Activities (Prevention) Act in 2004 and in 2008." He said the Home Secretary would call a meeting of the state police chiefs and the heads of the anti-terrorist organization and forces of the state government and discuss in detail the scope and the functions of the NCTC. Noting that he would be happy to respond on any further issues that the Chief Ministers might wish to rise, Mr. Chidambaram enclosed a three-page note on the "genesis, objectives, structure and powers of the NCTC." One of his pet project, he has been pursuing the NCTC since the November 26, 2008 terror attack in Mumbai. Most of the Chief Ministers, including those from the BJP and Tamil Nadu Chief Minister

[14] Ibid

Jayalalita, raised objections on the power of the NCTC to arrest and to search under Section 43A of UA (P) Act.[15]

Bare Minimum Powers- The Home Minister's enclosed note to the Chief Ministers describes these powers to search and arrest as 'the bare minimum powers" that would be necessary for a body mandated to deal with counter-terrorism, which was true of all counter-terrorism bodies in the world. "It may be noted that the powers under Section 2 (e) and section 143A are available to both Central Government and State Government."[16]

The note said that a law to deal with terrorism such as the UA (P) A was within the legislative competence of Parliament, and similar laws (TADA and POTA) have been upheld by the Supreme Court. Both Act 29 of 2004 and Act 35 of 2008 that amended the UA (P) A were passed by Parliament and there was no objection to either Section 2(e) or Section 43A. It said all that the Central Government had done in the February 3 office memorandum, notifying the setting up of the NCTC, was to "specify its duties and functions; to outline its structure; and to confer minimum powers that are required for a counter-terrorism body." [17]

---

[15] Ibid. Section 43A of the Unlawful Activities (Prevention) Act 1967 provides that any officer of the designated authority empowered in this behalf, by general or special order of the Centre Government or the State Government, as the case may be, knowing of design to commit any offence under this Act and has to believe from the personal knowledge or information given by any person and taken in writing that any person has committed any offence punishable under this Act or from any document, article or any things which may furnish evidence of Commission of such offence or from any illegal acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under this Chapter is kept or concealed in any building, conveyance or place, may authorize any officer subordinate to him to arrest such a person or search such building, conveyance or place whether by day or by night or himself arrest such a person or search a such building, conveyance or place. [this provision inserted by 35 of 2008, section 12]

[16] Section 2 (e) of UA(P) Act states the definition of "Designated Authority," which means such officer of the Central Government and below the rank of Joint Secretary to that rank of Secretary to that Government, as the case may be, as may be specified by the Central Government or the State Government, by notification published in the Official Gazette;

[17] Ibid, In the issues related to the different legal controversy of the Terrorist and Disruptive Activities (Prevention) Act 1987; Supreme Court decided the matter in Kartar Singh v State of

In the above reference it is also to high light the latest development on the basis of the Central Government that the meeting of Chief and of the Police will be held on 8th March 2012 to solve the issue of interference of the Central Government on the affairs of the State Government, the country is in full confidence that this issue will be solved by the democratic government as earliest as possible, it is also relevant to point out that the provision of section 43A Unlawful Activities (Prevention) Act 1967 is not challenged so far on the ground of violation of Constitutional provisions, thus, it can be said that Section 43 A is Constitutional, it is also apt to think that terrorism problem should be solved on the co-operation of the both government, take the example of co-operation of law and order enforcement agencies at Delhi on 29th February 2012 three states police in joint efforts success to arrest two members of Lashkar-E-Taiba and destroyed their plan of the explosion in the public places.[18]

The above efforts of the Central and State Governments are in the way of the protection of human rights of the general public. It is the paramount duty of the Government to maintain law and order for the safety of the people and property of India, thus, in the matters of the safety and security of the country, compromise should be done by all the sates and central government on the basis of the co-operative federal system of the Constitution and this is laid down by the Supreme Court in number of the cases.

Conclusion and Observations- The efforts and the role of the social society is vital for the protection of human rights and combating terrorism. In this context, latest observation of August 2012 is relevant for the said purpose that in the Kokrajhar district of the Assam, it has been seen that there was ethnic clash between the social groups. In this matter, civil society played pivotal role in

Punjab (1994) 3SCC 569: 1994 SCC (Cri) 899, Usmanbhai Dawoodbhai Memon v State of Gujarat (1988) 2SCC 271: 1988 SCC (Cri) 318, Niranjan Singh Karam Singh Punjabi v Jitendra Bhimraj Bijjaya (1990) 4 SCC 76: 1991 SCC (Cri) 47, Mohd. Rashid Khan v State of West Bengal 1994 Cri L J 2699 (Cal), Sanjeev Hagde v State of Maharashtra 1992 Supp (2) SCC 230, State of Maharashtra v Abdul Hamid Haji Mohammed (1994) 2SCC 664: 1994 SCC (Cri) 595, and Union of India v Mohd. Sadiq Rather, (1993) 1 SCC (Cri) 8 etc.

[18] The Radio News of 29th February 2012 at 8.45 p.m.

mitigation of the co-operation between the groups for strengthening fraternity in the society.

About the ethnic conflict and communal violence of August 2012, of Assam, Nattional Commission for Minorities sounded the warning that there is a possibility that Muslim in the Bodo districts of Assam might turn "militant" influenced by jihadi outfits from across India, in case their security is not ensured by the state government. The National Commission for Minorities (NCM) in its report communicated to Assam Chief Minister Trun Gogoi. The report was prepared after it visited the conflict-torn districts in the Bodoland Territorial Autonomous Districts (BTAD) and Dhubri districts in Assam.[19]

The NCM delegation, which included Planning Commission member Dr. Syeda Hameed and NCM member K.N. Daruwalla, visited Kokrajhar, Gossaigaon, Dhubri and Bilasipara in July. Its report said the cause of the riot originated from the conflict between the Bodos and the resident Muslims of BTAD, and not between Bangladeshi migrants and the Bodos, even though it said infiltration from Bangladesh does take place throughout the year. "The conflict this time as far as we could see was not between some exodus of Bangladeshi immigrants and the Bodos but between the Bodos and the resident Muslims of the BTAD." "The conflict was unequal because the BODOS had leftover arms from the BODO Libration Tigers [AK 47 etc]. The Muslims are very poorly armed in comparison," said the minority panel report, with a warning about the potential jihadi influence on the Muslim population in Bodo land. "There can be grave danger in future in case militant jihadi outfits from the rest of the country start supplying lethal weapons in this area," added by NCM. The panel has also recommended the formation of a Special investigative Team (SIT) to investigate the major incidents of violence during the riots in the State as, 'this will restore confidence in the justice delivery system." It has also called for a "serious and detailed dialogue" between the Union Ministry of Home Affairs, Assam Government and the Bodoland Territorial Council. Such an interaction, it

[19] The Hindu, August 17, 2012 P.2.

said, was "absolutely essential." The report also observed that the Bodos think "driving out other ethnic people" was in their interest and that is why the NCM delegation told the Chief Minister that "Bodos need to be told firmly that they cannot under any circumstances engineer a mass exodus of the Non-Bodos and that they would never get statehood this way."[20]

Accusing the Administration of failing to stop the first round of violent clashes between Muslims and Bodos in the BTD areas, the delegation told the Chief Minister to instruct the police to be "more forceful with both Bodos and Muslim criminals." "We were also left with the distinct impression that the lower rungs of the police were afraid of taking action against the Bodos, possibly because of the armaments they possessed and the fact that they ruled the area," observed the delegation.[21]

Though Civil society has played very active role for strengthening human rights, however, to fulfill the excess demand of human rights by the civil society is not possible. The Indian judiciary has interpreted the fundamental rights in the expansion of human rights and laid down the bundle of rights for protection of civil liberty of person. But expansion of the fundamental rights should be within the limit of its expansion.

The following suggestions may be considered by the government for strengthening the human rights and balancing for maintaining law and order and protection of human rights.

1. There is a continuous need of human right education training to the police personnel.
2. Human rights education should be in the curriculum of training programme and after the training refresher course of at least one week after one year of gap should be imparted to all police personal including officers.

[20] Ibid.
[21] Ibid.

3. Human rights education training should be given to Para Military forces before deploying for maintaining law and order work.
4. Police personnel and officers need to be more sensitive towards the people approaching them for registering their complaints of violation of human rights.
5. Award should be given to active, honest, and worthy police personnel for protection of human rights and curbing of terrorism.
6. The education of human rights should be included in the syllabus of every class as a compulsory paper from the stage of inception of the education.
7. Indian social values and ethics should also be incorporated in the educational teaching and learning process.
8. Reformative theory of administration of criminal justice should be adopted for the youth criminals.
9. Criminal Procedure Code and Jail Manual should be amended and human rights input also be incorporated in these laws.

FARMERS' RIGHTS IN INDIA: ASSESSING CONCEPTUAL AND IMPLEMENTATION ISSUES

Sujith Koonan*

Abstract

India is a pioneer in developing explicit legal provisions to recognise and protect farmers' rights. The legal regime related to farmers' rights in India has been developed as a response to the developments under international law. Farmers' rights have become a part of Indian legal system through statutory frameworks related to plant variety protection and biodiversity. These two statutes have come into force as India's response to obligations under two international treaties – Agreement on Trade Related Intellectual Property Rights, 1994 and Convention on Biological Diversity, 1992. Farmers' rights regime in India involves mainly two statutes - the Protection of Plant Varieties and Farmers' Rights Act, 2001 and the Biological Diversity Act, 2002. While the former addresses farmers' rights directly, later deals with some of the key aspects of farmers' rights. The legal recognition of farmers' rights in India has been criticised on various grounds including conceptual and implementation aspects. The impact of intellectual property rights protection for agricultural biotechnology on conceptualisation and implementation of farmers' rights is extremely controversial and significant. While the legal formulation of farmers' rights in India is infamous for its loose policy type language, some of the ongoing developments such as the proposed Seeds Bill are likely to make implementation of farmer's rights further ineffective. In this context, this paper critically examines the concept of farmers' rights as recognised under international law and India.

Introduction

The farming communities across the world have been following, since time immemorial, the practice of sharing of knowledge and resources. Sharing of seeds among farmers constitutes perhaps the most important part in these traditional agricultural practices.[1] As such hitherto there was no legal interference with this practice of free flow of knowledge and resource, both at the national and international level. From a legal angle, it could be said that there was no well defined property right regime regulating or controlling plant genetic resources. Reasons for this could be either there was no need for a formal legal articulation

* Assistant Professor, Amity Law School, Amity University Uttar Pradesh

[1] *See* Stephen B. Brush, "Farmers' Rights and Genetic Conservation in Traditional Farming Systems", 20(11) *World Development* 1617-1630 (1992).

of private property rights or absence of such a regime was considered as beneficial to farmers and farming communities and to the society as a whole.[2] Indeed, free flow of knowledge and resources has claimed to have produced immense results in the enhancement of food production and thereby achievement of food security.[3]

However, the scenario has changed significantly over the last few decades particularly with the development of agricultural biotechnology. The development in the field of agricultural biotechnology has resulted in the unprecedented growth of commercial seed production. This development was complemented and supported by the evolution of private property rights regime vis-à-vis plant genetic resources. The concept of plant breeders' rights (PBRs) emerged in this context which refers to private property right over plant genetic resources developed by commercial breeders. Generally, the legal consequence of PBRs is that the genetic resources or seed protected by the PBRs can be used only with the proper authorisation of the right holder. Any kind of unauthorised use will attract legal action against the user.

The idea of farmers' rights has evolved in this context of the fast development of the legal protection of the commercial breeders' rights in the seeds developed with the help of modern science and technology. While the rights and interests of commercial breeders are recognised and protected under the law, similar efforts taken by farmers for centuries are left legally unrecognised and unprotected. Primarily, it is this asymmetry in recognising the rights of farmers and farming community at par with the rights of commercial breeders that form the major rationale behind the legal concept of farmers' rights.[4]

---

[2] Thomas Cottier, "The Protection of Genetic Resources and Traditional Knowledge: Towards More Specific Rights and Obligations in World Trade Law", 7(2) *Journal of International Economic Law* 555, 562 (1998).

[3] *See* Stephen B. Brush, "Farmers' Rights and Protection of Traditional Agricultural Knowledge", 35(9) *World Development* 1499-1514 (2007); Cary Fowler *et al*, "Unequal Exchange? Recent Transfers of Agricultural Resources and their Implications for Developing Countries", 19(2) *Development Policy Review* 181-204 (2001) and Craig D. Jacoby and Charles Weiss, "Recognizing Property Rights in Traditional Biocultural Contributions", 16 *Stanford Environmental Law Journal* 74-124 (1997).

[4] Carlos M. Correa, Options for the Implementation of Farmers' Rights at the National Level, Trade-related Agenda, Development and Equity (TRADE) Working Paper 8, December 2000, at p. 3.

India is one of the few countries having specific legal provisions addressing farmers' rights. The concept of farmers' rights has become an explicit part of the Indian legal system through the Protection of Plant Varieties and Farmers' Rights Act, 2001. While this can be considered as a landmark as a beginning, farmers' rights provision under the Act has invited several critique both from a conceptual and implementation point of view. In this back ground, this paper explains the nature and scope of farmers' rights in India and captures critique relevant for further meaningful development and implementation of the concept.

Conceptualising farmers' rights: the international law context

The concept of farmers' rights has been a subject matter of discussion at the international level at least since the adoption of the International Undertaking on Plant Genetic Resources, 1983 by the Food and Agricultural Organization. However, the legal conceptualisation of farmers' rights at the international level reached a decisive stage with the adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture, 2001 (hereafter the FAO Treaty). The term farmers' rights found a place in a legally binding international agreement for the first time through the FAO Treaty. However, the FAO Treaty is not the only legal basis of farmers' rights under international law. There are other multilateral treaty regimes having linkages with farmers' rights such as the Convention on Biological Diversity, 2002; International Convention for the Protection of New Varieties of Plants, 1961 revised in 1972, 1978 and 1991 and the Agreement on Trade Related Intellectual Property Rights, 1994 (TRIPS). In this backdrop, this part of the paper traces the trajectory of the legal conceptualisation of farmers' rights under international law.

The idea of farmers' rights denotes in simple terms the rights of farmers over their resources and knowledge. The term 'resources and knowledge' can have wide meaning and scope in common parlance. It may encompass a number of concerns related to all important factors of agricultural production such as land, water, seeds, traditional agricultural practices and traditional agricultural knowledge. However, the contemporary legal regime does not address all these

aspects of farmers' rights. In fact, farmers' rights as a legal norm has well-defined boundaries. Broadly, there are two major issues that are addressed by the concept of farmers' rights in the contemporary legal context - plant genetic resources and traditional agricultural knowledge. The term 'plant genetic resources' consists of seeds, plants and plant parts useful in crop breeding, research or conservation for their genetic attributes.[5] The term 'traditional knowledge' in the context of agriculture may be seen as referring to knowledge regarding a particular crop with desired characteristics and the environment suitable to such crops.[6]

The context in which the legal norm of farmers' rights has been evolved at the international level seems to provide an explanation for this limited scope. As mentioned earlier, the idea of farmers' rights has taken its roots from the linkages that developed between intellectual property rights regime and agriculture. The development of intellectual property rights regime in this regard was mainly focused on plant genetic resources and knowledge associated with it. Having begun primarily as a counter balance strategy against the development of intellectual property rights, farmers' rights were also evolved as a legal norm addressing rights of farmers in plant genetic resources and knowledge.

A. Rationale for Recognising Farmers' Rights

The rationale for the recognition of farmers' rights under international law (as well as domestic law) is usually based on three pillars. Firstly, the notion of equity as a rationale for the legal recognition of farmers' rights comes into forefront in the specific context of the development of agricultural biotechnology increasingly protected and facilitated by the intellectual property rights regime. The argument in this regard is mainly based on the fact that one of the major inputs to the modern agricultural biotechnology essentially comes from the enormous effort undertaken by farmers and farming communities in different parts of the globe for several centuries. Hence, it is argued that, while the modern

[5] Ronan Kennedy, "International Conflicts over Plant Genetic Resources: Future Development?", 20(1) *Tulane Environmental Law Journal* 1- 42, 2 (2006).

[6] Thomas Cottier and Marion Panizzon, "Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection", 1(4) *Journal of International Economic Law* 371- 400, 371 (2004).

commercial breeders are benefited from the legal system, the historical efforts of farmers go unrewarded.[7]

This fundamental asymmetry can be further translated into an issue of non-convergence of basic regulatory framework between the developed and developing countries. At the global level, developing countries are the major contributors of basic plant genetic resources or genetic materials for the modern biotechnology based research and commercial production of plant varieties. Developed countries, on the other hand, are the major producers of technologically induced new plant varieties. In this context, it can be argued that developed countries, which are poor in basic genetic resources, receive substantial gains from the resources conserved, protected and improved by the developing countries.

Secondly, farmers' rights are seen as a tool to protect and conserve agricultural biodiversity. Agricultural biodiversity could be defined as that part of biodiversity that feeds and nurtures people. It includes genetic resources for food and agriculture such as harvested crop varieties, livestock breeds, fish species and non-domesticated resources within field, forest and in aquatic ecosystem.[8] One of the important contributing factors towards the conservation and improvement of agricultural biodiversity is the farming practices found within the centres of diversity. Indeed, traditional farming practices are diversity oriented and farmers enrich biodiversity through selection and improvement of seeds. Thus, the concept of farmers' rights could be justified as a systematic tool to support and facilitate the conservation activities undertaken by traditional farmers.[9]

---

[7] Philippe Cullet, "Environmental Justice in the Use, Knowledge and Exploitation of Genetic Resources", in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge: Cambridge University Press, 2009).

[8] Patricia Kameri-Mbote and Philippe Cullet, "Agro-Biodiversity and International Law: A Conceptual Framework", 11(2) *Journal of Environmental Law* 257-279 (1999).

[9] C.S. Srinivasan, "Exploring the Feasibility of Farmer's Right", 21(4) *Development Policy Review* 419-447 (2003).

The significance of agricultural biodiversity lies in the fact that it contributes directly to the livelihood of a large segment of human kind and constitutes the basis for all human food consumption and for food security. Despite the significance of agricultural biodiversity for basic human needs and existence little attention has been paid in the past to conserve and protect agricultural biodiversity. This has resulted in the increasingly declining condition of the agricultural biodiversity.[10] The homogenisation of agricultural production largely promoted by the technically induced plant varieties is one of the major highlighted reasons for this decline. For instance, green revolution varieties have been observed as one of the significant reasons for the decline of agricultural biodiversity.[11]

Thirdly, preservation of farmers' traditional practices is seen as a strategic resistance against the increasing application of the private property right regime in the case of plant varieties. The underlying reason is the possible implications of the private property right regime upon farmers and broadly its social and environmental implications.

The private property regime *vis-à-vis* plant genetic resources as developed under international law over the last few decades tends to promote the perpetual dependence of farmers upon commercial breeders. The transaction of commercial varieties is essentially market based. This would likely to threaten the livelihood of farmers who extensively depend upon farm-saved seeds, which is less expensive. Further, the commercialisation of seed production has the potential to exacerbate the rural poverty in developing countries. The expansion and application of intellectual property rights to plant varieties has been further criticised as contrary to the traditional farming practices that historically did not regulate seed production and exchange.[12]

---

[10] Ashish Kothari, "Reviving Diversity in India's Agriculture", *Seedling*, December 1994.

[11] Bongo Adi, "Intellectual Property Rights in Biotechnology and the Fate of Poor Farmers' Agriculture", 9 (1) *Journal of World Intellectual Property* 91–112 (2006).

[12] Craig Borowiak, "Farmers' Rights: Intellectual Property Regimes and the Struggle over Seeds", 32 (4) *Politics & Society* 511-543 (2004).

Another implication of protecting the private property rights of commercial breeders is the possibility of legal action against farmers for violation of private property rights such as patents and PBRs. Given the asymmetry in the capability of fighting cases between poor farmers in developing countries and big multinational corporations, it is unlikely to deliver justice.[13] In this context, recognition of farmers' rights under international law could be justified as a counter-balance against the strong private property rights of commercial breeders. The underlying idea is to protect the rights of farmers to save, exchange and sell farm saved seeds.

B. Farmers' Rights under International Law

The concept of 'farmers' rights' was formally introduced into a binding multilateral instrument at the global level through the International Treaty on Plant Genetic Resources for Food and Agriculture, 2001 (hereafter the 'FAO Treaty').[14] The FAO Treaty expressly recognises farmers' rights. However, it cannot be asserted that the idea of farmers' rights at the international level emerged with the FAO Treaty. The concept of farmers' rights was evolved in a historical context preceding the FAO Treaty. In fact, the legal conceptualisation of farmers' rights through the FAO Treaty owes significantly to the prior historical context particularly the development that occurred under the auspices of the Food and Agricultural Organization (FAO) at least since the early 1980s.

The development of the legal concept of farmers' rights could be traced back to the International Undertaking on Plant Genetic Resource, 1983 (hereafter the 'International Undertaking').[15] The International Undertaking was adopted with the objective of ensuring free access to plant genetic resources. The cardinal principle of the International Undertaking was that genetic resources are a

[13] Philippe Cullet, "Farmer Liability and GM Contamination: Schmeiser Judgment", 39(25) *Economic and Political Weekly* 2551–2554 (2004).

[14] The International Treaty on Plant Genetic Resources for Food and Agriculture (FAO Treaty) was adopted at the thirty first session of the FAO conference in November 2001 through resolution 3/2001. The FAO Treaty entered into force in 29 June 2004.

[15] The International Undertaking on Plant Genetic Resource was adopted by Resolution 8/83 at the Twenty Second Session of the FAO Conference held in Rome in 1983.

common heritage of mankind and should be available without restriction.[16] The International Undertaking, as it was originally adopted, does not address the issue of farmers' rights. However, the relevance of the International Undertaking lies in the fact that it is this document that has triggered the debate on private property rights in crop genetic resources and the subsequent formulation of the concept of farmers' rights under international law.

The constant discussion under the auspices of the Food and Agriculture Organization eventually led the FAO Conference to adopt a resolution on 29 November 1989 expressly recognising farmers' rights (hereafter the 'Resolution 5/89'). The Resolution 5/89 was annexed to the International Undertaking and thereby it became an integral part of the International Undertaking. The Resolution 5/89 could be considered as the first documented expression of farmers' rights at the international level and therefore can be considered as a landmark in the trajectory towards the legal conceptualisation of farmers' rights.

Failure of the International Undertaking to establish a concrete system to promote the realisation of farmers' rights was an important reason behind the move towards the revision of the International Undertaking.[17] The initiation of the revision of the International Undertaking could be considered as a starting point of the efforts towards the FAO Treaty. Negotiations were initiated in 1994 in the first extra ordinary session of the Commission on Genetic Resources for Food and Agriculture. Initially the aim was to adopt a new agreement in 1996. However, the negotiation prolonged till 2001 due to lack of consensus among negotiating parties on various issues.

The significance of the FAO Treaty is that, the concept of farmers' rights, for the first time, found express manifestation in a legally binding instrument at the international level. Hence, in a legal point of view, the FAO Treaty is the most important and direct source in international law regarding farmers' rights. It

[16] *Id.*, Article 1.

[17] Elsa Tsioumani, "International Treaty on Plant Genetic Resources for Food and Agriculture: Legal and Policy Questions from Adoption to Implementation", 15 *Year Book of International Environmental Law* 19-144 (2006).

should also be noted that the FAO Treaty is widely accepted by countries. India ratified this treaty in 10 June 2002.

FAO Treaty emphasises farmers' contributions for the conservation and development of plant genetic resources as the basis of farmers' rights. The FAO Treaty further rationalises the recognition of farmers' contributions by highlighting it as the basis of food and agricultural production throughout the world.[18]

The FAO Treaty adopts an approach different from that of the International Undertaking with regard to the conceptualisation of farmers' rights. The FAO Treaty follows an illustrative approach in defining the concept of farmers' rights by providing certain measures to protect and promote farmers' rights. The illustrated measures to protect and promote farmers' rights are: the protection of traditional knowledge relevant to plant genetic resources, the right to equitably participate in sharing benefits arising from the utilisation of plant genetic resources and the right to participate in decision making on matters related to the conservation and sustainable use of plant genetic resources.[19]

In addition to the illustrated measures, the FAO Treaty further recognises, in principle, the rights of farmers to save, exchange and sell farm saved seeds.[20] This traditional practice of farmers is recognised by prohibiting the interpretation of the provisions of the FAO Treaty in such a way to limit the rights of farmers to save, use, exchange and sell farm saved seeds.

Another important feature of farmers' rights as conceptualised under the FAO Treaty is the fact that the Treaty casts the responsibility for realising farmers' rights upon national governments (FAO Treaty: Article 9.2). By saying so, the Treaty grants flexibility to the concerned state parties to forge measures to protect and promote farmers' rights according to their needs and priorities and according to their domestic legislation.

---

[18] International Treaty on Plant Genetic Resources for Food and Agriculture, 2001, Article 9.1.
[19] *Id*., Article 9.2.
[20] *Id*., Article 9.3.

Key Conceptual Issues

The FAO Treaty does not go much beyond recognising the term 'farmers' rights'. Article 9 of the FAO Treaty uses completely the non-mandatory language. For instance, Article 9.2 does not make it obligatory for member countries to provide legal framework to ensure protection of traditional knowledge, benefit sharing and right to participation. The obligation of member countries in this regard is diluted by using the expression "Contracting Party should, *as appropriate, and subject to its national legislation*, take measures to protect and promote Farmers' Rights" (emphasis added).

FAO Treaty casts responsibility for the realisation of farmers' rights with national governments. This means, member countries have absolute freedom to decide the ways and means to be adopted for the realisation of the farmers' rights. This flexibility may create uncertainty as to the way in which farmers' rights are to be implemented at the national level and it may also delay the implementation process. In fact, the Governing Body of the FAO Treaty in its Resolution 2/2007 acknowledges that: "there is uncertainty in many countries as to how Farmers' Rights can be implemented and that the challenges related to the realization of Farmers' Rights are likely to vary from country to country".[21]

Similar approach is reflected in the provision dealing with farmers' privileges also. Article 9.3 does not grant farmers the 'right to save, use, exchange and sell farm-saved seed/propagating material' positively. Instead the provision adopts a different approach where in it prevents the interpretation of the FAO Treaty in such a way to limit these rights. Further, the scope of these rights will depend upon national legislation. Hence, in effect, farmer's privileges will be protected only if they are recognised and protected under concerned domestic legislation.

Hence, it could be stated that the FAO Treaty does not prescribe anything regarding farmers' rights. It only provides guidance in a limited way to the

[21] Food and Agricultural Organization, Report of the Second Session of the Governing Body of the International Treaty in Plant Genetic Resources for Food and Agriculture held in Rome, 29 October – 2 November 2007, Doc. No. IT/GB-2/07/Report.

member countries on the ways through which farmers' rights may be protected. From a developing country perspective, FAO Treaty cannot be considered as a complete success. This is particularly because, developing countries in their initial proposal raised several key concerns such as collective rights of farmers with respect to their innovations, knowledge and cultural diverse systems, prior informed consent, traditional rights of farmers to keep, use, exchange, share and market their seeds and any other plant reproductive material, including the right to re-use farm-saved seed and modification of intellectual property rights systems to ensure that they are in harmony with the concept of farmers' rights. While looking at Article 9, it is clear that these concerns of developing countries have been watered down.[22]

Another major issue that arises in this context is related to the key contents of farmers' rights (Traditional Knowledge, Benefits sharing and right to participation) illustrated under Article 9. The farmers' rights provision under the FAO Treaty (Article 9) is silent as to the nature and scope of protection to be granted to these key aspects of farmers' rights. While benefit sharing has been dealt with under Article 13, other two illustrated contents are not addressed under the FAO Treaty.[23] In addition to that, the issue of benefit sharing has been addressed through a separate protocol adopted under the Convention on Biological Diversity, 2002 (Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, 2010). However, the Nagoya Protocol is not yet come into force due to shortage of ratification.[24] The scenario becomes complex given the fact that the issue of traditional knowledge is still an unresolved issue at the international level. This issue is a subject matter of ongoing negotiations in various international forums, particularly the Convention on Biological Diversity and the World Intellectual

[22] Svanhild-Isabelle Batta Bjørnstad, Breakthrough for 'the South'? An Analysis of the Recognition of Farmers' Rights in the International Treaty on Plant Genetic Resources for Food and Agriculture 48 (Lysaker: The Fridtjof Nansen Institute, Report No.13/2004).

[23] In 2010, a legally binding document on benefit sharing has been adopted under

[24] While 50 ratifications are required for the Nagoya Protocol to come into force, only eight countries have ratified the Nagoya Protocol. India ratified the Nagoya Protocol on 9 October 2012. For the complete list of signatories and ratifications, see http://www.cbd.int/abs/nagoya-protocol/signatories/

Property Organization. Hence, the outcome of these ongoing efforts will be a crucial determining factor in the realisation of farmers' rights.

Legal Framework in India

The legal regime relating to farmers' rights in India has been evolved in response to the developments that have taken place at various multilateral fora. The concept of farmers' rights has become a part of Indian legal system through statutory frameworks related to plant variety protection (the Protection of Plant Varieties and Farmers' Rights Act, 2001) and biodiversity (the Biological Diversity Act, 2002). While the former addresses farmers' rights directly, later deals with some of the key aspects of farmers' rights. These two statutes have come into force as India's response to obligations under two international treaties – Agreement on Trade Related Intellectual Property Rights and Convention on Biological Diversity. In fact, India is one of the few countries having specific legal provisions addressing farmers' rights.

A. Protection of Plant Varieties and Farmers' Rights Act

The legal framework of farmers' rights in India attained significant momentum with the enactment of the Protection of Plant Varieties and Farmers' Rights Act (PVP Act) in 2001. The PVP Act expressly emphasises, in its preamble, the need to recognise and protect the rights of farmers in respect of their contribution made at any time in conserving, improving and making available plant genetic resources for the development of new plant varieties. The PVP Act provides a separate chapter to elaborate the content and meaning of farmers' rights. Since the PVP Act is the direct source of farmers' rights in India, the nature and scope of farmers' rights in India is essentially depended upon the articulation of the concept under the PVP Act.

The PVP Act was enacted primarily to comply with India's obligations arising from the Agreement on Trade Related Intellectual Property Rights (TRIPS). Article 27.3.b of the TRIPS casts an obligation upon the state parties to provide plant variety protection either through patents or through a *sui generis* system. India responded to this obligation by enacting the PVP Act. Due to

several reasons including strong pressure from civil society organisations, farmers' rights were included subsequently as a part of this legal framework which was framed originally for the protection of new plant varieties. The PVP Act, by including both farmers' rights and breeders' rights, tends to strike a balance between the interests of the modern commercial breeders and farmers.

Interests of and concerns for farmers are recognised in the PVP Act in different ways. Foremost among these are the provisions providing entitlements for farmers. These entitlements are mainly provided under Chapter VI of the PVP Act. In addition to that, the PVP Act tends to protect the interests of farmers by envisaging institutional structure for the promotion of welfare of farmers and by providing special exemptions from several procedural requirements.

Specific recognition of entitlements of farmers under the PVP Act could be explained as five major rights. First, the PVP Act provides farmers the right to register a new variety. This right also includes the right to register farmers' variety.[25] This right treats farmers at par with breeders so far as assertion of rights over new varieties is concerned. However, regarding the registration of farmers' variety, the Act provides significant exemptions by not requiring necessary documents which are otherwise to be submitted along with the application for registration of a variety.[26] Consequently, the application for registration of farmers' varieties does not require documents such as affidavit to the effect that the variety does not contain any gene or gene sequence involving terminator technology, complete passport data of the parental lines from which the variety has been derived and statement describing the characteristics of novelty, distinctiveness, uniformity and stability.[27] By virtue of this right, farmers are entitled to exercise and enjoy the benefits sought to be conferred by the

[25] Farmers' variety is defined in the PVP Act as a variety which - (i) has been traditionally cultivated and evolved by the farmers in their fields; or (ii) is a wild relative or land race of a variety about which the farmers possess the common knowledge. *See* Protection of Plant Varieties and Farmers' Rights Act, 2001, Section 2(l).

[26] Protection of Plant Varieties and Farmers' Rights Act, 2001, Sections 39 (1)(ii) and 18.

[27] *Id*., Section 18.

registration of a variety, that is, the exclusive right to produce, sell, market, distribute, import or export the variety.[28]

Second entitlement is the right to 'recognition and reward'. A farmer who is engaged in the conservation of genetic resources and its improvement through selection and preservation is entitled to recognition and reward.[29] Right to recognition and reward is subject to the condition that the genetic material so preserved and improved is used as donors of genes in varieties registrable under the PVP Act. The right to recognition and reward as enshrined under the PVP Act recognises the key role played or continues to play by farmers in the field of conservation and improvement of crop genetic resources and envisages reward for such farmers if such conserved and protected genes are utilised for making a new variety registrable under the PVP Act.

The idea of reward for farmers' contributions to the development of a new variety could be seen as a part of a general design of benefit sharing under the PVP Act. The PVP Act envisages the right to benefit sharing to all persons who contributed to the development of a new variety.[30] The sharing of benefits is designed to be in monetary form. The amount to be paid in the course of benefit sharing is to be determined by considering the extent and nature of the use of genetic material of the claimant in the development of a new variety and the commercial utility and market demand for a new variety.[31]

Third is the right to claim compensation. The PVP Act recognises the right to claim compensation to village or local communities for their contribution to the evolution of a variety registered under the Act.[32] An important feature of this right is that it is a group right or a community right. Consequently, the principle of *locus standi* is diluted in putting claim for compensation. This means the right holding village or local community need not necessarily lodge claim for compensation. The PVP Act permits any person, group of persons or any

[28] *Id*., Section 28.(1)
[29] *Id*., Section 39.(1) (iii.)
[30] *Id*., Section 26.
[31] *Id*., Section 26.(5)
[32] *Id*., Section 41.

governmental or non-governmental organisations to file the claim on behalf of the right holding community. This is particularly relevant in the case of farmers given the probable incapacity of farmers in various matters related to lodging claim for compensation before the appropriate authority such as satisfying the technical requirements and follow up of registration of new varieties.

The right to claim compensation is available to farmers in another situation also, that is, if they purchase a registered variety. In case a registered variety has been sold to farmers, the breeder of such variety has a duty to disclose the expected performance of the variety under given conditions. If the variety fails to perform as per the disclosure, concerned farmers can claim compensation from the breeder.[33]

Fourth is the protection of traditional practices of farmers. It is already mentioned that farmers across the world have been traditionally following the practice of sharing of knowledge and resources. In the context of genetic resources, it means mainly the practice of using, reusing, saving and exchanging the seeds. With the development of modern agricultural biotechnology and the consequent development of commercial seed industries, legal framework has been developed or promoted to protect the interests of commercial breeders. This is largely happening by recognising private property rights over commercial seed varieties through patents or plant breeders' rights. The inevitable consequence of these developments is the legal restriction or prohibition of traditional practices of farmers *vis-à-vis* genetic materials. This situation makes the protection of farmers' practices as one of the major contents of the legal concept of farmers' rights.

The PVP Act tends to recognise and protect farmers' practices. It is provided in the Act that farmers have the right to 'save, use, sow, resow, exchange, share or sell' farm produce including seed of a protected variety in the same manner as they were entitled prior to the PVP Act.[34] However, farmers are

[33] *Id*., Section 39.(2)
[34] *Id*., Section 39.(1)iv.

not entitled to sell the seed of a variety protected under the Act. This means, out of the bundle of rights provided to protect farmers' practices; the right to sell cannot be invoked in the case of seeds of a variety protected under the Act.

Fifth is the protection of innocent infringement. By virtue of this protection, farmers shall not be sued for infringement of rights granted under the PVP Act provided the infringement was innocent, that is, a farmer who alleged to have infringed the rights was unaware of such rights.[35] This means an action by a farmer which is otherwise actionable under the PVP Act is not actionable if such infringement was innocent. The legal consequence of such protection is that a right holder under the PVP Act cannot claim damages or share of profits from farmers for innocent infringement of his rights.

Besides the above mentioned entitlements, there are mainly two other ways through which farmers' interests are recognised and protected under the PVP Act. First, special considerations and privileges are provided to farmers by way of exemptions such as exemption from documents to be submitted along with the application for registration of a variety and exemption from fees to be paid in any proceedings before the authority, registrar or the tribunal or the High Court under the Act.[36] The special consideration could also be seen in the dilution of the principle of *locus standi* by permitting any person or organisation to file claim for compensation on behalf of farmers or local community.[37]

The second way of ensuring the protection of interests of farmers is through institutional arrangements provided under the PVP Act – Protection of Plant Varieties and Farmers' Rights Authority (hereafter 'the Authority') and the Gene Fund.[38] It is explicitly mentioned in the Act that the general function of the Authority includes the protection of the rights of farmers and to ensure that the seeds of varieties registered under the Act are available at reasonable price and reasonable quantity.[39] Gene fund is a financial mechanism envisaged under the

[35] *Id*., Section 46.
[36] *Id*., Sections 44 & 18.(1)
[37] *Id*., Section 41.(1)
[38] *Id*., Sections 3 and 45.
[39] *Id*., Sections 8 and 47.

Act. This is the mechanism for implementing major entitlements such as compensation and benefit sharing. Hence, it could be said that the Authority and the Gene Fund play crucial role in the realisation of farmers' rights as envisaged under the PVP Act.

B. Biological Diversity Act

The Biological Diversity Act, 2002 (hereafter 'Biodiversity Act') is another important statute significant to farmers' rights in India. The Biodiversity Act was enacted with the purpose of complying with the Convention on Biological Diversity, 1992. The Biodiversity Act does not address farmers' rights explicitly. Nevertheless, two important aspects of farmers' rights are dealt with under the Biodiversity Act. They are access to biological resources and fair and equitable sharing of benefits arising out of the use of biological resources.

While the PVP Act is silent on the issue of access, this is one of the important objectives of the Biodiversity Act. Therefore, the Biodiversity Act is the major statutory framework in India applicable to the issue of access to plant genetic resources. Access to biological resources or knowledge (this includes plant genetic resources and knowledge) is regulated under the Biodiversity Act through a license mechanism. This means, prior approval from the National Biodiversity Authority is required to access biological resources and knowledge.[40] The requirement of prior approval is also applicable to the case of transfer of the results of any research relating to biological resources obtained from India.[41]

The application of the prior approval system is limited to foreign citizens, foreign corporations and Indian citizens who are non-resident.[42] Indian citizens and Indian companies are expressly excluded from this provision. The Biodiversity Act provides a lesser degree of regulation to Indian citizens and corporations registered in India by requiring prior intimation from the State

[40] Biological Diversity Act, 2002, Section 3.(1)
[41] *Id*., Section 4.
[42] *Id*., Section 3.(2)

Biodiversity Board. There is a significant difference between 'prior approval' and 'prior intimation'. Foreign citizens and companies have to wait until they get permission from the National Biodiversity Authority. At the same time their Indian counterparts have to just intimate and do not have to wait for the permission.

This differential treatment would likely to have implications on farmers' rights. Regulation at the point of access could be considered as an effective measure through which the scope and extent of benefit sharing can be determined. Moreover, this is the stage where key norms of prior informed consent and mutually agreed norms can be effectuated fruitfully. This is apparent in the Biodiversity Act where it gives power to the National Biodiversity Authority to put terms and conditions in the prior approval including terms and conditions regarding benefit sharing.[43] While this differential treatment can be justified on the ground that the most serious breaches will occur when biological resources or traditional knowledge are transferred to foreign countries without regulation, this does not seem to make much sense so far as the rights of the traditional farmers and local communities are concerned.[44]

Equitable sharing of benefit is another important area where the Biodiversity Act is linked to farmers' rights. The Biodiversity Act makes it a mandatory duty of the National Biodiversity Authority to ensure that the terms and conditions subject to which approval is granted secure equitable sharing of benefits. The Biodiversity Act also provides that the benefit sharing arrangement shall be in accordance with mutually agreed terms and conditions between the person applying for approval, local bodies concerned and the benefit claimers.[45]

The Biodiversity Act gives an illustrated list of benefits that could be shared. This includes joint ownership of intellectual property rights, transfer of technology, establishment of research and development units in the area of

[43] *Id*., Section 19.(3)

[44] Rajesh Sagar, "Intellectual Property, Benefit-Sharing and Traditional Knowledge – How Effective is the Indian Biological Diversity Act, 2002?", 8(3) *Journal of World Intellectual Property* 383- 400, 387 (2005).

[45] Biological Diversity Act, 2002, Section 21.(1)

benefit claimers and monetary compensation.[46] As a general strategy, the Biodiversity Act provides that the compensation amount is to be deposited in the National Biodiversity Fund. It is further envisaged that the amount may be paid to claimers directly if it is possible to identify precisely the claimers.[47] However, this is subject to the discretion of the National Biodiversity Authority.

The idea of equitable sharing of benefits is further facilitated under the Biodiversity Act by making it mandatory for any person intending to apply for intellectual property rights, in or outside India, for any inventions based on biological resources obtained from India to get prior approval from the National Biodiversity Authority.[48] One of the purposes of this provision is to ensure equitable benefit sharing by empowering the National Biodiversity Authority to put conditions in this regard on approval.[49] This provision does not distinguish between foreign citizens and corporations and their Indian counterparts. However, this provision is not applicable to the registration of plant varieties under the PVP Act.

Implementation Issues: An Analysis

The PVP Act has received mixed comments and responses in the context of farmers' rights. While some hails it as a landmark being the first of its kind in the world, some others criticise it as incapable of producing any significant outcome for farmers.[50]

The appreciation of the PVP Act, mainly, is based on the fact that farmers' rights have been incorporated as a separate chapter recognising some of the core rights of farmers. Whereas the critique is mainly based on the fact that the PVP Act treats farmers at par with modern commercial breeders. This approach does not take into consideration the essential difference in working, preferences and

---

[46] *Id*., Section 21.(2)
[47] *Id*., Section 21.(3)
[48] *Id*., Section 6.(1)
[49] *Id*., Section 6.(2)
[50] N.S. Gopalakrishnan, "Protection of Farmers Right in India: Need for Legislative Changes", *Cochin University Law Review* 105-116 (2001).

concerns between modern commercial breeding and the traditional farming system. These two systems rely on and promote different knowledge systems and identify innovations differently and reward inventors in different ways.[51] This could be explained with two points.

First, the modern commercial breeding industry seeks rewards mainly in the form of financial benefits, whereas the established farming practices do not concentrate exclusively on financial incentives. Second, knowledge produced through farming practices cannot easily be attributed to a single farmer or a group of farmers. To put it another way, farmers' knowledge is often less individualistic than scientific knowledge produced in the laboratory.

The PVP Act does not consider this essential difference. The procedure prescribed under the Act for registration of farmers' variety could be taken as a best example to establish this gap. Even though the PVP Act does not require farmers to comply with all conditions prescribed under the Act, farmers need to produce a declaration as to the lawful procurement of the genetic material or parental material to register a farmers' variety. It has been argued that this requirement does seem to be unrealistic given the farming practices followed traditionally in this country.[52]

Further, the equal treatment of farmers and commercial breeders under the PVP Act with regard to the registration of new varieties would do little good to farmers. Because, various conditions required to be followed in the registration of a new variety requires technical expertise. Given the social and economical conditions of majority of farmers in India, this provision would have little effect when it comes to implementation.

The socio-economic condition of farmers will also likely to affect the benefit sharing mechanism envisaged under the PVP Act. The PVP Act requires farmers to be vigilant and make application before the authority which is situated most likely far away from their places. To counter this implication, the PVP Act

---

[51] Philippe Cullet, "Revision of the TRIPS Agreement Concerning the Protection of Plant Varieties". 2 (4) *Journal of World Intellectual Property* 617-656 (1999).

[52] *See* Gopalakrishnan, note 50 above.

presupposes that non-governmental organisations would take care of this matter. However, this does not seem to be sufficient, especially given the fact that the socially and economically under privileged farmers will have to fight against big companies having huge financial and human resources.[53]

Regarding the procedural and administrative aspects, there could be three major critique of the PVP Act. First, the PVP Act envisages that the revenue generated from the use of farmers' variety is to be maintained by the Gene Fund and part of this money will be used for the administrative expenses of the Gene Fund. Being this a responsibility of the government, it could be argued that the whole amount should be used for the benefit of farmers. Second, the PVP Act provides for compensation to farmers from commercial breeders if the seeds purchased by farmers failed to yield as declared by the breeder. Regarding the quantum of compensation, the PVP Act gives complete discretion to the Authority. In this scenario, it could be suggested that there should be some guidelines as to the quantum of compensation such as 'it should be at least twice the projected harvest value of the crop'.[54] Third, the PVP Act provides protection to farmers from innocent infringement of breeders' rights. Here the critical point is that the burden of proof lies on farmers. It is for the farmers to prove that the infringement was 'innocent'. This could be considered as a deviation from the general principle that the duty to prove lies on the person who alleges the violation of rights. Moreover, the PVP Act does not provide any particular reason for this deviation.

Another major critique of farmers' rights as provided under the PVP Act is related to the classic property rights of farmers. Section 39 of the Act provides that farmers are not allowed to indulge in commercial exchange of seeds of a variety protected under the Act. As per the classical property concept, a farmer has absolute control over the seeds purchased by him. Therefore, the right to exchange such seeds, whether in a commercial or non-commercial manner, could

---

[53] *Id*., at p. 115.

[54] Suman Sahai, "Plant Variety Protection and Farmers' Rights Law", 36(35) *Economic and Political Weekly* 3338-3342 (2001).

be considered as inevitably emanating from the classic property right concept. This right has been curtailed or restricted by the PVP Act. Moreover, it is a fact that majority of seed requirement in India is met by farmer-to-farmer exchange.[55] It could be, therefore, argued that the PVP Act does not provide sufficient reason for restricting this classic property right and its implications upon agricultural economy do not seem to have considered adequately.

Broadly, the major reason for these seemingly unrealistic normative and procedural manifestations could be attributed to the fact that the PVP Act was originally designed for the registration of new variety bred by modern corporate breeders. Farmers' rights were included subsequently at the instance of the Joint Parliamentary Committee without changing the rest of the provisions of the framework.[56] Therefore, inconsistencies and contradictions are very likely both at the conceptual and procedural level.

Further, the presence of the Biodiversity Act makes the legal and institutional framework addressing farmers' rights in India complex. The complexity is particularly apparent in the case of access and benefit sharing. A brief comparative analysis of two statutes could reveal that there is overlapping and differences between these two statutes. This might lead to obscurity at the level of implementation and realisation of farmers' rights also. Most importantly, there are three issues relevant to farmers' rights in this regard.

First, it is most likely that access to plant genetic resources will be regulated under the Biodiversity Act in accordance with mutually agreed terms with the participation of all stakeholders.[57] This reveals an unclear scenario where a person or corporation intends to develop a new plant variety by using a plant genetic resource(s) in India should seek prior permission from the National Biodiversity Authority in consultation with farmers and local communities and the consequent new plant variety will be registered under the PVP Act. Since, the

---

[55] Niranjan Rao, "Indian Sees System and Plant Variety Protection", 39(8) *Economic and Political Weekly* 845-852 (2004).

[56] Biswajit Dhar and Sachin Chaturvedi, "Introducing Plant Breeders' Rights In India: A Critical Evaluation of the Proposed Legislation", 1(2) *Journal of World Intellectual Property* 245 – 262 (2005).

[57] It is to be noted that this provision shares the norms provided under the FAO Treaty which envisages right to participation as an important content of farmers' rights.

PVP Act also contains norms regarding benefit sharing, it is most likely that farmers have to apply afresh before the Protection of Plant Varieties and Farmers' Rights Authority for benefit sharing. Here the critical question is the relevance and legal validity of terms and conditions entered into as part of approval by the National Biodiversity Authority regarding benefit sharing when a farmer or a farming community approach the Protection of Plant Variety and Farmers' Rights Authority for benefit sharing. Another problem arise in this context is the presence of more than one forum to address single issue.

Second issue is related to the difference in the scope of benefits. It is already noted that the PVP Act envisages only monetary benefits. Whereas the Biodiversity Act enlists a number of benefits other than monetary compensation. This raises a number of questions such as whether farmers can approach two different statutory authorities to claim benefits related to a single issue and whether the registered owner of the plant variety under the PVP Act can be held liable to share benefits under the Biodiversity Act on the basis of the instrument of prior approval?

Third issue is related to the difference in the ways in which monetary benefit is to be dispensed. The PVP Act does not provide any direct rights in this regard by providing that monetary compensation is to be deposited in the Gene Fund. At the same time, the Biodiversity Act, to some extent, recognises the right of the claimers to receive monetary compensation directly. Here again the question comes whether farmers can choose the forum to claim monetary compensation? Even if this is possible at a theoretical level, it may be very difficult to happen in practice given the socio-economic condition of most of the farmers in India.

A probable solution to these overlapping and conflicting regimes is an effective co-ordination between two statutory frameworks. This could be facilitated by a new regulation or guideline on access and benefit sharing by the central government by incorporating all relevant norms such as prior informed consent, mutually agreed terms and an expanded list of benefits. The impediment of socio-economic conditions of farmers and local communities could be

addressed by envisaging a pro-active role for statutory bodies to ensure that relevant norms are followed in meaning and spirit. In fact the Biodiversity Act already follows this approach by entrusting the duty on the Biodiversity Authority to ensure mutually agreed terms between the user, local communities and claimers.

Conclusion

Legal regime in India relating to farmers' rights consists of two major statutes – the Protection of Plant Varieties and Farmers' Rights Act, 2001 and the Biological Diversity Act, 2002. The Protection of Plant Varieties and Farmers' Rights Act, 2001 addresses farmers' rights directly. The rights of farmers provided under this Act are registration of farmers' variety, right to claim compensation for default seeds purchased from breeders, benefit sharing and recognition of traditional rights of farmers. The Biological Diversity Act, 2002 is linked to farmers' rights as it regulates access and benefit sharing. This Act provides norms of prior informed consent and mutually agreed terms for accessing biological resources in India. These norms are crucial for farmers' rights as it facilitates fair and equitable sharing of benefits arising from the use of plant genetic resources.

The existence of more than one statutory framework makes farmers' rights in India a subject of 'regime complex'. There are several overlapping areas between the existing statutory regimes. For instance, both the Protection of Plant Varieties and Farmers' Rights Act and the Biological Diversity Act deal with benefit sharing. However, the scope of benefit sharing is significantly different under these two statutes. While the Plant Variety Protection Act talks only about monetary compensation, the Biological Diversity Act provides a number of benefits other than monetary compensation.

A probable solution to these overlapping and conflicting regimes is an effective co-ordination between two statutory frameworks. This could be facilitated by a new regulation or guideline in this regard by the Central Government by incorporating all relevant norms. The poor socio-economic conditions of farmers and local communities could be addressed by envisaging a

pro-active role for statutory bodies to ensure that relevant norms are followed in meaning and spirit. In fact the Biodiversity Act already follows this approach by entrusting the duty on the Biodiversity Authority to ensure mutually agreed terms between the user, local communities and claimers.

Legal regime of farmers' rights is still evolving. Two major challenges in this regard are the proposed Seeds Bill, 2004 (latest amendment in February 2011) and the evolution of the legal framework for the protection of traditional knowledge. It is too early to analyse these ongoing developments. However, it is very important that the evolving statutory framework needs to be brought in harmony with the existing statutes. Otherwise the presence of multiple legal and institutional frameworks will weaken the implementation and thereby affecting the interests of farmers. Moreover, adequate care and attention must be taken to ensure that protection of the commercial rights of seed companies is not at the cost of food security of the country and the livelihood of farmers.

CAUSES OF RIVER POLLUTION IN INDIA AND ITS IMPACT SOCIO-ECONOMIC DEVELOPMENT

Anjum Parvez*

Abstract

River Pollution has become a menace these days. Even the most prestigious and sacred rivers of India have been facing the curse of pollution for a long time. This has not only adversely affecting the availability of fresh potable water in the country but also resulting in many contentious and dangerous diseases loss of tourism and harm to the property. All this has been happening due to the fault and negligence of Administrative Agencies and Common Citizens as they are using these precious sources of clean water in absurd and unreasonable manner. It is the need of time that these rivers should be bring back to their natural state by eradicating the pollution so that their water once again become wholesome and clean.. But again cleaning these rivers is not an easy task. Though the Programmes of river cleaning are going on these days by the Government of India but the cost of these Programmes is enormous. Were these rivers not polluted this money could be utilized for some welfare purpose.

India is a country, which has rich history, not only of social and economic prosperity, but also of Environmental Richness. But, we cannot claim today the same, because in modern time India is suffering from economic crises, and unplanned development is resulting in pollution of rivers, which are considered as "Godesses" in the Indian Culture. Ample money has been spend on cleaning theses rivers as they are the primary source of water supply to most of the States in India, still, the desirable results are yet to be achieved. In this manner, River Cleaning Programmes in India, like Ganga Action Plan and National River Conservation Plan, in a sense, are also contributing in the economic crises of the country, as lot of money of public has been spended on these Plans. But, This money can be saved if we work upon the causes of river pollution, which will serve two purposes, *First*, the eradication on social evils, and, *Second*, the rivers will be cleaned once again.

* Assistant Professor in Law, Law College Dehradun, Dehradun

According to the Preamble of the Constitution of India, 1950 "We the People of India, having solemnly resolved to constitute India into a Sovereign, Socialist, Secular, Democratic Republic and to secure to all its citizens: Justice-social, political and economic....". Keeping in view the Socio-Economic Development of India, clause (b) of Article 39 provides that "the ownership and control of the material resources of the community are so distributed as best to subserve the common good"[1]. Water is one the important material resources of the community, without which, neither the social development nor the economic development is possible. Today, water pollution has become a menace for India, which is, in fact, hampering the socio-economic development of India.

The fact that socio-economic development of the country is at the nucleus of the State's Policy is clear when India adopted the socialist model of development[2] after India got the independence from the Britishers. Though, there is no denial from this truth, that India has achieved tremendous growth in absolute terms in the recent past, however, the irony is that, this growth has not reached uniformly to all facets of the social life. River Pollution is one of the such fact, which, has been increasing for a long time after the independence, and it is one the biggest hurdle in the India's growth and economic progress. To eradicate the pollution of water of Rivers in India, the Government of India has taken many initiatives like Ganga Action Plan and National River Conservation Plan, but after spending millions of Dollars upon them the result is, still, zero.

If we work upon the under mentioned factors, of River Pollution in India, millions of dollars can be saved by us, which are going to be spend on the programmes of river cleaning in future, if state of affairs of Indian Rivers would not improve.

Natural factors may be, at some extent, responsible for causing the pollution of rivers, but in India, they are not responsible for tragic state of affairs of our rivers. We, the people of India and our Government is responsible for the misery of our rivers. In other words, human activities, which have tendency to cause

[1] . The Constitution of India, 1950.
[2] .Chronicle "Socio-Economic Development" IAS Edition Delhi, (2012), p.2.

defilation of water, of any water body including rivers, are liable for the pollution hazard of river water, which is resulting in economic loss also.[3]

River pollution, generally originates from discharge of domestic sewage,[4] industrial effluents, or agricultural run-off into the water of rivers. The assault on Indian rivers from growing population, agricultural modernization, unplanned urbanization and industrialization is enormous and growing day- by- day.[5]

Broadly, the human causes responsible for pollution of water of rivers are mentioned underneath. They are:

{i} Growing Population,

{ii} Poverty,

{iii} Urbanization,

{iv} Industrialization,

{v} Agricultural run-off and Improper Agricultural Practices, and

{vi} Religious and Social Practices.

{i} Growing Population:

The rapid pace of growth of population in India, is primarily responsible for the significant increase in the level of pollution of rivers. With the increasing rate of growth of population, the human activities around the bank of rivers also increased, which results in contamination of water. An intimate relationship is found between human number (population) and environment. The impact of population on environment, in general and on rivers, in particular, is harsh. We

[3] .According to the Millennium Assessment Report, 2005, there has been severe attacks carried on by the man, on those life supporting systems of nature, which are considered as basis to life on the planet. there is warning that if such harmful tendencies of mindless extraction and exploitation of nature continuous for next 50 years, there will serious threat on various forms of life. See "Kurushetra", Ministry of Rural Development, Government of India, New Delhi (December, 2005), p. 48.

[4] . P.W. Birnie & A.E. Boyle; "International Law And The Environment", 2nd Edition, Oxford University Press . New Delhi, (2004), p.306.

[5] . State of India's Environment – The Citizens Fifth Report, Part-I, published by 'Centre for Science and Environment', New Delhi, (1999), p. 58.

can understand the effect of population growth on rivers by a simple formula. Population affluence, i.e. material aspects of per capita consumption of goods and resources, and technology of production. Using appropriate indices, these factors can be incorporated into an 'Environmental Impact Equation' as under.[6]

Impact = Population x Affluence x Technology

or I = P.A.T.

The impact of growing human population on the river waters can be find out by above-mentioned formula.

Population growth is directly related with more resource consumption. In order to meet the increasing demands and expectations of the growing population, enormous pressure creates on earth's finite natural resources including availability of fresh potable water. Rivers, as the finite resource of fresh water,[7] have been bearing the burden of demand of water for huge increasing population, not only by providing clean and fresh water for fulfillment drinking and other needs of the man, but also by way of receiving back the filth of the human beings in most parts of the world.

As far as India is concerned, on 11th May, 2000, India crossed the One billion (100 Crore) mark, that represents the 16 percent of the total World's Population, while the total surface area of the Globe occupied by India is just 2.4 percent. If current trend continues, India may overtake China in 2045, to become the most populous country of the world. It is to be noted that quantity of water in the rivers have not increased with the increase of population, but they are exploited to fulfil the requirements of water for the growing population.

The gravity of problem can be revealed by this alarming fact that, while global population has increased three-fold in the twentieth Century, from 2 billion to 6 billion, the population of our country increased about five-fold from

[6] . A. Ehrlich and P. Ehrlich, "The Population Explosion", Simor & Schuster, New York (1990), p.58.
[7] . . Kailash Thakur, "Environmental Protection- Law And Policy In India", Deep & Deep, New Delhi (1999), p.19.

238 million (23 Crore) to 1 billion, in the same span of time.[8] The consequent result is depletion and defilation of resources including depletion and defilation of water of rivers. Besides this, the result of growing population is generation of huge wastes including waste water, which is to be disposed-off into the environment, in general and particularly into the rivers.[9]

India's current annual increase in population, which is about 15.5 million per annum, is large enough to neutralize the efforts to conserve the resources, endowment and environment,[10] and this fact is well reflected in the reports about the state of water quality of rivers. For example, about 86 percent of diseases in India are directly or indirectly related to poor quality of drinking water, while another devastating fact is that about 70 percent of India's water is polluted.[11] A river in the State of Madhya Pradesh, is known as 'Khooni Nadi', as excessive iron element discharged into the river water by the riparian populace, have turned the water red.[12] A recent World Water Development Report of the United Nations Organization (U.N.O.) has categorized India among the countries with poor water quality. India ranks a shocking low at 120th place out of 122 countries.

A Report reveals the fact that Development of India would be hamper at every stage due to growing population and the developmental goals, which are supposed to be achieved by the country in future, have to face the adverse impact, due to growing population. Not only the unemployment will go up tremendously, but nation also have to face the scarcity of water as well as deficiency of food products within twenty-five years from now, i.e. from the year of 2025.[13]

---

[8] ."National Population Policy-2000", Courtesy: Department Of Family Welfare, Ministry Of Family Welfare, Government Of India, New Delhi. See Employment News, New Delhi (23rd – 29th March, 2002), p. 1.

[9] . . Kailash Thakur, "Environmental Protection- Law And Policy In India", Deep & Deep, New Delhi (1999), p.26.

[10] . ."National Population Policy-2000", Courtesy: Department Of Family Welfare, Ministry Of Family Welfare, Government Of India, New Delhi. See Employment News, New Delhi (23rd – 29th March, 2002), p. 1.

[11] . "A Report by an N.G.O. [Consumer Unity And Trust Society (C.U.T.S.)] -2005", Hindustan Times, New Delhi (31st August, 2005),p.12.

[12] . Id.

[13] .Dainik Bhaskar, Ajmer (11th July, 2005), p.5.

Surging population would require space for living that will increase the rate of deforestation. Deforestation will cause the shortage in rainfall, which will be adversely affect the volume of water of rivers, because rain water is an important source of augmentation of volume of water in the rivers. Less water in rivers means more chances of pollution.

The exponential type of population increase necessarily means more houses, more demand of food grains, clothing, increased production of vehicles, need of more water for various purposes, health care and other basic amenities.[14] The overall impact of population increase is manifest in the form of water, air and land pollution…[15]

It is submitted that most of the Indian Rivers are extremely polluted due to the discharge of municipal sewage, which is the result of increasing human habitat. The effects resulted from the population growth on water and other commodities of daily use are mentioned in Table-1.

The problem has global dimension. The human population of the world stands, at present over 6.5 billion, it is further expected to reach 9.1 billion by 2050.[16] This will inevitably put extra stress on the natural resources of the earth, which are simultaneously disappearing.[17] Not only the Indian Rivers but the Rivers of the whole world have been facing the mayhem of growth of population because they are exploited beyond their capacity and also polluted by the populace, which is detrimental for them.

Rivers are not only affected, directly in adverse manner with the growth of population, but growing population will make it very difficult for the Government also, to protect the rivers from the misery of pollution. Under

[14] . Rosencranz, Diwan and Noble, "Environmental Law and Policy in India-Cases, Materials and Statutes" Tripathi Publication, New Delhi (1992), p.20.
[15] . Id.
[16] . Report of United Nations Department of Economic and Social Affairs, "Population Challenges And Developmental Goals", Population Division (2005), at http:/www.un.org/esa/population/publications/pop-challenges/Population-Challenges.pdf
[17] .South Asia Human Rights Documentation Centre, "Introducing Human Rights: An Overview Including Issues Of Gender Justice, Environmental And Consumer Laws", Oxford University Press, New Delhi (2006), p.203

Article 39(b) of the Constitution of India, it is the moral obligation of the Government to distribute the material resources of the community as

TABLE-I[18]

The Impact of growing population on the resources in India

S.NO	Item	2001	2011	2021	2031	2041	2051
1.	Projected Population (In Million)	1027.02	1178.4	1287.88	1394.66	1468.4	1516.86
2.	Number of New House Holds to be created	24230000	66870000	53390000	54740000	75690000	90356279.5
3.	Demand of Land for Residential Use (In Hectare)	48460000	7374000	10678000	10948000	15138000	18071256
4.	Net Land for Agriculture (In Hectare)	117712000	122558000	133236000	143914000	154862000	170000000
5.	Drinking Water Requirement (million litter/day)	138647.7	159084	173863.8	188279.1	198234	204776.1
6.	Average Food Requirement per capital per day (million tonus)	0.564861	0.64812	0.708334	0.767063	0.80762	0.834273
7.	Number of New Job Seekers (in million)	712.078	730.608	811.3644	892.5824	954.46	1001.1276
8.	Food Requirement (Million Tonus per year)	206.174265	236.5638	258.54191	279.977915	394.7813	304.509645
9.	Food Production (Million Tonus per year)	211.17	243.085	262.36	273.0351	284.09451	261.6426
10.	Gain/Deficit Food Grains (Million Tonus)	4.995735	6.5212	3.81809	(-) 6.942895	(-) 10.6867	(-)13.16704

[18] .See Employment News, New Delhi, (1st-7th November, 2003), p.1.

best to sub-serve the common good. Similarly, under Article 47, it is the duty of the Government to raise the standard of living of common people. As we know that water of rivers is not unlimited, and if an attempt made by the Government Authorities to distribute equally the water of rivers to every individual, there will be fear of deficiency of water. On the other hand, if Government prefers to save the rivers from scarcity of water and declare them a prohibited place, in order to prevention and control of pollution, it will be blamed for lack of constitutional commitment to serve the human being.

Thus, Growing population is not only the major cause of river pollution, but also, it is mother of other related problems like poverty, urbanization, unemployment and degradation of environment, which in turn, also contributing in the pollution load of rivers.

{ii} Poverty:

'Lasting peace cannot be achieved unless large population groups find ways in which to break out of poverty'.[19] The observation of 'Nobel Committee' is very significant for the solution of almost all the problems of the world, besides conservation of rivers. Poverty contributes equally to both population growth and environmental pollution, particularly to the river pollution.

'Poverty' can be define as the 'inability of an individual or household to attain a minimal standard of living'[20] Unhygienic and insanitary conditions are another bye-product of poverty affecting human health. Each year, between 3 and 4 million people, mostly poor and deprived, perish due to lack of access to water and sanitation.[21] Poverty reduces people's capacity to use resources in a sustainable manner, it intensifies pressure on the environment.[22]

"Sadly, the impoverishment of the poor is accompanied by simultaneous and systematic erosion of the basic means of their subsistence, the environment,

[19] . Observation of "Nobel Committee" while awarding the 'Nobel Peace Prize-2006' to the Mohammed Yunus of Bangladesh. Hindustan Times, New Delhi, (14th October, 2006), p.1.
[20] . "Our Planet, Our Health", Report Of The World Commission On Health And Environment", (1992), p.38.
[21] . "Human Rights And Access To Water And Sanitation-Acting On The Report Of The O.H.C.H.R. Noted from www.cohre.org/water
[22] . S.C. Shastri, "Environment Law In India", 2nd Ed., Eastern Book Company, Lucknow (2005), p.14.

with its life supporting natural resources – land, water and forest."[23] Poor people, are helpless, and they pollute the rivers because they use to do all their daily activities near the bank of rivers. The deprived people lack the sufficient means of livelihood, proper housing, access to sanitation facilities, health care, proper nutrition etc. Hence, they induced to have the recourse to the natural and available resources, for their survival. They use the water of rivers for their daily use like drinking, bathing and washing, but use of water in unhygienic and unsustainable manner cause damage to the river.

Today, there are more than one billion people world - wide living on less than one U.S. $ per day, more than 2.7 billion that live on less than two U.S. $ a day.[24] There are as many as four billion people living on less than $ 15,00 a year, the so called 'bottom of pyramid'.[25] They have been struggling with the menace of hunger and most of them are unattentive towards environmental problems.

These poor people, however, it is submitted may not causing damage to the environment, 'intentionally', particularly to the rivers, but they are helpless to take the resort of natural products available in the state of nature for their very survival. In India, the challenge of poverty is, definitely, very tough. The challenge to arrange jobs for the poor is much difficult even for the State, in the background of rapid pace of population growth. Nearly 60 percent of the increase in population will be concentrated in just five States namely Uttar Pradesh, Bihar, Madhya Pradesh, Orissa and Rajasthan. Except Rajasthan, the remaining four States have rich river network. Bihar and Uttar Pradesh-according an estimate-are home to 40 percent of the 170 districts identified by the Government as backward districts.[26]

---

[23] . "Our Common Future", Report of the World Commission on Environment and Development (1987), p.14.

[24] . South Asia Human Rights Documentation Centre, "Introducing Human Rights: An Overview Including Issues Of Gender Justice, Environmental And Consumer Laws", Oxford University Press, New Delhi (2006), p.202. See also United Nations Development Programme, "Fast Facts: The Faces Of Poverty", Millennium Project at http://www.unmillenium project.org

[25] .Lucia Wegner, "Lend Some Thought", Hindustan Times, New Delhi (24th October, 2006), p.8.

[26] . Hindustan Times, New Delhi, (24th August, 2006), p.8.

There are over 26 crore people living below poverty line (B.P.L.) in India and more than 19 crore of them are in rural areas. This information was given by the Union Government to the Lok Sabha on 24th August, 2005. While Uttar Pradesh top list of States having highest chunk of B.P.L. population estimated at 5.3 crore, it is followed by Bihar with 4.3 crore and Madhya Pradesh with about 3.00 crore.[27]

These five States are home to 45 percent of the total population of India. It is estimated around 45 percent of the poor and deprived people live in these States. Projection by a study reveals that in the next 20 years these States will account for more than half the population of the country, out of which 75 percent would be poor, if current trend continued.

Therefore, the rivers which flows from these States and have been bearing the burden of pollution, would have face the ill-consequences of poverty, by receiving the filth of the human beings. It is true that poor cause the contamination of water of rivers, and damage the environment. But the chunk of destruction by the poor, is too small as compared to the damage caused by the rich. Poor use the water resources for their daily work on the bank of rivers to meet their basic needs of survival under compulsion, when other resources are either not available to them or the available ones are beyond their economic or paying capacity.[28]

It is submitted that for eradication of pollution of rivers and,thus, on saving of expendiiture on river cleaning, participation of general public is necessary. But when the major, portion of the population of the country is poor, living without the security of livelihood it is unrealistic assumption that such people would join with the campaign of prevention and control of pollution of water of rivers. Thus, it is recommended that, pro-poor welfare schemes like National Rural Employment Guarantee Act, 2005 should be implemented in all the districts of India, so that poor could get the employment for at least 100 days a year.

[27] . "Yojna", Ministry of Information & Broadcasting, Government of India, New Delhi (October, 2005), p.74.
[28] . Kailash Thakur, "Environmental Protection- Law And Policy In India", Deep & Deep, New Delhi (1999), p.20.

Eradication of poverty from the Indian Society is intrinsically related with the mission of saving the rivers from the pollution.

{iii} Urbanization

In India there has been a major shift of population from rural areas to urban areas with a view to have better livelihood and better standards of living. As a result of this large human concentration there are changes that are likely to occur in the urban environment, within its physical and socio- economic aspects. Urbanization, for river means, more pollution load.

In India, in 1901 there were 1827 urban agglomerations with a population of 25.85 million, which was 10.84% of the then total population, whereas as per 1991 census there are 3768 urban agglomerations/towns covering a population of 217.8 million, which works out to about 25.72% of the country's population. The class-I (population of one hundred thousand and above) towns, account for 65.2% of the total urban population of the country in 1991. There are now 23 metropolitan cities with a population of one million or more each, as compared to 12 such cities in 1981. These 23 cities account for roughly one-third of country's urban population and one twelfth of country's total population. There are 5 mega cities with a population of more than 5 million each and almost one fourth of the population living in class-I towns in the country lives in these mega cities.

Most of the major metropolitan cities as well as other important cities are located at the banks of rivers. For example Delhi is situated at the bank of river Yamuna, Agra is also situated on the bank of Yamuna. Similarly, Kanpur, Allahabad, Varanasi, Patna and Calcutta situated on the bank of holy river Ganga, while Lucknow is on the bank of river Gomti. Besides these, there are many town and cities situated on the bank of rivers. As we know that in India, in most of the cities and towns, the city waste, including sewage and trade effluent go into the rivers, because they are treated by the municipal authorities as dumping yard for disposal of waste water.

According to the projections by the Census Office, amidst the fear of increase of river pollution, large chunks of the country are going to be urbanized over the

next two decades. This is a part of global trend where people moving from villages to town and cities. As economy keeps growing at a healthy clip and the services sector continuous to boom, it is natural that people are moving away from the traditional source of livelihood like agriculture. This has meant mass exodus from villages to cities.[29]

Urbanization rate in India is very fast. It has increased from 10.84% in 1901 to 28.5% in 2001. According to the Census figure of 2001, the number of class I cities and class II towns was around 900. One of the conspicuous features of urbanization in India is the skewed distribution of population with as much as 28.3% of the urban population in 35 metropolitan cities. Unregulated growth of urban areas, particularly over the last two decades, without infrastructural services for proper collection, transportation, treatment and disposal of domestic waste water led to increased pollution and health hazards. Fast urbanisation followed by increase in prosperity resulting in steep increase in waste generation.

On the other hand, with the environmental aspects, urbanization means more generation of sewage, domestic waste, waste water and accumulation of solid waste. Rapid and unplanned urbanization has been contributing to environmental pollution, in general and river pollution, in particular.[30] 'Environmental factors have given too little consideration on the thinking on urbanization in India. Yet, they are important and their importance will increase with increasing urbanization. The levels of water and air pollution are already high in many cities, and they could increase to intolerable level with further increase in their Populations.'[31] Rivers and streams that pass through cities and towns are turning into toxic streams….due to discharge of untreated sewage into them.[32] Now it is said about the existing town and cities, that the "planner of the cities and towns had not foreseen the future problems, which could arose later, while planning them. Many of the towns and cities that came up on the bank of a river did not

[29] . "Urban Legends-Shift In Population From Country To City", The Times Of India, New Delhi (9th August, 2006), p.16.
[30] . S.C. Shastri, "Environment Law In India", 2nd Ed., Eastern Book Company, Lucknow (2005), p.15.
[31] . Shri Nath, "Urbanization In India", Economic and Political Weekly, (22nd February 1986), p. 339.
[32] . State of India's Environment – The Citizens Fifth Report, Part-I, published by 'Centre for Science and Environment', New Delhi, (1999), p.207.

give a thought to the problem of urban sewage. Most of the sewage was conveniently allowed to flow into the rivers.[33] Sewage is defined as "the water borne waste derived from home (domestic waste) and animals or food processing plants, and includes human excreta, soaps, detergents, papers and clothes."[34] According to the Uttar Pradesh Water Supply and Sewerage Act, 1975, sewage "means night-soil and other contents of water-closets, latrines, privies, urinals, cesspools or drains, and polluted water from stress, bathrooms, stables and other like places, and includes trade effluent."[35]

Most of the world's sewage is still disposed of untreated. In developing countries, 90 percent or more is release, without treatment of any kind – usually to a water body, including rivers, lakes or an ocean.[36] Not only sewage is major source of nutrients in urban waters but is also poses a significant risk to health from such sewage-borne pathogens as cholera bacterium, hepatitis viruses, salmonellae, and shigellas.

In India, as per the latest estimate of Central Pollution Control Board,[37] about 29,000 million litre per day of wastewater generated from class-I cities and class-II towns out of which about 45% (about 13000 mld) is generated from 35 metro-cities alone. The collection system exists for only about 30% of the wastewater through sewer line and treatment capacity exists for about 7000 mld. Thus, there is a large gap between generation, collection and treatment of wastewater.

Given its sheer volume, sewage is a major threat to local urban water including rivers, and also it become one of the most vexing problem to the urban managers, whom charge with the duty of its safe disposal. A large part of un-collected, un-treated wastewater find its way to either nearby surface water body

[33] . Id., at p.59.
[34] . S.L. Agarwal, "Environmental Pollution And Law", Agro-Botanical Publishers, Bikaner (1995), p.126.
[35] . Uttar Pradesh Water Supply and Sewerage Act, 1975. Section 2(25).
[36] . "Lal's Commentry On Water And Air Pollution And Environment (Protection) Laws", Revised by M.C. Mehta, 4th Ed., Vol.-II, Delhi Law House, Delhi (2005), p.1367.
[37] . See www.cpcb.nic.in

or accumulated in the city itself forming cesspools. In almost all urban centres cesspool exist. These cesspools are good breeding ground for mosquitoes and also, if they exist near river bank, source of river water pollution. The waste water accumulated in these cesspools get percolated in the ground and pollute the groundwater. Also in many cities and towns conventional septic tanks and other low cost sanitation facilities exists. Due to non-existence of proper maintenance these septic tank become major source of river water as well as of groundwater pollution.

According to a Report of the Ministry of Housing and Urban Poverty Alleviation, the situation of urbanisation get aggravated, with India's economic boom in post-1990 era, which has registered the fastest growth of urban towns with an increase in the number of homeless and relatively poor people in the cities.[38] While acknowledging the increasing pollution load in the cities the report further says "the pressure on cities is increasing because of continuous migration of people into the cities in search of better life."

The challenge to make cities slums free, will remain a big question for city planners, as most of the people, who are poor, lives in slums or develop new slum cluster because they lack the resources of better living. The enormity of the situation can be gauged from the fact that about 23 percent of the urban population live in slums, with almost no facilities of sanitation including hygiene, drinking water, bathroom and toilets.[39] It is estimated that more than 42 million people live in the slums in India, but that number does not include tens of million of others without an address- including squatters, temporary workers and those in illegal or extremely poor settlements.

The people, who have no proper facilities in cities, resort to do all their daily activities like bathing, washing and defecation, on the bank of rivers, and pollute the rivers. In many urban areas, river water is only source of drinking water supply. Thus, a large population is at risk of exposed to water borne diseases of

[38] . Report of the Ministry of Housing and Urban Poverty Alleviation-2006, Hindustan Times, New Delhi (26th December, 2006), p.6.
[39] .Id.

infectious (bacterial, viral or animal infections) or chemical nature (due to fluoride or arsenic). Water born diseases are still a great concern in India.

Rapid population growth, urbanization and industrialization have lead to serious problem of waste management in cities and towns of India. The traditional role of Municipal Corporation is to keep the streets clean, collect garbage from public places and ensure its safe disposal. Most city corporations have the largest number of their employees engaged in these tasks. Yet, only about half to two-third of the waste generated is collected by the staff. With increasing facilities and income, the life-style of urban resident has also been changing. Urban India is, thus, becoming a 'throw-away society'. In larger cities, the composition of wastes is changing with rapid increase in paper, plastic, metal and hazardous materials. If any river passes through these cities, the waste go into the water of river along with run-off in the rainy seasons.

Municipal water treatment facilities in India, do not remove traces of heavy metals. Given the fact that heavily polluted rivers are the major source of drinking water for most of the towns and cities, it is believed that every consumer of water, has been over the years, exposed to quantities of pollution in the river water, which he consumed.[40] Contrary to the common belief, it has been estimated that community or domestic waste accounts for four times as much pollution as the effluents from the industry do, in the rivers.[41]

Discharge of sewage and other domestic waste in to the rivers is the central cause of river pollution in India. Besides this, uncontrolled dumping of wastes of villages, towns and cities into the rivers are additional factors to the pollution load of the rivers. The increased levels of consumption characteristics of the population of urban areas lead to the generation of copious quantities of wastes.[42]

---

[40] . State of India's Environment – The Citizens Fifth Report, Part-I, published by 'Centre for Science and Environment', New Delhi, (1999), p.59.

[41] . Kailash Thakur, "Environmental Protection- Law And Policy In India", Deep & Deep, New Delhi (1999), pp.27-28. See also S.N. Jain, "Water Pollution Act, 1974: The Basic Legal Issues" in Paras Diwan (Edited by), "National Seminar On Law Towards Environmental Protection", Chandigarh (10th-12th February, 1984).

[42] . "Lal's Commentry On Water And Air Pollution And Environment (Protection) Laws", Revised by M.C. Mehta, 4th Ed., Vol.-II, Delhi Law House, Delhi (2005), p.1367.

The domestic and municipal sources are responsible for 80 percent of total pollution in rivers.[43]

Thus, unplanned infrastructure of cities and towns, coupled with failure of municipal authorities, to prevent the inflow of sewage and other domestic waste into the rivers, is resulting in severe pollution of rivers.

[iv] Industrialization:

The most challenging environmental problems India is facing stem from the rapid growth of the polluting industries in the urban areas. For years, industrial development came without either planning or environmental controls. The industrial sector has mushroomed in urban agglomeration. Unplanned growth has caused an overall decline in environmental conditions.[44]

Major industrial sources of pollution in India include fertilizer plants, refineries, pulp and paper, leather tanneries, metal plating, chemical and pharmaceutical and dye intermediate industries. A 1994 survey of the quality at 138 sampling locations in 22 industrialized zones of India revealed that water of rivers in all 22 zones was not fit for drinking, due to high bacteriological and heavy metal contamination.[45]

It is a common practice that a large number of industries, which are located on the banks of rivers discharge their untreated industrial effluents into the river water. Industrial Effluents contain, *inter alia*, mercury, lead, cadmium and copper etc., which are harmful to the living organisms.

The problem of pollution of water of rivers, due to discharge of industrial waste has already attained a new height in the country. With the increase in numbers of industries in India, the discharge of industrial effluents also increased tremendously. The considerable degradation of raw water sources like rivers, due

[43] . Id. at, p.185.
[44] . Dr. D.N. Tewari, **"** Environment Protection : Key To Sustainable Development", noted from http://pib.nic.in/welcome.html
[45] . See Reports Of Central Pollution Control Board, (1994-1995) at http://www.cpcb.nic.in

to discharge of trade effluents from industries, project adverse effects on the quality of water and subsequently its utility at downstream.[46]

Industrial wastes or 'trade effluents'[47] as it is legally called includes any liquid, gaseous or solid substance, which is discharged from any premises used for carrying on any industry, operation or process or treatment and disposal system other than domestic sewage.

The largest volume of discharged wastes, is in the form of effluent, that is liquid waste water generated from the industries during or after the manufacturing process because every industry use water and discharge the same water after using it for manufacturing of products. The industrial effluents, which dispersed in the aquatic environment in different ways, generally contain various toxic pollutants, which are harmful and injurious to the human being, animals, plants and property. (SeeTable-2)

Most of the Indian cities have major industries in and around their periphery. There is heavy industrial effluents expelled out, from the various categories of industries such as jute mills, textile mills, tanneries, paper mills, large distilleries etc. having variable characteristics and it is discharged into the Hoogli Estuary in Calcutta-Asansol region.[48] The highly industrialized belt of Durgapur-Asansol in West Bengal having steel plants, coke-oven plants, distillery, pulp and paper mills, coal-based chemical industries, a fertilizer plant and several other industries have been discharging trade effluents into the water of Damodar river for a long time. River Damodar has become one of the most polluted river of the country, due to extreme discharge of pollutants into it, and its water is so polluted that it become unfit for the consumption by any creature, including human being.

[46] . "Lal's Commentry On Water And Air Pollution And Environment (Protection) Laws", Revised by M.C. Mehta, 4th Ed., Vol.-II, Delhi Law House, Delhi (2005), p.185.
[47] . Water (Prevention and Control of Pollution) Act, 1974, Section 2(b).
[48] . "Lal's Commentry On Water And Air Pollution And Environment (Protection) Laws", Revised by M.C. Mehta, 4th Ed., Vol.-II, Delhi Law House, Delhi (2005), p.1176.

Periyar, the largest river in State of Kerala, has number of factories on its lower bank. There are fertilizers, chemicals, metallurgical and rayon units. According to a study, it is

Table-2

Water pollution and Sources[49]

.No	Pollutant	Principle Source	Distribution in Environment
1.	Pathogenic Organisms	Domestic Waste (Human and Animal Excreta) Agricultural run-off	Fresh Water, marine Environment, soil and air
2.	Solid Wastes	Domestic, Municipal, Commercial, Industial and Agricultural wastes	Fresh water, marine Water, land and soil
3.	Degradable Organic matters	Sewage, garbage, Industrial wastes, Agricultural Wastes	Fresh water, marine Water, land and soil
4.	Oil	Shipping accident, Run-off from transport wastes-Boats and Ferries, Polluted Land drainage, Industrial (Refineries) wastes, off-shore oil production.	Fresh water, marine Water and land
5.	Organopesticides (Chlorinated hydrocarbons)	Application in Agriculture, Public Health, Industrial wastes (Pesticides, Wood and carpet manufacturing)	Fresh water, marine Water, land and air
6.	Poly Chlorinated biphenyls	Sewage, Industry (Electrical, Plastics, Lubricants) and uncontrolled disposal PCB containing products	Fresh water, air and food
7.	Detergents	Sewage, Industrial wastes, and Washing places.	Fresh water, marine water and land
8.	Dyestuffs	Industrial wastes	Fresh water, marine water and land
9.	Phenols	Industrial wastes	Fresh water, and land
10.	Inorganic Acids and Alkalis	Industrial wastes, burning of fossil fuels, medical and research laboratories, Mercury Industry (Pulp, Paper, Mining, Refining Process)	Fresh water, marine water, air, soil, and food.
11.	Lead	Anti-knock ingredients of motor-fuel, Lead smelting chemical industry, Lead paints and enamels, Agricultural pesticides.	Fresh water, marine water, air and food
12.	Cadmium	Industry (mining and metallurgy, chemical, food industry, leather industry)	Fresh water, air and soil.
13.	Arsenic	Industrial wastes, combustion of coal, food, agricultural use (fertilizers and	Fresh water, marine water, air and soil.

[49] .Source: Prof. R.A. Malviya, "Environmental Pollution And Its Control Under International Law", Chugh Publication, Allahabad (1987).

		insecticides)	
14.	Phosphates	Sewage, Agricultural run-off, Industrial effluents	Fresh water and Marine water.
15.	Nitrates and Nitrites	Sewage, fossil fuel burning, Industrial wastes and agricultural run-off	Food, Fresh water and marine environment
16.	Fluorides	Industrial Processes(Production of aluminum, steel, phosphate fertilizers, brick making Agricultural run-off)	Air, Fresh water, soil and food.
17.	Sulphides	Industrial effluents	Fresh water and food.
18.	Cyanides	Industrial effluents	Fresh water
19.	Chlorates	Industrial effluents	Fresh water
20.	Ionizing radiation (including radio nuclides)	Medical uses, weapon production and testing, Nuclear power production, uses of radioisotopes and radiation	Fresh water, marine water, air, land and soil.
21.	Heat	Fossil fuel and Nuclear Power station, Urban areas	Fresh water, marine water and air.

estimated that over 170 million litres of effluents are discharged into the river, containing suspended solids, metals, urea, ammonia, fluorides, chlorides and other toxic chemicals.[50]

The story of remaining rivers of India like the Ganges, the Yamuna , the Godavari and the Gomti is, more or less, same and all have been suffering due to inflow of industrial effluents and sewage for many years.

It is submitted that the Small Scale Industries (hereinafter referred as S.S.I.) forms an important sector in Indian economy in terms of contribution to production, GDP, exports and employment. The sector accounts for 40% of the industrial production, 35% of the total exports and employs about 167 lakhs persons in about 33.2 lakhs SSI units in the country. The SSI sector manufactures about 7500 types of products. This sector also supplies the lower income groups with inexpensive consumer goods and services as well as machines and the sophisticated requirements of technology based industries in India and abroad.[51]

[50] .Id., at p. 1180.
[51] . Annual Report Of Central Pollution Control Board, New Delhi, (2000-2001)

However, due to uncontrolled and haphazard growth, SSI sector is also a significant contributor to environmental pollution in general and river pollution in particular. Therefore, it is necessary to estimate the pollution load from SSI sector, to prioritize the pollution control strategies, to identify the low cost clean technologies and to bring out issues that need to be taken up for effective pollution control policy for SSI sector in India. The level of pollution caused by S.S.I. sector per unit of output is higher than their counterparts in developed countries. The reasons are

- Continued usage of outdated and inefficient technologies that gives large amount of wastes
- Large and unplanned industrial conglomeration
- Lack of resources for enforcement and implementation of pollution control performance
- Productivity and environmental performance given a back seat.
- However, SSI units have different reasons for non-implementation of env-standards.
- They operate in very small area (in 100 sq ft area)
- No space for setting up of pollution control systems
- No funds for setting up of pollution control systems
- No guidance available from pollution control Boards/Committees
- Cost effective technologies for pollution control are not available.

All the SSI units aggregate to a very large quantity of waste, and wastewater. The share of SSI wastewater generation is about 40% hence pollution control in SSIs is utmost required. As the SSIs play significant role in economic development, retardation in their growth is not desirable but continuation of environmental pollution is equally undesirable. Obviously, innovative measures to control pollution are required to balance the two apparently contradictory compulsions.

It is submitted that the volume of untreated municipal wastes fall into the rivers, is much greater than the industrial effluents. But the former is less harmful to the rivers in comparison to the industrial effluents, because sewage and domestic waste is biodegradable. On the other hand, industrial pollutants are highly toxic and non-degradable substances. But, in both the cases, river get polluted, and in order to clean the river, lot of money would have to be spend.

[v] Withdrawal of Water:

A Water Course require continuous flow of large volume of water, to be called as river, and it is necessary for the survival of the river that certain quantity of water must be maintained, for sustenance of flow of the river. When the minimum required quantity of water get further reduces in the river, it starts perishing. When a river get dried, its fishes and other creatures have died, which resulted in huge loss of economy, as fishes are used for food.

[vi] Agricultural Run-off and Improper Agricultural Practices:

Agricultural wastes include wastes arising from production and processing of food and other crops and from the raising and slaughter of livestock.[52] It include farm animals wastes, fertilizers and pesticides etc. farm animals waste consists of excreta, urine, slurry etc, which are organic in nature.

More than two billion tones of agricultural wastes produces each year include slaughter house refuses, useless residues from crop harvesting, vineyards, orchard prunings, and greenhouse wastes.[53] (See Table-3) These materials create problem when they allowed to enter into the water sources like rivers and lakes during the cleaning of the confinement areas or during the period of heavy down-pour when the run-off carries them into the adjacent rivers or into the other water

[52] ."Lal's Commentry On Water And Air Pollution And Environment (Protection) Laws", Revised by M.C. Mehta, 4th Ed., Vol.-II, Delhi Law House, Delhi (2005), p. 1537.

[53] . Id.

courses. Being organic in nature, they increase bio-chemical oxygen demand (B.O.D.) of the receiving water of the river.

Table-3

Solid Wastes from Agriculture

Source	**Waste**	**Composition**
Forms, ranches, Greenhouses	Crops Wastes	Cornstalks, pruning Sugarcane bagasse, drops and culls from fruit and vegetables washer waste, stubble and straw, hulls, fertilizer bags etc.
Animal Husbandry	Forest slash Animal manure Pouch manure Poultry manure Swine manure Animal carcasses	Trees, stumps, limbs, debris Ligning, organic, fibbers, nitrogen phosphors, potassium, proteins, fats. Carbohydrates Ammonia and nitrates proteins, etc, flesh, blood, fat, oil grease
Forms, ranches, Greenhouses	Pesticides, insecticides herbicides fungicides, Vermicides and microbiocides	Chlorinated organics, phosphorous, complex organic and inorganic salts.

India is the largest manufacturer of pesticides in South Asia. Industrialized agriculture, more popularly known as green revolution agriculture, has promoted an extraordinary use of dangerous chemicals in the form of pesticides, weedicides and fertilizers. The pesticides industry has grown rapidly and produces a range of products from D.D.T. (Dichloro diphenyl trichloroethane) and B.H.C. (Benzene Hexa Chloride) to carbamates, which are highly toxic in

nature. The annual production of D.D.T. is about 14,000 tonnes. The 28,000 tones of sludge obtained every year from D.D.T. plants in India, after treatment of the highly corrosive and toxic water, still contains nearly 14 tones of D.D.T. This sludge is usually dumped on low lying areas and the leachate pollutes both ground water and surface water bodies like rivers. Annual production of B.H.C is 41,000 tones and it is believed that some 1.5 tones of B.H.C. lost in treated effluent and another in sludge.[54]

Pesticides used in agriculture cover a wide range of organochlorine (D.D.T., B.H.C, Dieldrin , Aldrin) , polychlorinated biphenyls (P.C.Bs.) , synthetic auxins etc. Many of these compounds are not only on-biodegradable, but also, hardly soluble in water. Traces of fertilizers and pesticides are washed into the water bodies like rivers and lakes, located near the vicinity, at the on-set of the monsoon or whenever there would heavy down-pour.[55] Farms located near the banks of rivers cause heavy pollution to the water of rivers, because fertilizers and other toxic chemicals and utilized in the farming, go into the rivers along with run-off. As the point entry of such agricultural input is diffused throughout the river basin, they are termed as 'non-point' source of pollution.[56]

Improper Agricultural Practices:

Most of the Indian farmers are uneducated. They are unaware about the safe techniques of cultivation, which reduce the level of harmful effects of chemicals used in agriculture. Because of the lack of knowledge about the harmful effects of fertilizers, pesticides and other hazardous chemicals, Indian farmers use them frequently for higher yield, which reach to the river along with run-off and ultimately prove injurious to the water quality of rivers.

"An uneducated farmer tends not to go by the recommended dosage of pesticides, nor does he bother about protection of workers" says A.K. Dikshit,

[54] .Id., at p. 1409.
[55] . State of India's Environment – The Citizens Fifth Report, Part-I, published by 'Centre for Science and Environment', New Delhi, (1999), p. 63.
[56] .Id.

senior scientist of Indian Agricultural Research Institute (I.A.R.I.), New Delhi. "The recommendations are made on the basis of carefuol scientific research. But in the Indian context, the farmer generally uses his own interpretations, often uses excess of fertilizers and pesticides." adds Dikshit.[57] When pesticides and fertilizers are used more than the recommended doses, they remain in the soil or accumulated on the stones, and get dissolve with the rain water in the monsoon season and washed into the rivers or lakes.

After recede at the end of monsoon, river bed coated with fresh deposits of silt provide an ideal farming area. Yet this time tested ancient practice of farming, has now become dangerous as pesticides and fertilizers used on these tracts of land are found to be washed into the rivers during the monsoon. As rivers are the principal source of drinking water for the cities and towns supplied by the water agencies, their pollution means hurdles in the way of municipal agencies to supply the water for domestic purpose because it is already contaminated with residues of pesticides and fertilizers.

Pesticides can have the wide-ranging impact on the ecology of rivers. However,…. despite the gravity of the problem of pollution caused by the pesticides, lack of proper policy and even bigger, lack of political will of implementation of that policy, would hamper stringent control on the future use of pesticides in the farming.[58]

A study conducted in Corbett National Park, in Nainital district of Uttarakhand, reveals that the higher reaches of Ramganga river, which flows through the vast area of the park, are intensely used for cultivations and farmers have been using the pesticides in large scale for many years. The contaminants in the form of residue of pesticides and fertilizers, reach into the river water along with run-off, during the monsoon seasons. These contaminants, not only polluting the water of river, but also intoxicating the food web system, found in the river, which is a plausible threat to the rare species of the bird, which come there from distant regions of the world for progeny. Intoxication of food web of

[57] . Id.
[58] . Meena Menon, "Our Stolen Future", Sahara Time, New Delhi (17th September, 2005), p.20.

the ecology of river has already become a major factor for failure of breeding attempts made by the scientists for the conservation of the species of the bird, in the Park, which are feared to be extinct, from the world within few years, if proper attention would not be given to them.[59]

Thus, excessive use of fertilizers and pesticides in cultivation and lack of knowledge of cultivators about the hazardous effects of these chemicals, is resulting in pollution of water of our rivers and also disturbing the fragile ecosystems of nature.

[vii] Harmful Religious and Social Practices:

Faith is a simple word of five letters, yet very powerful when one has it. It is like how, when the five fingers of each hand come together, the entire meaning of their existence changes.[60] Yet, on many occasions this faith cause unimaginable loss to the human beings. Religious and social practices in the Indian Societies in India are glaring example, because they are resulting in damage to the rivers. People worship the rivers as "Goddesses" or "Devi" with great faith in eternity, but these religious activities under the guise of faith, are proving very costly to the rivers, because they involve unmindful and ignorant practices, which cause severe harm to the rivers. Burning of dead bodies on the bank of rivers, throwing of un-burnt or half-burnt bodies in the rivers, throwing of carcasses of animals, mass-bathing in rivers and idol immersion in the rivers during the festive seasons , some example of harmful religious and social practices prevailing in India.

{a} *Cremation of Dead Bodies on the Bank of Rivers* :

In keeping with ancient rituals, the dead bodies are still cremated on the banks of rivers by the religious people in our country.[61] The tones of ash

[59] . Rished Nauroji, "A S tudy On The Breeding Biology Of Resident Raptors In Corbett National Park", Bombay Natural History Society (B.H.N.S.) Journal, Vol.-94, (1997).
[60] . Anindita Banerjee, "Wrought Only By Prayer", Hindustan Times, New Delhi (11th December, 2006), p.11.
[61] . State of India's Environment – The Citizens Fifth Report, Part-I, published by 'Centre for Science and Environment', New Delhi, (1999), p. 64.

produces in the process of burning of dead bodies on the bank (*ghats*) of rivers, is eventually thrown conveniently into the water of rivers. In simple words, the Burning-Ghats on the banks of rivers are causing pollution in the rivers.

{b} *Throwing of Un-burnt or Half-burnt Bodies into the Rivers*:

The tradition of throwing un-burnt and half-burnt bodies of holy man like sages and hermits (sadhus and sanyasies), infants and those who succumb to contagious diseases, into the rivers, has given the issue of pollution in the Indian rivers an unhealthy social dimension.[62] The dead-bodies when thrown into the rivers, undergo the process of decomposition in the water of river, which results in defilation of water.

{c} *Mass Bathing in the Rivers*:

The tradition of taking bath in the rivers, specially on the occasion of religious ceremony, is very old. In olden days when there was abundant of water carried by the rivers, such traditions do not affect rivers, adversely. But the case is no longer same. Much water has been flown from the river till now. Now rivers are facing the scarcity of water, thus, losing their flow. Mass bathing on any occasion is, now no longer good for the ecology of the rivers.

But, mass-bathing is a part of integral religious practices, which is considered as *sacred,* by the religious community. Mass-bathing in the rivers during festive occasions, is prevailing in India. In Allahabad, during the occasion of *Maha-Kumbh* in the year of 2001, more than 20 million people took a holy dip at the confluence (sangam) of the Ganges, the Yamuna and the mythical Saraswati. Recently , during the occasion of *Ardh-Kumbh*, million of people from various part of the world had, taken holy bath, at the confluence, in Allahabad. Mass bathing usually takes place on the occasion of religious festivals like *Amavasya, Chhath, Dussehra, Diwali, Budh-Poornima* etc. on the river banks, in almost all the rivers of India, and particularly, in the rivers like the Ganges, the Yamuna , the Brahmaputra etc.

[62] . Id.

Studies have indicate that the Bio-Chemical Oxygen Demand (B.O.D.) of river water goes up when tens of thousands of people simultaneously take a 'holy dip' or '*Pavitra-Snan*'. It is submitted that mass-bathing or holy bath is no longer safe for the persons, who takes it, given the quality of water of Indian rivers, which is extremely polluted. Thus, people by mass-bathing not only putting themselves in the situation, where there is every possibility that they might contract the diseases, but also further deteriorating the quality of water by washing out their filth into it.

{d} *Idol Immersion in the Rivers*:

Idol immersion in the rivers is another environmentally hazardous practice, which is deteriorating the quality of water of Indian rivers. The festive season begins with Ganesh Pooja in September and usually ends with Saraswati Pooja in February.[63] During these festivals, millions of idols are immersed in the various rivers of India. According to an estimate, about 1 million small idols and, also about 1 million large community idols are immersed in the rivers.

Lead and chrome based cheap paints are extensively used in the making of idols in the various cities of our country. Paints containing lead and chrome, have been banned in many countries of the world since they are harmful to the health of the humans. Plaster of Paris (P.O.P.) is commonly used in making of idols, which is insoluble in water and contaminates the rivers by forming an impermeable layer in the river bed, thus, prevents bio-degradation of substances, which causes a build-up of poisonous gases, resulting in destruction of aquatic life.[64]

In olden days the idols were made exclusively of clay, which is eco-friendly, easily dissolve in the water and does not contain any harmful chemical. Such idols were painted with organic dyes, derived from stones, vegetables, seeds, fruits, sea-shells and soils. However these age old practices have now replaced by

[63] . Bibhuti Mishra, "Immersion Hazards", Sahara Time, New Delhi (17th September, 2005), p.20.
[64] . Id.

the modern cheap methods of idol formation, which include use of Plaster of Paris, inorganic paints, which are inherently hazardous to the rivers.[65]

Religious practices also demands that offerings from *pooja* be immersed in the rivers. Not only the floral offerings, but also the other rubbish of the temples and other worship places, usually be thrown into the rivers. It is now common to see the people immersing offerings in plastic bags, further adding to the pollution load of the rivers.

It is submitted that idols made of Plaster of Paris, painted with inorganic paints are highly dangerous to the water of rivers, and also to the health of the any living being, who consume the water of that river. It can be concluded that with the immersion of idols during festival seasons in rivers may contribute increased levels of organic and inorganic load into the water bodies. Thus, idol making from clay painted with lead and chrome free organic paints should be encouraged, so not only the rivers could be saved from the calamities of chemicals, but also the public money on river cleaning programmes.

{e} *Throwing of Animal Carcasses*:

Villagers often throw carcasses of their animals in to the river water, because they are, for them, a cheap and convenient place for disposal of such things. Many of these dead animals might have suffered from contagious and infectious diseases during their life span. Such carcasses of ailing animals, besides defiling of water, also disseminate bacteria and viruses of infectious disease into the water of rivers, thus, putting the health of consumers of water in jeopardy.

Economic Cost of River Cleaning

According to the Press Information Bureau, Government of India,[66] an expenditure of Rs.433 crore has been incurred against sanctioned cost of projects of Rs.462 crore on Ganga Action Plan Phase-1. Projects under GAP Phase-II

[65] . Id.
[66] . http://pib.nic.in/newsite/erelease.aspx?relid=79010, Dated 29th April, 2012

were sanctioned in stages from 1993 onwards on receipt of proposals from respective State Governments. The total cost of the projects sanctioned under the ongoing Ganga Action Plan Phase-II is Rs.594.96 crore against which an expenditure of Rs.469.75 crore has been incurred so far.

Yamuna Action Plan (YAP) for abatement of pollution of river Yamuna is being implemented in a phased manner. YAP Phase-I started in 1993 with a sanctioned cost of Rs.705.51 crore against which an expenditure of Rs 682 crore has been incurred. The ongoing second phase of YAP was started in December 2004 with an approved cost of Rs.624 crore with a completion period of 5 years. Starting of this phase took some time due to compliance to the administrative and procedural requirements. Sanctioned cost of projects under this phase so far has been Rs. 666.76 crore. Excess sanctioned cost is due to revision in scope of works, taking up of additional works etc. which are borne by the respective State Governments.[67] The National River Conservation Plan (NRCP) presently covers 39 rivers in 185 towns in 20 States. Similarly, on National River Conservation Plan an expenditure of Rs.4475 crore has been incurred so far.[68] The Central Government has approved a project in April 2011, under the National Ganga River Basin Authority for abatement of pollution of river Ganga with World Bank assistance at an estimated cost of Rs.7000 crore. The World Bank will provide financial assistance of US $ 1 billion. The principal objective of the project is to fund creation of pollution abatement infrastructure for conservation and restoration of water quality of the river[69].

[67] .Id.
[68] . http://www.gits4u.com/water/water24.htm Dated 29th April, 2012.
[69] .Id.

Details of funds released state-wise under the National River Conservation Plan (till March, 2011) . (Rs. in crore)

S.No.	State	Funds Released
1	Andhra Pradesh	259.80
2	Bihar	92.07
3	Jharkhand	4.45
4	Gujarat	90.05
5	Goa	9.26
6	Karnataka	47.83
7	Maharastra	123.72
8	Madhya Pradesh	79.00
9	Orissa	56.41
10	Punjab	228.80
11	Rajasthan	21.12
12	Tamilnadu	623.65
13	Delhi	417.07
14	Haryana	231.61
15	Uttar Pradesh	1107.82
16	Uttrakhand	81.20
17	West Bengal	656.22
18	Kerala	2.78
19	Sikkim	59.46
20	Nagaland	4.50
Total		4196.82

This information was given by the Minister of State for Environment and Forests (Independent Charge) Shrimati Jayanthi Natarajan in a written reply to a question by ShriMeghraj Jain and Shri Raghunandan Sharma in Rajya Sabha on September 6, 2011.[70] Therefore, lot of money is incurred on River Cleaning

[70] .Id.

Programmes in India, which is necessary, because "Right to Clean Water is a Fundamental Right" in India[71]. But, it is submitted that this money can be saved by people's awareness regarding their environmental duties.

Conclusion

It is clear from the aforementioned analysis that our religious and social practices, though unintentionally, are also contributing in pollution, of water of rivers. It seems that there is no end to the misery of rivers. Therefore, it may be concluded with this remark that river pollution generally originates from industrial effluents, agricultural run-off and domestic sewage, which is resulting in environmental-economic loss to the country. Rapid industrialization and urbanization, accompanied by rural exodus to urban areas have had their evil consequences,[72] generally on environment, and particularly on rivers. The law dealing with the task of prevention and control of river pollution, is need to be set in motion along with public awareness about the importance of pollution free rivers, so that the rivers can be saved from the curse of pollution, and the precious money of the Government exchequer can be saved from expenditure on the river cleaning programmes.

[71] .See Subhash Kumar v. State of Bihar, AIR 1991 SC 420.
[72] . P. Leelakrishnan, "Environmental Law In India", Butterworth India, New Delhi (2000), p.90.

VICTIMOLOGY : A SUB-DISCIPLINE OF CRIMINOLOGY

Pramod Tiwari*

Abstract

Victimology could be defined as science of crimes and their victims; is a sub-discipline of criminology. Very task of victimology is to make victim and offender as *'penal-couple'* and victim is now no more a *'forgotten-man'* rather stands at the centre stage of entire criminal justice system. In the present paper an endeavor has been made to discuss history of victimology together with various theories related to it. Paper also discussed the concept of compensation to victim in western countries in general and India in particular.

Key-Words- Victim, Penal-couple, Forgotten-man, Compensation and Victimology.

Introduction

If Criminology could in nutshell be described as the science of crime i.e. *'the study of law making, law breaking and societal reaction to law breaking*, Victimology could similarly be defined as science of crimes and their victims[1].

Andrew Karmen who wrote a text on victimology entitled-"Crime victims: An Introduction to victimology,1990" broadly defined Victimology is the study of- a) Victimization, b) Victim offender relationship, c) Victim criminal justice system relationship d) Victim and media, e) Victim and the cost of crime and f) Victim and social movements[2].

The administration of criminal justice is not much concern with the victim of crimes. The entire focus of the criminal justice system is on the offender, either to punish him or to seek him reformation or rehabilitation. Thus, the liberal criminology unfortunately ignored the victim and concentrated mainly on protection of interest of criminals .Very recently the attention has been drawn to

* Assistant professor, Law College Dehradun, Uttarakhand

[1] Prof. E.H.Sutherland, Principles of Criminology (J.B.Lippincott Co.,1955) p.7

[2] Prof. R. Deb,"Victimology"*Cr.L.J.*1986 at 17

protection of interest of victims of crimes which has resulted into a new discipline commonly known as Victimology. Criminal law does not give separate identity to victim of crime. A victim is viewed in relation to offender and therefore, Mendelsohn describes victim and offender as *" Penal couple"*.[3] However, the development of victimology has brought the victim of crime to centre stage and he is no more a *"forgotten man."*

In order to protect the interest of victims of crime, President G.R.Ford[4](U.S.A.) opined- For too long, the law has centered its attention more on the rights of the criminals rather than the victims of crimes. It is high time we reversed this trend and put the highest priority on the victims and potential victims.

History of Victimology

Victimology is the scientific study of victims of crimes, a sub-discipline of criminology. It seeks to study the relationship between victims and offenders; the persons especially vulnerable to crimes and the victim's placement in the criminal justice system.[5]

At first (going back to the origins of criminology in the 1880s), anything resembling victimology was simply the study of crimes from the perspective of victims .The scientific study of victimology can be traced back to the 1940s and 1950s. Two criminologist , Mendelsohn and Von Henting , began to explore the field of victimology by creating "typologies". They are considered the "fathers of study of victimology."

These new "victimologists" began to study the behaviors and vulnerabilities of victims. Mendelsohn created a typology of six types of victims, with only first type, *the innocent*, the other five types are contributed somehow to their own injury, and represented *victim precipitation.*

[3] Dr. A.K. Pandey, "Victimology (Review Article)" *Banaras Law Journal*, 2000 at 197.
[4] A message to the American Congress,1975.
[5] Ahmed Siddique, Criminology Problems and Perspectives,1993 p.505

Von Hentig (1948) studied victims of homicide, and said that the most likely type of the victim is the "depressive type" who is an easy target, careless and unsuspecting.

Wolfgang's research (1958) followed this lead and latter theorized that "many victims –precipitate homicides were in fact caused by the unconscious desire of the victims to commit suicide.

Theories of Victimology

Followings are the few theories of Victimology-

1. Luckenbill's Situated Transaction Model,
2. Benjamin & Master's Threefold Model, and
3. Cohen & Felson's Routine Model.

Definition and Concept of Victim

The concept of victim dates back to ancient culture and civilization. Original meaning was rooted in idea of sacrifice i.e. the execution of man or animal for the satisfaction of a deity.

During the founding of Victimology in 1940s, victimologists such as Mendelshon, Von Hentig and Wolfgang describe victims as helpless dupes who instigate their own victimization.

Today, the concept of victim includes any person who experiences injury, loss or hardship due to any cause.

The term crime victim generally refers to any person, group or entity who has suffered injury or loss due to illegal activity. The harm may be physical, psychological or economic thus, the victim of crime to be understood in a comprehensive and inclusive sense and not in its narrow sense. It must also include a collectivity comprising a group, a class, or a community of persons-racial, economic, political or religious to whom harm, damage, loss, injury both physical and psychological have been caused by an individual wrongdoer or

group including persons in lawful authority by abusing his or their lawful powers.

Victim participation in crime

Dr Hans Von Hentig made the first ever study of the role of victims in crime and found some general characteristics among them which may be summarized as follows-[6]

1. The poor and ignorant and those who are greedy are the victims of offences involving fraud.
2. The victim of larceny (theft) or intoxicated or sleeping persons.
3. Wanton or sensual persons may become victim due to situations precipitated by themselves.

Mendelsohn studied victim on the basis of their contribution to crimes and classified them into following categories[7]-

1. Completely innocent victim, e.g. children, person in sleep.
2. Voluntary victim, e.g. who commit suicide.
3. Victims who are more guilty than the offenders, e.g. who provoke others to commit crimes.

Persons needing special attention[8]

Certain categories of vulnerable persons and victims needs special and greater attention-

1. Elderly Victims

In western countries elderly persons tend to be in lower income groups and have, therefore, needs special attention. In U.S.A. the problem of crimes against

[6] The Criminal and his Victim,(1948) pp.384-388
[7] V.M.Rajan,Victimology in India,pp.10-11
[8] Supra at 5, pp.506-510

elderly persons is sufficiently serious to have drawn the attention of White House Conference on Ageing held in 1973.

These factors may not be much relevant in traditional countries like India where elderly people by and large, live with their children and they do not generally have to face any peculiar problems of physical insecurity. Even though Indian Parliament have enacted legislation for protection of old age persons in 2007, namely- "Maintenance and Welfare of Parents and Senior Citizens Act, 2007."

2. Child Victims

The problem requires attention regarding offences involving violence in general and sexual abuse in particular. They need special attention because inept handling by the law enforcement agencies may prove to be even more damaging than the crime committed against the child. Some special measure are, therefore called for which may do away with the appearance and cross-examination of the child in the law court. An innovation in this area has been introduced in Israel regarding the 'Reception of the Evidence Revision (Protection of Children) Act, 1955. The purpose of law is to protect the child from the undesirable effects of testimony in the police station or the court. Under this law a child is examined by a young "interrogator" who decides as to under what conditions the child should, if at all, appear before the court.

3. Victim of Sex Offences

Offences against women in particular serious offences such as that of rape, have been increasing everywhere including in traditional societies like India and greater attention is now being given to the problem of victims vis-à-vis to the criminal justice system. Perhaps this class of victims, irrespective of the age factor, deserves the maximum consideration in view of the emotional, psychological and human problems involved. The police and court proceedings may be as traumatic as the offence itself which led to the proceedings. The feeling is almost universal among the victims that instead of being treated as

victims, they are treated by the police and law agencies as if they themselves are the culprits. The rules of criminal law and evidence, for all practical purposes are titled against the victim as evident by the requirements given below;

- It is for the prosecution to prove the lack of the consent on the part of the victim. The courts often insist that proof to be given of the resistance offered by the victim.
- The credit of rape victim may be impeached by showing that she was of generally immoral character. Highly humiliating and scandalous questions are often put to the victim despite the legal bar against the questions. Lastly, some legislative measures have been introduced in order to alleviate the sufferings of the rape victims.

Disclosing the identity of the victim of the offence of rape has been made punishable. [9] Proceedings in a rape trial are to be held in camera.[10] A new provision has been introduced in the Evidence Act, 1872 laying down the presumption that there is no consent of a victim of rape if the offence was committed by the husband during judicial separation from the victim and in cases where the offence was committed while the victim was in custody of the police or were in hospital or in a rehabilitation home. [11]

In USA one significant development has been the creation of 'Rape Crisis Centers , these Centers' have all female participants including some Rape Victims whose common concern is the problem of Sex Crimes and they aim at providing counseling and other therapeutic measures to the victims.[12]

4. Female Victims

In western society, the issue regarding criminality against women generally pertain to and are confine to sexual offences but in Indian setting, women are exposed to gang rape by police men or by dominant cast groups, sati, wife

[9] Section 228-A,The Indian Penal Code,1860
[10] Section 327 (2),The Code Of Criminal Procedure,1973
[11] Section 114-A,The Indian Evidence Act,1872
[12] William MacDonald,Criminal Justice and the Victim 1976, pp 24-25

beating, prostitution and even occasional witch-hunting. Legislation exists but effective enforcement of the laws is not forthcoming.

Dowry death caused by the husband and in-laws of the helpless women, who are unable to fulfill their husband's or in-laws' demand based on greed, are quite often given the color of suicide.

5. Weaker section

Members of ethnic, religious or linguistic minorities in pluralistic societies may be especially vulnerable to crime, in conflict resulting from socio-economic imbalance and political factors. A number of caste and communal riots occur each year in the country and lead to the murder, rape and looting of property on a large scale in which the main sufferers obviously are those belonging to minority and weaker sections. Hardly any administrative or legal action is possible and even lesser is the possibility of the protection of victims and of punishment to the perpetrators of the ghastly crimes.

Concept of compensation to victim

It may be discussed under two heads-

- Traditional concept and
- Modern concept.

a) Traditional concept

"Ubi remedium ibi jus"[13] principle was traditionally applicable for awarding compensation. Almost in all primitive society the concept of true criminal law was unknown. Every crime including murder could be paid for by way of pecuniary redress. Indeed every crime was a civil wrong and not an offence against society at large. All old codes- Roman, German, English or Islamic gave emphasis on the question of compensation and restitution.

[13] Where there is remedy there is right.

b) Modern concept

"Ubi jus ibi remedium" [14] principle is now applicable. Modern concept of compensation is that no one should left without remedy.

In U.K, Compensation are payable in under the 'criminal injuries compensation scheme, 1964.' The basis of quantum of compensation is same as that of damages in civil injuries and the money payable is for pain and suffering& loss of earning capacity. Under the revised scheme of 1973, it is now possible to give compensation for injuries caused by one family member to another. The Criminal Justice Act of U.K. provides that if a court contemplates to impose both fine and compensation order, and the offender lacks the capacity for both the payments, the court is to issue compensation order only. Since 1988, the law requires the court to record reason if no order for compensation is passed.

In U.S.A, California was the first State to introduce laws to compensate victims of violent crimes in 1965 and as of now, 45 out of 50 States have such programmes and restitution. Legislations have been passed by all the states to empower the courts to order compensation by the offender to the victim and reasons must be recorded when the compensation order is not passed.

In India following legislations are there which talks about victim compensation scheme.

i)- Code of Criminal Procedure,1973-

Section 357 is the main provision dealing with compensation to crime victims[15]. It says that whenever criminal court imposes a fine….the court may order the whole or any part of the fine recovered to be applied in the payment of any person of compensation for any loss or injury caused by the offence when compensation is, in the opinion of the court, recoverable by such person in a civil court. Further sub section (3) of section 357[16] provides that when a court imposes a sentence of which fine does not form a part, the court may, when passing

[14] Where there is right there is remedy.
[15] Other related provisions are sections 237,250 and358 of the code.
[16] Added as recommended by the Law Commission in its forty- first report.

judgment, order the accused person to pay , by way of compensation such amount as may be specified in the order , to the person who has suffered any loss or injury by reasons of the act for which the accused person has been sentenced. Again section 357-A[17] lays down the "Victim Compensation Scheme."

The court has very limited discretion u/s 357(1); it can give compensation only out of the fine if imposed on the offender. The court has, however, much more discretion u/s 357(3); though only if fine does not form a part of the sentence. Theoretically the power of the court is unlimited, though practical consideration would prevail. A Magistrate can order for higher compensation than the amount of fine he can impose.

In *Sarvan singh v/s State of Punjab*[18] it was said by the court that in awarding compensation the court should just consider what compensation ought to be awarded to the heirs of the deceased and then impose fine which is higher than the compensation. The court laid down that the amount of fine should be determined on the basis of various factors including *the* nature of crime, number of injuries and the paying capacity of the offender. In *Mohammed Shah v/s Emperor*[19] the offender was awarded one years' imprisonment and a fine of Rs 500 out of which Rs 400 was awarded to the heirs of the victim. The judicial attitude is, however, reflected somewhat differently *in Guruswami v/s State of T. N.*[20] it was held that in a case of murder it is only fair that proper compensation should be provided for the dependents of the deceased. A perusal of a subsequent case, *Baldev Singh v/s State of Punjab*[21] also indicates that quite often Supreme Court prefers to substitute a severe punishment given to offender in award of compensation to the victim in death resulting due to family feud. Further, in *Dr Jacob George v/s State of Kerala*[22] where a homeopath attempting to procure an abortion by operating upon a woman caused her death, the Supreme Court

[17] Added by the Code of Criminal Procedure(Amendment) Act,2008
[18] (1978)4 SCC 111
[19] AIR 1934 Lah. 519
[20] (1979)3 SCC 799
[21] (1995)6 SCC 593
[22] (1994)3 SCC 430

reduced the imprisonment to the two months already undergone. The fine imposed upon the petitioner was increased from Rs 5000 to one lakh required to nurse the child of the deceased reasonably well.

ii)-The Probation of offenders Act,1958-

The Act lays down that while releasing an accused on probation or on admonition the court may order offender to pay compensation and cost to the victim concern.[23]

iii)-The Motor Vehicles Act,1939-

Act empowers the Government. to establish and administer a "Solatium Fund" out of which compensation can be paid in cases of death or grievous hurt.[24]

iv)- Fatal Accident Act, 1955[25]

v)- Indian Railway Act, 1890[26]

vi)- Workmen's Compensation Act,1923[27] also talks about the victim compensation scheme.

vii)-Article 21 of the Constitution of India-[28] Supreme Court has expanded article 21 and incorporated new branch of study from Rudal shah[29] to Chandrima Das[30] wherein Supreme Court evolved the "Victim compensation scheme." Although it has been criticized by various scholars[31] in the name of unbrinded expansion of life and personal liberty.

[23] Section 5 of the Act.
[24] Sections 109-110 of the Act.
[25] Section 1-A of the Act
[26] Chapter VII of the Act.
[27] Section 2 of the Act.
[28] Expansion of article 21: Compensatory Jurisprudence.
[29] (1983)4 SCC 141
[30] AIR 2000 SC 988
[31] N.Dharmadan,(Senior Advocate H.C. of Kerala),"Unbrinded Expansion of Life and Personal Liberty-Whether to be curtailed?"(2004)8 *AIRJ*.pp234-237 & Justice V.N. Reddy,"Article 21-Has the Supreme Court gone too far?"(2001)8 *AIRJ* p289.

Concluding observation

Criminology is mainly concern with the criminals, their social backgrounds, the causes of criminality, methods of punishment and crime prevention setc. Little attention has been made on the victim either as instigator of crime or as deserving protection of administration and society for rehabilitation in an honorable and dignified way. Victimology is not confined now in studying the 'Penal-couple' relation only, the compensation to victim is also gaining importance. A person sustaining injuries or his dependents in case of his death may be provided compensation. Western countries like U.K. &U.S.A. have enacted a separate branch of law in this regard. In New Zealand, the provision has been made for "indemnity fund" in the State Treasury. In India, various legislations in general and The Code of Criminal Procedure, 1973 in particular which talks about the compensation to victims of crime. A new provision in the code has been added in 2008 i.e. section 357-A which incorporates 'victim compensation scheme'. Even though various legislative measures are there for the protection of victim of crime but writer is of the view that "***Victimology"***should be a separate branch of study as a sub-discipline of ***"Criminology".***

THE CONCEPTUAL ANALYSIS OF THE PRINCIPLE OF DOUBLE JEOPARDY AND THE PROTECTION OF HUMAN RIGHTS IN CRIMINAL JUSTICE ADMINISTRATION

Vijoy Vivekanandan*

Abstract

The rule against double jeopardy is a centuries old common law principle, which bars repeated criminal prosecution for the same offence. The rule plays a vital role for the protection of integrity of the criminal justice system including precious human rights of the accused persons. The existence of the rule is very essential as far a criminal justice administration is concerned irrespective of the nature of the system. The paper attempts to analyse the concept of double jeopardy under Indian law in comparison with English law and examines how it protects the human rights of the persons accused of an offence.

Keywords: Double jeopardy, retrail, new and compelling evidence, human rights, appeal, autrefois acquit, autrefois convict.

Introduction

Every civilized society maintains a system of criminal justice administration in order to punish the guilty and make the life of common man safe. The criminal justice system operates in accordance with the specific criminal statutes. A valid criminal justice system must satisfy certain legal as well as constitutional requirements. The criminal justice system operates on the basis of certain values within which it admits no compramise. The double jeopardy principle is one such value protected by the system. It is a procedural safeguard, which bars a second trial then an accused person is either convicted or acquitted after a full-fledged trial by a court of competent jurisdiction[1]. The rule against double jeopardy

* B.Com., LL.B (Kerala), LL.M. (Cochin), Assistant Professor in law, Law College Dehradun, Uttarakhand.

[1] Lawrence Newman, "Double Jeopardy and the Problem of Successive Prosecutions", 34 S.Cal.R [1960], p.252

originally flows from the maxim "*nemo debet bis vexari pro uno et eadem causa*" which means that no person shall be vexed twice for the same cause. The term "double jeopardy" expresses the idea of a person being put in peril of conviction more than once for the same offence[2].The core rule includes the old pleas in bar of jurisdiction, namely *autrefois acquit* and *autrefois convict*[3]. These two doctrines are aimed to protect criminal defendants from the tedium and trauma of relitigation[4]. When a criminal charge has been adjudicated by a competent court, that is final irrespective of the matter whether it takes the form of an acquittal or a conviction, and it may be pleaded in bar of a further prosecution when it is for the same offence[5]. It is regarded as one of the most important fundamental as well as the human right against the repeated state prosecution for the same offence.

History of double jeopardy

There is no unanimity of opinions regarding the origin of double jeopardy principle since it obscure in the mists of time. It is a centuries old principle, and it has been rightly observed that the history of double jeopardy is the history of criminal procedure[6]. The rule is considered to have its origin in the controversy between Henry II and Archbishop Thomas Becket in 12th century[7]. At that time

[2] Ian Dennis, "Rethinking Double Jeopardy: Justice and Finality in Criminal Process", [2000] Crim. L.R. 993. For the applicability of the principle, the conviction must be for the same offence:
"For the doctrine of autrefois to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word 'offence' embraces both the facts, which constitute the crime, and the legal characteristics, which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law." See, Lord Devlin in *Connelly* v. *Public Prosecutions*, [1964] A.C 1254

[3] *Autrefois acquit* is a defense plea available to the accused in a criminal case, that he has been acquitted previously for the same offence and thus entitling a discharge. Likewise, *Autrefois convict* discharges an accused, as he has been convicted previously for the same offence.

[4] Daniel K. Mayers and Fletcher L.Yarbrough, "Bisvexari: New Trials and Successive Prosecutions", [1960] Harv. L. Rev.74

[5]*R V. Miles, 24* Q.B. *423, at p.431*, as cited in *Broom's Legal Maxims*,R.H.Kersley (Ed), Herbert Broom, Pakistan Law House, Karachi (10thed), 1998.

[6] Martin L.Friedland, "Double Jeopardy", (1969) Oxford University Press,p.3

[7] Excerpt by Justice Roslyn Atkinson at Australian Law Student's Association (ALSA) Double Jeopardy Forum, 9 July 2003, Brisbane, available at http://archive.sclqld.org.au/judgepub/2003/atkin090703.pd, visited on 6/12/2009.

two courts of law have existed, the royal and the ecclesiastical. The king wanted the clergy subject to be punished in the royal court even after the ecclesiastical court punished him. Becket relied on St. Jerome's interpretation of Nahum and declared that the ancient text prohibitted "two judgments"[8]. He had viewed that the repeted punishments would violate the maxim *nimo bis in idipsum* that means no man ought to be punished twice for the same offence. Followed by the dispute, King's knights murdered Becket in 1170, and despite of this King Henry exempted the accused from further punishment in 1176. This concession given by King Henry is considered as responsible for the introduction of the principle in English common law. In the twelfth century, the *res judicata* doctrine had been introduced in English civil as well as criminal law due to the influence of teachings of Roman law in England. During the thirteenth and part of the fourteenth centuries, a judgment of acquittal or conviction in a suit brought by an appellant or King barred a future suit. During the fifteenth century, an acquittal or conviction on an appeal after a trial by jury was a bar to a prosecution for the same offence. The sixteenth century witnessed significant lapses in the rational development of the rule partly due to the statute of Henry VII, by totally disregarding the principle. Further, it was during that period the famous *Vaux's* case was decided to the effect that a new charge could be brought even after a meritorious acquittal on a defective indictment. The last half of the seventeenth century was the period of enlightenment regarding the significance of the rule against double jeopardy. Lord Coke's writings contributed to it partly and of course, the rest was due to the public dissatisfaction against the lawlessness in the first half of the century. It is only by seventeenth the century, the principle of double jeopardy seems to have developed into a settled principle of the common law[9].

During the eighteenth century, the extreme procedure was generally followed. It should be noted that, in eighteenth century, Blackstone stated thus:

[8] Nyssa Taylor, "England and Australia relax the double jeopardy privilege for those Convicted of Serious Crimes", [2005] 19 Temp. Int'l & Comp. L. J., p.195.

[9] Charles Parkinson, "Double Jeopardy Reform: The New Evidence Exception for the Acquittals", (2003) UNSW Law Journal,p.,605

"First, the plea of *autrefois acquit,* or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life for more than once for the same offence and hence it is allowed as a consequence that when a man is once fairly found not guilty upon any indictment or other prosecution, before any court having competent jurisdiction of the offence he may plead such acquittal in bar of any subsequent accusation for the same crime."[10]

Until the nineteenth century, the accused was provided with virtually no protection against a retrial when he or she was discharged due to a defect in the indictment or a variation between what was alleged and proved[11].

It must be noted that Continental law recognised the principle of double jeopardy. Article 360 of the Napoleonic *"code d'instruction criminalle"* provided that, "No person legally acquitted can be a second time arrested or accused by reason of the same act." In Spanish law also, there were references to double jeopardy in the thirtieth century. It is noteworthy that both the Continental as well as the Common law have adopted the doctrine from the common source of Canon law. The origin of the maxim that, "not even God judges twice for the same act" was present in church canons as early as 847 A.D. The protection under the rule was also available in Roman law. As per the Justinian Code, "He who has been accused of a crime cannot be complained of for the same offence by another person."[12]

The classical argument for the need of maintaining the rule is apparent in the observation of the court in *Green* v. *United States*[13]. The Court observed thus:

"The underlying idea… is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an

[10] Blackstone, Commentaries, 335, (1889), excerpt by Lawrence Newman, "Double Jeopardy and the Problem of Successive Prosecutions", 34 S.Cal.R [1960], p.252.
[11] *Supra* 6, p.3.
[12] Lawrence Newman, "Double Jeopardy and the Problem of Successive Prosecutions", 34 S.Cal.R [1960], p.254, See also; Peter Westen, Richard Druben, "Toward A General Theory of Double Jeopardy", Sup. Ct. Rev.(1978), p.81.
[13] (1957) 355 US 185

alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

The protection given under this rule has gained international recognition also through various international documents[14]. Today, almost all civilized nations incorporate protection against double jeopardy in their municipal laws. While some of these countries have provided the protection through their constitution and others have incorporated it into their statute law[15].

Double jeopardy protection in India: A comparison with English law

Double jeopardy protection under Indian law

In India, the protection against the double jeopardy is a constitutional[16] as well as a statutory guarentee.[17] The principle has also been recognized under the provision of General Clauses Act.[18] The Constitution of India recognize only *autrefois convict* whereas the Code of Criminal Procedure, 1973 incorporates *autrefois acquit* as well. The rule against double jeopardy has been recognized as a fundamental right in the Constitution of India. A person can claim fundamental rights against the state and the state can abridge those rights only to the extent laid down. Even though its origin can be trace back in the common law principles, the ambit and content of guarantee are much narrower than those of the common law in England. Under Indian law, when a person has been

[14] The states are bound to cope with the relevant provisions of the conventions to which they are parties. For instance, Article 14(7) of the International Covenant on Civil and Political Rights; Article 4(1) , Protocol 7 to the European Convention of Human Rights; Article 50 of the Charter of Fundamental Rights of the European Union.

[15] For instance, in countries such as U.S.A and India, it is accepted as a constitutional right. In particular, Fifth Amendment to constitution of USA and article 20(2) of the constitution of India. Conversely, in England and Canada, it is the part of common law and statute law.

[16] Article 20(2) of the Constitution of India articulates that, "No person shall be prosecuted and punished for the same offence more than once".

[17] See, Section 300(1) , Code of Criminal procedure, 1973.

[18] General Clauses Act, 1897, Section 26 provides," Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

convicted of an offence by a court of competent jurisdiction, the conviction serves as a bar to any further criminal proceeding against him for the same offence. The most important thing to be noted is that, sub-clause (2) of Article 20 has no application unless there is no punishment for the offence in pursuance of a prosecution.

Under the provisions of the Indian Constitution, the conditions that have to be satisfied for raising the plea of *autrefois convict* are firstly; there must be a person accused of an offence; secondly; the proceeding or the prosecution should have taken place before a 'court' or 'judicial tribunal' in reference to the law which creates offences and thirdly; he accused should be convicted in the earlier proceedings. The requirement of all these conditions have been discussed and explained in the landmark decision, *Maqbool Hussain* v. *State of Bombay.*[19] In this case, the appellant, an Indian citizen, was arrested in the airport for the illegal possession of gold under the provisions of the Sea Customs Ac, 1878. Thereupon, an action was taken under section 167(8) of the Act, and the gold was confiscated. Sometimes afterwards, he was charge sheeted before the court of the Chief Presidency Magistrate under section 8 of the Foreign Exchange Regulation Act, 1947. At trial, the appellant raised the plea of *autrefois convict*, since it violates his fundamental right guaranteed under article 20(2) of the constitution. He sought the constitutional protection mainly on the ground that he had already been prosecuted and punished inasmuch as his gold has been confiscated by the customs authorities. By rejecting his plea, the court held that the proceedings of the Sea Customs Authorities cannot be considered as a judicial proceedings because it is not a court or judicial tribunal and the adjudgment of confiscation or the increased rate of duty or penalty under the provisions of the Sea Customs Act does not constitute a judgment or order of a court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy. The court also held that the proceedings conducted before the sea customs authorities were, therefore, not 'prosecution' and the confiscation of gold is not punishment inflicted by a 'court' or 'judicial tribunal'. The appellant, therefore, cannot be said to have been

[19] A.I.R. 1953 S.C. 325

prosecuted and punished for the same offence with which he was charged before the Chief Presidency Magistrate Court.

To operate as a bar under Article 20(2), the second prosecution and the consequential punishment must be for the same offence, i.e., an offence whose ingredients are the same.[20] One of the important conditions to attract the provision under clause (2) of article is that, the trial must be conducted by a court of competent jurisdiction. If the court before which the trial had been conducted does not have jurisdiction to hear the matter, the whole trial is null and void and it cannot be said that there has been prosecution and punishment for the same offence.[21] Gajendragadkar, J. has stated the protection under Article 20(2) as follows:

"The constitutional right guaranteed by Article 20(2) against double jeopardy can be successfully invoked only where the prior proceedings on which reliance is placed are of a criminal nature instituted or continued before a court of law or a tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure."[22]

However, the Code of Criminal procedure recognize both the pleas of *autrefois acquit* as well as *autrefois convict*. The conditions which should be satisfied for raising either of the plea under the Code are: firstly; that there should be previous conviction or acquittal, secondly; the conviction or acquittal must be by be a court of competent jurisdiction, and thirdly; the subsequent proceeding must be for the same offence. The expression "same offence" shows that the offence for which the accused shall be tried and the offence for which he is again being tried must be identical, and based on the same set of facts.[23]

[20] *Manipur Administration* v *Nila Chandra Singh*, AIR 1964 SC 1533
[21] *Bai Nath Prasad Tripathi* v. *Statel*, A.I.R. 1967 S.C. 494
[22] *Raja Narayanlal Bansilal* v *M.P. Mistry*, AIR 1961 SC 29
[23] *State of Rajasthan* v *Hat Singh*, (2003) 2 SCC, 152

Double jeopardy protection under English law

In England, the pleas of *autrefois acquit* and *autrefois convict* are understood as they have been understood in the common law.[24] In *Sambasivam*[25], Lord McDermott stated thus;

"The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence".

As per the decision of *Sambasivam*, the effect of a final verdict of acquittal after a lawful trial by a competent court is binding and conclusive in all subsequent proceedings between the parties to the adjudication.The House of Lords affirmed the rule in *Humphry*'s case[26] and thus the rule came into force in English law. Further, in English law, the rule against double jeopardy is supplemented by the doctrine of abuse of process[27], laid down by the House of Lords in *Connelly v. DPP*[28]. In this case, the Crown had charged Connelly, and three other defendants with two indictments: one for robbery and one for murder. These indictments arose out of an office robbery in which an employee had been killed. Initially, the Crown proceeded on the murder indictment alone. The jury returned a guilty verdict and Connelly appealed to the Court of Criminal Appeal. The Court quashed Connelly's conviction and directed a verdict of acquittal. A month later, the state tried and convicted Connelly on the second indictment for robbery. Connelly appealed his robbery conviction. The House of Lords dismissed Connelly's appeal and held that the *autrefois* plea was a limited doctrine that did not prevent Connelly's retrial. In this case the House of Lords found that the traditional autrefois rule did not developed in England as had in other countries and instead of enlarging its scope, they favored supplementing the rule with the inherent power to stop abuse of process.

[24] Dr. K.N. Chandrasekharan Pillai, *Double Jeopardy Protection: A Comparative Overview*, Mittal Publications, Delhi (1st edn- 1988), p.28.
[25] *Sambasivam* v *Public Prosecutor, Federation of Malaya,* [1950] AC 458
[26] [1977] AC 1 H.L.
[27] Abuse of process means abuse of process of the court by the parties to the litigation. The court has the inherent power to stop proceedings if it is an abuse of process of the court.
[28] [1964] A.C. 1254

In another case, the House of Lords observed that the inherent power, which a court of justice must possess to prevent misuse of its procedure, would otherwise bring the administration of justice in to disrepute among right thinking people.[29] The court also held that a second trial is permissible only when special circumstances demand and what is meant by this phrace is not settled. However, it would mean to includes acquiescence by the defendant in separate trials of two indictments, cases where in a subsequent event occurred in relation to and after the first trial (say for instance, the death of an assault victim of which the defendant has already been convicted for the offence of assault).

The English rule against double jeopardy is very narrow in the sense that it is restricted to an offence identical in law to the offence of which the person was previously acquitted or convicted. In *Beedie*,[30] it was held that the protection is not available to an accused who has been acquitted previously for an offence under the Health and Safety at Work Act,1974, in respect of his failure to maintain a gas fire in a house he let out, when later he charged with manslaughter of a tenant who died of poisoness gas from the faulty fire.

One of the notable difference between the rule against double geopardy in India and England lies on the prosecution's right of appeal. Under English law, until the coming into force of Criminal Appeal Act of 1907, neither the prosecution, nor the defense was allowed to appeal. This was mainly due to the fact that an appeal provision would offend the rule against double jeopardy and resulted in difficulties and inconveniences to the defendants. The Act did not provide for the any prosecution appeals instead, the defendant could very well get his conviction vacated by the Court of Appeals on the ground of some errors in the trial. The law operated asymmetrically in the sense that the prosecution could not challenge an acquittal except under very limited situations. At the same time, the defendant has been able to challenge his conviction on appeal[31] as well

[29] *Hunter* v. *Chief Constable of the West Midlands Police* [1982] AC 529
[30] [1998] Q.B. 356
[31] The Criminal Appeal Act, 1907.

as post appeal.[32] The rationale underlying behind the rule is that it helps to serve the purposes of double jeopardy protection. However, after coming into force of the Criminal Justice Act, 2003, a new trial is permissible at the instance of finding out "new and compelling piece of evidence". A retrial is allowed in pursuance of tainted acquittals in serious offences.[33]

Under Indian law, any person convicted of an offence may prefer an appeal in accordance with the law subject to certain restrictions. The notable provision with regard to the power of appeal is that the State has given ample power to prefer an appeal against inadequacy[34] in sentencing or acquittal[35].

The need for preserving a system prevents retrial for the same offence: Rationale behind the rule against double jeopardy in a human right perspective

The rule serves two reasonably defined objectives. First, it performs a declerative function by informing citizens the boundary, beyond which they can be sure that the criminal process will no longer be levied againt them in respect of the same alleged offence. Secondly, it serves as the safegurd to the subjects' aginst the abuse of state's power by making them the illegitimate persuits of suspects leads to undue hardships and harassment[36]. In fact, the principal reasons

[32] David Hamer, "The Expectation of Incorrect Acquittals and the "New and Compelling Evidence" Exceptio n to Double Jeopardy" [2009] Crim. L. R., 64, the post appeal provision is administered in England by the Criminal Cases Review Commission which commenced operation on January 1, 1997 under the Criminal Appeal Act,1995 (UK).

[33] Part10 of the Criminal Justice Act, 2003 sets out a statutory framework, which enables retrial of a defendant who has been secured a cloudy acquittal at trial. But the process is available only for the so called "qualifying offences" as specified in the legislation, i.e., the offences listed in Part 1 of Schedule 5 to the Act. Section 75 of the Act deals with the cases that may be retried and section 76 provides for certain procedure for making the application to Court of Appeal. As per section 76, the prosecutor may apply to the court for quashing a person's acquittal for a qualifying offence and ordering him to be retried. Such an application must be pursued only with the leave of the Director of Public Prosecution, who must issue a written consent. The DPP may give consent if he satisfied that there is new and compelling evidence against an acquitted person in relation to the qualifying offence. Section78 of the Act deals with the expression, new and compelling evidence. Accordingly, evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related).

[34] Section 377 , Code of Criminal Procedure, 1872

[35] *Id.*,S. 378

[36] Ben Fitzpatrick, "Tinkering or Transformation? Proposals and Principles in the White Paper, Justice for All", [2002] 5 Web JCLI.

for protection of the rule are two fold. Affording protection to the citizens against the repeted state prosecution is at one hand and preserving the moral integrity of the criminal justice process on the other[37]. The English Law Commission identifies four major rationales for the double jeopardy rule.[38] They are; i) reducing the risk of wrongful conviction, ii) minimising the distress of the trial process, iii) the need for finality, and iv) the need to encourage efficient investigation. Some scholars are of the opinion that the rule serves many purposes[39]. Here, it is desirable to analyse some of the rationale of rule against double jeopardy in a human rights angle.

i) Reducing the risk of wrongful conviction

One of the long established rationale for the double jeopardy rule is that it reduces the risk of wrongful conviction[40].The chance of erroneous conviction is comparatively high in a retrail since the prosecution is forewarned and forearmed with the defence strategies. The United States Supreme Court has rightly observed:

"Repeated prosecutions increase the risk of an unjust conviction of an innocent defendant by wearing down the defendant and giving the Government opportunities to learn from its earlier mistakes and to hone its trial strategies."[41]

[37] A.L-T. Choo, "Abuse of process and Stays of Criminal Proceedings", as quoted by Gavin Dingwall in "Prosecutorial Policy, Double Jeopardy and Public Interest",[2000] MLR Vol. 63, p.268.

[38] Law Commission (UK), Double Jeopardy, Consultation Paper No 156 (1999).

[39] David S. Rudstein, "Retrying the Acquitted in England, Part I: The Exception to the Rule against Double Jeopardy for New and Compelling Evidence", (2007) 8 San Diego Int'l L.J., 387. The author identifies eight rationales for the rule. They are: a) preserving the finality of judgments, b)minimizing personal strain, c)reducing the risk of an erroneous conviction, d)protecting the power of the jury to acquit against the evidence, e)encouraging efficient investigation and prosecution, f)conserving scarce prosecutorial and judicial resources, g) preventing harassment, and h) maintaining the public's respect and confidence in the legal system.

[40] Supra n.9 at p.613, See also Ian Dennis, "Rethinking Double Jeopardy: Justice and Finality in Criminal Process", [2000] Crim. L. R. 939; Poul Roberts; "Double Jeopardy Law Reform: A Criminal Justice Commentary", MLR (2002) Vol. 65(3), p. 397.

[41] *United States* v. *DiFrancesco*, 449 US, (1980)

ii) Minimising the distress and trauma of the trial process

Manifold attempts by the state to conduct a retrial of an accused acquitted for an offence would expose him to embarassment, expenses and ordeal, and compelling him to live in a continious state of anxiety and insecurity. The retrial will seriously disrupt the accused's personal life during the trial. This argument is based on the state's duty of humanity to its subjects to treat them with dignity and respect[42]. Prof. Glanwille Williams has written thus:

"It is hard on the defendant if, after he has at great cost in money and anxiety secured a favorable verdict from a jury on a particular issue, he must fight the battle over again when he is charged with a technically different offence arising out of the same facts."[43]

iii) Preventing harassment

In the absence of such a rule, the government could be able to re-prosecute an acquitted until securing a conviction. The law enforment officers may use it as a weapon to take vengence against their enemies. Moreover, a prosecutor who believes that the accused was wrongly acquitted by the jury, would be able to harass him by bring about a second prosecution. Even if the police or the prosecution did not find any evidence of guilt, they may be satisfied with forcing the accused to undergo additional embarrassment, anxiety, concern and expense arising from the retrial.

The analysis of the rationales of the principle of double jeopardy made it clear that, it protects some values of the criminal justice system. It shows concern for the basic human rights of the unfortunate accused persons who are caught in the web of criminal law. Another view is that the innocent defendants may lack sufficient stamina and resources to defend the state continiously in criminal

[42] Rosemary Pattenden, "Prosecution Appeals Against Judges' Rulings", [2000] Crim. L.R. 971.
[43] Glanwille Williams, "*Textbook of Criminal Law"*,(1983),(2nd ed.) p. 164

proceedings.[44] The distress attaches to the criminal trial is undoubtedly high and definitely, it will increase with the repeated trial process.[45]

Conclusion

The rule against double jeopardy is a universally accepted principle for the protection of certain values within the criminal justice system. It serves many purposes such as preventing the arbitrary actions of the state against its subject, ensures finality in litigations etc., which are of great importance for the protection of human rights of the accused persons. It is a centuries old principle, which survived not by chance, but for many good reasons. It must be noted that when the English legislatures intended to introduce an exception to the rule, strong criticism was raised from the part of legal fraternities as well as human rights activists. Thus, existence of such a rule is inevitable for the integrity of the criminal justice system itself.

[44] *R* v *Carroll* [2002] 194 ALR 1
[45] David S. Rudstein, "Retrying the Acquitted in England. Part II: The Exception to Rule Against Double Jeopardy for Tainted Acquittals" San Diego Int'l L.J. [2008], p.246