UTTARANCHAL UNIVERSITY

DEHRADUN law REVIEW

(A Peer Reviewed Journal)

LAW COLLEGE DEHRADUN
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EDITORIAL

An intellectual-cum-inquisitive endeavour has a symbiotic relationship with social responsibility. Law, Law makers and legal researchers are not exceptions to this social reality. It has been our constant propensity to offer society-centric legal articles aimed at peripheral expansion of legal paradigms, concepts and researches permeating into pressing societal concerns requiring pragmatic solutions. Hence, it gives us immense pleasure to put forward the current issue of *Dehradun Law Review* to our academic brethrens. In the contemporary scenario, the human society is witnessing a paradigmatic shift in judicial, legal, cultural, economic and ideological spheres. In this issue, we have made sincere efforts to inculcate such articles which incorporate and analyse the pressing socio-legal concerns. We hope, that this collaborative effort of academicians and researchers from across the legal spectrum will lead to a steady march towards justice in its entirety.

The editorial board of *Dehradun Law Review*, a law journal of Law College Dehradun, Uttaranchal University, is pleased to bring up Vol. 8, Issue 1, November, 2016. This issue includes articles from eminent academicians of leading Indian universities. Issues concerning laws relating to third party administrators-health services, international and national perspectives of traditional cultural expressions, international perspective concerning early childhood care and education, recent pronouncement of Supreme Court on dishonour of cheques, amendments in the field of international commercial arbitration, the shades of legal mechanism of human rights and prisoners, right to service in India and current trends toward intellectual property protection for farmers in India have been extensively discussed and analysed in concurrence with the primary objectives of our journal.

Dr. P. K. Pandey in his research paper titled "Demystifying Indian Laws Relating to Third Party Administrators-Health Services" argues that IRDA (Third Party Administrators-Health Services) Regulations, 2016 has incorporated many new concepts intended for strict compliance of statutory norms for having an effective and better environment beneficial for the insurers and policyholders. He examines the governing laws relating to TPAs with special reference to health services.

Dr. Rajnish Kumar Singh in his paper titled "Protection of Traditional Cultural Expressions/Folklore: International and National Perspectives" examines the international and national initiatives on protection of traditional cultural expressions/folklore. He argues that at national level establishing institutional framework having expertise on such a subject of immense diversity is a real challenge. As long as a legal framework does not come into existence the process of documentation may be the only method to ensure that some protection is provided to the TCEs of India.

Dr. Vivek Kumar Pathak in his paper titled "Early Childhood Care and Education: International Perspective" examines the international legal framework for early childhood care and education. He argues that the aim of providing quality early childhood care and education is possible only when all the stakeholders put a combined effort in this direction.

Professor Ram Naresh Chaudhary in his article titled "Supreme Court on Dishonour of Cheques" analyses some significant judgments of the Apex Court which have widened the scope and extent of dishonour of the cheques to meet out newly emerging problems and challenges.

Professor (Dr.) Rajesh Bahuguna and Vijay Srivastava in their research article titled "India as a Hub for International Commercial Arbitration: An Overview in Reference to the Amendments in Indian Arbitration Law" examine some major areas of concern viz. some opinions of stake holders of International Commercial Arbitration as well as the Indian Government's efforts for making India as a hub for ICA in the light of Foreign Direct Investment (FDI) policies. They have also explained and explored the lacunas of ICA and prescribe some remarkable suggestions for improvement for making India as a hub for International Commercial Arbitration.

Dr. Poonam Rawat and Avnish Bhatt in their research article titled "The Shades of Legal Mechanism of Human Rights and Prisoners with a Special Reference to National Human Rights Commission, India" raise concerns over emerging prison jurisprudence with a view to protect inherent rights of prisoners and for the proper administration of prisons. They argue that existing legal structure of the prison administration needs a complete change whereas criminal laws required to be amended including the jail manuals and Prison Act and examine the diverse shades of regulatory measures of Prisoners' Human Rights in India in the light of National Human Rights Commission.

Mr. Kuljit Singh in his paper titled "Right to Service in India" asserts that the right to service in India brings transparency, hassle- free delivery of public services and reduces the corruption in providing the public services. He examines 'Right to Service' as a statutory right at national level and argue that Government of India which is providing public services on the basis of citizens' charter, is not legally enforceable.

Dr. Digvijay Singh in his paper titled "Current Trends toward Intellectual Property Protection for Farmers in India: An Analysis" argues that an efficient *sui generis* system of intellectual property protection for farmers shall enhance their status. He examines the efficacy of Indian *sui generis* system and also analyses data available at Indian PPV & FR Authority to understand its current trend.

We are looking forward to reader's responses, valuable suggestions and feedbacks as these are the true intellectual inducements which multiply our efforts manifold for the betterment and further upgradation of the journal. I, take this opportunity to offer warm wishes and compliments to the contributors of articles and expect their continuous support in this academic sojourn.

God Speed !

Prof. (Dr.) Rajesh Bahuguna
Editor-in-Chief

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DEMYSTIFYING INDIAN LAWS RELATING TO THIRD PARTY ADMINISTRATORS-HEALTH SERVICES

P. K. Pandey*

Abstract

The Third Party Administrators (TPAs), as service providers, were introduced in 2001 in Indian insurance industry as a new efficient entity to ensure better quality services to insurers as well as to policyholders through proper regulation of health care services and its expenses. Earlier, TPAs were licensed by the IRDA to provide health services to policyholders by establishing network but in the year 2016 the earlier Regulation was repealed and the Insurance Regulatory and Development Authority (IRDA) made the IRDA (Third Party Administrators-Health Services) Regulations, 2016 which has incorporated many new concepts intended for strict compliance of statutory norms for having an effective and better environment beneficial for the insurers and policyholders. The present paper attempts to demystify the governing laws relating to TPAs with special reference to health services.

Key words

Insurance, Health Insurance, Third Party Administrator and IRDA.

I. INTRODUCTION

> *The presence of Third Party Administrator was aimed at ensuring higher efficiency, standardization and improving penetration of health insurance in the country. Third Party Administrators play an important role in standardization of charge and managing cashless services in health insurance.*
>
> *- Competition Commission of India*[1]

The system of insurance was evolved as an effective tool to help individual/group financially in case of happening of insured event in exchange of their financial contribution to the insurer. Like other forms of insurance, the health insurance also provides an efficient mechanism for financing the health care needs and medical expenses of the people who contribute premiums to the insurer in compliance of their

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[1] *In re: V. Senthilnathan v. M/s. United India Insurance Co. Ltd.,* Case No. 27 of 2013, Competition Commission of India. (Decided on July 1, 2013)

contractual obligations. In true sense, the need of health insurance is felt by majority of the people because of growing costs of lifestyle diseases, changing disease pattern, medical inflation, increasing life expectancy and uncertainties in individual employability and earnings. In India, due to the deficient and inadequate healthcare services the nature of health insurance is complex which necessitated the introduction of the Third Party Administrators (TPAs), by the regulator of Indian insurance industry *i.e.* Insurance Regulatory and Development Authority of India (IRDA), who provide administrative services to insurance companies. The TPAs are intermediaries between the insurer and insured to facilitate cashless services at the time of hospitalization as well as processing of claims. Presently, there are only twenty-seven[2] TPAs in India. Recently, the IRDA, repealing the provisions of *IRDA (Third Party Administrators-Health Services) Regulations, 2001, IRDA (Third Party Administrators-Health Services) (First Amendment) Regulations, 2013 and IRDA (Third Party Administrators-Health Services) (Second Amendment) Regulations, 2013,* has made the IRDA (Third Party Administrators-Health Services) Regulations, 2016 which came into force on March 14, 2016. The Regulations, 2016 has brought widespread curiosity in common people, health insurance policyholders and persons working in insurance industry including TPAs also.

II. THIRD PARTY ADMINISTRATOR: ORIGIN, NEED & IMPORTANCE

The TPAs were introduced by the IRDA in the year 2001 to manage problems arising out of increasing health care expenses, to improve the processing of claims, to ensure better service delivery to the policyholders and to prevent the abuse of the health insurance system. They are registered with the IRDA and appointed by the concerned insurance companies to provide health services. The terms and conditions of TPAs are decided by the respective insurer and TPA. A TPA is authorised to provide health services to more than one insurer and similarly an insurer may also engage more than one TPA for providing health services to its policyholders or claimants. The TPA is defined as under:

Third Party Administrator means a company registered with the Authority, and engaged by an insurer, for a fee or remuneration, by whatever name called and as may be mentioned in the agreement, for providing health services as mentioned under these Regulations[3].

Thus, it is evident from the above definition that the TPA is an independent organisation which is registered with IRDA and appointed by the insurance company to provide

[2]As on 21st July, 2016: 1. United Healthcare Parekh TPA Pvt. Ltd., 2. Medi Assist India TPA Pvt. Ltd., 3. MD India Healthcare (TPA) Services (Pvt.) Ltd., 4. Paramount Health Services & Insurance TPA Pvt. Ltd., 5. E Meditek (TPA) Services Ltd., 6. Heritage Health TPA Pvt. Ltd., 7. Focus Health services TPA Pvt. Ltd., 8. Medicare TPA Services (I) Pvt. Ltd., 9. Family Health Plan (TPA) Ltd., 10. Raksha TPA Pvt. Ltd., 11. Vidal Health TPA Private Limited, 12. Anyuta TPA in Healthcare Pvt. Ltd., 13. East West Assist TPA Pvt. Ltd., 14. Med Save Health Care TPA Ltd., 15. Genins India Insurance TPA Ltd., 16. Alankit Insurance TPA Limited, 17. Health India TPA Services Private Limited, 18. Good Health TPA Services Ltd., 19. Vipul Med Corp TPA. Pvt. Ltd., 20. Park Mediclaim TPA Private Ltd., 21. Safeway Insurance TPA Pvt. Ltd, 22. Anmol Medicare TPA Ltd.,23. Dedicated Healthcare Services TPA (India) Private Limited, 24. Grand Health Care TPA Services Private Limited, 25. Rothshield Healthcare (TPA) Services Limited, 26. Ericson Insurance TPA Pvt. Ltd.,and 27. Health Insurance TPA of India Ltd.

[3]Regulation 2 (1) (m) of the IRDA (Third Party Administrators-Health Services) Regulations, 2016.

health services as a link between insurance company and policyholder. For such services, the concerned TPA is provided fee or remuneration by the insurer. The insurance policies are issued by the insurance companies and serviced by the TPA, as a facilitator. The health services which are provided by a TPA are contained in Regulation 3 under an agreement in connection with 'health insurance business'[4] as under-

(a) servicing of claims under health insurance policies by way of pre-authorization of cashless treatment or settlement of claims other than cashless claims or both, as per the underlying terms and conditions of the respective policy and within the framework of the guidelines issued by the insurers for settlement of claims.

(b) servicing of claims for hospitalization cover, if any, under Personal Accident Policy and domestic travel policy.

(c) facilitating carrying out of pre-insurance medical examinations in connection with underwriting of health insurance policies. The TPA is authorised to extend this service for life insurance policies also.

(d) health services matters of foreign travel policies and health policies issued by Indian insurers covering medical treatment or hospitalization outside India.

(e) servicing of health services matters of foreign travel policies issued by foreign insurers for policyholders who are travelling to India. Such services shall be restricted to the health services required to be attended to during the course of the visit or the stay of the policyholders in India.

(f) servicing of non-insurance healthcare schemes.

(g) any other services as may be mentioned by the IRDA.

But, a TPA, while performing the health services as indicated above, is not authorised to-

(a) directly make payment in respect of claims;

(b) reject or repudiate any of the claims directly;

(c) handle or service claims other than hospitalization cover under a personal accident policy;

(d) procure or solicit insurance business directly or indirectly; and

(e) offer any service directly to the policyholder or insured or to any other person unless such service is in accordance with the terms and conditions of the policy contract and the agreement entered into in terms of these regulations.

The TPA has an important place in the field of health insurance by providing hospitalization services, cashless access services, billing services and call center services. The TPA enters into a memorandum of understanding with individual hospitals and medical aid providers to facilitate the cashless hospitalization. The Competition Commission of India, mentioning the role of TPAs, observed that the primary role of the TPAs has been to provide services to the policyholders of the different insurance companies licensed by IRDA by processing their insurance claims and

[4] Section 2 (6C) of the Insurance Act, 1938: 'Health insurance business' means the effecting of contracts which provide for sickness benefits or medical, surgical or hospital expense benefits, whether in-patient or out-patient travel cover and personal accident cover.

providing cashless and non-cashless facility to the insured by negotiating with the hospitals/nursing homes that render health care services and facilities in India. The TPAs are paid a fee negotiated with the insurers at certain percentage of the insurance premium and in certain cases on per member or per service basis. The introduction of TPAs as authorized entities in the health care service chain was done with a view to ensure higher efficiency, standardization, providing cashless healthcare services to policyholders and increasing penetration of health insurance in the country. They are also potentially equipped to play a wider role in standardization of charges for various treatments and procedures, benefit management, medical management, provide network management, claim administration and maintaining a database of health insurance policies[5].

III. THIRD PARTY ADMINISTRATOR: REGISTRATION, FUNCTIONS AND ROLE

To start or carry out the business of rendering health services as a TPA, a person or entity must be compulsorily registered with IRDA whose main and sole objective is to exclusively carry on the business of providing health services. The Regulations, 2016 tightening the norms for TPAs provide that a TPA is not allowed to engage itself in any other business. The Regulations have mandated to use 'Insurance TPA' in the name of TPA/applicant to reflect that it is engaged or proposes to engage in the business of TPA for rendering health services. At the same time, the insurers are also mandated not to engage any entity/person to carry out the business of TPA who does not hold a valid certificate of registration as TPA.

Eligibility

The Regulations, 2016 provides that only a company registered under the Companies Act, 2013 can function as a TPA which has to maintain the minimum paid up equity share capital of not less than rupees four crores. For the TPAs registered in earlier Regulations of 2001 this stipulation has to be complied with within one year from the date of notification of these regulations. Every registered TPA has to maintain a 'working capital' of not less than rupees one crore. The 'working capital' means the difference between the aggregate of the current assets and current liabilities as on the date of reckoning. The foreign investments in the TPA is not restricted but it has to comply with the policy and rules framed in this regard by Government of India and any regulations, guidelines or instructions issued by the IRDA.

(a) the applicant has the words "Insurance TPA" in its name;

(b) the applicant has complied with the minimum capital requirements;

(c) the promoters of the applicant have the financial strength to carry out the business of TPA;

(d) at least one of the directors of a TPA holds a minimum qualification of MBBS, with a valid registration from the Medical Council of India or Medical Council of any State

[5] *Association of Third Party Administrators v. General Insurers (Public Sector) Association of India*, Case No. 49/2010 Competition Commission of India. (Decided on July 12, 2011)

of India and is thereby entitled to practice medicine within its jurisdiction and is acting within the scope and jurisdiction of his/her registration;

(e) the applicant or its promoters or its directors are not suffering from any of the disqualifications;[6]

(f) the applicant has the necessary infrastructure such as adequate office space, equipment and trained manpower to effectively discharge its functions;

(g) the applicant has employed at least one person who has the necessary qualifications in respect of qualification, training and passing of prescribed examination and has adequate experience to conduct the business of TPA;

(h) the Chief Executive Officer (CEO) or a Chief Administrative Officer (CAO) and a Chief Medical Officer (CMO) of the applicant fulfils the fit and proper criteria in respect of qualification, training and passing of prescribed examination;

(i) the applicant has sufficient reach with Network Hospitals and Information Technology capability;

(j) the applicant has necessary in-house medical expertise in addition to the regulatory stipulation of at least one Director having the stipulated medical qualification; and

(k) any other requirements that the IRDA may consider necessary for grant of Certificate of Registration to the TPA.

The IRDA may require an applicant to furnish any further information or data or clarifications in addition to directing the applicant to comply with certain additional requirements for the purpose of consideration of the application and accordingly the applicant shall furnish the information or comply with the directions within given time. It is pertinent to note here that after submission of application for registration the applicant cannot change the structure, composition and other aspects of the applicant company which may have a bearing on decision for grant of TPA registration, without prior approval of the IRDA.

On examination of the application and details furnished by the applicant, where the IRDA is satisfied that the applicant company fulfills all the requirements it issues the

[6] Section 42D (5) of the Insurance Act: The disqualifications above referred are as- (a) that the person is a minor; (b) that he is found to be a unsound mind by a court of competent jurisdiction; (c) that he has been found guilty of criminal misappropriation or criminal breach of trust or cheating or forgery or an abetment of or attempt to commit any such offence by a court of competent jurisdiction: Provided that, where at least five years have elapsed since the completion of the sentence imposed on any person in respect of any such offence, the Authority shall ordinarily declare in respect of such person that his conviction shall cease to operate as a disqualification under this clause; (d) that in the course of any judicial proceedings relating to any policy of insurance of the winding up of an insurance company or in the course of an investigation of the affairs of an insurer it has been found that he has been guilty of or has knowingly participated in or connived at any fraud dishonestly or misrepresentation against an insurer or an insured; (e) that he does not possess the requisite qualifications and practical training for a period not exceeding twelve months, as may be specified by the regulations made by the Authority in this behalf; (f) that he has not passed such examinations as may be specified by the regulations made by the Authority in this behalf; (g) that he violates the code of conduct as may be specified by the regulations made by the IRDA.

certificate of registration on payment of a further sum of Rs. 30,000/- (Rupees Thirty Thousand only) and applicable service tax to the IRDA as registration fee. A Certificate of Registration granted by the IRDA to a TPA or any renewal thereof is valid for a period of three years as indicated in the Certificate of Registration, unless the IRDA decides to revoke, suspend or cancel the Certificate of Registration in accordance with these regulations. The TPA which has been granted Certificate of Registration is under obligation to commence its business operations within twelve months from the date of grant of Certificate of Registration. Further, every registered TPA has to display and be identified in public domain by the name with which it is registered, IRDA registration number, validity period of the Certificate of Registration, address of the Registered and Corporate Office and the insurers it is representing.

But, on examination of the application as mentioned above, if the IRDA finds that the application and other requirements are not complied with, it may refuse grant of Certificate of Registration to an applicant after providing the applicant a reasonable opportunity of being heard. The order of refusal is communicated to the applicant by IRDA in writing indicating reasons for such decision and the applicant whose application has been refused cannot submit a fresh application to IRDA, for a period of two years from the date of such refusal, for grant of Certificate of Registration as a TPA.

If the Certificate of Registration of a TPA is destroyed, lost or mutilated it can apply to IRDA with a processing fee of Rs. 2,000/- (Rupees Two thousand only) and service tax for issue of duplicate Certificate of Registration. After being satisfied with the application, the IRDA may issue a duplicate Certificate of Registration to the TPA.

Renewal of Certificate of Registration

For renewal of the Certificate of Registration, the concerned TPA has to make application to IRDA accompanied by prescribed documents, a non-refundable renewal processing fee of Rs.15,000/- (Rupees Fifteen Thousand only) and service tax not earlier than 180 days and not later than 30 days before the date on which the Certificate of Registration ceases to be valid. If the application is made after prescribed time, an additional fee of Rs. 100/- (Rupees One Hundred only) has to be paid. But, where the application is made after expiry of the validity of Certificate of Registration, the IRDA may, if satisfied that undue hardship would be caused otherwise, accept the application on payment of a penalty of Rs. 750 (Rupees seven hundred and fifty only) and service tax. The non-compliance with minimum business requirements may result in non-renewal of Certificate. In respect of renewal the IRDA may call for additional information, clarifications or data as deemed necessary. When the IRDA is satisfied that the concerned TPA fulfils all the conditions required for renewal of the Certificate of Registration and there are no reasons for denial of renewal, it renews the Certificate of Registration for further period of three years.

Surrender of Certificate of Registration

Where a TPA applies to IRDA to voluntarily surrender its Certificate of Registration stating the reasons for surrender with required documents, the IRDA may consider such application on merits and subject to such conditions as it may deem fit to impose. When the IRDA is satisfied with the reason for surrender, it may pass an order agreeing to the surrender of registration by the TPA. Such order shall be displayed on the website of the IRDA for information of general public and the insurance companies for necessary action.

Revocation, Suspension, Cancellation or Denial of Renewal of Certificate of Registration

The Certificate of Registration issued by the IRDA may be revoked, suspended, canceled or denied the renewal stating clearly the reasons, if the IRDA is satisfied after providing a reasonable opportunity of being heard to the TPA that-

(a) the TPA is functioning in a manner detrimental to the interests of the insured, policyholder or insurer.

(b) the financial condition of the TPA has deteriorated because of which the TPA cannot function effectively.

(c) the character, constitution and ownership of the TPA has changed significantly since the grant of Certificate of Registration.

(d) the TPA furnished wrong or false information or undertaking or willfully concealed or failed to disclose material facts in the application for obtaining a Certificate of Registration or renewal of Certificate of Registration and such Certificate of Registration or renewal was granted to the TPA on the basis of non-disclosure, misrepresentation of facts or fraud.

(e) the TPA is under liquidation or is adjudged as being insolvent.

(f) the TPA has violated or failed to comply with these regulations or any other provisions of the Insurance Act,1938, Insurance Regulatory and Development Authority Act, 1999 or rules, regulations, guidelines or circulars issued by the Authority.

(g) the TPA failed to furnish information relating to its business as a TPA or failed to submit periodical returns as required by the IRDA.

(h) the TPA did not co-operate with any inspection, audit or enquiry conducted by the IRDA;

(i) the TPA failed to resolve the complaints of the policyholders or network providers or failed to give a satisfactory reply to the IRDA in this behalf.

(j) the TPA is found guilty of misconduct or its conduct is not in accordance with the Code of Conduct mentioned in these regulations.

(k) the TPA failed to maintain minimum capital or working capital requirements.

(l) the TPA failed to pay to the IRDA the fees, penalties imposed or the reimbursement of expenses under these regulations.

(m) the TPA violated the conditions, if any, imposed at the time of issuance of Certificate of Registration or renewal of Registration.

(n) the TPA did not carry out its obligations as mentioned in the regulations.

(o) the CEO/CAO/CMO does not fulfill the required norms though the TPA is otherwise compliant;

(p) the TPA has been set up only to divert or siphon off the funds within a group of companies or their associates.

(q) the TPA has failed to furnish additional information or clarifications called for by the IRDA within the time laid down, in connection with the application for renewal of TPA registration.

But, in the following circumstances the IRDA may revoke or suspend the Certificate of Registration without notice if the TPA-

(a) violates any one or more of the requirements under the Code of Conduct;

(b) is found to be guilty of fraud or is convicted of a criminal offence;

(c) commits such defaults which require immediate action in the opinion of the IRDA; and

(d) has not commenced business within twelve months from the date of Certificate of Registration.

In above mentioned circumstances, the Certificate of Registration so revoked or suspended shall not be cancelled by the IRDA unless an enquiry is conducted and the TPA has been given a reasonable opportunity of being heard. The order of revocation, suspension or cancellation or denial of renewal of the Certificate of Registration shall be displayed on the website of the IRDA for information of general public and the insurance companies for necessary action.

The effects of revocation, suspension, cancellation, voluntary surrender of the Certificate of Registration or denial of renewal of Certificate of Registration of TPA are as under-

(a) On and from the date of the order issued by the IRDA, of revocation, cancellation, suspension or voluntary surrender of the certificate of registration, or denial of renewal of Certificate of Registration, the TPA shall cease to do the business of TPA unless mentioned otherwise in the order.

(b) The TPA shall forthwith inform the insurer for taking alternative steps such as appointment of another TPA or undertaking of the servicing of the affected policies as may be necessary, immediately, to continue to cater to the insured or policyholders serviced by the TPA.

(c) The TPA shall immediately handover to the concerned insurer all the books, information, records or documents etc. and the complete data collected by it relating to the business carried on by it with regard to such insurer.

(d) On publication of the order, where an insurer, approaches the TPA for return of the above referred information or records, the TPA shall render all cooperation and assistance to the insurer.

(e) A TPA which renders non-insurance services relating to any of the health schemes shall immediately notify the order issued by the IRDA to the concerned Central or State Governments.

(f) Where TPA renders the health services of the foreign insurers to their respective policyholders visiting India, it shall immediately notify the order issued by the IRDA to all such foreign insurers to whom the TPA services were rendered in the preceding three financial years.

(g) No insurer shall permit a TPA whose Certificate of Registration is revoked, suspended or cancelled or which has been denied renewal of Certificate of Registration to render health services to their policyholders in foreign countries.

(h) Where a Certificate of Registration of a TPA is revoked or cancelled or where the TPA is denied renewal or where the TPA voluntarily surrenders Certificate of Registration, the company shall not carry the words "Insurance TPA" in its name.

IV. OBLIGATIONS OF TPA

Every TPA has the following obligations to adhere-

Appointment of Officials

Every TPA has to appoint a CEO or a CAO and a CMO. The TPA, from amongst its directors or senior employees, may appoint a CEO/CAO who possesses the following qualifications-

(a) a bachelor's degree from a recognised University and

(b) a pass in the Associateship examination conducted by the Insurance Institute of India or such equivalent examination as may be recognised and specified by the IRDA and

(c) completion of training with an institution recognised by the IRDA for these purposes.

The CEO/CAO shall be responsible for the day-to-day administration of the affairs of the TPA and for ensuring compliance of regulatory requirements.

Additionally, a CMO has also to be appointed by every TPA who holds the minimum qualification of MBBS, a valid registration from the Medical Council of India or Medical Council of any State of India being thereby entitled to practice medicine within its jurisdiction and is acting within the scope and jurisdiction of such registration. The CMO should be a full time employee of the TPA. The respective TPA has to intimate regarding the appointment of CEO/CAO/CMO to the IRDA within thirty days of the date of their appointment.

Maintenance of Minimum Business Requirements

Every registered TPA has to comply with minimum business norms towards health services for the insurers as has been specified by the IRDA. The Minimum Business Requirements are applicable to all the TPAs registered from 01st April, 2016 and the TPA companies registered under earlier Regulations have to comply with these norms from 01st April, 2016 onwards. In compliance of the Regulations, 2016 the IRDA issued a Circular[7] detailing the following Minimum Business Requirements to be fulfilled by every registered TPA during each financial year-

Number of Financial Years Completed since 01-04-2016 or date of granting the Certificate of Registration, whichever is later	Number of policies serviced Parameter- 1	Number of Lives serviced Parameter- 2
Second Year	2500	5000
Third Year	5000	10000
Fourth Year to Sixth Year	10000	25000
From Seventh Year onwards	15000	50000

[7] Circular Reference No. IRDA/TPA/REG/CIR/059/03/2016 dtd. 28.03.206, available at: *http://www.dhc.co.in/uploadedfile/1/2/1/Circular%20as%20per%20provisions%20of%20IRDAI%20(TPA%20Health%20Services)%20Reg%202016.pdf*

If the TPA is exclusively servicing Group Health Insurance Policies, it has to fulfill twice the number of policies prescribed under Parameter-1 as an additional number of lives in the respective years in addition to those prescribed under Parameter- 2. For such TPA, the norms prescribed under Parameter-1 are not applicable. The TPA which intends to exclusively service Group Policies it has to inform the IRDA at the commencement of the Financial Year. Every TPA's endeavor should be to enter into Health Services Agreement with at least two insurers during second and third years of business, a minimum of three insurers during fourth to sixth year of business and a minimum of four insurers from seventh year onwards.

Maintenance of Books of Account etc.

Every TPA has been mandated to maintain proper records, documents, evidence and books of all transactions carried out by it on behalf of an insurer. The maintenance of books and accounting records have to be done in accordance with the provisions of the Companies Act, 2013. These records, documents, evidence, books etc. and any information contained therein have to be made available to the insurer, the IRDA or to such person appointed by the IRDA for investigation into or inspection of the functions of the TPA. In maintaining these records, the TPA follows strictly the professional confidentiality between the parties as required except certain circumstances where the TPA may be bound to disclose the relevant information relating to its business to any Court of Law, Tribunal, the Government or the IRDA in case any investigation is carried out or is proposed to be carried out against the insurer, TPA or any other person or for any other reason. Every TPA and insurer has to establish electronic systems for seamless flow of data for all the claims and shall follow standards and protocols for capture of data. The Annual Report duly certified by one of the Directors of TPA and the CAO/CEO is submitted to the IRDA within a period of ninety days after the close of each financial year. Additionally, every TPA has-

(a) to submit or handover all the files, data and other related information pertaining to the settlement of claims to the respective insurers on a quarterly basis within fifteen days after the close of each quarter and the insurer shall accept the same under acknowledgement.

(b) not to share the data and personal information received by it for servicing of insurance policies or claims thereon except as mentioned above.

(c) to furnish to the insurer and the IRDA an annual report and any other return of its activities.

(d) to file periodical information to the IRDA relating to claims data.

(e) to furnish declarations and undertakings in such form and at periodicity.

Adherence to Code of Conduct

Every TPA is under legal obligation to act in the best professional manner and abide by the code of conduct. It is the duty of every TPA, its CAO or CEO, CMO and its employees or representatives to-

- establish their identity to the insured, claimant, policyholder and that of the insurer with which it has entered into an agreement, other entities and the public.
- disclose its certificate of registration on demand to the insured, policyholder,

claimant, prospect, public or to any other entity relating to the services under a policy issued by an insurer.

- disclose on demand to the insured, policyholder, claimant, prospect, public or to any other entity the details of the services it is authorized to render in respect of health insurance products under an agreement with an insurer.
- bring to the notice of the insurer with whom it has an agreement, any adverse report or inconsistencies or any material fact that is relevant for the insurer.
- obtain all the requisite documents pertaining to the examination of an insurance claim arising out of an insurance contract.
- render such assistance as mentioned under the agreement and advice to policyholders or claimants or beneficiaries to comply with the requirements for settlement of claims with the insurer.
- conduct itself or himself in a courteous and professional manner.
- refrain from acting in a manner which may influence, either directly or indirectly, the insured or policyholder of a particular insurer to migrate from one insurer to another.
- refrain from dissuading or discouraging policyholder from approaching specific hospital of his / her choice or persuade or encourage the policy holder to approach any specific hospitals which are in their Network, other than offering advice and guidance when specifically sought for.
- have effective grievance management systems in place.
- ensure to resolve the grievances of policyholders within fifteen days of receipt of the same.
- ensure to resolve the grievances or disputes with hospitals or network providers expeditiously and ensure that the policyholder is not adversely affected due to such disputes.
- refrain from trading on information and records of its business except for sharing of the same as permitted.
- maintain the confidentiality of the data collected by it and not share the same except as provided in these Regulations.
- refrain from issuing advertisements of its business or the services carried out by it on behalf of a particular insurer, without prior written approval of the insurer. Provided that a TPA can issue advertisement about the activities or the services carried out by it, for publicity or promoting public awareness. Provided further that, as part of its Corporate Social Responsibility, a TPA may promote the need for and benefits of health insurance in general without specifically referring to any insurer, insurance policy, network provider or hospital.
- refrain from inducing an insured, policyholder, network provider to omit any material information or submit wrong information.
- refrain from demanding or receiving a share of the proceeds or a part of the claim amount from the policy holder, claimant, network provider.
- comply with the regulations, circulars, guidelines and directions.

- not lend or grant any loan to any other company, entity or individual not connected with its TPA business. However, this does not prevent a TPA from granting any loans or temporary advances either on hypothecation of property or on personal security or otherwise, as part of the benefits to the fulltime employees of the TPA as per the scheme duly approved by its Board of Directors.
- not submit any wrong, incorrect, misleading data or information or undertaking to the IRDA or to the insurer or to any other stake holder of the TPA business.
- not accept any kind of incentives other than the remuneration agreed towards service fees or any inducement for maintaining low claims ratio.
- not to outsource the job of servicing of those insurance policies for which he is appointed as TPA to any other registered entity including TPA or unregistered entity.
- not remit any sum including the claim amount whether directly or indirectly either to a policyholder, claimant, Network Provider or any other hospital. A TPA shall not maintain any float fund account or any other account with any other nomenclature for payment of insurance claims on behalf of insurer. Provided that, with respect to servicing of foreign travel policies issued by foreign insurers, a TPA can make claim payment based on a valid and written agreement in this regard with such foreign insurers.
- not publish on its website any incorrect or misleading information or display any content or matter which is not in line with these regulations.
- no claim is concurred or disputed by a medical practitioner unless he is from the same stream of medicine relating to which the treatment was provided and claim is preferred.
- abide by the Corporate Governance guidelines pertaining to TPAs as issued by the IRDA.
- shall disclose on demand, the fee received for servicing of health insurance policy to the policy holder, insured or claimant.
- follow claim guidelines as issued by insurers from time to time.
- ensure that at no point of time contact numbers of a TPA like phone number, toll free number as published or provided to policy holders shall be out of service or closed. Further, any change in details referred herein shall be notified suitably to all the policyholders within seven days of such change.
- disclose the list of network hospitals with whom it has valid agreement to policy holders, prospects and general public. Further, any change in details referred herein shall be notified suitably to all the policyholders within seven days of such change.
- have systems in place for assisting the policyholder or claimant during hospitalization with respect to concerned health insurance policy terms and conditions and services for cashless facility.
- abide by the timelines for rendering health services and shall make public disclosures on their websites or disseminate information through call centers.
- clearly explain cashless service procedures at hospitals and also on their website and through call centers.

- communicate promptly to the claimant under intimation to the insurer concerned about any delay which is unavoidable or owing to the customer or hospital.
- have systems in place to identify, monitor, control and deal with fraud including hospital abuse, by various agencies including healthcare providers.
- put in place systems and internal processes for detection of fraud and its mitigation, delineate and disseminate information on fraudulent cases to the concerned insurer within three days of detection and submit such information on fraudulent claims as directed by the IRDA.

Further, the Code stipulates that the director(s), promoter(s), shareholder(s), CAO, CEO, CMO and Key managerial person(s) of a TPA shall not engage directly or indirectly in any other insurance or insurance related activities that may lead to conflict of interest.

V. ROLE OF IRDA

The IRDA, being the regulator of the Indian insurance industry, has various roles in respect of TPAs also which may be summarized as under-

Direction to Terminate the Services of CEO/CAO/CMO

As mentioned above, when the information of appointment of CEO/CAO/CMO is furnished by the TPA the IRDA may direct the TPA to terminate their services. The direction issued by the IRDA should be accompanied with the reasons in writing. It is important to note here that before issuing such direction, the IRDA gives the TPA an opportunity of being heard.

Appointment of Inspecting Authority

The IRDA has power to appoint one or more of its officers as 'Inspecting Authority', with or without prior notice, regarding inspection of books of accounts, records and documents of the TPA for any of the following purposes-

(a) to ensure that the statutory books or books of account are being maintained in the manner as required or

(b) to ensure that the provisions of the Act, rules, regulations, guidelines, circulars, advisories are being complied with or

(c) to inspect the complaints received from any insured, any insurer, other TPA or any other person on any matter having a bearing on the activities of the TPA or

(d) to inspect the affairs of the TPA *suo motu* in the interest of proper development of TPA business or in policyholders' interests.

The officers and employees of the TPA are duty bound to make available the books of account, statements, documents, etc. for inspection and copies of all contracts entered into with the insurers. The failure to furnish any document, statement, return, etc. to the IRDA is construed as a non-compliance of the Regulations, 2016.

Issuance of Clarifications, Circulars, Guidelines, Instructions

The Chairperson of the IRDA has authority to issue appropriate clarifications or guidelines as deemed necessary in order to remove any doubts or the difficulties that may arise in the application or interpretation of any of the provisions of the Regulations,

2016. Further, under these regulations, the IRDA has been authorised to specify by issue of Circulars, Guidelines or Instructions in respect of the following-

- Format of application for Grant of Fresh Certificate of Registration to TPA along with list of documents to be submitted and procedural requirements for obtaining Fresh TPA Registration.
- List of documents to be submitted along with Form TPA - 1 and Procedural requirements for obtaining Fresh TPA Registration.
- Format for Certificate of Registration.
- Declaration and Undertaking w.r.t. fit & proper criteria.
- Form for Intimation of appointment or change in Director, Chief Executive Officer or Chief Administrative Officer, Chief Medical Officer.
- Application for issue of Duplicate Certificate of Registration.
- Format for Duplicate Certificate of Registration.
- Application for Change in Shareholding Pattern.
- List of documents to be submitted for consideration of application for transfer of ownership or change in shareholding pattern.
- Quarterly return for Status of Shareholding Pattern of a TPA Company.
- Minimum Business Requirements for TPAs.
- Application for Renewal of Certificate of Registration.
- List of documents to be attached with the Application for Renewal of TPA Registration.
- Format for Certificate of Renewal of TPA Registration.
- List of documents to be submitted along with application for Voluntary Surrender of TPA Registration.
- Schedule of apportionment of expenses.
- Schedule of Income or Remuneration received by TPA.
- Form and Formats for Annual Report to be submitted by TPAs.
- Format for Monthly and Cumulative Claims data for TPAs.
- Annual Certificate in the matter of Working Capital of a TPA Company.
- Annual Declaration and Undertaking by TPA Company.
- Quarterly Form for Service Level Agreement Details.
- Minimum Standard clauses in agreement between Insurer & TPAs.
- Periodical returns - Quarterly information on non-insurance health schemes.
- Stipulations in the matter of Non Insurance Services under Health Care Schemes.
- Format for quarterly Information on services rendered in Indian or in foreign jurisdictions for policies issued by Indian Insurers.
- Format for quarterly Information on health services rendered to foreign travel policies issued by Foreign Insurers.
- Corporate Governance norms for TPAs.

- Form for intimation of opening and closing of the branches or change in office address.
- Any other matter which is required to be specified by the IRDA under these regulations.

VI. BUSINESS OF TPA

As TPAs' business is to provide health services to the policyholders, it has to enter into Health Services Agreement[8] with insurers as well as network providers. The term 'network provider' means hospital or health care provider enlisted by an insurer, TPA or jointly by an insurer and TPA to provide medical services to an insured either on payment or by a cashless facility[9]. Further, the 'cashless facility' is defined as a facility extended by an insurer to an insured where the payment of the costs of treatment undergone by the insured in accordance with the policy terms and conditions is directly made to the network provider by the insurer to the extent of approved pre-authorization[10].

A TPA enters into an agreement, for providing the defined health services, with an insurer and network provider, covering hospitalization benefits within India, issued by an Indian insurer. It has to ensure that the agreement is enforceable at all times. The agreement defines the scope of the agreement, the health and related services that may be provided by the TPA in addition to the following clauses-

(a) its termination by either party on mutual consent or on grounds of any fraud, misrepresentation, deficiency of services or other non-compliance or default. However, there shall be no clause in the Agreement which shall dilute, restrict or otherwise modify the regulatory stipulations mentioned by the IRDA in respect of policyholders' interests, protection, service standards and turn-around-time parameters.

(b) prescribing the minimum Turn Around Time envisaged for rendering various policy services stipulated in the terms and conditions of the policy contract but it cannot exceed the minimum norms prescribed in any of the regulatory requirements.

(c) the remuneration payable to the TPA by an Insurer.

The TPA is under duty to file details of the agreement entered into between the TPA, insurer, Network Provider or any modification thereof to the IRDA. The remuneration of the TPA shall be based on the health services rendered to the insurer only and insurers are prohibited to pay any remuneration related to the product, linking to the claims experience or the reduction of claim costs or loss ratios. The TPA cannot charge any fees in any form or in any manner from the policyholders or network providers for the health services rendered under these Regulations.

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[8]Regulation 2 (1) (i) of the IRDA (Third Party Administrators - Health Services) Regulations, 2016: 'Health Services Agreement' means an agreement prescribing the terms and conditions of services which may be rendered to the holders of health insurance policies of any insurer and may be entered into between-

(a) a Third Party Administrator (TPA) and an insurer or

(b) a Network provider and an insurer or

(c) a Network provider, a TPA and the insurer.

[9]Regulation 2 (1) (k) of the IRDA (Third Party Administrators - Health Services) Regulations, 2016.

[10] *Id.* at Regulation 2 (1) (f).

If there is any change in TPA by the insurer, all the policyholders should be communicated thirty days before giving effect to the change. The contact details like helpline numbers, addresses etc. of a new TPA should be immediately made available to all the policyholders in case of change of TPA. Further, the insurer has to take over all the data in respect of the policies serviced by the earlier TPA and make sure that the same is transferred seamlessly to the newly assigned TPA, if any. It shall be ensured that no inconvenience or hardship is caused to the policyholder as a result of the change. In this respect, the following aspects should be taken into consideration-

i. Status of cases where pre-authorization has already been issued by existing TPA.

ii. Status of cases where claim documents have been submitted to the existing TPA for processing.

iii. Status of claims where processing has been completed by the existing TPA and payment is pending with the insurer.

Next, it has been provided that if any discount is received or agreed to be received from the hospital towards health services, such discount must be passed on to the policyholder or the claimant of the concerned health insurance policy. In order to implement the above norms, every insurer and the TPA has to put in place the following procedures which are applicable to both cashless services and reimbursements of all the claims of health insurance policies-

(i) The insurers and TPAs shall mandate the hospitals to reflect such agreed discounts in the final hospitalization bill of each claim, by which the policyholder or the claimant can also be aware of the actual bill raised by the hospital.

(ii) Where the admissible claim amount is more than the Sum Insured, the agreed discount shall be effected on the Gross amount raised in the bill, before letting the policyholder or the claimant bear the costs over and above the eligible claim amounts.

(iii) Where the underlying health insurance policies have co-payment or the deductible conditions, the insurer or TPA shall ensure that the said co-payment or deductible is effected only after netting off the discounts offered by the hospital, if any.

The TPA is mandated to have in place the necessary infrastructure to extend the health services as required to the policyholders at all times and the TPA and the insurer are responsible for the proper and prompt service to the policyholder at all times. The TPA may admit claims, authorize cashless facility and recommend to the insurer for the payment of the claim which shall be in line with the detailed claims guidelines issued to TPA by the insurers for the particular product. It shall endeavor to collect all documents pertaining to the claims reported in electronic mode for seamless processing and for recommending to the insurer for payment or rejection as the case may be. In respect of settlement of the claims, the TPA has to adopt the following procedure-

(i) In case of admissible claim, full or partial, in the communication addressed to the policyholder or claimant, the TPA is required to state clearly the following-

(a) "Your claim bearing No <Claim No> against policy issued by <name of the insurer> has been settled for Rs <Amt Paid> against the Amount Claimed for Rs <Claimed Amount> towards Medical Expenses incurred for treatment of <name of the Ailment> at <Name and City of the Hospital> for the period from <Date of Admission> to <Date of Discharge>".

(b) The granular details of the payments made, amounts disallowed and the reasons there for.

(c) The details of (i) Grievance Redressal Procedure in place with the insurer (ii) Contact details of concerned Grievance Redressal Office and officer (iii) Procedure to be followed for approaching Insurance Ombudsman in case the policyholder or claimant is not satisfied with the resolution provided by the insurer (iv) Contact details of office of Insurance Ombudsman.

The above details shall be mandatorily included in the communication to the policyholder or claimant in every case where the TPA has disallowed any part of the claim.

(ii) In case of inadmissibility of the entire claim, the TPA on its own shall not reject or repudiate the claim and the decision and the communication with respect to rejection or repudiation of claim shall be sent only by the concerned insurer directly to the Policyholder or the claimant.

The TPAs are authorised for servicing of foreign travel policies after obtaining approvals under various other applicable laws and other relevant framework in India. Before servicing the foreign travel policies issued by the foreign insurers, a TPA has to obtain the complete terms and conditions governing such policy and then service only on the specific authorisation of the foreign insurer. Accordingly, it has to submit the details of the health services that could be offered as part of agreement to the foreign insurers.

VII. CONCLUDING OBSERVATIONS

The introduction of TPAs in India was a revolutionary step for the insurance companies as well as to the policyholders. They are playing a valuable role in the Indian health insurance industry by providing professional capacity for handling health insurance claims and cashless hospitalization benefits. Their role is not to sell the insurance policies rather they provide administrative service to the insurers and hence they are termed as the 'back office' of the insurers also. The role of TPAs starts from issuance of unique identity cards to policyholders for hospital admissions up to settlement of claims either on cashless basis or reimbursement basis.

TPAs are a new category in the field of insurance administration and are becoming a significant factor. As a result of their increasing prominence, but lack of publicity, there appeared to be a need for some enlightenment concerning their potential and market. In true sense, they are working under the proper supervision and regulation of the IRDA to strengthen the health insurance system but it is reality that the relationship between network providers and TPAs is of utmost significance for the effective service of policyholders otherwise there may be issues related to incorrect billing, fraud resulting in abuse of financial system. Due to inconsistency in paying claims, the level of trust between TPAs and policyholders/claimants is not satisfactory which needs the proper awareness regarding insurance plan benefits and operational processes of the TPA on the part of policyholders.

[11] Roger M. Siddall & Clyde J. Cooley, "The Third Party Administrator for Self-Insured Health Care Plans", Vol. 8, No. 1, 1985, *The Journal of Insurance Issues and Practices*, 42-51 at 42.

PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/ FOLKLORE: INTERNATIONAL AND NATIONAL PERSPECTIVES

Rajnish Kumar Singh*

Abstract

Traditional Cultural Expressions (TCEs) are the creative expressions in which traditional culture and knowledge are embodied. These have deep connection with the culture, religious practices and economy of the indigenous communities. Realizing the tremendous importance of the subject matter initiatives have been taken at international level in the form of WIPO draft. Regional and national initiatives are also there. Most of these indicate that the copyright approach with some modifications has been used to protect folklore, however, copyright law has its own limitations. The proprietary rights regime assumes that an individual will possess the rights whereas in case of TCEs beneficiaries will be communities. The paper examines the international and national initiatives on the subject. It is argued that at national level establishing institutional framework having expertise on such a subject of immense diversity is a real challenge. As long as a legal framework does not come into existence the process of documentation may be the only method to ensure that some protection is provided to the TCEs of India.

Key words

Traditional Cultural Expressions, Folklore, Cultural heritage, Performer's Rights, Copyright, Intellectual Property Protection and Sui generis protection.

I. INTRODUCTION

Traditional Cultural Expressions (TCEs) are described as the creative expressions in which traditional culture and knowledge are embodied or expressed and sometimes called as expressions of folklore[1]. These are the area which may be covered under the

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[1] J. Michael and Philip Schuler, *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries*(Washington: The International Bank for Reconstruction and Development / The World Bank, 2004) ; *See also*, Valerie J. Phillips, "Indigenous Rights to Traditional Knowledge and Cultural Expressions: Implementing the Millennium Development Goals", 3 *Intercultural Human Rights Law Review, 2008, pp.191-197;* Hannu Wager, "Biodiversity, Traditional Knowledge and Folklore: Work on Related IP Matters in the WTO", 3 *Intercultural Human Rights Law Review, 2008, pp.215-227;* Molly Torsen, Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues", 3 *Intercultural Human Rights Law Review, 2008, pp.199-214;*and Cathryn A. Berryman, "*Toward More Universal Protection of Intangible Cultural Property",* 1 *Journal of Intellectual Property Law,* 1994, pp.293-310.

heading collective rights and which apparently does not fit into the traditional understanding of intellectual property rights. TCEs reflect a community's cultural and social background and consist of characteristic elements of a community's heritage. They are often made by authors who are unknown or unidentified, or by communities or individuals recognized as having the right, responsibility or permission to create them in accordance with the customary law and practices of that community. TCEs are often evolving, developing, and being recreated within source communities[2]. TCEs are still subject to evolution and that these cultural endeavors do not exist in a vacuum from other considerations and aspirations in human development[3]. Intellectual property rights and issue of its protection have long been a concern of societies in which traditional cultural expressions have strong influence on traditions and culture[4]. It is relevant to mention that most of the societies have denied protection to TCEs on the ground that these do no pass the criteria of IP but have allowed patent and copyright protection for the creations based on TCEs undermining the tremendous contribution of the generations in developing the expression. The preamble of TRIPs Agreement refers to this notion by recognizing that intellectual property rights are "private rights". These are considered to be the basis of economic individual freedom and a market economy[5]. Harshavardhan Ganesan, however, argues that "our conception of property have been constantly evolving, engulfing many items which otherwise wouldn't have an IP right, into the property net. Why not Cultural Property as well? I find it baffling that items like folklore, folkdances, medicinal knowledge, etc. which is clearly within the confines of Copyright Law or Patent Law are ostracized and doomed to rest in The Twilight Zone of Law merely because they do not adhere to the austere requirements of the outdated statutes".[6]

In recent years, indigenous peoples, local communities, and governments mainly in developing countries have strongly demanded IP protection for these traditional forms of creativity and innovation, which under the conventional IP system, are generally regarded as being in the public domain, and thus free for anyone to use[7]. Alexander Peukert observes that in fact, the public domain is the fundamental principle from which IP rights depart. These are "islands of exclusivity in an ocean of freedom. Therefore, they

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[2] Janice T. Pilch, "Traditional Cultural Expression", available at: *http://www.librarycopyrightalliance.org/storage/documents/issuebrieftce.pdf,* 2009, at 2.

[3] *Leena Desai,* "Traditional Cultural Expressions", V(XI) Singh and Associates, 2012, at 13.

[4] Bernard Jankee, "Policy objectives for the Protection of Traditional Knowledge, Folklore/Traditional Cultural Expressions and Genetic Resources in the Caribbean: The Role of Government", available at: *http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtk_kin_08/wipo_grtk_kin_08_presentation03.pdf*

[5] *Alexander Peukert, "*Individual, Multiple and Collective Ownership of Intellectual Property Rights: Which Impact on Exclusivity?", in Annette Kur & Vytautas Mizaras (eds) *"The Structure of Intellectual Property Law. Can One Size Fit All?"*Aldershot, UK and Brookfield, U.S.: Edward Elgar, 2011, 195-225 available at: *http://ssrn.com/abstract=1563990*

[6] Harshavardhan Ganesan, Justifying Group Intellectual Property: Applying Western Normative Principles to Justify Intangible Cultural Property, available at: *http://ssrn.com/abstract=2715809*

[7] "Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions", World Intellectual Property Organization, 2015, at 10, available at: *http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf*

are limited in scope and time. Any knowledge must at some point in time become part of the public domain to fuel a free public discourse and competition. A kind of cultural conservation via IP is incompatible with this thinking. It is true that indigenous communities reject such a concept of the public domain. Since traditional knowledge was never protected under classical IP, it could not be said to have entered the public domain. They claim instead that this knowledge has been, is, and will be regulated by customary law to be recognized by governments. The problem with that attitude is that one cannot claim exclusive protection akin to classical IP without respecting the public domain, which is the other side of the coin[8].Indigenous people, local communities and many countries reject a public domain status of TCEs and argue that this opens unwanted misappropriation and misuse[9]. National governments have enacted legislation partially based on the Model Provision for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982[10]. Further, realizing the sentiments of the member countries, in 1999, WIPO launched certain new initiatives as reflected in its Program and Budget for the biennium for exploration of the issues relating to intellectual property rights of holders of indigenous knowledge[11].In India, there is a strong demand for looking towards a mechanism for the protection of folklore and it is not confined to the limited scope offered in the definition of expressions of folklore in the Model Provisions.[12]

II. TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE: MEANING AND SIGNIFICANCE

A mentioned before the term traditional cultural expression refers to the work of indigenous people and the traditional communities. For examples a folk dance in which customary costumes and masks are used and are intrinsically linked to the performance. These expressions may include music, stories, handicrafts, musical instruments, words, names, performances, textile, carpet designs, etc. The most significant aspect of these expressions is that these have strong social, cultural, spiritual, economic, scientific, intellectual and educational value; these also represent the heritage of a community. Another significant aspect of TCEs is its dynamism is the sense that these are not static. These expressions passage from one generation to another, either orally or by imitation. These expressions are often primarily created for spiritual and religious purposes and constantly evolving, developing and being recreated within a community[13].

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[8] *Alexander Peukert, supra note 5, at 8.*

[9] "Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions", World Intellectual Property Organization, 2015, at 10, available at: *http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf*

[10] In 1982, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO) adopted the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions.

[11] *P.V. Valsala G. Kutty, "*National Experiences with the Protection of Expressions of Folklore/ Traditional Cultural Expressions: India, Indonesia and the Philippines", *World Intellectual Property Organization, at 23 available at:http://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf*

[12] *Ibid.*

[13] *See,* Comments and observations by the National Commission for the Development of Indigenous Peoples

The term Traditional Cultural Expressions (TCEs) in the international community is also referred to as "folklore" and some nations prefer using the term "folklore" in their national copyright laws. The term "folklore" means the traditional beliefs, myths, tales, and practices of a group of people, transmitted orally[14]. The term "folklore" was coined by William Thomas in the year 1846. Mr. Thomas meant to include manners, customs, observations, superstitions, ballads, proverbs and so on, in the term 'folklore', which he summarized as the lore of the people.[15]

Dan Ben-Amos notes that definitions of folklore are as many and varied as the versions of a well-known tale. Folklore became the exotic topic, the green grass on the other side of the fence, to which they were attracted but which, alas, was not in their own domain[16]. It is clear therefore that any discussion on TCEs requires us to travel through various disciplines including culture, language, literature, history and anthropology apart from others. According to the American Folklore Society, folklore is a broad umbrella term that encompasses traditional art, literature, knowledge, and practice disseminated largely through oral communication and behavioral example[17]. While folklore scholars tend to disagree about how far the scope of folklore extends, there appears to be a consensus that the term is relatively broad, and is deeply rooted in an oral tradition centered in local communities[18].

The last quarter of the twentieth century witnessed an unprecedented pace of activities in the area of legal protection of folklore[19].The tremendous importance of the subject led the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO) to evolve an acceptable framework at international level. This resulted in the formulation of Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions[20]. The draft of guidelines for WIPO defines 'expressions of folklore' as any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or manifested which are products of creative intellectual activity, including individual and communal creativity; characteristic of a community's cultural

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(CDI) on "Gap Analysis on the Protection of Traditional Cultural Expressions/ Expressions of Folklore and Traditional Knowledge ", Draft Working Documents prepared by the Secretariat of the World Intellectual Property Organization (WIPO), 2008, at 4.

[14] Leena Desai, *supra* note 3, at 10.

[15] Simon J. Bronner, *Following Tradition: Folklore in the Discourse of American Culture* (Utah: Utah State University Press, 1998) at 2; The term 'folklore' coined by Willium Thomas in 1846 received wide recognition and entire popular literature, observances, practices, customs, rituals and superstitions of humans are grouped under the wide category of folklore now. *See* for details Archer Tailor, *Folklore and the Student of Literature*, II*The Pacific Spectator*, 1948, pp.216-221.

[16]Dan Ben-Amos, "Toward a Definition of Folklore in Context", 84(331), *Journal of American Folklore*, 1971, pp.3-15.

[17]American Folklore Society, About Folklore, What is Folklore, available at: *http://www.afsnet.org/aboutfolklore/aboutFL.cfi*. Folklore includes folk traditions ranging from planting practices, dance, and instructions on how to build an irrigation dam, and stories.

[18] Michael Jon Andersen, "Claiming the Glass Slipper: The Protection of Folklore as Traditional Knowledge", *Case Western Reserve Journal of Law, Technology & the Internet*, Volume 1, Number 2 Spring 2010, at 150.

[19] P.V. Valsala G. Kutty, *supra* note 11, at 1.

[20] World Intellectual Property Organization and United Nations Educational, Scientific and Cultural

and social identity and cultural heritage; and maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community[21]. The definition includes a wide range of creative works and it is not only limited to tangible medium. Both individual and anonymous communal works may qualify as expressions of folklore. The forms folklore may take range from stories and oral narratives to glassware and architecture. The definition thus makes copyright, trademark, and patent regimes relevant. It is also relevant to note that indigenous expressions, heritage, and knowledge have different and sometimes interchangeable names in the legal community; it includes the intangible forms, such as oral traditions, or folkloric expressions that fall outside the traditional notions of arts and crafts[22].

The foregoing suggests that the biggest challenge is defining the term folklore. Folklore is a living phenomenon which evolves over time. It is a basic element of our culture which reflects the human spirit. Folklore is thus a window to a community's cultural and social identity, its standards and values. Folklore is usually transmitted orally, by imitation or by other means. Its forms include language, literature, music, dance, games, mythology, rituals, customs, handicrafts and other arts. Folklore comprises a great many manifestations which are both extremely various and constantly evolving. Because it is group-oriented and tradition based, it is sometimes described as traditional and popular folk culture."[23]

Indigenous expressions, heritage, and knowledge have different and sometimes interchangeable names in the various communities[24]. The American Heritage Dictionary defines folklore as the "traditional beliefs, myths, tales, and practices of a people, transmitted orally."[25] The World Intellectual Property Organization (WIPO) has defined "expressions of folklore" as characteristic elements of traditional artistic

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Organization, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions,* 1985, available at: *http:/ www.wipo.int/tk/en/documents/pdf/1 982-folklore-model-provisions.pdf*

[21] Christoph Antons, *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in Asia-Pacific Region* (Chicago: Kluwer Law International, 2009), at 3.

[22] For traditional knowledge and other forms of indigenous and cultural rights, see "Traditional Knowledge, Intellectual Property, and Indigenous Culture" Symposium issue of the Cardozo Journal of International and Comparative Law at 11 Cardozo J. Int'l & Comp. L. 239 (Summer 2003). *See also* Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States,* 48 Am. Univ. L. Rev. 769 (1999); Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPs Game,* 88 Minn. L. Rev. 249 (Dec. 2003); Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge,* 17 Colum. J. Asian L. 73 (Fall 2003).

[23]Cathryn A. Berryman, "Toward More Universal Protection of Intangible Cultural Property", 1 *Journal of Intellectual property Law,* 1994, pp.293-310 as quoted in *Jo Carrillo*, "Protecting a Piece of American Folklore: The Example of the Gusset", 4(2) *Journal of Intellectual Property Law,* 1997, at 244.

[24] Paul Kuruk, "Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States", 48 Am. Univ. L. Rev. 769 (1999).

[25] Definition from the American Heritage Dictionary online edition, available at: *http://www.bartleby.com/61/72/F0227200.html*

[26] Rory J. Radding, "Interfaces Between Intellectual Property and Traditional Knowledge and Folklore: A U.S.

heritage developed and maintained by a community[26]. It also encompasses the individuals who reflect "the traditional artistic expectations of such a community" either through verbal, musical, visual, and active physical expressions such as dance[27].WIPO itself notes that there are many definitions of traditional knowledge and folklore, and it may not be possible (or necessary) to develop an all-purpose term[28]. Thus the task to define the term remains unaccomplished. On the other hand it is argued by many that a regime of protection is not possible unless the term is defined with precision. In this context it is believed that as consensus on the definition has not evolved it is premature for us to finally evolve the protection regime[29]. It is also significant that this lack of consensus is not due to a lack of effort. WIPO's definition in *Model Laws* of 1982 is based on *Tunis Model Law on Copyright* of 1976. The Tunis definition of folklore included "all literary, artistic, and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage."[30] Recent attempts in the direction is seen in the form of the *Bangui Agreement* of 1999, *Panama Law No. 20* of 2000, and the *South Pacific Model Laws for National Laws* in 2002.In the light of the uncertainty about the precise definition it remains to be answered whether such a wide range of knowledge can even be protected. Despite the above, literature and different national initiatives suggest that there may be two mechanisms for the protection of TCEs: (1) protection for TCEs through existing IP laws, or (2) sui generis protection.

III. IP PROTECTION FOR TCEs: INTERNATIONAL PERSPECTIVES

Adequate protection of expressions of folklore has been claimed, discussed and tested for a much longer time than protection of other aspects of indigenous heritage, such as traditional knowledge or the traditional names, signs and insignia. It seems that an ideal solution has not yet been found.[31] In 1967, the Berne Convention for the Protection of

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Perspective", available at: http://articles.corporate.findlaw.com/articles/file/00310/008753#_ednref3 (quoting WIPO's study, *WIPO/GRTKF/STUD YI)*

[27] *Ibid*.

[28] *Ibid*, The term, "traditional knowledge" has come to be focused narrowly on the knowledge of indigenous people regarding medicinal and usually patentable subject matter. However this term, like defining "expressions of folklore" lacks any true consensus.

[29] The International Intellectual Property Alliance (IIPA) noted "that the inclusion of provisions on folklore in a regional trade agreement is premature." It went on to state the simple reality facing proponents today: "There is no international consensus on how to address this issue." Michael N. Schlesinger, *IIPA Comments on the FTAA IPR Negotiating Text,* August 22, 2001,*available at http://www.iipa.com/rbi/200 lAug22FTAA.pdf*

[30] *See* WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Comparative Summary of Sui Generis Legislation for the Protection of Traditional Cultural Expressions,* Annex April 28, 2003, *available at: http://www.wipo.int/documents/en/meetings /2003/igc/pdf/grtkf ic 5-inf3.pdf*

[31] Silke von Lewinski, "Adequate Protection of Folklore- A Work in Progress", in Paul Torremans (ed.), *Copyright Law A handbook of Contemporary Research*, Edward Elgar, Cheltenham, U.K., (2007), at 207.

[32] The Berne Convention for the Protection of Literary and Artistic Works, 1886 as revised at Stockholm on July 14, 1967.

Literary and Artistic Works provided a mechanism for the international protection of unpublished and anonymous works[32]. It aims at providing international protection for expressions of TCEs.[33] As the background to Article 15(4) of Berne implies, at least some folklore may fall within the definition of literary or artistic works, even if they are unpublished works of unknown authorship. Some laws include folklore partially or wholly within the scope of literary and artistic works,[34] while others define it altogether distinctly either within copyright laws or in *sui generis* laws for protection of folklore.[35] The interpretation of this term from a copyright perspective can often turn on what characteristics an expression of folklore might lack, by contrast with a copyrighted work: for example, underlying originality, individual authorship, a fixed form, and clear boundaries. For instance, folklore "must be distinguished from specific works created by distinguishable persons or groups of persons at a certain time on the basis of folklore or interpreting certain folkloric elements."[36]

In 1976, the Tunis Model Law on Copyright for Developing Countries was adopted. It includes sui generis protection for expressions of folklore.[37] Susanna Frederick Fischer observes that recognizing the doctrinal difficulties with protecting folklore under copyright law, the drafters of the Model Provisions preferred a *sui generis* type of protection. They chose to use the term "expressions of folklore' in the Model Provisions rather than the more typical copyright law term "works of folklore" in order to make clear that the protection was *sui generis*, not copyright.[38] In 1982, an expert group convened

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[33] *Id.,* Article 15.4: In the case of certain unpublished works of unknown authorship- (a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union and (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

[34] The UNESCO-WIPO Tunis Model Law on Copyright for Developing Countries defines folklore as "all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of traditional cultural heritage." United Nations Educ., Scientific and Cultural Org. & World Intellectual Prop. Org., Tunis Model Law on Copyright for Developing Countries (1976).

[35] This approach is taken in numerous African laws. The Cameroon law defines folklore as: all productions involving aspects of traditional cultural heritage, produced and perpetuated by a community or by individuals who are clearly responding to the expectations of such community, comprising particularly folk tales, folk poetry, popular songs and instrumental music, folk dances and shows, as well as artistic expressions, rituals and productions of popular art. Law No. 90-010 on Copyright, Article 10, Aug. 10, 1990 (Cameroon).

[36] Lucas- Schloetter, A. "Folklore", in Silke von Lewinski (ed.) *Indegenous Heritage and Intellectual Property*, The Hague, Netherlands, Kluwer at 86.

[37] The *Tunis Model Law on Copyright for Developing Countries, 1976, section 6:* Works of national folklore. The object of this provision is to prevent any improper exploitation and to permit adequate protection of the cultural heritage known as folklore.

[38] Susanna Frederick Fischer, "Dick Whittington and Creativity: From Trade to Folklore, From Folklore to Trade", 12 *Texas Wesleyan Law Review*, 2005, at 32.

[39] The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit

by WIPO and the United Nations Educational, Scientific and Cultural Organization(UNESCO) developed a sui generis Model Provisions for the IP type protection of TCEs.[39] In 1984, WIPO and UNESCO jointly convened a group of experts on the international protection of expressions of folklore by IP. A draft treaty based on the Model Provisions, 1982 was at their disposal. Yet, a majority of the participants believed it premature to establish an international treaty at that time.[40]

In December 1996, WIPO Member States adopted the WIPO Performances and Phonograms Treaty (WPPT). It provides protection for a performer of an expression of folklore and thus the concept of related rights for protection of performances of TCEs was recognized. The WPPT provides an international system of protection for performances of expressions of folklore. It gives rights in performances of literary and artistic works or expressions of folklore. The protection provided encompasses moral rights and a series of exclusive economic rights, including economic rights in their unfixed performances.

It must be stressed that only the protection of folklore is at stake. In contrast, individual works created on the basis of folklore can be protected. Only creative additions by the author are protected, rather than the elements of preexisting folklore. The producer of phonogram of folklore music gets protection in relation to the phonogram but the folklore itself does not get the protection. Performers of folklore may be protected in respect of their performance (i.e not the folklore itself).[41] In most of these cases the indigenous community would not in fact benefit from such protection, since they usually do not make fixations and collections of their own folklore. However, performers of folklore will often stem from indigenous communities and therefore benefit from protection in their performance. So that in this case the communities may be protected indirectly in respect of the folklore performed.

In April 1997, the UNESCO-WIPO World Forum on the Protection of Folklore was held in Phuket, Thailand. During 1998 and 1999, WIPO conducted fact-finding missions in 28 countries to identify the IP-related needs and expectations of traditional knowledge holders (FFMs). The results of the missions were published by WIPO in a report entitled 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-finding Missions (1998-1999).[42] The recommendations unanimously specified that future work in these areas should include the development of an effective international regime for the protection of expressions of folklore.[43]

In late 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established. The

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Exploitation and Other Prejudicial Actions, 1982.

[40]"Intellectual Property and Traditional Cultural Expressions/Folklore", World Intellectual Property Organization, Booklet No. 1, at 3, available at: *http://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf*

[41]The WPPT, Article 2(a).

[42]WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Comparative Summary of Sui Generis Legislation for theProtection of Traditional Cultural Expressions.*

[43] *Id.*, at 4.

Committee has made substantial progress in addressing both policy and practical linkages between the IP system and the concerns of practitioners and custodians of traditional cultures. Under the guidance of the Committee, the Secretariat of WIPO has issued a detailed questionnaire on national experiences, and undertaken a series of comprehensive analytical studies based on the responses to the questionnaire and other consultations and research.[44] It is the most prominent platform for the international discussion of this issue.[45] The studies have formed the basis for ongoing international policy debate and assisted in the development of practical tools.[46]

There is currently a growing list of countries with national laws related to traditional knowledge, cultural expressions and genetic resources.[47] Discussion and proposals surrounding their relationship to the TRIPs Agreement and the Convention of Biological Diversity (CBD) are ongoing. Lively discussion surrounds the many issues related to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted by the UN General Assembly only two months before the IP conference in Santa Clara.[48]

In relation to the developments which took place at international level it may be summed up that so far we have not been able to find out a solution which fits all the situations. However, it is also relevant to mention that the continued efforts of various agencies involved have ensured that maturity on the subject and likely solution may emerge. There are various other laws which touch the area of TCE indirectly. We need to be sensitive towards the objects of those laws also while evolving any long term proposal for protection of TCEs. As Article 10 of WIPO's Draft Provisions on Traditional Cultural Expressions/Expressions of Folklore puts forth that: Protection for traditional cultural expressions/expressions of folklore in accordance with these provisions does not replace and is complementary to protection applicable to traditional cultural expressions/expressions of folklore and derivatives thereof under other intellectual

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[44] It is a forum where WIPO member states discuss the intellectual property issues that arise in the context of access to genetic resources and benefit-sharing as well as the protection of traditional knowledge and traditional cultural expressions.

[45] Molly Torsen, "Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues", 3 *Intercultural Human Rights Law Review, 2008, at 199*

[46] *Final Report on National Experiences with the Legal Protection of Expressions of Folklore*, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Geneva, June 13 to 21, 2002.

[47] Shantanu Basu, Panel I Materials, *Global Legislative Efforts on Protection for Traditional Knowledge and Cultural Expressions,* (Nov. 9, 2007) (unpublished conference materials, University of Santa Clara School of Law); Gustavo Morais, Panel 1 Materials, *Access to Biodiversity- Brazilian Perspective,* (Nov. 9, 2007) (unpublished conference materials, University of Santa Clara School of Law)(on file with author); Molly Torsen, *Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues, infra,* at 199.

[48] Valerie J. Phillips, "Indigenous Rights to Traditional Knowledge and Cultural Expressions: Implementing the Millennium Development Goals", 3 *Intercultural Human Rights Law Review,* 2008 at 192.

[49] *"The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objective and Principles",2007, WIPO/GRTKF/IC/9/4*, available at: *http://www.wipo.int/meetings/en/doc details.jsp?docid-77573*

property laws, laws and programs for the safeguarding, preservation and promotion of cultural heritage, and other legal and non-legal measures available for the protection and preservation of traditional cultural expressions/expressions of folklore.[49]

IV. OPTION OF SUI GENERIS PROTECTION FOR TCES

Apart from a growing acceptance of sui generis solutions to the protection of TK and TCEs in international fora, in recent times, some experts have observed that in legal scholarship, the initial enthusiasm about the prospects for modifying IP laws to protect intangible heritage and expressions of folklore seem to be cooling off.[50] The attempt to evolve a system for protection of some elements of folklore within the regimes of copyright and neighboring rights have not been successful to fully achieve the goal of an effective mechanism for adequate protection against unauthorized exploitation and this has convinced many countries of the need for a sui generis system for the protection of folklore.[51] Many countries and several regional organizations have elected to protect TCEs through sui generis measures. Most have done so within their copyright laws, following largely the Model Provisions, 1982 and others have elected to establish stand-alone IP-like laws and systems.[52] Following aspects need to be addressed in a sui generis system for the protection of TCEs: Object of protection; subject matter of protection; rights and exception; criteria and procedure for registration of the subject matter; duration of protection including the question of retrospectively; Institutional framework; violation of rights and remedies. It is also relevant that influence of IP principles on any sui generis law cannot be denied. A brief mention of beneficiaries and scope of rights under Draft Provisions of WIPO and of the Model Law 2002 of the Pacific Community may help us in understanding the difficulty of the task at hand.

The draft provisions indicate an approach which integrates certain elements of customary law into legislative norms. The subject matter of protection is "traditional cultural expressions" or "expressions of folklore".[53] This alternative use of both notions reflects the underlying controversy about the proper designation of the subject matter.[54]

While the beneficiary of the copyright is the author who creates a work, and the beneficiary of performer's protection is the performer who performs a work, the

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[50] "*Sui Generis* Protection of Traditional Cultural Expressions", at 212, available at: *http://shodhganga.inflibnet.ac.in/bitstream/10603/14157/11/11_chapter%206.pdf*

[51] P.V. Valsala G. Kutty, *supra* note 11, at 5.

[52] For example: The Indigenous Peoples Rights Act, 1997 (Philippines); the Bangui Agreement on the Creation of an African Intellectual Property Organization, 1999; the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge of Panama, 2000 and the related Executive Decree of 2001; and, the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 *etc*.

[53] WIPO Draft Provisions, Article 1.

[54] Folklore was considered by some as having a negative connotation, stemming from colonial times, when folklore was considered as primitive. When WIPO therefore chose to use the term 'traditional cultural expressions', other stated to the contrary their preference for 'expression of folklore', which they considered as generally established term without any negative connotation.

beneficiary of expression of folklore has been proposed to be the communities rather than any individual who may have been at the start of an expression of folklore. Communities are recognized as beneficiaries only if the custody, care and safeguarding of the folklore are entrusted to them in accordance with their own customary law and practices and if they maintain, use or develop the folklore as being characteristic of their cultural and social identity and cultural heritage.[55]

The Model law for the Pacific Community seems to be even more precise. The beneficiaries made under Article 6 of the Model Law are the 'traditional owner' of the traditional knowledge or expression of culture who are defined in article 4 of the same Model Law, as:

(i) the group, clan or community of people; or

(ii) the individual who is recognized by a group, clan or community of people as the individual;

in whom the custody or the protection of traditional knowledge or expression of culture are entrusted in accordance with the customary law or practice of that group, clan or community.

This definition even takes account of the inner structure of communities where individuals are recognized by the group, clan and community as being custodians of a particular expression under customary law.[56]

The content and scope of protection has been designated in the Draft Provisions as 'acts of misappropriation'. [57] Different scopes of protection have been proposed in respect of different kinds of folklore. The broadest scope of protection would be provided for expression of folklore of particular cultural and spiritual value to a community, on the condition that they are registered or notified. In contrast the Model Law of the Pacific Community establishes a list of acts subject to prior informed consent, and specifies that prior informed consent is required only for non-customary uses, whether or not commercial, and clarifying that the traditional owners themselves are entitled to use expressions of folklore in the exercise of their traditional cultural rights without the need for prior informed consent.

V. PROTECTION OF TCEs IN INDIA

India's intangible cultural heritage flows from her 5000 year old culture and civilization. Dr. A.L. Basham, in his authoritative "Cultural History of India", has noted that "While there are four main cradles of civilization which, moving from East to West, are China, India, the Fertile Crescent and the Mediterranean, specially Greece and Italy, India deserves a larger share of credit because she has deeply affected the cultural life of most of Asia. She has also extended her influence, directly and indirectly, to other parts of the

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[55] WIPO Draft Provisions, Article 2.

[56] Silke Von Lewinski, *supra* note 31, at 218.

[57] The WIPO Draft Provisions, Article 3.

[58] Bhaswati Mukherjee, "India's Intangible Cultural Heritage: A Civilisational Legacy to the World", available at: *http://www.mea.gov.in/in-focus-article.htm?24717/Indias+Intangible+Cultural+Heritage+A+Civilisational+Legacy+To+The+World*

World."[58] Tribal communities are the primary source of traditions and culture. Rich folk literature and handicrafts, handlooms, folk painting, etc., contributed by these communities are significant components of the TCEs and folklore of India.

Despite the rich repertoire of folklore and folk traditions there is no special law to protect these traditions from unauthorized commercial use by outsiders. Some of the communities do have some customary practices to regulate the use of TCEs by outsiders but these are not sufficient to protect the folklore of India. It is in this context the following part examines the existing IP law framework for the protection of TCEs.

In India the legislation that takes care of the rights relating to literary and artistic works, sound-recordings, films, and the rights of performers and broadcasting organizations, is the Copyright Act, 1957. The Act has been amended a number of times with the most recent change was done in 2012.[59] However, it does not contain any express provisions for the protection of TCEs and folklore.

Anurag Dwivedi and Monika Saroha identify among others the following features of copyright law which make the law not suitable to meet all the needs and objectives of traditional communities viz. the identifiable author requirement, ownership requirement, fixation requirement, and limited duration of protection. They, however, argue that by adopting a purposive and liberal approach towards interpretation of copyright laws one may extend the protection of these laws to folklore.[60]

Under the amendment incorporated in the Copyright Act in 1994, a certain amount of protection is offered to the performers. As per the Act, a performer includes, "an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture, or any other person who makes a performance."Again, performance, in relation to a performer's right, is defined as "any visual or acoustic presentation made live by one or more performers." It is to be noted that the concept of a performer is not limited to 'one who performs a literary or artistic work', as per provisions of the Rome Convention, rather the performer as per the Indian Act can be any one who makes a performance. To that extent, a person who performs folklore is a performer and his rights are protected under this Act.[61]

The performer of a performance shall, independently of his right after assignment, either wholly or partially of his right, have moral right in the performances.[62] Further, Section

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[59] P.V. Valsala G. Kutty, *supra* note 11, at 19.

[60] Anurag Dwivedi and Monika Saroha, "Copyright Laws as a Means of Extending Protection to Expressions to Folklore", *Journal of Intellectual Property Rights*, Vol 10, July 2005, pp 308-314.

[61] P.V. Valsala G. Kutty, *supra* note 11, at 20.

[62] *Id*., 38-B, Moral rights of the performer: The performer of a performance shall, independently of his right after assignment, either wholly or partially of his right, have the right,- (a) to claim to be identified as the performer of his performance except where omission is dictated by the manner of the use of the performance; and (b) to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation. *Explanation*.- For the purposes of this clause, it is hereby clarified that mere removal of any portion of a performance for the purpose of editing, or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the performer's reputation.

39 deals with certain fair use provisions in relation to performer's rights and the right of broadcasting organization, like private use, and the reporting of current events. Thus, it is evident that the rights granted under the Act to the performers seek to prevent, as mentioned earlier, certain acts being undertaken without the consent of the performer. However, in the case of audiovisual fixation, the act explicitly states that as soon as the performer consents for incorporation of his performance in a cinematograph film he ceases to have any rights in the film.[63]

The foregoing only suggests that folklore as such is not protected under Indian law it is the performer of that folklore who gets the benefit of the provision of law. Further it is also relevant to note that the performer can be anyone and is not limited to the member of the community preserving the folklore.

VI. CONCLUSION

The brief discussion of the issue only highlights that an acceptable model for protection of TCEs is yet to emerge at both international and national levels. The indigenous communities may demand for a wider definition of folklore than what WIPO provides. It is important to address the issue because the large-scale production of the folk material and use of folk traditions existing in intangible forms affect the cultural, economic and social fabric of the traditional societies. In the context of India the law makers will also have to take into account the diversity inherent in Indian folklore. Establishing

[63] P.V. Valsala G. Kutty, *supra* note 11.

EARLY CHILDHOOD CARE AND EDUCATION: INTERNATIONAL PERSPECTIVE

Vivek Kumar Pathak*

Abstract

The present paper is an attempt to examine the international legal framework for early childhood care and education. The term childcare generally refers to a variety of services providing non-parental care and education for children. Early childhood education is a broad term used to describe any type of educational program that serves children in their preschool years, before they are of legal age to enter kindergarten. It can logically be established that these early childhood years are crucial, critical and important for caring and investing in to provide an enabling environment for each and every child so that a sound foundation be built up on which the fullest development of their personality can be ensured. The paper presents discussion on UN Convention on the Rights of Child, provision of UDHR, initiatives by UNICEF, ICCPR, Health for all Declaration, Maternity Protection Convention, World Declaration on Education for all and Moscow World Conference on Early Childhood Care and Education. The paper argues that the aim of providing quality early childhood care and education is possible only when all the stakeholders put a combine effort in this direction.

Key words

Early Childhood Care, Education, Maternity, Rights of Child and Human Rights.

I. MEANING

Early childhood care and education refers to preschool, prekindergarten and kindergarten, day care, nursery school or nursery education with an objective to prepare young children for their transition into elementary school. The term 'childcare', as one word, generally refers to a variety of services providing non-parental care and education for children below 14 years of age.[1] Early Childhood Education is a term that refers to educational programs and strategies geared towards children from up to the age of eight.[2] Quality early childhood care and education promotes children's social, emotional,

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[1] "Diversity and Equality Guidelines for Child Care Providers", Minister of Children, Ireland, December 2006.

[2] According to MS Beth Lewis (An Elementary Education Expert), available at: *emergeedu.com/faculty/beth lewis-ms*

physical and cognitive development and helps them to develop their full potential. Children who benefit from early childhood education programs are better prepared for primary school and will reach better education outcomes.[3] Early childhood education is a broad term used to describe any type of educational program that serves children in their preschool years, before they are of legal age to enter kindergarten. Early childhood education may consist of any number of activities and experiences designed to aid in the cognitive and social development of preschoolers before they enter elementary school.[4] Early childhood is defined as the period from birth to eight years old, time of remarkable growth as these years lay the basis for subsequent development. Early Childhood Care and Education (ECCE) is more than a preparatory stage assisting the child's transition to formal-schooling. It places emphasis on developing the whole child attending to his or her social, emotional, cognitive and physical needs to establish a solid and broad foundation of lifelong learning and wellbeing.[5] Early childhood education is a science which studies the process of education before the school age. Early childhood education is an activity that takes place before the school age. The aim of early childhood education is a versatile development of child's personality. Besides education and teaching, early childhood education also include a basis care. It helps a child to be ready and mature for a smooth transfer to school.[6] Early Childhood Education consists of activities and/or experiences that are intended to effect developmental changes in children prior to their entry into elementary school. Early child education program includes any type of educational program that serves children in the pre-school years and is designed to improve later school performance.[7] Early Childhood Development (ECD) and/or Early Childhood Care and Education (ECCE) as understood by Indian professionals working with young children, relating to a holistic and integrated program of nutrition, health and early childhood education which caters to children from prenatal to 6/8 years and which addresses the all round development of the child.[8] Early childhood refers to the formative stage of first six years of life, with well marked sub-stages (Conception to birth, birth to three years and three years to six years) having stage specific needs, following the life cycle approach. ECCR encompasses the inseparable elements of care, health, nutrition, play and early learning within a protective and enabling environment. It is an indispensable foundation of lifelong development and learning, and has lasting impact on early childhood development.[9]

From birth to age 5, children rapidly develop foundational capabilities on which subsequent development builds. In addition to their remarkable linguistic and cognitive

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[3] "Global Partnership for Education", available at: *www.globalpartnership.org*

[4] Available at: *Preschool.Teacher.org./what-is-early-childhood-education*

[5] *Education 2030 Agenda,* UNESCO, available at: *en.unesco.org./themes/early-childhood-care-and-education*

[6] Mikko Ojala, "Early Childhood Care as a Science", The First Early Childhood Education, Professor in Finland, 1978.

[7] *Encyclopedia of Children's Health: Infancy to through Adolescence,* available at: *www.healthofchildren.com*

[8] Venita Kaul and Deepa Shankar, *Early Childhood Care and Education (Education For All-Mid Decade Assessment)*, National University of Education Planning and Administration (NUEPA), New Delhi, 2009.

[9] *National Early Childhood Care and Education (ECCE) Policy*, Ministry of Woman and Child Development, Government of India, 2013.

gains, they exhibit dramatic progress in their emotional, social, regulatory and moral capacities. All of these critical dimensions of early development are intertwined, and each requires focused attention.[10] Learning and education do not begin with compulsory schooling they start from birth. The early years from birth to compulsory school age are the most formative in children's lives and set the foundations for children's lifelong development and patterns for their lives. In this context high quality early childhood education and care (ECEC) is an essential foundation for all children's successful lifelong learning, social integration, personal development and later employability. A competent ECEC includes competent individuals; collaboration between individuals and teams in an ECEC setting, and between institution (ECEC settings, nurseries, pre-schools, schools, pre-primary settings, support services for children and families etc.), as well as effective governance arrangements at a policy level.[11] The dynamic process approach to early childhood care and education offers more for children's positive development and learning than either the academic (education) or play based (care) approach alone.[12] The integrated approach to ECEC systems stems from a paradigm shift, in which the responsibility for the care and socialization of young child is no longer of the family alone, but of society as a whole, shifting from a deficit model to a model based on human rights. It results that a significant portion of the upbringing process has become a public matter, therefore, falling within the realm of human rights arena, with enormous implications for the development of ECEC policies and programs.[13] Early education is important for all. Investment in quality child care and early childhood education produce significant returns for children. They also benefit taxpayers and enhance economic vitality.[14] Public policy evolved in the twentieth century in relation to multiple challenges, most notably pauperization, the needs of working mothers, demands for an enriching preschool education for a growing middle class, and for preparing young children for primary schooling.[15] Education at the initial stage is indeed basic to future learning. It is here that the attitudes towards learning that will continue throughout one's life are formed. Scientific evidences point out that the pace of development is very high during the first 6 to 8 years of life when much of the potential for

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[10] Jack P. Skonkoff and Deborah A. Philips (eds.), *The Science of Early Childhood Development: From Neurons to Neighborhood*, Board on Children, Youth and Families, National Research Council and Institute of Medicine (Washington D.C.: National Academy Press, 2000), at 5.

[11] *Proposal for Key Principles of a Quality Framework for Early Childhood Education and Care,* A Report of the Working Group on Early Childhood Education and Care under the Auspices of the European Commission, October 2014.

[12] Noirin Hayes, "Perspectives on the Relationship between Education and Care in Early Childhood", The Early Childhood Curriculum Framework, National Council for Curriculum and Assessment, NCCA, Dublin, 2007.

[13] Lenira Haddad, *Integrated Policies for Early Childhood Education and Care: Challenges, Pitfalls and Possibilities*, Education Centre, Federal University of Alageas.

[14] Leslie J. Calman and Linda Tarr-Whelan, "Early Childhood Education for All: A Wise Statement", in a conference on the Economic Impacts of Child Care and Early Education: Financial Solutions for the Future sponsored by Legal Momentum's Family Initiative and the MIT Work Place Centre, April 2005.

[15] *Right Beginnings: Early Childhood Education and Educators: Global Dialogue Forum on Conditions of Personnel in Early Childhood Education*, International Labour Organization, Geneva, 22-23 February 2012.

adult level intelligence is realized. Therefore, the environment in which children are placed during this period impact the process of development very heavily. Children growing up in a rich and stimulating environment tend to gain a lot. They learn to be creative and inquisitive about the world around them and cultivate a love for learning that stays with them for the lifetime. This early child care and education, serves dual purpose. One is to produce a literate population and the other is to lay a ground for later learning.[16] Early childhood education generally means education before the start of formal school or before the age at which children are required to attend the school. Early childhood education and care (ECEC) is important for individual educational and social progress as well as national economic development. A large body of evidence from social science, psychology and neuroscience demonstrates the importance of early years for later development. It is an important policy for all children and specially for trying to assist children to overcome disadvantage.[17] It is argued that care and education are co-essential and should be conceived as a continuum process.[18] Researches in various fields show that skill begets skill; that learning begets learning. It means that if once a child falls behind, he is likely to remain behind.[19] It may be logically argued that the basis for future learning and social and emotional development is set before children start school and therefore the foundations of ECEC lie in the realization that learning abilities are formed during the first years of childhood.[20] Further to this, where children do not get a good start in life, early intervention is essential as schools are generally ill-equipped to remedy a bad start.[21] Many studies show the impact of quality ECEC on educational

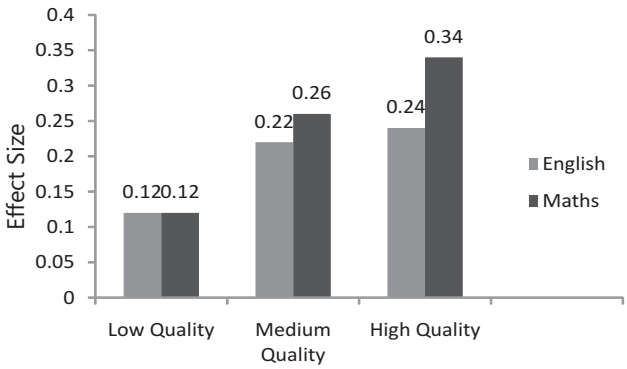

Figure: Impact of pre-school quality on English and Maths at age 11 (Reference group: Home Children) - EPPE Study in England [22]

[16] Neelam Sood, *Planning and Management of Early Childhood Education: A Case of Himachal Pradesh,* School and Non-Formal Education Unit, National Institute of Educational Planning and Administration, New Delhi, 2003.

[17] *Early Childhood Education and Care*, Spotlight, Oireachtas Library & Research Service, Ireland, 2012.

[18] L. Menchini, "The Ongoing Transition of Child Care in the Economically Advanced Countries", Proceedings of the Child on Europe Seminar; European Network of National Observatories on Childhood.

[19] James J. Heckman, "The Economics of Investing in Children", UCD Geary Institute, 2006.

[20] Andersen G. Esping, "Childhood Investment and Skill Formation, International Tax and Public Finance", 2008, pp. 19-44.

[21] Gosta Esing Andersen, "Equality Opportunities in an Increasingly Hostile World", 2007 at 22 available at: *http://dcpis.upf.edu/~gosta-esping-andersen/materials/equal opportunities.pdf*

[21] Start Strong, 2010, at 12.

outcomes. The study on Effective Provisions of Pre-School Education (EPPE) in Britain involving 3000 children finds that high quality pre-school accounted for big improvement in Maths and English test scores over children with no pre-school.

Data presented by this study suggests that the benefit deriving from 18 months of pre-school is similar to that desired from 6 years of primary school.[23] There is clear evidence that participation in high quality ECEC leads to significantly better attainment in international tests on basic skills, such as PISA.[24] There are, generally speaking, two approaches to ECEC. One focuses on the acquisition of particular skills and on school-readiness.[25] The other takes a more holistic approach[26] to child well-being and development, integrating education and care, and is more focused on the 'here and now' than on skills for tomorrow.[27]

II. NEED AND IMPORTANCE

First 6-8 years of a child's life, known as early childhood stage, are globally recognized to be the most critical years for life-long learning and development because the pace of development during these years is extremely rapid. Researches in the field of neuroscience convincingly suggest that experience-based brain development in the early years sets neurological and biological pathways that affect health, learning and behaviour throughout life. These early years of a child's life are the important critical stages of development of several social, cognitive and psychological competencies which becomes the foundation for the later success of life.[28] It is also an established fact that these early childhood years of a child are also important from the perspective of the development of personal, social and ethical values and accordingly for the development of a child's personality. It means that if we are not able to support these critically important years of a child's life by providing a stimulating and enriching physical and psycho-social environment, the chances of the development of child's brain to its fullest extent of potential would certainly be reduced.[29] At the same time it is also an important fact in this context that the children belonging to poor sections, indigenous communities, disadvantaged groups and minority sections, particularly in developing countries are at risk in terms of their chances to have avail the opportunities of early childhood care and education. By the time poorer children in many countries reach school age, they are at the significant disadvantage in cognitive and social ability.[30]

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[23] E. Melhuish, "Pre-School Matters", 333 *Science*, 2011.

[24] PISA is an international assessment of the reading, science and mathematical literacy of 15-years old students.

[25] This approach is common in UK, USA, Italy, and Belgium.

[26] This approach is prominent in Denmark, Finland, Sweden and Norway.

[27] Hasan, "Public Policy in Early Childhood Education and Care", 1(1) *Internat. J. of Childcare and Education Policy*, 2007.

[28] Venita Kaul and Deepa Shankar, *supra* note 8.

[29] Researches have indicated that if these early years are not supported by, or embedded in, a stimulating and enriching physical and psychosocial environment, the chances of the child's brain developing to its full potential are considerably, and often irreversibly reduced.

[30] The World Bank, 2005 b:132.

Therefore it can logically be established that these early childhood years are crucial, critical and important for caring and investing in to provide an enabling environment for each and every child so that a sound foundation be built up – on which the fullest development of their personality can be ensured. This is not only the right of every child of a country but also important in the sense that it also impacts the quality of human resource capital available to a country. It is logical to state that early childhood care, development and education for children in the age of 0-6 years (or Parental to 6 years) is relevant and important for any country. It is specifically important for the young country like India for the rationale that its main asset at present and in the years to come is its 'youth power'. Early childhood is the most critical period for cognitive and social development, the acquisition of languages and early literacy.

The process of globalization has also made it possible to draw international attention towards the issue of children across the countries. Issues of child labour, child malnutrition and child education are now being addressed transnationally and resources are being put together. South Asian countries also have achieved important milestones in their commitment to children. They started to take initiatives to identify common issues to be addressed in relation to child health, nutrition, education, and protection of children from exploitation, violence, abuse, trafficking and labour. The Status Report in E-9 countries[31] clearly shows that all are taking steps to promote early childhood care ad education as a critical element of EFA, including attempts to introduce holistic curricula, teacher's training and various other indicators.[32]

III. LEGAL DEVELOPMENT

Children have a right, as expressed in the Universal Declaration of Human Rights and the UN Convention on the Rights of Child, to receive education. Early childhood education must be considered as the part of this right. Education International strongly believes that early childhood education is of great importance and value to all children and should be available to all. This commitment is evident in the 1998 Resolution passed by the EI World Congress in Washington D.C., which resolved to lobby for the provisions of free of charge quality ECE to every child.[33]

In twentieth century children came to be viewed as holders of rights. Child education was started to be recognized as part of the broader concept of the right of childhood

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[31] The nine most populous countries – India, China, Pakistan, Bangladesh, Brazil, Egypt, Indonesia, Mexico and Nigeria.

[32] The UNESCO, 2003.

[33] *Early Childhood Education: A Global Scenario*, A Report on A Study Conducted by the Education International ECE Task Force, June 2010.

[34] By the present declaration of the rights of child, men and women of all nations, recognising that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:

(i) the child must be given the means requisite for its normal development, both materially and spiritually.

(ii) the child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored;

when League of Nations adopted Geneva Declaration[34] on the Rights of Child on 26 September 1924. The Geneva Declaration was a historic document that recognized and affirmed for the first time the existence of rights specific to children and the responsibility of adults towards children.[35] The United Nations replaced League of Nations after World War II. It took over the Geneva Convention in 1946. In 1948, the General Assembly of United Nations adopted the Universal Declaration of Human Rights (UDHR) which represents the first global asseveration of universally protected fundamental human rights. The UDHR enunciated the special rights of child for the first time by providing that motherhood and childhood are entitled to special care and assistance. All children whether, born in or out of wedlock, should enjoy the same social protection.[36] However, following the adoption of the Universal Declaration of Human Rights in 1948, the advancement of rights revealed the shortcomings of Geneva Declaration and therefore it required to be expanded but it could not become possible as the proposal could not be adopted and therefore, a specialized agency of the UN-UNICEF was established to promote care for the world's children.[37] Member States of U.N., then thought to draft another declaration of the rights of child which could address the notion that 'mankind owes to the child the best that it has to give'. On 20 November 1959 the *Declaration of Rights of Child* was adopted unanimously by all then 78 member states of U.N. General Assembly.[38] 1959 Declaration recognized, universally, the child as a human being who must be able to develop physically, mentally, socially, morally, and spiritually, with freedom and dignity. The Preamble of the Declaration highlights children's need for special care and protection including appropriate legal protection, before as well as after birth and accordingly the Declaration of the Rights of Child, 1959 lays down various principles to fulfill these objectives.[39] Although the Declaration reflected the best intentions, it did not have any binding force on the Member States,

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(iii) the child must be first to receive relief in times of distress;

(iv) the child must be put in a position to earn a livelihood, and must be protected against every form of exploitation;

(v) the child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.

[35] Available at: *http://www.humanium.org/en/childrens-rights-history/references-on-child-rights/declaration-rights-child*

[36] The Universal Declaration of Human Rights, 1948, Article 25(2).

[37] Present nomenclature is United Nations children Fund.

[38] The U.N. General Assembly Resolution No. 1386 (XIV).

[39] Following ten principles were laid down by the Declaration –

(i) the right to equality, without distinction on account of race, religion or national origin;

(ii) the right to special protection of child's physical, mental and social development;

(iii) the right to a name and nationality;

(iv) the right to adequate nutrition, housing and medical services;

(v) the right to special education and treatment when a child is physically or mentally handicapped;

(vi) the right to understanding and love by parents and society;

who were not very active and effective in putting the principles into practice and operation. The biggest drawback of both the Geneva Declaration (1924) and the Declaration of the Rights of Child (1959) was that they failed to define 'child', which left uncertainty as to when childhood began and ended.[40] Recognizing the relevance, importance and significance of child welfare and development, the year 1979 was designated and celebrated as the International Year of the Child.

International Covenant on Civil and Political Rights (ICCPR) adopted by U.N. General Assembly in 1966 was an earliest international instrument recognizing the child's right to protection.[41] It is relevant to refer that the responsibility of ensuring protection to the child was assigned to the family, society and the State.[42] India ratified this Convention in 1979. Health for All Declaration, 1978[43] enunciated the need for urgent action by all governments, health and development workers and the World Community to protect and promote health for all people. It was the first International Declaration focused on the importance of primary health care. The Declaration expressed the need to address improvements in nutrition of both the mother and the child, to impart knowledge about nutrition, and proper feeding of children and nutrition of mothers during pregnancy and lactation.[44] The important goal set out by the Declaration for its member countries was to provide plentiful supplies of clean water and help to decrease mortality and morbidity, in particular among infants and children. [45]

Maternity Protection Convention 2000[46] is aimed to promote equality of all women in the workforce and the health and safety of mother and child. The Convention imposes the obligation on States to adopt appropriate measures to ensure that the pregnant and breastfeeding women are not obliged to perform work for it may be prejudicial for the health and safety of mother and child. The Convention recognizes the shared

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(vii) the right to recreational activities and free education;

(viii) the right to be among the first to receive relief in all circumstances;

(ix) the right to protection against all forms of neglects cruelty and exploitation; and

(x) the right to be brought up in a spirit of understanding, tolerance, friendship among people, and universal brotherhood.

[40] *Early Childhood Development and Legal Entitlements*, Report No.259, Law Commission of India, Govt. of India, August 2015.

[41] The ICCPR, 1966, available at: *http://www.ahchr.org/EN/Professional Interest/Pages/CCPR.aspx*

[42] *Id.,* Art.24(1) states that every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

[43] Almaty, and Kazakhstan adopted in WHO International Conference on Primary Health Care (PHC), held on September 6-12, 1978.

[44] *Primary Health Care,* Report of the International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978.

[45] *Ibid*.

[46] The Convention concerning the Revision of the Maternity Protection Convention (Revised) 1952 was adopted by the General Conference of the International Labour Organization held on 30 May 2000 at Geneva.

responsibility of State and society towards pregnant and breastfeeding mothers by taking into consideration the circumstances of women workers and realizing the need to ensure the protection for pregnancy and the nurturing and care of the child. It is the significant feature of the Convention that in matters of dismissal of pregnant women, the burden of proof lies on employers to establish that the reasons of dismissal were unrelated to pregnancy or childbirth and its consequences or to nursing.

In 1989, the United Nations adopted the legally binding Convention on the Rights of Child (CRC), which is known as most widely ratified human rights treaty in the world. The Convention emphasizes the right of all children to protection, care and education.[47] The CRC requires the governments of member states to provide assistance to parents and legal guardians in their child rearing responsibilities and to make child-care services and facilities available to them and especially to working parents.[48] It seems that the CRC helped to formalize and to shape early childhood education policies and provisions around the world. This Convention came into force on 2 September 1990 after it was ratified by required number of member states. Presently 196 countries are party to it.[49] Two Optional Protocols were adopted on 25 May 2000[50] and both the protocols have been ratified by more than 150 countries.[51] A third Protocol relating to communication of complaints was adopted in December 2011 and came into force on April 14, 2014.

The World Declaration on Education for All (EFA) at Jomtein (1990) introduced the idea that learning begins at birth and affirms early childhood care and education as an integral part of basic education and an educational level in its own right.[52] Ultimate objective of EFA is sustainable development by achieving certain goals.[53] In the year

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[47] The UN Convention on the Rights of Child, 1989, Articles 2, 3, 13, 14, 17, 18, 24, 28, and 29.

[48] *Id.,* Art. 9, 18, and 27.

[49] United Nations Treaty Collection, Convention on the Rights of the Child, Retrieved 2 Oct. 2015.

[50] First Protocol restricts the involvement of children in military conflicts, and second optional protocol prohibits the sale of children, child prostitution and child pornography.

[51] United Nations Treaty Collection: Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, Retrieved on 20 Oct. 2010 and United Nations Treaty Collection: Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography Retrieved on 20 Oct. 2010.

[52] The UNESCO World Declaration on Education for All, Art. I states that child, youth, and adult shall be able to benefit from educational opportunities designed to meet their basic learning needs.

[53] EFA Goals:

(i) to expand early childhood care and education;

(ii) to provide free and compulsory primary education for all;

(iii) to promote learning and life skills for young people and adults;

(iv) to increase adult literacy;

(v) to achieve gender parity; and

(vi) to improve the quality education.

[54] The Millennium Development Goals: These goals are the world's time bound and quantified targets for achieving the objective of addressing issues responsible for poverty like income poverty, hunger, disease,

2000, several countries adopted these EFA goals and 8 Millennium Development Goals,[54] the two important frameworks in the field of education. The education priorities of UNESCO[55] are also shaped by the same objectives. These two sets of goals offering long-term vision of reducing poverty and hunger, better health and education, sustainable development, strong partnerships and shared action may be availed as ambitious roadmap for the global community to ensure the early childhood care and education. It is also relevant to state that EFA goals and Millennium Development goals are complementary as the Director General of UNESCO, Mr. Irina Bokova states that when you fund education, you are securing progress towards all the Millennium Development Goals. In the year 2000 after a decade from the declaration of EFA Declaration 1990, the international community met again at the World Education Forum and expressed their agreement on Dakar Framework for Action- Education for All: Meeting. The Framework, in addition to reaffirming the commitment to achieve Education for All by year 2015, also identified six education goals[56] to fulfill learning needs of children, youth and adults by 2015.

Moscow World Conference on Early Childhood Care and Education: Building the Wealth of Nations convened by Director General of UNESCO was held in Moscow, Russian Federation from 27 to 29 September 2010.[57] The Conference was aimed to heighten global awareness of ECCE as the right of all children, encourage a dynamic and far reaching reflection on the transformative powers of ECCE and reinforce its role as a basis for development, take stock of progress, identify challenges and establish more effective benchmark towards achieving education for all, engage governments policy-makers, researchers and range of institutions in reorienting national systems and programmes to

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gender disparity, education and environmental sustainability etc. The MD goals were determined by the adoption of U.N. Millennium Declaration at the Millennium Summit in Sept. 2000, the largest gathering of world's leaders in the History. Following and the finally adopted goals-

(i) to eradicate extreme poverty and hunger;

(ii) to achieve universal primary education;

(iii) to promote gender equality and empower women;

(iv) to reduce child mortality;

(v) to improve maternal health;

(vi) to combat HIV/AIDS, malaria and other diseases;

(vii) to ensure environmental sustainability; and

(viii) to develop a global partnership for development.

[55] The United Nations Educational, Scientific and Cultural Organization.

[56] Some of these goals affecting children are –

(i) to expand and improve comprehensive early childhood care and education;

(ii) to provide access to complete, free and compulsory primary education for all;

(iii) to improve all aspects of quality of education; and

(iv) to eliminate gender disparities in primary and secondary education and to achieve gender equality in education.

[57] The Conference was held as a joint collaboration between UNESCO and Russian Federation in accordance with the 35C/Resolution 15 adopted by General Conference at its 35th Session

take into account the early childhood years as human right and an integral part of development, and to promote global exchange of good practices.

The U.N. Convention on the Rights of Child provided for the Constitution of monitoring body, the United Nations Committee on the rights of child. The Committee consists of independent experts elected by the ratifying member countries.[58] Experts are to be elected from various fields including human rights, international law, juvenile justice, social work, health care and journalism. The committee is to take the responsibility to determine whether children enjoy the rights recognized by the Convention on the Rights of Child. With this objective the committee regularly reviews the progress achieved by countries in the performance of their obligations under the Convention regarding the promotion and protection of these rights. The committee performs this function by examining relevant information available through U.N. agencies and other diligent sources. The committee also employs a type of monitoring system that is common to all human rights bodies. The system relies on periodic reports transmitted through the Secretary-General of United Nations by national governments on child-welfare legislations and other meaningful measures countries have adopted that give effect to convention rights within their territories. [59]

The Committee holds a Day of General Discussion in Geneva every two years in September about a specific article of the Convention on the Rights of Child or a related subject. This initiative provides an opportunity to develop a deeper understanding of contents and implications of CRC. The topic is selected by the Committee and announced at least one year in advance. Since 1992, the Committee has held 20 Days of General Discussion. The Day of General Discussion in 2004 was devoted on the topic 'Implementing Child Rights in Early Childhood'. The Committee reaffirms that the Convention on the Rights of Child reflects on holistic perspective on early childhood development. All the rights recognized in the Convention apply to all persons below eighteen, including the youngest children. Early childhood covers different age groups in different countries and regions, generally covering children aged below four to ones below eight years, and the committee does not favour the one over the other. The committee in organizing the Day Discussion wishes to underline the importance of early childhood development, since the early childhood years are critical for laying a solid foundation for the sound development of the child's personality, talents, mental and physical abilities.[60] In the light of the importance of early childhood development services and programs for the short and long term cognitive and social development of children, the State parties are urged to adopt comprehensive and strategic plans on early childhood development within the rights-based framework, and accordingly, increase

[58] The U.N. Convention on the Rights of Child, Article 43 and 45 of the Convention provides the procedure and responsibilities related to the composition and the functions of the committee.

[59] "Implementing Child Rights in Early Childhood", A Guide to General Comment, United Nations Committee on the Rights of the Child, United Nations Children Fund and Bernard Van Leer Foundation, the Hague, 2004.

[60] *Id.,* Recommendation 1, Day Discussion: Implementing Child Rights in Early Childhood, United Nations Committee on the Rights of Child, 17 September, 2004.

their human and financial resource allocations for early childhood development services and programs. In this connection, State parties are encouraged to develop strong and equitable partnership between the government, public services, families and the private sector to finance early childhood care and education.[61] In pursuing these actions, it is necessary that State parties and other stakeholders involved commit themselves to respect all the provisions and the principles of the Convention, especially its four general principles: non-discrimination (Art. 2); the best interest of child (Art. 3); right to life, survival and development (Art. 6); and the respect for the views of child (Art. 12).[62] In the light of Art.3 of the Convention States parties must guarantee that in all activities and programs concerning children, whether undertaken in public or private early childhood institutions, the best interest of the child shall be primary consideration. State parties must ensure that the institutions, services and facilities responsible for early childhood development conform to the quality standards established by competent authorities, particularly in the area of safety, health, in the number and suitability of the staff, as well as competent supervision. [63]

Art. 6.2 of the Convention guarantees the right to survival to all children. The Committee reminds States parties and others concerned that this provision can be implemented only in holistic manner, through the enforcement of all other provisions recognized in the Convention, including the rights to health, adequate nutrition and education. State parties to the Convention need to ensure that in their first years all children have access to adequate health care and nutrition, as stipulated in Art.24, to enable them a healthy start in life. In this context, breastfeeding, access to clean drinking water and adequate nutrition are essential and due attention should be paid to the importance of prenatal and postnatal health care for mothers to ensure healthy development of children in early years and a healthy mother-child relationship. To underline the importance of education as a part of early childhood development, the Committee recommends that State parties consider making early childhood education an integral part of primary/basic education as a tool to nurture the child's evolving capacities in stress-free environment.[64]

In view of the sufficient attention given by States parties and other concerned to the implementation of the provisions of Art. 31 of the Convention, which guarantees right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of child and to participate freely in cultural life and the arts, the committee reiterates that these are key rights that enable every young child to fully develop his/her personality, talents and mental and physical abilities to their fullest potential. Recognizing that these rights are often-endangered by all manners of external constraints hindering children to meet, play and recreate in stimulating and secure environment that are child appropriate, the committee appeals all States parties, non-

[61] *Id.,* Recommendation 4 on Resource Allocation for Early Childhood (Art. 4 of the Convention), Day Discussion: Implementing Child Rights in Early Childhood, United Nations Committee on the Rights of Child, 17 September, 2004.

[62] *Id.,* Recommendation 5.

[63] *Id.,* Recommendation 7.

[64] *Id.,* Recommendation 8.

governmental organizations and private actors to identify and remove potential obstacles to the enjoyment of these rights by the young children, including through poverty reduction strategies. In this connection States parties are encouraged to play greater role and allocate adequate resources (human and financial) for the implementation of the right to rest, leisure and play.[65]

The Convention on the Rights of Child principally enshrines children's participation in all matters affecting children (Art. 12). Therefore States parties must take all appropriate measures to ensure that the concept of the child as right holders is anchored in the child's daily life from the earliest stage: at home (and including, when applicable, the extended family); in school; in day care facilities and in his or her community. States parties should take all appropriate measures to promote the active involvement of parents (and extended families), schools and communities at large, in the promotion and creation of opportunities for young children to actively and progressively exercise their rights in the everyday activities. In this regard, special attention must be given to the freedom of expression, thought, conscience and religion and the right to privacy of the young children, according to their evolving capacity.[66]

The Committee recommended that States parties support early childhood development programs, including home and community based pre-school education programs, in which parents' empowerment and education are main features. They are urged to construct high quality, developmentally appropriate and culturally relevant programs by working with local communities rather than imposing a top-down approach to early childhood development practices. The Committee also recommended that States parties pay greater attention to, and actively support, the rights-based approach to early childhood development, including transition to primary school initiatives that build children's confidence, communication skills and enthusiasms for learning.[67]

The Committee encouraged States parties to invest in systematic training and research in the field of early childhood development from a right based perspectives. States parties are encouraged to undertake systematic education and training of children and their parents, as well as all professionals working for and with children, in particular parliamentarians, judges, magistrates, lawyers, law-enforcement officials, civil servants, personnel in institutions and places of detention for children, teachers, health personnel, social workers and local leaders. Furthermore, the Committee urged States parties to conduct awareness raising campaign for the public at large.[68]

The Convention requires States parties to render appropriate assistance to parents, legal guardians and extended families in the performance of their child rearing responsibilities, *inter alia*, by providing parenting education. States parties also should ensure the development of institutions, facilities and services for the care of children and

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[65] *Id.,* Recommendation 9.

[66] *Id.,* Recommendation 10.

[67] *Id.,* Recommendation 11.

[68] *Id.,* Recommendation 12.

[69] *Id.,* Recommendation 13.

to take all appropriate measures to ensure that children of working parents have the right to benefit from child care services, maternity protection and facilities for which they are eligible. In this regard, the Committee recommended States parties to ratify the ILO Convention No. 183 on Maternity Protection. Finally, States parties must ensure that parents are given appropriate support to enable them to fully involve their young children in early childhood programs, including pre-school education.[69] In the light of Art. 29 and the Committee's General Comment No. 1 on the aims of education,[71] the Committee recommended that States parties include human rights education in pre and primary school programs. Such education should be participatory, and adapted to the ages and evolving capacities of young children.[71]

The Committee recommended that donor institutions, including the World Bank, other United Nations institutions and bi-lateral donors support early childhood development programs financially and technically, as one of their main targets to assist sustainable development in countries benefiting from international assistance.[72] The Committee urged all States parties, inter-governmental organizations, NGOs, academics, professional groups and grass-root communities to foster continuous high level policy dialogues and research on the crucial importance of quality in early childhood development, including at the regional and local levels.[73]

The 5th World Congress of Educational International[74] decided that the Executive Board should establish a Task Force on Early Childhood Education. The aim of the Task Force[75] was to advise Educational International on various aspects of early childhood education, including strategies for the effective implementation of the Washington Resolution,[76] on early childhood education policy, practice, programs and activities. The findings of the report on the study of early childhood education conducted by EI Task Force reveal that there is a wide range of positive developments and experiences in several countries which include increasing participation rates, provisions of comprehensive ECE services, as well as the training and professional developments of educators engaged in ECE. However, progress remains slow and uneven, both within and between the countries. Therefore public authorities should be encouraged in early

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[70] CRC/GC/2001/1.

[71] *Supra* note 59, Recommendation 14.

[72] *Id.,* Recommendation 16.

[73] *Id.,* Recommendation 17.

[74] Held in Berlin in 2007.

[75] Which was established by the Executive Board of Education International in 2008.

[76] Which was passed by Education International World Congress held in Washington D.C. in 1998.

[77] Foreword by Fred Van Leeuwen, General Secretary, Education International to the Report on Study conducted by the Education International ECE Task Force on "Early Childhood Education: A Global Scenario", June 2010.

childhood education and it is also equally relevant and important to encourage teachers unions, parents associations, and civil society organizations to ensure that this neglected Education for All (EFA) goal is achieved. [77]

IV. CONCLUSION

Early childhood care and education is the right of children in the internationally recognized human rights regime as it is the foundation for all future development of a child. Various efforts have been made by the international community especially by League of Nations and United Nations. Several Agreements, Treaties and International Conventions were agreed to and adopted by national governments for caring about the rights of children and particularly for ensuring early childhood care and education. But, it seems that because of nonbinding nature of International commitments, the development of law ensuring and regulating early childhood care and education could not find its proper place in national regimes. It is also not out of context to state that legal frameworks on this subject could not become uniform because of the diverse social, economic, cultural, political considerations and resources available in individual countries. The economic viability has also been an important factor which affected prejudicially the initiatives towards development of effective legal framework to guarantee the most fundamental, human, and natural right of children to early childhood care and education. It is also relevant to note that the development of legal framework at international level is found scattered and initiatives could not be taken to consolidate international laws at one place and accordingly to inspire the countries to adopt complete code of conduct for promoting the early childhood care and education. Consistent effort of all the stakeholders and evolution of an international model law on the issue is desired to fulfill obligations of state and parents towards children.

SUPREME COURT ON DISHONOUR OF CHEQUES

Ram Naresh Chaudhary*

Abstract

The Supreme Court has enriched and developed the law of dishonour by the delivering catena of cases. It is said that about 30 lacs cases of dishonour of cheques pending all over the country in various criminal courts, High Courts and the Supreme Court of India former Chief Justice of Supreme Court Justice Sadashivam and Justice K.G. Balakrishnan have suggested for special courts for dealing dishonour of cheques cases. The law Commission of India is also recommended the setting up of fast track Magisterial Courts for dealing with the huge pendency of dishonoured cheque cases. There are 7,66,974 cases pending in criminal courts in Delhi at the Magisterial level as on June 1, 2008. This shows the very importance of the provisions of dishonour of cheques. In this context, the present paper analyses some significant judgments of the Apex Court which have widened the principles and explaining the scope and extent of dishonour of the cheques to meet out newly emerging problems and challenges.

Key words

Dishonour of Cheques, Supreme Court and Negotiable Instruments Act.

I. INTRODUCTION

The Negotiable Instruments Act was passed in the year 1881 which deals with negotiable instruments i.e., Promissory Note, Bill of Exchange and Cheque. These Negotiable Instruments are used as a means of credit as well as payment. Out of these instruments cheque plays very significant role in commercial as well as non-commercial transactions and dealings. By the use of cheques commercial transactions have not only become easy, convenient and economical but it has oiled the wheels of comers and facilitated quick and prompt deals and transactions.[1]

Sections 91 to 99 of the Negotiable Instruments Act, 1881 deal with dishonour of negotiable instruments *inter alia* cheques as well and notice of the dishonour thereof.

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[1] *N. Rangachari v. BSNL*, AIR 2007 SC 1682.

The dishonour of cheques was not recognized as an offence under the Negotiable Instrument Act before 1988 it was simply considered as a civil wrong and in some cases covered under Section 415 read with Section 420 of Indian Penal Code. These provisions were not effective in dealing with the malady of dishonour of cheques, so there was a need in change of law as to dishonour of cheques. Before 1988 dishonour of cheques was regarded only a moral obligation, thus people were never sincere about honour (payment) of cheques issued by them, therefore cases of dishonour of cheques were rampant in society. There were no provisions in the Act to deal effectively the cases of dishonour of cheques. This created a feeling of shy and fear among people accepting cheques as means of payment. The holder of the cheque aggrieved by dishonour was helpless because he had no remedy against the drawer of the cheque. This necessitated a new law on dishonour of cheques. Thus, in 1988 a new Chapter XVII was incorporated for "penalties in case of dishonour of cheques due to insufficiency of funds" in the account of the drawer (account holder) of the cheque. New Sections 138 to 142 were added in the Act and in 2002 further Sections 143 to 147 were also added making a complete code on dishonour of cheques as an offence and cognizance thereof. Now dishonour of cheques under the provisions of Section 138 is an offence and be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both.

The objects of amendment were mainly:

(i) to encourage the use of cheques, and

(ii) to enhance the credibility and acceptability of cheques.

II. DISHONOUR OF CHEQUES: SUPREME COURT'S RESPONSES

The dishonour of the cheques as an offence under the given conditions under Section 138 is a new provision. Recently some very significant judgement of the Apex Court have widened the principles and explaining the scope and extent of dishonour of the cheques to meet out newly emerging problems and challenges.

These judgments may be explained in the following heads:[2]

Revalidation of Stale Cheques

A cheque which has become invalid because of the expiry of the stipulated period is called a stale cheque. Payment of a stale cheque is not deemed to be a good payment, so a banker is under duty not to make payment of stale cheques. Here a very significant question may arise as to whether such stale cheques can be revalidated voluntarily by altering the dates so as to give a fresh life to cheque for another three months (earlier it was six months). This question came for decision before the Apex Court in a significant case Veera Exports v. T. Kalavati.[3] In this case the respondent had issued to the appellant 8 cheques bearing various dates from 9th April, 1999 to 13th April, 1995 for a sum totalling Rs. 4 lacs. The cheques were presented for payment on 15th May, 1995 but were dishonoured. It is the case of appellant that the fact of dishonour was brought to the

[2] R.N. Chaudhary, *The Law Relating to Cheques,* pp. 353 to 369.

[3] AIR 2002 SC 38.

notice of the respondent and that the respondent then requested for more time to pay. The appellants granted more time to pay. On request of the respondent. The appellants claimed that as the respondent still could not pay the amounts in January, 1996, she changed the dates of the cheques from the 1995 to 1996. The appellant claimed that the respondent also made the necessary endorsement on the cheques at that time. The cheques were again presented on 18th July, 1996 and were dishonoured. A legal notice dated 8th August, 1996, was served upon the respondents. The respondents alleged that she had been forced to change the dates against her will. The appellant then filed a complaint under Section 138 of the Negotiable Instruments Act, 1881. The respondent thereafter filed a petition in the High Court of Madras to quash the complaint filed under Section 138 of the Act. The High Court quashed the complained, hence this appeal before the Apex Court. The grounds for quashing the proceedings by the High Court mainly based upon:

(i) That the validity period of all the 8 cheques had already expired by October, 1995 and then held that once the validity period was over the cheques could not be revalidated by altering the dates so as to give a fresh life to the cheques for another six months (now it is three months).

(ii) Any material alteration of a negotiable instrument renders the same void as against anyone who is a party thereto at the time of making such alteration and does not consent thereto as contemplated by Section 87 of the N.I. Act.

On appeal to the Supreme Court quashed the decision of the High Court and the Supreme Court held that the reasoning of the High Court were entirely fallacious and unsound. The Supreme Court held that a cheque which has become invalid because of the expiry of the stipulated period could be made valid by alteration of cheques. There is no provision in the Act or any other law which stipulates that a drawer of the negotiable instrument cannot revalidate it. It is always open to a drawer to revalidate Negotiable Instruments including a cheque. It is further held that if the drawer of the cheque himself alter the cheque for validating or revalidating the same instrument he cannot take advantage of it later by saying that the cheques became void as there is material alteration thereto.

Successive Presentment of Cheques

As to presentment of cheques for payment a very significant question arises that whether cheque can be presented more than once or only one time. There has been different view of the various High Courts, but the principles of law on this point has been settled by the Supreme Court in Sadanandan Bhadaran v. Madhvan Sunil Kumar.[4] The Supreme Court ruled that a cheque can be presented for payment any number of times during its period of validity and its dishonour on every occasion will give rise to fresh cause of action within the meaning of clause (b) of Section 142 of the N.I. Act, so as to entitled the payee to institute prosecution under Section 138 on the basis of the last cause of action.

[4] AIR 1988 SC 3043.

Deemed Dishonour

In Modi Cement Ltd. v. K.K. Nandi[5] it has been ruled by the Supreme Court that 'Account Closed', 'Payment Stopped' will constitute deemed dishonour subject to the provisions of Section 138 of the N.I. Act. This judgment was further upheld by the Supreme Court in NEPC Micon Ltd. vs. Magma Leasing Ltd.[6] and Rangappa vs. Mohan AIR 2010 SC 1898.

As to Jurisdiction and Cognizance of the Offence by the Court

Section 142 of the N.I. Act provides as to jurisdiction and taking cognizance of offence as:-

(a) No court shall take cognizance of any offence punishable under Section 138 except upon a complaint in writing made by the payee or by the holder in due course of the cheque.

(b) Such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138.

(c) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class try any offence punishable under Section 138.

Thus, the conditions for taking cognizance by court are first, upon a complaint second, complaint within statutory period of one month, and third, by Metropolitan Magistrate or Magistrate of the first class.

These conditions are *sine qua non* for taking cognizance of a complaint under section 142 of the Act. Now, the moot question is that which criminal court may exercise jurisdiction as to dishonour of cheques. In dishonour of cheques several acts are contemplated and where any of the Act takes place that court will have jurisdiction to take cognizance. As to question of jurisdiction Supreme Court has laid down principles of law in K. Bhaskaran v. Shankaran Vaidhyan Balan.[7] It has been held that Section 138 has five components namely:

(i) Drawing of Cheque,

(ii) Presentation of cheque to the bank for payment,

(iii) Returning of cheque unpaid by the bank,

(iv) Giving notice in writing to drawer after dishonour of the cheque,

(v) Failure of the drawer to make payment.

Under Section 178 of the Cr.P.C. where the offence consists of several acts in different areas it may be enquired into and trial by court having jurisdiction over any of such local areas. Thus, different Acts were done in five different areas any of the Court may exercise jurisdiction and try the offence under Section 138. This case of the Supreme Court laid down as principles of law for deciding jurisdiction. Section 138 requires no FIR no inquiry and no investigation. It starts cognizance with trial upon complaint.

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[5] AIR 1998 SC 1057.

[6] AIR 1999 SC 1952.

[7] AIR 1999 SC 3662.

But this principle of law as laid down in K. Bhaskaran case has been overruled by the Supreme Court in Dashrath Roopsingh Rathod v. State of Maharashtra.[8] The Supreme Court held that the complaints relating to dishonour of the cheques must be filed in the courts within whose territorial jurisdiction the drawee bank is situated.

Further in Times Business Solution Ltd. v. Databyte,[9] mere presentation of cheques before a bank in Delhi where drawee bank situated outside Delhi, will not confer jurisdiction upon Delhi Courts.

Thus, the multiplicity of jurisdiction of the, Courts for offence under section 138 has been done away by the ruling given by the Supreme Court in Dashrath Roopsingh Rathod case.[10]

As to Premature Complaint under Section 138

Where the complaint is filed before the expiry of 30 days from the date of notice given under Section 138 is called premature complaint i.e. filing of complaint before cause of action arises. There were difference of opinion of the various High Courts as to premature complaints under Section 138. The High Courts of Calcutta, Rajasthan and Karnataka were of the view that such complaint liable to be returned for filing same on accruing cause of action or should waited till maturity period. Thus, cognizance on such complaint can be taken after its maturity but the opinion of Madras High Court[11] was that premature complaint is infirm and liable to be quashed.

This controversy as to premature complaint under Section 138 has been resolved by the Supreme Court in Narsinghdas Tapadia v. Goverdhandas Partani.[12] In this case the Supreme Court drew a distinction between 'taking cognizance of offence' and 'the filing of the complaint by the complainant'. This court has held that there is a bar to the taking of a cognizance by the Magistrate but there was no bar to the filing of a complaint and that complaint filed even before the expiry of the period of the 15 days could be made a basis for taking cognizance of the offence provided cognizance was taken after the expiry of the said period.

But this principle of the law as laid down by the Supreme Court in Narsinghdas Tapadia case has been overruled by this court in Yogendra Pratap Singh v. Savitri Panday.[13] This court has expressed doubt as to where premature complaint can be regarded a valid complaint under Section 142 for taking cognizance by the Court. This Court has also expressed doubt as to rule laid down in Narsinghdas Tapadia case.

In the light of the ever, this court has referred the case to a three Judge Bench of this Court i.e. a larger bench for decision, the three Judge Bench consisting of Chief Justice of India Justice R.M. Loda held that a premature complaint under Section 142 is no complaint in the eyes of law. Further, the observation of the court was:

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[8] AIR 2014 SC 3519.

[9] AIR 2015 SC 1138.

[10] R.N. Chaudhary, *Banking Law*, at 707.

[11] *Kanchan Kamdansthan v. Nagraj (1995) 1 crimes 366 (Mad).*

[12] AIR 2000 SC 2946.

[13] AIR 2012 SC 2508.

"A complaint filed before the expiry of 15 days from the date on which notice has been served on drawer/accused cannot be said to disclose the cause of action in terms of clause (c) of the Proviso of Section 138 and upon such complaint which does not disclose the cause of action the Court is not competent to take cognizance. A conjoint reading of Section 138, which defines as to whom and under what circumstances an offence can be said to have been committed, with Section 142(b) of the N.I. Act, that reiterates the position of the point of time when the cause of action has arisen, leaves no matter of doubt that no offence can be said to have been committed unless and until the period of 15 days prescribed under Section 138 (c) has in fact elapsed. Therefore, a Court is barred in law from taking cognizance of the complaint….." We, therefore, do not approve the view taken by this Court in Narsingh Das Tapadia v. Goverdhan Das Partani.[14]

As to Repayment of Cheque Money

The Act under Section 138 provides punishment for offence of dishonour of cheques which may extends to two years imprisonment or with fine which may extend to twice of the cheque amount or with both. But the Act does not provide as to repayment of cheque money to the payee or holder in due course.[15]

The practice of repayment to the payee or holder in due course of cheque amount is that after being successful the payee or holder in due course has to file another civil suit for recovery of the cheque money. It does not seem proper and expedient for the payee or holder in due course that after travelling the legal battle from Trail Court to the Supreme Court, he further file another civil suit for the recovery of cheque amount. The author has suggested for repayment of cheque amount out of the amount of fine imposed on drawer.[16]

In R. Vijayan v. Baby[17] the Supreme Court had advised suitable amendment under Section 138 so that compensation may be paid to the complainant as there is no provision for repayment of cheque money out of fine imposed upon drawer. But the judgment of the Supreme Court in Somnath Sarkar v. Utpal Basu Mallick[18] finds support of providing compensatory justice to the payee or holder in due course but observed that it is the function of the Legislature to make suitable amendment in the Act.

III. CONCLUSION

There are catena of cases decided by the Supreme Court touching relevant aspects of dishonour of cheques. Above are some significant judgments which have been mentioned here. Since the decisions of the courts and particularly of the Apex Court not only provide basic material but play significant role in the development of the subject and for giving now trends and challenges. These judgment be incorporated in the relevant provisions of the Act.

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[14] AIR 2000 SC 2946.

[15] *Supra* note 2.

[16] *The Banking Law*, at 723; Dr. S.L. Chaudhary, *New Paradigm of Dishonour of Cheques.*

[17] AIR 2012 SC 528.

[18] AIR 2014 SC 771.

INDIA AS A HUB FOR INTERNATIONAL COMMERCIAL ARBITRATION: AN OVERVIEW IN REFERENCE TO THE AMENDMENTS IN INDIAN ARBITRATION LAW

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Vijay Srivastava**

Abstract

The amendment to the Arbitration and Conciliation Act, 1996 brings much required changes and was intended at transforming the arbitration system in India. Some major changes will have a noteworthy effect on the way of arbitrations which are conducted in India and will also bring a positive signal for India's reputation as a hub for International Commercial Arbitration (ICA). Even after major alteration the certain areas of Indian arbitration are still doubtful and need explanation. In this paper the authors mainly examine some major areas of concern viz. some opinions of stake holders of International Commercial Arbitration as well as the Indian Government's efforts for making India as a hub for ICA in the light of Foreign Direct Investment (FDI) policies. It may be noted that applicability of law and principles of lex arbitri under ICA and recourse against foreign award in India have also been discussed with the help of leading cases. The article also highlights the lacunas of ICA and prescribes some remarkable suggestions for improvement for making India as a hub for International Commercial Arbitration.

Key words

International Commercial Arbitration (ICA), Cross Border Commercial Issues, Foreign Direct Investment (FDI) and lex arbitri.

I. INTRODUCTION

The global trading community, has shown deep distrust due to the excessive judicial supervision even in the context of foreign arbitrations, has set alarm bells ringing in the government and judiciary. The International business community all across the globe has accepted international commercial arbitration[1] as an effective mechanism for resolving its commercial disputes. reluctance of parties to have matters decided by the national court of the other disputing party, with perhaps unknown law, language and culture, is treated as one of the major reasons for this preference. The history of arbitration as an informal mechanism of dispute settlement in the Asian continent can

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[1]The terms 'International Arbitration' and 'International Commercial Arbitration' are used as 'ICA' interchangeably.

be long back to ancient times.[2] The political and economic conditions that existed in various countries in the continent created major uncertain blocks for the growth of commerce and trade until the beginning of the 20th century.

The region has also clear aggression towards cross- border arbitration for the settlement of international commercial disputes. Asian countries felt, their concern especially for ICA, first time ever; Many countries in the region increased a noteworthy economic impetus after the Second World War and experienced an remarkable record of growth in the last few decades.

Over the past few years, the world trade communities has spectator an increasing number of cross-border disputes, especially investments; along with a simultaneous rise in international disputes. The commercial parties support ICA for the settlements of such disputes. There is a major doubt that the choice of arbitral seat is control inter alia by the arbitral set up and the intervention of judiciary in the place of arbitration. Asian countries have responded to these demands through effective development of their strong mechanism for ICA, together with noteworthy initiatives to bring up to date their domestic arbitration laws. Following this pitch in ICA, there has also been a lot of increase in the conflict of laws especially in legal systems of various countries, for example: India, Hong Kong, Singapore, Malaysia, Dubai etc.

Amendments to the Arbitration and Conciliation Act, 1996, have been very long awaited changes in arbitral world especially for ICA in India. It is much expected from The Arbitration and Conciliation Act, 1996, (Amendment) Act, that it will prove as effective tool for ICA. The Amendment is intended at bringing about a constructive change in the arbitration law by preventing ambiguity and irregularity in India's arbitration law. It is hoped that it will promote the use of arbitration in India, as well as promote India as a venue for international arbitration. However, despite the legislative intervention, the Amendment may not be able to resolve certain issues.

The Indian legislature introduced the Arbitration and Conciliation Act, 1996 as it was realized that the then existing arbitration law had become obsolete.[3] The authors discuss some issues, where judicial involvement is further necessary to determine the inconsistency and uncertainty that have mushroomed under arbitration law. The ambiguity adjoining the law leading the arbitration agreement in ICA is a major discussed issue in this paper. Along with this issue the problems relating, whether two Indian parties can select a foreign seated arbitration, and hence prohibit the Part I of the Arbitration and Conciliation Act, 1996.[4]

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[2] Simon Greenberg, *et al., International Commercial Arbitration: An Asia Pacific Perspective,* (2011). for example, arbitration in china can be traced back to about 2100 – 1600 BC.

[3] Prior to the enactment of the Act, the arbitration regime in India was governed by multiple legislations, which were often criticized for the extensive judicial intervention permitted there under. Domestic arbitrations were governed by the Arbitration Act, 1940 and recognition and enforcement of foreign awards was provided for under two separate legislations, the Arbitration (Protocol and Convention) Act, 1937 (for awards under the 1927 Geneva Convention) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (for awards under the 1958 New York Convention).

[4] Arbitration and Conciliation Act, no. 26 of 1996 (India), § 2(2) [Part I] shall apply where the place of arbitration is in India.

The prime objective of reform in Indian arbitration law to make it effective and responsive in terms of Economic reforms and it may completely successful if its dispute resolution provisions are in harmony with the international commercial administration. Part I of the Arbitration and Conciliation Act 1996, which governs Domestic arbitrations, is drafted on the basis of guidelines of UNCITRAL Model Law on International Commercial Arbitration, 1985. Under the Act, arbitration emerged as a frequently used method of alternate dispute resolution. However, it has become synonymous with high costs and delays, plagued by the same ills as litigation, which it had intended to replace.

As a consequence, foreign investors and corporate hoses which are doing business in India became anxious of the risks correlated with arbitration proceedings in India. Once again, the Government of India identifies the critical requirement to amend the Indian arbitration law. After two unsuccessful attempts to motivate alteration in 2001[5] and 2004[6] the Law Commission of India token up an initiatives to amend the Act in 2010 and submitted its report by August 2014.[7] These recommendations were recognize by the Parliament and received presidential assent on December 31, 2015.[8]

The Amendment has convey the extensive alteration to the arbitration set up in India, and has deal with various concerns concerning postponement and unnecessary interference by the courts. Most of the changes comprise the availability of interim relief in case of ICA located outside India, which will protect foreign parties by securing the assets of the Indian party, if necessary[9] The definition of Court' for ICA is now specifically mean the High Court.[10] The Amendment also incorporates provisions of the IBA Guidelines on Conflicts of Interests in ICA, which establish impartiality of arbitrators and guarantee autonomy and neutrality of arbitrators, introducing intelligibility in the whole arbitral process.[11] The explanation of public policy' has been justified and further bound in case of ICA , to help courts while shaping a challenge to a domestic award or enforcement of a foreign award.[12] The Act now permits arbitrators to award penalty based on whether, *inter alia,* the party made a frolicsome counter claim or that it decline any sensible offer to resolve the dispute.[13] These changes will have a noteworthy impact on the way arbitrations are conducted in India for ICA and it is expected that the Amendment will fetch a optimistic change to the method India is professed as a seat for ICA.

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[5] Law Commission of India, Report no. 176 - the Arbitration and Conciliation (Amendment) Bill, 2001 (2001), available at: *http://lawcommissionofindia.nic.in/arb.pdf*

[6] Ministry of Law and Justice, Justice Saraf Committee Report on Implications of the recommendations of the Law Commission's 176th Report and Amendment Bill of 2003 (2005).

[7] Law Commission of India, Report no. 246 – amendments to the Arbitration and Conciliation Act, 1996, 25 (2014), available at: *http://lawcommissionofindia.nic.in/reports/report246.pdf*

[8] Arbitration and Conciliation (Amendment) Act, no. 3 of 2015 (India).

[9] Arbitration and Conciliation Act, no. 26 of 1996, § 2(2).

[10] *Id.* § 2(1)(e)(ii).

[11] This is provided in Section 12, read with fifth schedule and seventh schedule, Arbitration and Conciliation Act, 1996.

[12] The Arbitration and Conciliation Act, no. 26 of 1996, §34, §48.

[13] *Id.* § 31a (3).

II. CONFLICTING ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION:

The proper law of the arbitration

'*Lex Arbitri*' has been most significant issue in whole arbitration process in India , especially in ICA. It refers the law applied in the arbitration agreement, which is one of the areas which is vague and required imperative justifications. It also focuses on the applied law of the arbitration agreement' or *'lex arbitri'*[14] in ICA. Which is also known as the conflict of laws rules applicable to select each of the foregoing laws.[15] It is largely agreed that there are broadly three sets of laws which apply to arbitration:[16]

The principle of party autonomy allows parties to choose different laws, for all the above, in their contracts. preferably an arbitration clause would recognize all three kinds of law, however, parties often fail to specify the *lex arbitri* send-off it to the courts to determine what the parties intended to be the proper law of the arbitration agreement.

There is no clear cut definition which determines the matters covered under the *lex arbitri*. A distinction has to be drawn between substantive matters relating to the arbitration agreement, which are governed by the law of the arbitration agreement and, procedural matters relating to a reference, which are governed by the curial law *i.e.* law governing the conduct of the arbitration. Where the parties have not expressly chosen the *lex arbitri* in their dispute resolution clause, it falls on the courts to decide what the parties intended. The Supreme Court of India in *National Thermal Power Corporation v. Singer Company and Others* [NTPC], held that the *proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But this is only a rebuttable presumption*.[17]In *Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Ors.* [Sumitomo], the Supreme Court upheld an early decision of an English court holding that the proper law of the contract was decisive of the *lex arbitri.*[18]

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[14] It is noteworthy that the term *lex arbitri* is used differently by different authors. for eg. Russell uses *lex arbitri* while referring to the curial law; even the Indian Supreme Court uses it in different ways- in Enercon (India) Ltd. and ors.v. Enercon Gmbh and anr., (2014) 5 S.C.C. 1 (India), *lex arbitri* is used to describe the procedural law governing arbitration, whereas in Reliance Industries v. Union of India, (2014) 7 S.C.C. 603 (India), it is used to describe the proper law of the arbitration agreement. In this article, we have used *lex arbitri* to identify the proper law of the arbitration agreement.

[15] G. Born, *International Commercial Arbitration*, pp. 409-561, 1310-47, 2105-2248 (2009).

[16] Lord Mustill and Stewart Boyd, *Applicable Law and Jurisdiction of Courts in Commercial Arbitration*, (2nd ed. 1989); Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and others, (1998) 1 S.C.C. 305 (India); Reliance Industries Limited v. Union of India, (2014) 7 S.C.C. 603 (India).

[17] 16 (1992) 3 S.C.C.551, 21 (India).

[18] (1998) 1 S.C.C. 305 (India) (though this case reached the same decision as in NTPC, the court here did not refer to or discuss its own decision in NTPC).

The decisions of the Supreme Court in *NTPC/Sumitomo* are contrary to the stand taken by most English courts on international arbitration, which say that in the absence of an express choice by the parties, the *lex arbitri* will be held to be the law of the country in which the arbitration is held, *i.e.*, seat of arbitration.[19] This line of reasoning is supported by the Convention on the Recognition and Enforcement of Awards, 1958 the New York Convention. Therefore, the New York Convention envisaged that where the parties had not agreed to the *lex arbitri*, the proper law of the arbitration agreement would be the law of the seat of the arbitration.

A similar approach was taken by the Bombay High Court in *HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Limited* [HSBC],[20]where the court held that the agreement to arbitrate at Singapore; has a closer and real connection with the seat chosen by the parties, *i.e.* Singapore. Therefore, arbitration agreement would be governed by the law of Singapore. Therefore, even though the proper law of the contract was expressly chosen by the parties in *HSBC* to be Indian law, the Court chose to decide the *lex arbitri* based on the seat of arbitration rather than the proper law of the contract.These decisions of the Calcutta and Bombay High Courts try and carve out exceptions to the *NTPC* principle, but there is still uncertainty in recognizing the *lex arbitri* when the seat as well as the substantive law have been identified by the parties. Thus it may establish a problem in an ICA where, for example, the substantive law of the contract is Indian law, but the arbitration is managed by institutional rules and the seat is outside country . In such a condition, an international tribunal consisting of arbitrators from England and other jurisdictions with similar rules, would believe the law of the seat to be the *lex arbitri*. The Indian party may resist the enforcement of an award from such a tribunal on the grounds that the tribunal applied the wrong law and this is against the public policy of India.

Problems in choosing Seat for arbitration outside India

In Indian arbitration law a most debating and arguing issue under ICA is , whether two Indian parties can prefer a foreign seat and keep out the provisions of Part I of the Act or not . No doubt it is very rare to have a situation where the Indian subsidiary of a foreign entity has entered into an arbitration agreement with another Indian party providing for a foreign seat. Would such arbitration be considered a domestic arbitration or an international commercial arbitration? Part I of the Act provides that it will only be applicable where the place of arbitration is India, therefore an arbitration seated abroad between two Indian parties would not be a domestic arbitration under Part I of the Act.[21] Section 2(f) of the Act defines ICA 'as arbitration relating to disputes that arise out of a legal relationship where one of the parties is not Indian.[22] Therefore, arbitration between

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[19] Sulamerica v. Enesa, [2012] EWCA (Civ.) 638 (U.K.); Naviera Amazonica Naviera Amazonica Peruana S.A. v. Compania Internacional Compania Internacional De Seguros Del Peru, (1988) 1 Lloyd's Rep. 116 (ca) (U.S.).

[20] Arb. p. 1062 of 2012 Jan. 22 2014 (Bombay High Court) (India) this judgment has been challenged in the Supreme Court of India.

[21] Arbitration and Conciliation Act, no. 26 of 1996. §2(2).

[22] Section 2(f), Arbitration and Conciliation Act, 1996 provides that- International Commercial Arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is (i) an individual

two Indian parties, seated outside India would not be considered an international commercial arbitration under the provisions of the Act. The Hon'ble Supreme Court of India has constantly declare that Part I of the Act does not apply to ICA seated outside India and if parties choose a foreign seat of arbitration and a foreign law as their law of arbitration, then the intention is to exclude Part I of the Act.[23] This has been unbreakable by the Amendment, whereby barring Sections 9, 27 and 37, Part I has specifically been made inappropriate to ICA seated outside India.[24] An award which results from such an arbitration will be considered a foreign award'under Part II of the Act.[25] Applicability of Part II is exclusively based on the seat of arbitration and whether the seat is located in a country which is a signatory to the New York Convention and been recommended by the Central Government in the Official Gazette. Once this standard is fulfilled, Part II would relate and the foreign award'from such an arbitration would be familiar and enforced in India.

The Act does not envision a condition where two Indian parties can decide a seat for their arbitration outside India. This irregularity could have been taking away by the Amendment by expansion the definition of ICA, to include arbitration seated abroad. The Indian judiciary has been focused with this quandary for some time and has been incapable to give a clear reply. This issue brought before the Hon'ble Supreme Court of India in *Atlas Exports Industries v. Kotak and Company.*[26] The argument raised was that the contract was complementary to public policy as it unreservedly barred the remedy available under Indian law and bound two Indian parties to have their disputes arbitrated by foreign arbitrators. Section 28 of the Indian Contract Act, 1872 provides that agreements in restraint of legal proceedings are void; The court went onto hold that, *merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement*'.[27] Thus, the arbitral award arising out of a foreign-seated arbitration stuck between Indian parties was held to be not inoperative or opposed to public policy. Section 28 of the Act provides for the rules on which the Tribunal would decide a matter, if the arbitration is seated in India.[28] The Court added a

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who is a national of, or habitually resident in, a country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the government of a foreign country.

[23] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 S.C.C. 552 (India); Videocon Industries Ltd. v. Union of India and anr., (2011) 6 S.C.C. 161 (India).

[24] This is based on the proviso to section 2(2) of the Arbitration and Conciliation Act, 1996, added by the amendment.

[25] Section 44, of the arbitration and conciliation act, 1996 unless the context otherwise requires, -foreign award means an arbitral award on difference between person arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, [...] (a) in pursuance of an agreement in writing for arbitration to which the convention set forth in the first schedule applies, and (b) in one of such territories as the central government, being satisfied that reciprocal provisions have been made may, by notification in the official gazette, declare to be territories to which the said convention applies.

[26] (1999) 7 S.C.C. 61 (India).

[27] ATLAS Exports, (1999) 7 S.C.C. 61

[28] Section 28, Arbitration and Conciliation Act, 1996 provides as follows- rules applicable to substance of

corrigendum in *TDM* to the effect that, *any findings/observations made hereinbefore were only for the purpose of determining the jurisdiction of this Court as envisaged under Section 11 of the 1996 Act and not for any other purpose*. The Court followed the decision in *Atlas Exports* and allowable the Indian parties to arbitrate outside India, and held that if the seat is in a country which is a signatory to the New York Convention, then Part II of the Act would be appropriate. The agreement cannot be held to be null and void because the parties had chosen for a foreign-seated arbitration. The High Court further held that where two Indian parties had freely entered into an agreement in relation to arbitration, the argument that a foreign-seated arbitration would be opposed to public policy was untenable. The court logically explained, that where parties, by joint agreement, had decided to resolve their dispute by arbitration and chosen a seat of arbitration outside India then in view of the provisions of section 2(2) read with Section 44 of the Act, Part II of the Act would govern the proceeding rather than Part I. The High Court of Bombay in *M/s. Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.* has taken conflicting opinions on the same issue.[29] [30] The argument that two Indian parties choosing a foreign seat is contrary to Section 28 of the Act is indefensible, as Section 28 becomes applicable only when the arbitration is seated in India. The question is not whether two Indian parties may choose a foreign law as their substantive law, but whether they can prefer a seat of arbitration outside India and whether this choice would not be against the public policy of India.

In view of these changes in the institutional rules, the Law Commission in its report had suggested an amendment to the Act to give statutory recognition to the concept of emergency arbitrators.[31] This amendment was planned to be introduced in Part I of the Act, which defines arbitral tribunal to be a sole arbitrator or a panel of arbitrators.[32] The arbitral tribunal would be as appointed according to the procedure agreed between the parties or under Part I, if the parties are unable to appoint the tribunal.[33] The change that the Law Commission sought to bring about was to broaden the definition of arbitral tribunal' to include an emergency arbitrator appointed under any institutional rules. In the present scenario, in an arbitration seated in India, conducted under the institutional rules, which allow parties to ask for appointment for emergency arbitrators, the decision of an emergency arbitrator will not be enforceable, as emergency arbitrators are not

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dispute – (1)where the place of arbitration is situate in India – (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India; (b) in international commercial arbitration, - (i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute.

[29] Arb. app. no. 197 of 2014 and Arb. pet. 910 of 2013jun.12, 2015 (Bombay High Court) (India).

[30] 2014 (4) arb. l.r. 273 (Delhi).

[31] Law Commission of India, report no. 246 – amendments to the Arbitration and Conciliation Act, 1996 37 (2014), available at: *http://lawcommissionofindia.nic.in/reports/report246.pdf*

[32] Arbitration and Conciliation Act, no. 26 of 1996, § 2(1)(d).

[33] Arbitration and Conciliation Act, no. 26 of 1996, § 11.

[34] In the case of an ad-hoc arbitration, Indian Arbitration Act does not include any provision for appointment of an emergency arbitrator. Therefore, such a situation can only arise if the arbitration is conducted under institutional rules.

familiar under the Act.[34] In case of ICA seated outside India, the question is whether the decision of the emergency arbitrator qualifies as a foreign award to be enforceable under Part II of the Act.

The term arbitral 'award' is described in the New York Convention as *not only awards made by arbitrators appointed for each case but also made by permanent arbitral bodies to which parties have submitted*.[35] Even though this definition of an award is unclear, the opinion amongst experts of ICA is that the New York Convention only envisages enforcement of final awards.[36] Therefore, it will be very difficult to enforce the decisions of emergency arbitrators in India even under Part II of the Act. One way to conquer this obstacle of unenforceability would be set up further changes to incorporate specific provisions for the enforcement of an award passed by an emergency arbitrators. In Hong Kong, a specific provision has been introduced in their arbitration ordinance for the enforcement of reliefs granted by an emergency arbitrator.[37] As explained above, the Law Commission had intended to do something similar, which unluckily, did not see the light of the day. Parties in India have had to find an answer to fill the slit created by the lack of emergency interim relief. The High Court of Bombay was faced with a situation where an emergency arbitrator appointed under SIAC Rules, had granted emergency relief, which the respondent failed to comply with.[38] Since this decision was not enforceable *per say* in the Indian courts, the claimant for relief under Section 9 of the Act for grant of interim relief pending the constitution of the tribunal.

This, however, is not a feasible method of enforcing the decisions of an emergency arbitrator as it increases the load upon the courts and upon the parties. Therefore, it would be advisable to make suitable amendments in the Act to remove this loophole.

Statistical Status and Government's Efforts towards Making India as an International Hub for International Commercial Arbitration

With the speedy growth in international commercial activities, cross border issues became more inevitable challenge before world communities. Especially in India it has been experienced that cross border commercial disputes are mushroomed since last few years rapidly. Even after major amendments in arbitration law in India especially for the settlement of International disputes, there are still so many challenging issues which are untouched and unsolved. For the purpose of making more and more effective International commercial arbitration mechanisms in India and converting India as a hub for International commercial arbitration for world trade communities a personal survey has been done by the author for discussing the special features, factors and

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[35] Article i(2), New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, June 10, 1958,

[36] Jean-Paul Beraudo, recognition and enforcement of interim measures of protection ordered by arbitral tribunals, 22 j. international arb. 245, (2005); see also David A.R. Williams QC, Interim Measures, 225, the asian leading arbitrators' guide to international arbitration 244, (2007) (the prevailing view is that such orders are not enforceable as award under the New York Convention).

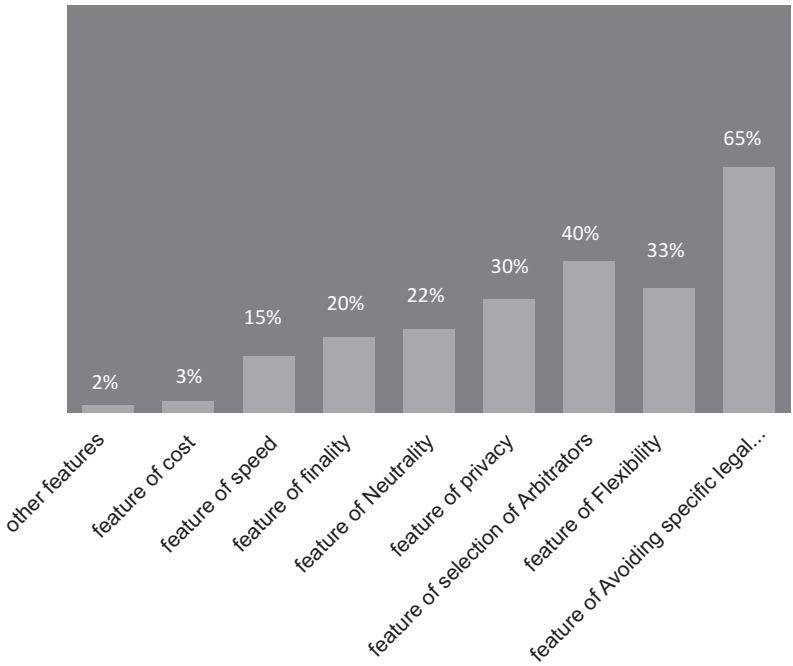
[37] Hong Kong Arbitration (Amendment) Bill, (2013) cap. 609, § 22b (Hong Kong).

[38] Avitel Post Studioz Limited and Others v. HSBCPI Holdings (Mauritius) Limited Arb. p. 1062 of 2012 Jan. 22, 2014(Bombay High Court) (India); Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Others, (1998) 1 S.C.C. 305(India).

III. SPECIAL FEATURES OF INTERNATIONAL COMMERCIAL ARBITRATION

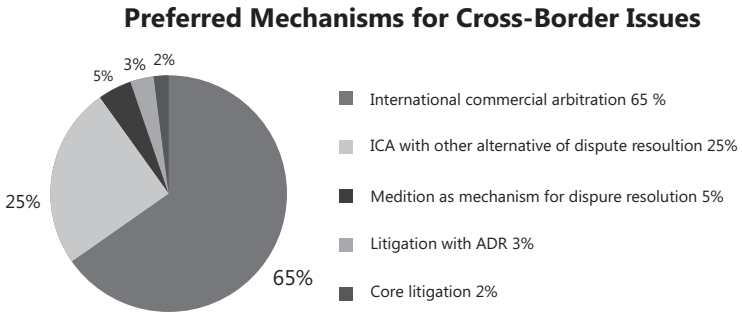
The recognition of arbitration may be justified by coding the special features of International Arbitration which considered as unique features of resolution of cross border disputes. In general predictably, features of arbitral procedure like enforceability and resolution without specific legal systems/national courts were most commonly preferred features for choosing arbitration as a mode for resolution of disputes , subsequently flexibility, selection procedures relating to arbitrators, other conventional aspect to international commercial arbitration, such as "finality" and "neutrality", were less preferred.

Special Features of International Arbitration



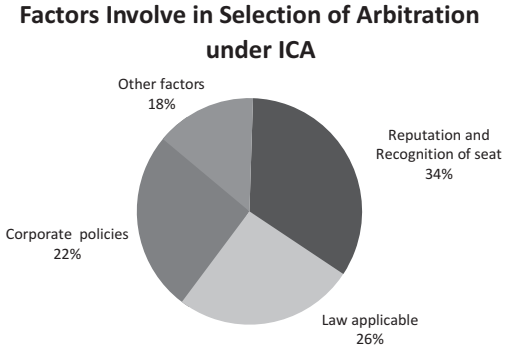
International Commercial Arbitration as Most Preferred Mechanism for Cross - Border Bisputes

Under a wider field observation respondents showed an effective preference for international commercial arbitration over other options such as cross-border litigation or arbitration. Almost ninety percent of respondents said that international commercial arbitration is their preferred dispute resolution mechanism, either through Independently International commercial arbitration which is approx 65% and together with other mechanisms of alternative dispute mechanisms which is approx 25%.



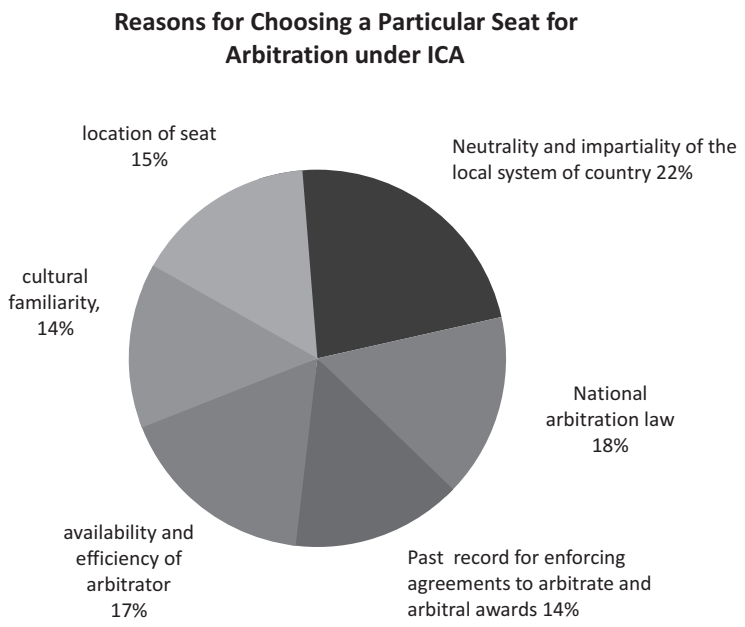
Factors for Selecting Seats for Arbitration under ICA

Under a opinion based survey for examine the factors for choosing particular seat for International commercial arbitration, it has been observed that the factors involves in giving preference to them. Most of the Respondents were in opinion that the reputation and recognitions of the arbitral seats are the major factors in selection of arbitral seats under ICA along with the said factors, law applicable to the particular dispute, corporate policy of the country, personal connections, counter party effects, recommendations are the factors, which effects the selection procedure of seat for arbitration under ICA.



Reasons for Choosing a Particular Seats of Arbitration under ICA

The reason for selecting a particular seats of arbitration under ICA, were also an centre for discussion under whole research project. In the light of amendments in Indian arbitration law in 2016 and on the basis of certain recommendation of Law commission report of 246th and 260th, which is an remarkable effort to make India as a place/ hub for International Commercial Arbitration (ICA), the three dominant factors relates to the 'formal legal infrastructure' of a seat for arbitration under ICA are : (I) Neutrality and impartiality of the local legal system of country; (II) National arbitration law; and (III) Past record for enforcing agreements to arbitrate and arbitral awards. Along with the above factors which attracts the respondents in selection of a seat for arbitration, of particular country are availability and efficiency of arbitrator, cultural familiarity, location of seat are as intrinsic legal features of an arbitration seat and were arguably justified by most of the respondents as the attractive and intrinsic features of seat for arbitration under ICA.



IV. INDIAN GOVERNMENTS EFFORTS FOR MAKING INDIA AS A HUB FOR INTERNATIONAL COMMERCIAL ARBITRATION

The Government of India's transformed focus to make India as the Global hub for International Commercial Arbitration for the settlement of cross border commercial issues.. Focusing the government's persistent assurance to provide a friendly the cross-border business environment, a three-day global arbitration conference was organized recently in Delhi by the government think tank NITI Aayog at the helm of affairs. Under this Global Conference a national initiative has been taken to make stronger arbitration law and its enforcement in India specially for cross border disputes.

The Judges of the Supreme Court of India, top government officials, luminaries, legal experts and corporate heads took part in the panel discussions. The interactive sessions focused on all processes involved in creating a robust and cost effective arbitration ecosystem.

Under the auspicious presence of Prime Minister of India a number of enlighten views has been discussed by the legal lumaniries. According to the Prime Minister, Mr. Narendra Modi, "A robust legal system with a vibrant arbitration culture is essential for businesses to grow and "the creation of a vibrant eco-system for institutional arbitration is one of the foremost priorities of this government." The Chief Justice of India, Justice T.S. Thakur endorse the views on the need to move forward Alternative Dispute Resolution (ADR), remarked that "The avalanche of cases constantly puts the judiciary under great stress" and articulated his concerns over the unnecessary judicial involvement in arbitral awards.

In order to attain the objectives of making India a regional hub and global hub for domestic and international arbitration, the conference tinted the need to develop world

class arbitral infrastructure in India. Senior advocate Dr. Abhishek Manu Singhvi said, "The Mantra of making arbitration more effective and popular can be achieved by getting the 'A, B, C, D of Arbitration right i.e., (Universal) Access, (Reducing) Backlog, (Lowering) Cost and (Removing) Delay,". He also acknowledged that one of the reasons of arbitration not receiving the full focus, is the excessive judicial supervision and intervention in the arbitral proceedings.

The requirement for expert arbitrators working at the plebs was highlighted by Justice R C Lahoti who advocated for the best human resource and physical infrastructure to provide the ideal atmosphere for qualitative arbitration in India. He also focused the lack of transparency in appointment of arbitrators especially by the Courts is also a major problems for ineffective arbitration mechanisms in India.

Judges of the Supreme Court of India, including Justice A.K Sikri, Justice D.Y Chandrachud, former judge, Justice R.V Raveendran together highlighted the role of court sustain in discomforting widespread challenge to stand arbitration at various stages. They also emphasizes on the need for a coordination that courts must attain with respect to their participation in the arbitral process.

Although the practice of arbitration is far from unfamiliar to India, the conference played a vital role in meeting competency of the best practices in arbitration and the way ahead from the world-class arbitration institutions such as ICC, SIAC, LCIA, KLRCA, HKIAC and PCA.

In an effort to contribute an all-around standpoint in constructing an effective arbitration policy, the conference brought together members of the user community also who have been in the suffer of high level disputes such as BALCO, Airtel, J.K Tyres, IndiGo Airlines, NHAI, BHEL and FICCI.

V. CONCLUSION

No doubt requirements Arbitration trend and practice in India is changing with the growth of international trade and its. From the above analysis, it is clear that there still there are some ambiguities in Indian arbitration law, which require judicial explanation and practically which need some major changes to solve the cross border issues through the arbitration. It is much expected from The Arbitration and Conciliation Act, 1996,(Amendment) Act, that it will prove as effective tool for ICA. The Amendment is intended at bringing about a constructive change in the arbitration law by preventing ambiguity and irregularity in India's arbitration law. It is hoped that it will promote the use of arbitration in India, as well as promote India as a venue for international arbitration. Indeed the legislative efforts to amend the Arbitration and Conciliation Act, which no doubt inactive the loopholes in the country's arbitration law, especially in ICA, goes a long way in scatching India as an arbitration friendly jurisdiction as a hub for International Commercial Arbitration.

THE SHADES OF LEGAL MECHANISM OF HUMAN RIGHTS AND PRISONERS WITH A SPECIAL REFERENCE TO NATIONAL HUMAN RIGHTS COMMISSION, INDIA

Poonam Rawat* &
Avnish Bhatt**

Abstract

A prison is a place in which individuals are physically confined or detained and usually deprived of arrange of personal freedom. This was considered as one of the most integral part and backbone of the criminal justice system of a country. In India there are provisions of various types of prisons such as those exclusively for adults, children, female, convicted prisoners, under-trial detainees and separate facilities for mentally ill offenders but at the same time the situation is a bit different rarely we got all such prison across India in the similar manner as prescribed. In the past years the Globe seems to be many concerns over developing prison jurisprudence with a view to protect inherent rights of prisoners and for the proper administration of prisons. This is undoubted and undebatable point that existing legal structure of the prison administration needs a complete change whereas Criminal Laws required to be amended including the Jail manuals and Prison Act. In this context, the present paper examines the diverse shades of regulatory measures of Prisoners' Human Rights in India. The paper also highlights the various roles of National Human Rights Commission for the betterment of Prisoners' Human Rights in India.

Key words

Correction, Reformation and Rehabilitation, Human Rights and NHRC.

I. INTRODUCTION

> "Convicts are not by mere reason of the conviction denuded of all the fundamental rights which they otherwise possess."-
>
> Justice V.R. Krishna Iyer

Imprisonment or incarceration is a legal punishment that may be imposed by the state for the commission of a crime or disobeying its rule. There are various different objective of imprisonment in different countries like punitive and for incapacitation, deterrence, and rehabilitative and reformative and others. In general, these objectives have evolved over time as shown in the accompanying figure. The wholesome purpose and justification of imprisonment is to give a shield to the society against crime and

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retribution. In the present approach towards the punitive methods of treatment of prisoners alone are neither considered to be relevant nor desirable to achieve the well planned objectives of reformation and rehabilitation of prison inmates. The concept of Correction, Reformation and Rehabilitation has come to the fore ground and the prison administration is now expected to function in a curative and correctional manner. Human rights approaches and human rights legislations have facilitated a change in the approaches of correctional systems, and they have evolved from being reactive to proactively safeguarding prisoners' rights. The United Nations has also provided several standards and guidelines, through minimal rules or basic principles in the treatment of prisoners.

II. PRISON REFORMATION: A DISTINCT VIEW

Central to the arguments to promote prison reforms is a human rights argument - the premise on which many UN standards and norms have been developed. However, this argument is often insufficient to encourage prison reform programs in countries with scarce human and financial resources. The detrimental impact of imprisonment, not only on individuals but on families and communities, and economic factors also need to be taken into account when considering the need for prison reforms.[1]

Human Rights Considerations

A sentence of imprisonment constitutes only a deprivation of the basic right to liberty. It does not entail the restriction of other human rights, with the exception of those which are naturally restricted by the very fact of being in prison. Prison reform is necessary to ensure that this principle is respected, the human rights of prisoners protected and their prospects for social reintegration increased, in compliance with relevant international standards and norms.[2]

Imprisonment and Poverty

Imprisonment disproportionately affects individuals and families living in poverty. When an income generating member of the family is imprisoned the rest of the family must adjust to this loss of income. The impact can be especially severe in poor, developing countries where the state does not provide financial assistance to the indigent and where it is not unusual for one breadwinner to financially support an extended family network.[3]

Public Health Consequences of Imprisonment

Prisons have very serious health implications. Prisoners are likely to have existing health problems on entry to prison, as they are predominantly from poorly educated and socio-economically deprived sectors of the general population, with minimal access to adequate health services. Their health conditions deteriorate in prisons which are overcrowded, where nutrition is poor, sanitation inadequate and access to fresh air and exercise often unavailable.[4]

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[1] Available at: *https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html* (accessed on 07.11.2016)

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

Prisons are not isolated from the society and prison health is public health. The vast majority of people committed to prison eventually return to the wider society. Thus, it is not in vain that prisons have been referred to as reservoirs of disease in various contexts.

Detrimental Social Impact

Imprisonment disrupts relationships and weakens social cohesion, since the maintenance of such cohesion is based on long-term relationships. When a member of a family is imprisoned, the disruption of the family structure affects relationships between spouses, as well as between parents and children, reshaping the family and community across generations. Mass imprisonment produces a deep social transformation in families and communities.[5]

The Cost of Imprisonment

Taking into account the above considerations, it is essential to note that, when considering the cost of imprisonment, account needs to be taken not only of the actual funds spent on the upkeep of each prisoner, which is usually significantly higher than what is spent on a person sentenced to non-custodial sanctions, but also of the indirect costs, such as the social, economic and healthcare related costs, which are difficult to measure, but which are immense and long-term.[6]

III. UN CONVENTION OF HUMAN RIGHTS AGAINST WRONGFUL CONFINEMENT

Wrongful confinement is an act condemnable by statutes in India. Before the Indian Constitution was promulgated to be a statute to safe the citizens from the transgression of human rights, some conventions existed in the world which not only gave specific legal content to human rights in an international agreement but also provided for the establishment of machinery for their supervision and enforcement.[7] It is very well confirmed that the main objective why the conventional protocols were formulated was to set minimum standards of life as the commission worked as court of review. However, the conventions formulated for the protection of human rights of people in custody against wrongful confinement were recognized in Art. 2 where recognition of everyone's right to life was to be protected by law, and no one was to be deprived of his life. Art. 3 protected people from being subjected to torture and inhuman or degrading treatment or punishment. When one is confined wrongly it is inhuman. Art. 5(1) is also crucial under which everyone is given a right to life and liberty and none has to be deprived of his life or liberty except through procedure established by law but since the statutes are against wrongful confinement any confinement under this category is against procedure established by law.

Art. 4 of the convention, says "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings through which the lawfulness of his detention shall be decided speedily. A legal proceeding of accused here means that one

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[5] *Ibid.*

[6] *Ibid.*

[7] Art. 69 of the European Convention on Human Rights, 1953.

is innocent till proved guilty. And the same proceedings must be undertaken speedily so that there is absolutely no room left for wrongful, confinement as *"justice delayed injustice denied."*

Art. 5 in its protection of people who are wrongly confined in the prisons, protects them that, everyone who has been the victim of arrest or detention in contravention of provisions of the statutes shall have an enforceable right to compensation. Finally, under Art. 6 it is the right of everyone to have fair and public hearing within a reasonable time by an independent and impartial tribunal. This is when human right of people in prisons is protected and when justice is done and not only that justice is done but also seen to be done, when law protects its people equally and they are equal before the law[8].

IV. PRISONER'S RIGHTS AND CONSTITUTIONAL UMBRELLA AGAINST WRONGFUL CONFINEMENT

In Indian Constitution part-III of the constitution is available to protect people in custody (wrongful confinement) because a person wrongly confined remains a person in prison. One of the most important provisions in the Constitution of India applied by the courts is Art. 14[9] in which principle of equality is embodied. It runs: *"The state shall not deny to any person equality before the law or the equal protection of the law within the territory of India."*

At the same time in Art. 19 of the Indian Constitution guarantees six freedoms, the most important for the research study being protection against custodial atrocities and human rights protection of those in prison against wrongful confinement followed by freedom of movement and of speech. When one is wrongly confined, he is not going to move, hence curtailing his fundamental right of freedom of movement at the same time as he is not well represented, there is no chance to be heard or time to speak hence his freedom of speech is interfered with and is a clear violation of fundamental right of the person and when fundamental rights of people in jail are violated, their human rights are also violated. Clause (1) of Art. 20 protects the person from *ex-post facto* laws. It provides: - *"no person shall be convicted of any offence except for a violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time the commission of the offence."*

This clause of Art. 20 protects a prisoner from being subjected to any punishment including that of imprisonment which were not authorized by law at the time when he committed the alleged act and for which he was convicted. If any person falls under these circumstances i.e. imprisoned in a manner not authorized by law at the time of committing the crime, then it is wrongful confinement. Article 20 (2) embodies the principles of double jeopardy that is :

No person shall be prosecuted and punished for some offence more than once. This clause states the common law rule *"Nemo debot vis vexari"* that is, no person should be put twice in the peril for same offence. As soon as this happens it is wrongful

[8]Arts. 4, 5 and 6 of United Nation Convention of Human Rights against Wrongful Confinement.

[9]Art. 14 of the Constitution of India.

confinement hence ultra virus to the law of the land i.e. violation of the fundamental rights of persons, violation human rights and ultra virus to Criminal Procedure Code, Civil Procedure Code and jail manuals. The simple rule that a person shall not be deprived of his life or personal liberty except according to procedure established by law is worded with utmost precision. These provisions have in *Prabhakar's*[10] case earlier and *Kishore Singh*[11] recently been used by Supreme Court to protect certain important rights of people in custody as there is no formal guarantee of the their rights in the constitution. After the *Maneka Gandhi*[12] case these provision not only protected the arbitrary actions on the part of the executive but also from legislative blows which cannot eliminate malice of an unreasonable or unjust law. There must be fair and reasonable procedure for deprivation of the life and personal liberty of the individual. A fair and reasonable procedure includes right to process of law, right to counsel, right to speedy trial, right to religion, right to separation of prisoners, good accommodation and finally good diet.

Without all these the confinement will be wrongful. The basic aim of the Art. 21 is not to impose a limitation on the authority of the legislature but just to protect the arbitrary and unreasonable blows on part of the executive or legislature. Art. 22 (4) to (7) provide special safeguards for detenues under prevention and detention laws. The article provides maximum time for which detenue can be detained before being produced before advisory board. Within this period, usually (2 month) detention is legal but beyond that it is wrongful confinement as some are detained without being told the grounds of detention and never produced before the magistrate meaning thereby that they are not represented by legal practitioner of own choice. Under Clause 5 of Art. 22 it is the duty of the detaining authority, to furnish the grounds of his detention and particulars required by the detenue to prepare his defence. Insufficient facts or particulars and ground may render the detention invalid as shown in *Ramkrishna's*[13] Case. Insufficient facts or particular is when arrested person is not produced before the magistrate within 24 hours of his arrest and this includes time for travel from place of arrest to court : the authority concerned must furnish information to accused that he needed to be represented by legal practitioner of his own choice.

V. PRISONER'S RIGHTS AND PROCEDURAL ASPECTS OF CRIMINAL PROCEDURE CODE AS AGAINST WRONGFUL CONFINEMENT

The Government of India while protecting human rights violation formulated statutes, the first being Constitution of India, which was followed by judicial system, various police manuals and Criminal Procedure Code, 1973 : which in its protection has given guidelines which have later on been used by judiciary in passing judgement which have come to be known as landmark judgements. However the guidelines are as follows:

Section 49 of Criminal Procedure Code, 1973 has established important guidelines in the protection of human rights of those in prison (wrongful confinement). It states that the

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[10] *State of Maharashtra v. PrabhakarPanduran,* AIR 1966 SC 424.

[11] *Kishore Singh v. State of Rajasthan,* AIR 1981 SC 625.

[12] *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

[13] *Ram Krishna v. State of Delhi,* AIR 1953 SC 318, *Pushkar Mukherjee v. State of West Bengal* 1969 2 SCR 635.

person arrested shall not be subjected to more restrain than is necessary. In other words there is restraint on the authority with regard to the powers of arrest not to detain a person for a single hour more than necessary except upon reasonable grounds justified by all circumstances of the case. However if they have to detain a person for longer time they must have the permission of magistrate, otherwise detaining will be illegal. As soon as a person has been arrested, he is still a person, Section 50 of Criminal Procedure Code, 1973 swings into function and provides safeguard to the accused that, person arrested has to be informed of grounds of arrest and of right to bail. Every person arrested, is the duty by law of the authority doing the arresting to inform the accused full particular of the offence and grounds of arrest and that the offence is bailable or non –bailable. Section 54, when a person is arrested and feels that a police authority has done any wrong with his body under will request magistrate for medical examination and it is his right. The magistrate will direct the examination of the body of such person by a registered medical practitioner unless the magistrate considers that request made to delay or defeat the ends of justice. More often than never arrested persons are not aware of this right and on account of their ignorance they are unable to exercise this right, even though they may have been tortured or maltreated by the police. It is because of ignorance of victims that magistrates should inform the arrested persons of the right of medical examination, in case he has any complaint of torture or maltreatment in police custody as observed in *Sheela Barse's*[14] case.

VI. PRISONERS AND HUMAN RIGHTS: JUDICIAL INTERVENTION

The enactment of the Constitution meant that India was born. The Constitution which was established conceived that, the state is existing for the citizens not the citizens for the state. In a written Constitution, judiciary has special role of safeguarding the supremacy of the Constitution by interpreting and applying its provisions. Supreme Court established at the apex of judicial system is the final arbiter, interpreter and guardian of the constitution; it is the final court of appeal in civil, criminal and constitutional matters. Art. 131 of Constitution of India confer powers on court to enforce fundamental rights. The court has powers to move proceedings or issue orders and writ in nature *habeas, corpus, certiorari, mandamus, prohibition, quo warranto*.

The judiciary has the power to protect personal liberty against arbitrary encroachment by the state and it has duty to check on exercise of governmental powers in violation of fundament rights. The judiciary has stood to the need and has proved true to the aspirations of people.It is through judiciary that law which makes a society is maintained as by the order. It is very significant in the governance of the nation because it not only maintains law but also does the work of interpretation and application of the statutes, and coordinates the machinery that applies the law on the ground. The statues will have no meaning without proper functions of judiciary which interprets the constitution, the very heart of the nation on which the country is built up and continues to exist.

The judiciary being the heart and supreme body of the nation it comprises of, the Chief Justice of India who heads the apex court or supreme court which is the top most court in the country, supreme court judges, magistrates and other officers. It comprises also the

[14] *Sheela Barse v. State of Maharashtra* 1983 Cr. LS 642 SC, AIR 1983 SC 378.

High Courts of India with chief justice, judges and high court magistrates and finally the lower courts and its magistrates. The police, para – military, army which does the work of ground application of the statues is implementation, Constitution of India as the supreme statute or holy laws of the country, Criminal Procedure Code, 1973, the Indian Panel code, 1860, Penology Act, all Acts related to consumer forums, Indian Contract Act, Indian Companies Act, 2013, Labour Laws, economic legislations Tax Laws, Railway Act and all Acts dealing with cyber laws, functions under operates under judiciary.

The Indian judicial system has played a prominent and unique role in upholding the human rights of the citizens enshrined in the Constitution. It has always shed rights to dispel the darkness of in human and brutal attacks on the dignity of the individual (women), so that every citizen of the country can congratulate the justice, magistrates and learned judges and the police because their efforts at attempting statues at their disposal.

Role of Judiciary Against Death in Custody

The role of judiciary in preventing any custodial death is very much practical in all the states. The judiciary includes magistrate and judges working in courts and the entire administrative set up helping them in working out legal procedures[15] i.e. the police, para -military (army, air force and navy). The apex court which had read all the provisions contained in the various statutes made the following order that about every state there are allegations of custodial deaths and this allegations are now increasing infrequency, described generally in papers. In case of lock up deaths at present there does not seem any machinery to effectively deal with such allegations.

VI. PRISONERS AND HUMAN RIGHTS: VARIOUS ROLES OF NATIONAL HUMAN RIGHTS COMMISSION

Role of National Human Rights Commission in Protecting Women in Custody

The effectiveness of the commission depends upon the range of functions it performs, the powers, conferred upon it to accomplish them and ultimately the fate of its recommendations. This effectiveness in turn, will provide for the future growth and survival of the commission.

Besides its objectivity will make it more accountable and accessible to the public. Objectivity being the basis of the commission, any deviance could be a major shortcoming in it. On the other hand, the complex process of achieving its objectives depends upon its effect on the public through various other institutions. This will provide to the acceptance and credibility to the commission. The National Human Rights Commission came into existence with certain well-identified objectives.

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[15] *State v. Ram Avter Chaudry* (1955), *Cr. LJ* 600, *Rajani Kanta Mehta v. State of Orissa* 1975 *Cr. LJ* 83, *Tarcem Kumar v. State* 1975 *Cr.LJ* 1303 Delhi.

Role of NHRC regarding Inquiry into Complaints

Immediately after the commission was set up, it issued directives to all the state governments to ensure that incidents of custodial deaths, rape, cruel inhuman degrading punishment by police judicial or any other detaining authorities authorized to arrest and interrogate must be reported to the commission within 24 hours by the district magistrate / superintendent of police, failing which the commission will presume that there was an attempt to suppress the incidents. Following these instructions numbers of reports have been received from different states in respect of deaths which have occurred in police or judicial custody. These reports were studied by the commission and accordingly action was recommended against officers found *prima facie* guilty. One very significance development in this connection has been a higher level of awareness among authorities in the government to initiate action against officials along with reports to the commission on incidents of custodial deaths.

Over the past few years of its existence the NHRC has received many complaints and in most of them action had already been taken or initiated. These complaints covered almost all the aspects of violations of human rights including custodial deaths, rape, torture, child Labour and bonded labour, disappearance, dowry deaths, indignity to women, the rights of the disadvantaged sections of society especially of scheduled castes and scheduled tribes, special problems of minority communities.

However, in the following cases is a clear example where the police. Judiciary, or other detaining authorities have committed atrocities and observations recommendations were communicated to the government and the government has acted as per the order of the commission.

Commenting on Amnesty International's concern that the criminal justice system in Gujarat failed many victims, the Central government stated that "there exists a sound constitutional and independent and effective judicial system to safeguard the rights of people in the country.

The impartially and effectiveness of the Indian judiciary is well-known and has been appreciated the world over. The judiciary does not function in a vacuum but acts on the basis of evidence and facts before it. Therefore the comments on the Judiciary are uncalled for". Amnesty International has throughout its report appreciated the active and valuable role of the Supreme Court and statutory bodies like the NHRC in safeguarding human rights in India.

Role of NHRC regarding Improving Custodial Conditions

Having seen clearly from the past incidents overcrowding i.e. insufficient accommodation, indiscriminate handling of offenders unhygienic conditions, sub-standard food, insufficient water supply, use of drugs and narcotic, atrocities on children and women, maltreatment of prisoners and corruption also the detenue are living a life of torture, rape, assault, teasing, harassment, cruel or inhuman degrading or punishment in custody.

Being thus empowered action of NHRC is twofold, i.e. first to study the factors responsible for over-crowding and other worsening jail conditions and steps needed to reduce the atrocities and secondly to encourage such measures as may be necessary to develop or improve the skills of inmates with a view to enabling their re-orientation and

tofacilitate their reintegration into society upon release from jail. The members of the commission visited jails and studied conditions in them and the jail manuals and discuss them with officials like Inspector General of Prisons and they noted the number of prisoners, the capacity required and capacity the concerned jails had and noted down.

Reviewing Dimensions of Existing Laws, Implementation of Treaties, and other International Instruments on Human Rights Protection of People in Custody

There has been growing concern in the country about issues pertaining to human right violations. Having referred to this and to changing social realities and emerging trends in the nature of crime and violence it has been considered one of the vital purpose of the protection of Human Rights Act, 1993 to review the existing laws and proceedings and the system of administration with a view to bringing about great efficiency and transparency.

Sub-section (d) of Section 12 has empowered the Commission to act in implementation of safeguards provided by or under the Constitution of India, Cr.P.C. 1973, IPC, 1860 and other social statutes for the time being in force for the protection of human rights of people (women) in custody of police, judiciary or any other detaining authority against torture, rape, death, cruel, inhuman or degrading punishment inflicted on them, and recommend measures for remedial action whenever felt to be necessary.

Another area of study by the commission is a legislation affecting the rights of women. Thus the National Commission for women which represents NHRC (1948) has done tremendous job for them. The NHRC remains close with its sister commission on this matter with a view to examining the issues on which it can led best of support and encouragement. India submits periodic reports on implementation of the provisions of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW).

Protecting the Human Rights Literacy and Awareness Among Various Sections of the Society.

Sub-section of Section 12 of the Protection of Human Rights Act. 1993 sets before the Commission the responsibility to "Spread human rights literacy among various sections of the society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means and to create culture of human rights across the entire country and amongst all its people.

Human rights education plays a very important part as reasonable percentage of the population is illiterate and where the concept of human rights is to be understood. Human Rights Commission has set as its goal dissemination of knowledge concerning the rights embodied in the constitution, in international covenants of 1966, i.e. covenant on civil and political rights (ICCPR) as well as other human rights instruments adopted under the United Nations. For awareness creation and literacy the commission, meets and solicits support of all political parties both national and regional. Then they hold meetings with chief ministers of various states. To sensitize heir civil servants, they hold dialogues with the Human Resource Development Ministry (NCERT) and competent educational authorities at the state level. Learning to respect human rights is very important for police, military and para - military forces despite the fact that they face provocative circumstances. In this regard the commission calls the Director Generals of

Police of various districts to prepare model training syllabi for all levels of police force. The members of the commission visit all police training institutes in various districts as well as the police academy to see the type of training being imparted.

The commission has sharpened to propagate its massage through the media and one such type is TV advertisement taking up causes of human rights.

Role Regarding Undertaking Promoting Research on Human Rights in Custody

Commission is interested, among other things with the statutory responsibilities to undertake and promote research in the field of human rights violation of people in custody. As research is one of the most important functions of the NHRC its chairperson desires to allot budget and specific amount from the ministry of home affairs and ministry of finance to organize research on and socio-legal aspects concerning women's rights. Accordingly, the commission is undertaking research studies in the following areas :

(a) Research on elimination of all forms of discrimination against women.

(b) Improving jail conditions and rehabilitation of women after the sentence.

(c) Research on elimination of all types of cruelty, (Rape, torture, teasing, harassment) inhuman degrading / punishment directed to women prisoners.

(d) Abolition of women trafficking for prostitution

(e) Prevention of female infanticides and foeticide.

(f) Terrorism and violation of human rights of women in Jammu.

(g) The problem of the aged women.

The aforesaid role of the NHRC on the normative plane cannot adequately express the overall assessment of the commission. Hence it is imperative here to analyse the efficiency/effectiveness of the commission towards achieving its goal side by side to make it to be more independent, accessible and accountable to the public.

VII. PRISONERS AND HUMAN RIGHTS: ISSUES

Curbing the Menace of Hand-cuffing

Before the formulation of the Indian Constitution which later became the supreme article carrying the law of the land, United Nations had already established reaffirmed their faith in fundamental human rights in the dignity and worth of human persons and in the equal right of men and women to promote social progress and better standards of life in larger freedom in 1948. The very important fundamental human rights established in the United Nations covenants against handcuffing were: - Art. (1) which included that all humans are born free and are equal indignity and rights hence no human being should punish another by handcuffing him/her. Art. 3 also came down heavily against hand cuffing by saying that; *everyone has right to life, liberty and security as person*. Art. 5 says that *no one should be subjected to torture or cruel in human or degrading treatment or punishment like hand-cuffing*. Art. 6 says that *everyone must be recognized everywhere as a person before the law hence when one is handcuffed one* is *reduced from a human person to an animal*. Finally, Art. 11 says that one who is charged with penal offence has the rights to be presumed innocent until proved guilty according

to law. All these were later incorporated in the constitutional statutes of India. They ensured safety, security and protection of human person from handcuffing while under any custody i.e. police, judiciary,[16] jail or any other detaining authority authorized by law to arrest, detain and interrogate a person for any offence.

The Court while performing its role in human rights protections of those in custody has passed landmark judgements, the best being that of *Sunil*[17] and *Sukla's*[18] case through which court has given guidelines regarding handcuffing of prisoners and the same guidelines have been incorporated in the police manuals of different states and have this become the law of the land.

The judiciary has a very important role in ensuring the safety and security of the society and the people at large. Another landmark judgement is *Khat Masdoor Chetna Singh*[19] passed June 4, 1998 where some workers who were agitating were rounded up and handcuffed in prisons. When they were produced before the magistrate it was held by the court to be a lapse on the part of judicial officer in the discharge of his duties as judicial officer is expected to ensure that the basic human rights of the citizens are not violated. The court also in its protection of violation of human rights decided that judicial officers should be made aware from time to time, of the law laid down by courts in India more especially in connection with the protection of basic human rights of the people and for that purpose short refresher's courses may be conducted at regular intervals so that judicial officers are made aware of the development in the field of law and if the order is followed we will have a society free from fear as the greatest thing to fear is fear itself.

Hammering the Issues of Wrongful Confinement

Wrongful confinement is to detain a person without following the procedure established by law statute, and any person detained or arrested and continue to be under custody on bailable offences, person detained after completing sentence or term of detention, arrest without informing grounds of arrest, arrest without producing arrested person before the magistrate within 24 hours of arrest, arrest without informing relatives or friends of the accused and refusing him / her representation by counsel of own choice, arresting women without the presence of women police constable and male family member and finally arresting women after sunset and before sunrise and putting them under the security of police constable. All these are summed up to be wrongful confinements which are *ultra-vires* to the law of the land.

Societal Dimension of a Woman after Sentence

After the sentence a women is released from the jail. The problems like discrimination are waiting for her, so much so that a free victim starts thinking that in jail life was good. Some of the problems which normally are faced are social cultural problems, like not being accepted back in the society as a part of it and if again not accepted by parents

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[16] Arts. 1,3,5,6,11 of Universal Declaration of Human Rights, 1948.

[17] *Sunil Batra (ii) v. Delhi Administration* 1980 3 S.C.C. 488.

[18] *Mrs. Veena Sethi v. State of Bihar and others*, AIR 1983 S.C.C. 339, *Prem Shankar Shukla v. Delhi Administration* 1980 Cr. LJ 930, *Kishore Singh v. State of Rajasthan* AIR 1981 SC 625.

[19] *Khedat Masdoor Chetna Singh v. State of Madhya Pradesh* JT 1994 6 SC 60.

automatically, a women becomes street prostitute. So before a female is released her relatives should be informed and where no relative exist or show up the released prisoner should be sent to her destination with a female escort. An appropriate assistance should be rendered to every female prisoner on release whether during or after completion of sentence. For the purpose a centre for assisting released prisoners should be set up to service a cluster of prisoners and custodial institutions on an area wise basis. Even without the centre the prison authorities should take necessary steps to arrange the rehabilitation of the released prisoners either through the family relief or voluntary organizations.

Released prisoners aid societies should operate in every district to provide a single – window assistance towards rehabilitation and mainstreaming of the released women prisoners. Aftercare and short – stay homes for women prisoners neglected by the husbands, family members and society should be established in every state to serve those prisoners who are homeless or rejected by their families. Women released from jail may be rejected because of many reasons, following the traditional belief in the society that will never deter the government judiciary, care homes, committee for jails reforms, NGO's, social organizations and even international bodies to reject, ignore or neglect and abandon an already reformed clean citizen of the land. It is certain that she will be able to survive on the expertise she has. The preamble to the constitution of India promises "to secure to all its citizens justice – social, economic and political liberty – of thought, expression belief, faith and worship equality of status and of opportunity, and promote among them all, fraternity assuring the dignity of the individual and the unity of the state upto here positive right areguaranteed in the statutes in the form of the constitution. In my opinion now work has been made easier for the judicial system for released women's rehabilitation as its work is only to interpret the statutes and define this verses to the government and tell the government that it is duty bound by the constitution to rehabilitate the released women.

Family members or relatives are also duty bound to show up to receive their newly released relative from jail and observe the same person as a part and of a very important member in the family. Being in custody or in jail does not detach the person from the family. She is still a human being and has been reformed to be observed by the parents, husband if married, children and finally society. If she is not so observed as the case may be then the NGOs have a very big role to play. It is their duty to try and convince the family members by any language and any means to welcome the released person. Still if is not possible they will try to rehabilitate her socially and economically by taking her into any care homes till the society changes its minds to take her back.

VIII. CONCLUSION

It may be noted that Indian Judiciary must continue to play its constructive and active role in prison justice, A review of the decisions of the Indian Judiciary regarding the protection of Human Rights indicates that the judiciary has been playing a role of saviour in situations where the executive and legislature have failed to address the

[20] S.K. Pachavri, *Women & Human Rights*, 1999, S.B. Nangia A.P. Publishing Corporation, New Delhi, at 70.

problems of the people. The Supreme Court has come forward to take corrective measures and provide necessary directions to the executive and legislature, however while taking note of the contributions of judiciary one must not forget that the judicial pronouncements cannot be a protective umbrella for inefficiency and laxity of executive and legislature. It is the foremost duty of the society and all its organs to provide justice and correct institutional and human errors affecting basic needs, dignity and liberty of human beings. Fortunately India has pro-active judiciary. It can thus be aspired that in the times ahead, people's right to live, as a true human beings will further be strengthened.

RIGHT TO SERVICE IN INDIA

Kuljit Singh*

Abstract

The Right to Service in India brings about transparency, hassle- free delivery of Public Services and reduces the corruption in providing the Public Services. Not only this, it provides speedy delivery of Public Services and Public Services should be quality services. In India, Right to Service is statutory right for the people of many States, but, at National Level, obtaining the Public Services by the people of India is not a statutory right so far. Government of India is providing Public Services on the basis of Citizens' Charter that is not legally enforceable. Besides, various States have not yet enacted legislation for providing the Right to Service to the people of the States.

Key words

Right to Service, Delivery of Public Services, Citizens' Charter, Designated Officer and Grievance Redress Officer.

I. INTRODUCTION

> "Administration is meant to achieve something and not to exist in some kind of an ivory tower, following certain rules of procedure and Narcissus-like, looking on itself with satisfaction. The test after all is the human beings and their welfare".
>
> Pt. Jawaharlal Nehru[1]

Right to Public Services legislation in India comprises statutory laws which guarantee time-bound delivery of various public services rendered to citizens and provides mechanism for punishing the errant public servant if they are deficient in providing the stipulated services. Hence, Right to Service legislation ensures delivery of time bound services to the public. If the concerned officer fails to provide the service in time, he will have to pay a fine. Thus, it is aimed to reduce corruption among the government officials and to increase transparency and public accountability.

Public Service means a commodity or service which is non-rivalrous and non-excludable in nature, and is supplied in public interest regardless of income, jurisdiction by the

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[1] Address delivered at the Inaugural meeting of *the India Institute of public Administration* (IIPA) on March 29 ,1954,. available at: *unpan1.un.org/intradoc/groups/public./cgg/upan045780.pdf* (last visited on July 20, 2016).

government to its people who have by a social consensus, democratically elected the government and vested it with the power to do so. The service could be publicly funded, contracted, commissioned or procured.

The public services law in India derives its origin from the Citizens Charter of UK, promulgated in 1991. Though it is not a legal document in the strict sense of law, being an agreement of contract entered into between the citizens and the public servants, providing for competent and time bound delivery of services. It sought to add consumer rights to those citizens' rights, equipping users with the means of seeking personal redress if the services they received were inadequate. The objective of the charter was to make public services accountable.

That idea arose from a simple question in UK that if the public service which people have paid for is not good, why should they not get their money back, as they would have the right to purchase it with any shop or service provider in the private sector. The then Prime Minister of UK, John Major explained the intention of the Citizens' Charter in the various ways.[2]

It will work for quality across the whole range of public services. It will give support to those who use services in seeking better standards. People who depend on public services – patients, passengers, parents, pupils, benefit claimants – all must know where they stand and what service they have a right to expect.

The twelfth report of session 2007- 08 of the Houses of Commons was third on the series off public administration reform in UK. The first of that was the fifth report of session 2007-08," When Citizens Complain" and the second was the sixth report of the session on " User Involvement in Public Services." Following the sixth report, a volume of oral and written evidence were published as "Public Services: Putting People First."[3]

In the meantime, in 1997, the right to services moved from "Citizens Charter Programme" and its impact on how public services were viewed, to Charter Mark, in 1997, with the inception of the government headed by Tony Blair. The Charter Mark stuck upon quality of services in ensuring that public services focus on the needs and views of service users, followed by its successor scheme, the Customer Service Excellence Standard. By 2002, that shifted to 'Public Service Guarantees,' which like the national charters introduced under the citizens' charter, was intended to act as a mechanism for setting out the standards of service provision that people can expect from public services utilities.

The Public Service Committee, 2007-08, finally recommended that there should be clear, precise and enforceable statements of people's entitlements to public service. That should be in the form of 'Public Service Guarantees'. The guarantees should specify the minimum standard of service provision that service users can expect, and set out the arrangements for redress, should service providers fail to meet the standard promised.[4]

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[2] Speech by John Major MP at the Conservative Central Council Annual meeting on Mar.23, 1991, referred in the Twelfth Report of the House of Commons Public Administration Select Committee, From Citizens Charter to Public Service Guarantees; Entitlements to Public Services United Kingdom, July 15, 2008 at para 6.

[3] *Ibid*. para1.

[4] *Id*., para 45.

The scenario was thus shifted from 'Citizens Charter' to 'Public Service Guarantees' in UK. The institution of the guarantees was taken to be a very strong case by the committee to empower users by allowing them to claim their services. It was also clearly indicated that in the provision of public services, it genuinely intended to put "people first."[5]

The Citizens Charter of UK aroused interest worldwide leading to establishments of such initiatives in Belgium (Public Service Users Charter, 1992), Canada (Service Standards Initiative, 1995), Australia (Service Charter, 1997), India (Citizens' Charter,1997) and so on.

The citizens charters were introduced in India in 1997, which was voluntary in character. That was based on the logo "services first" as in UK. The charters gradually spread through central to state ministries and to their local bodies and organisations. In 2002, a website was launched by the Department of Administrative Reforms and Public Grievances (DARPG) towards consolidating the write up on the progresses and improvements resulted out of citizens charters. The instance of implementation of charters by the Regional Transport Office, Hyderabad, the Jan Seva Kendras in Ahmadabad and Chennai Metro Water Supply and Sewage Board are noteworthy during 1997-2004. In 2005, the service excellence models "Servottam" was initiated to give a new thrust to the implementation of the citizens' charter, both at the central and state levels. The Centralised Public Grievance Redress and Monitoring System (CPGRAMS), a web based portal was launched for lodging complaints by the public in 2007. In 2009, the Report of the Administrative Reforms Commission of Citizen Centric Governance recommended for making citizens charters effective through implementing charter for each unit with redress mechanisms and periodic evaluation of charters.[6] It also recommended for holding officers accountable for results. It too suggested for suitable mechanism assuring citizens participation in administration.

In view of the above circumstances, the Government of India and of the states felt it necessary to legislate upon such a contingency. They were to make law on entry 8 of concurrent list, viz. actionable wrongs. Public Service Guarantee Acts have been passed by nineteen States and one National Capital Territory of Delhi till the Date.[7]

II. RIGHT TO SERVICES LAW IN INDIA

The Right of Citizens for Time Bound Delivery of Goods and Services and Redressal of their Grievances Bill, 2011, that has recently been introduced in Parliament, confers on every individual citizen, the right to time bound delivery of goods and services, and for redressal of grievances.

It is a welcome step that the governments in India have embarked on law-making on right to services at the centre and in some of the states. The Madhya Pradesh Lok Sewaon Ke Pradan ki Adhiniyam, 2010, is the first in that category, which has been followed by enactments in the States of Bihar, Chhattisgarh, Delhi, Himachal Pradesh,

[5] *Id*., para 79.

[6] See also "Statement of Object and Reasons" to the Central Bill, 2011.

[7] Available at: *https://en.wikipedia.org/wiki/Right_to_Public_Services_legislation* (last visited on July 21, 2016).

Jammu and Kashmir, Jharkhand, Karnataka, Punjab, Rajasthan, Uttar Pradesh and Uttarakhand.[8] Not only this, now, more States have enacted the Right to Service Act. The centre has introduced the Right to Redressal of Grievances Bill, 2011 in the Lok Sabha on the 20th of December 2011 but it did not pass finally. The list of States is given below, which enacted the Right to Service law.

State	Act title
Punjab	The Punjab Right to Service Act, 2011.
Uttarakhand	The Uttarakhand Right to Service Act, 2011.
Madhya Pradesh	The Madhya Pradesh Lok Sewaon Ke Pradan Ki Guarantee Adhiniyam, 2010.
Bihar	The Bihar Lok sewaon ka adhikar Adhiniyam, 2011.
Delhi	The Delhi (Right of Citizen to Time Bound Delivery. of Services) Act, 2011
Jharkhand	The Right to Service Act, 2011.
Himachal Pradesh	The Himachal Pradesh Public Services Guarrantee Act, 2011.
Rajasthan	The Rajasthan Public Service Guarantee Act, 2011.
Uttar Pradesh	The Janhit Gurantee Act, 2011.
Kerala	The Kerala State Right to Service Act, 2012.
Karnataka	The Karnatka Guarantee of Services to Citizens Act, 2011.
Chhattisgarh	The Chhattisgarh Lok Seva Guarantee Act, 2011.
Jammu and Kashmir	The Jammu and Kashmir Public Services Guarantee Act, 2011.
Odisha	The Odisha Right to Public Services Act, 2012.
Assam	The Assam Right to Public Services Act, 2012.
Gujarat	The Gujarat (Right of Citizens to Public Services) Act, 2013.
West Bengal	The West Bengal Right to Public Services Act, 2013.
Goa	The Goa (Right to Time-Bound Delivery of Public Services) Act, 2013.
Haryana	The Haryana Right to Service Act, 2014.
Maharashtra	The Maharashtra Right to Public Services Act, 2015.

III. A COMPARISON BETWEEN THE STATE PUBLIC SERVICES ACTS[9]

The state government have provided for nodal department for the supervision and monitoring of the implementation of right to public services within states. The only state

[8] *Ibid.*

[9] Sindhu Thulaseedharan, "Right to Public Services in India –A New Legal Scenario" 55*JILI* 59 (2013).

that has a department for that is Madhya Pradesh, where the Department of Public Services Management (DOPSM), controls and co-ordinates the public service delivery mechanism. The states of Uttar Pradesh, Bihar, Rajasthan and Delhi respectively has revenue, general administration reforms, and information technology departments as nodal departments.

The officer in the machinery include the designated officers, or their subordinate officers charged with the delivery of services.[10] The appellate authority would be the first appellate authority and the second appellate authority. In some states designated officers from outside the public authority concerned are appointed the appellate authority.[11] A notified officer/competent officer or a commission is also appointed by the government for the purpose of implementation of the Acts, as in Chhattisgarh, Karnataka and Punjab. An officer nominated by the government is entrusted with the power of revision upon final under or decision of the second appellate authority. [12]

The designated officer (DO) or the grievance redress officer (GRO) is the lowest in the hierarchy of the state machinery. They are required to provide the service applied for in the 'stipulated time limit' of 30 days. They may reject the application within the time limit with reasons recorded in writing. An eligible person, whose application is either rejected or who is not provided the service within the time limit may file an appeal to the first appellate authority within thirty days from the date of rejection or on the expiry of the given time limit as the case may be. Within the time frame of thirty days, the aggrieved citizen may file a second appeal from the order of first appellate authority, or within 30days from the date of rejection of his first appeal and pass an order either accepting the appeal or directing the DO to provide the service or reject the appeal, within sixty days from the date of receipt of appeal, the second appellate authority also determines the penalty to be imposed on the DO or GRO, or upon the first appellate authority. The person aggrieved by the final order may make an application for revision of the said order to the commission or an officer nominated in that respect within a period of sixty days from the date of such order. Citizen having applied for such services shall be entitled to seek compensatory cost from the erring officer, say the DO or his subordinating public servant, in case of delay or default in the delivery of such services beyond the stipulated time limit. The government shall appoint by notification, a competent officer to impose cost against the failing public servant concerned.[13]

The state Acts contain similar provision regarding notifying "services" and "stipulated time limit".[14] The "right to service" is defined as the right to obtain service within the

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[10] The Acts uniformly provides for desingnated Officers(Dos), which ought to be 'notified' by the respective states, for every unit of administration with an organizational state head for overall supervision.

[11] See the provision of the Acts for first and second appellate authorities. The Delhi Karnataka and Chhattisgarh Acts provide for "Appellate Authority", to be appointed from outside by the government.

[12] For instance, in Rajasthan a nominated officer exercises the power of revision and in Jammu and Kashmir; it is entrusted with a special tribunal.

[13] See sec. 2 of the Act for definitions of "Designated Officer", "Eligible person","first Appeal Officer", "Second Appellate Authority","service","state government" "stipulated time limit", "right to service","public Authorty"; see also definitions clause for "appellate Authority","commission","competent officer","citizen related service","designated public servant", in the Punjab, Karnataka, Chhattisegarh, Delhi and Bihar Acts, respectively

[14] See sec. 3 of the Acts. See also,sec. 4 of the Karnataka Act, 2012.

stipulated time limit. Penalty is provided for delay or default in providing service within the time prescribed in the Act. There are similar provisions on appeal, appellate authorities, revision, protection of action taken in good faith, bar of jurisdiction of courts, power to make rules and power to remove difficulties, if any, arising in giving effect to the provisions of the Act, by order by the state government.[15]

Apart from similarities, each Act varies significantly in the number of notified service, in the provision for compensation, monitoring mechanism and in the use of technological tools in the process of implementation. The individual Acts too differ slightly in setting up the hierarchy of officials entrusted or designated to deliver services in hearing appeals, for revision and for receiving of orders. The provision for fixing the quantum of penalty imposed on delay or default in delivering services and in deciding appeals, within the stipulated time limit, shows little differences.[16] Among the state Acts, Karnataka Act covers 151 services from 11 departments; Rajasthan spreads over 124 services from 15 departments including power, police, health and revenue and in Bihar, as many as 50 services in 10 departments, up to the lowest of 15 services in Uttar Pradesh. In Jammu and Kashmir, it covers 45 services from departments and in Jharkhand 54 services from 20 departments. In Madhya Pradesh and Delhi each includes 52 services from 16 and 18 departments respectively. The government of Kerala has proposed to notify 13 public services, and nine services separately from the police department. [17]

The provision for compensatory costs awarded to the citizen applicant is cast on the competent officer nominated by the by the state government in accordance with the Karnataka, Delhi and Chhattisgarh Acts. It is imposed on the government servant after issue of show cause notice as to why that amount should not be recovered from the officer concerned. In the state Acts of Himachal Pradesh, Jammu and Kashmir and Uttarakhand, the second appellant authority shall award compensation as it may deem fit, out of a penalty imposed on the DO or public servant. In the monitoring mechanism, e-governance has been incorporated in the Delhi and Karnataka Acts. The State of Delhi has implemented it through e-state level agreement- software, Adhikaar, in the monitoring and tracking of applications system. In Karnataka, the e-governance scheme Sakala has come into applications since April 2, 2012, the online tracking and monitoring system has been in full application the state of Madhya Pradesh and Bihar as well. In the other states, the complete utilisation of ICT tools has yet to be made.

In the hierarchy of officials notified as DOs, first appellate officer, second appellate authority and nominated officers by state government for revision, the legislation vary considerably there occurs uniformity as to the DO, who is required to provide "service" to the applicant[18] in Karnataka, Chhattisgarh and Delhi, there is a nominated officer

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[15] *Supra* note 13.

[16] *Ibid.*

[17] *Infra* note 35., Refer the Report on National Consulation, 2011, for notified services in the state , see also T.K. Devasia,"Kerala Introduces Law on Right to services" *The Hindu* , July 25,2012; Girish Menon, "no fee plea under right to services Act" *The Hindu* ,Oct 23,2012.

[18] See *supra* note 8, for "service" see "Definitions" clause in sec.2 of the Acts.

competent to impose cost on the DO, for default or delay[19] in the delivery of service. The public servant as well as the citizen has the right to go in appeal to a single appellate authority against the order of competent officer.[20] In Bihar the DO is called the designed public servant.[21] The other state Acts provide for the DO and in Appeal to the first and second appellate authorities.[22]

The authorities entrusted with power of revision are either an officer nominated by the state government or by a commission constituted by the state government.[23] The nominated officer exists for all state other than for states of Punjab, and Uttarakhand, where right to services commission are constituted for exercising the power of revision. In Uttrakhand, an officer nominated shall suffice. A special tribunal is entrusted with the revision power in Jammu and Kashmir.[24] There is no provision for revision in the states of Karnataka., Delhi, and Chhattisgarh, where the competent officer fixes the liability on the erring official.[25] The decision of the appellate authority shall be final in these states. The state of Bihar has a revising authority for modifying the orders of the appellate authority and to impose penalty upon the appellate authority, if it is of the opinion that the authority has failed to decide the appeals from the decisions of the appellate authority or on an appeal filed by the application directly upon non-compliance of order by the DO.[26]

The penalty provision are fixed by the final appellate authority on the DO and the first appellate authority.[27] In majority of states, the Acts prescribe fixed amount ranging between Rs. 500 to Rs. 5000 for default and between Rs. 250 to Rs. 5000 for delay upon the DO. The first appellate officer would be penalized in the range between Rs. 500 to Rs. 5000 for failure in deciding the appeal or rejecting it without reasonable cause. In Jammu and Kashmir, the penalty for delay in delivery of service range between Rs.250 per day or Rs. 5000 whichever is less. In case of deficiency in service, the penalty would be Rs. 2000, lump sum. For defaulting FAA the quantum of penalty range between Rs. 500 to Rs. 5000.[28]

In the State of Chhattisgarh every officer responsible for delivering loksewa, fail to do so, shall be liable to pay cost at the rate of one hundred rupees per day up to a maximum of one thousand recoverable from him towards payment to the applicant citizen.[29] In

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[19] See ss. 10 & 11 of the Karnataka Act, 2012; ss 9 & 10 of the Delhi Act 2011; and ss 4 & 5 of the Chhattisgarh Act 2011.

[20] *Ibid*., ss. 12, 13 and 7 of the respectively.

[21] The Bihar Act , 2011, sec. 4.

[22] *Supra* note 18.

[23] Sec. 8 of the Act generally. See also The Punjab and Chhattisgarh Acts, sec. 10.

[24] The Jammu & Kashmir Act, 2011, sec. 15

[25] See ss. 11, 10 & 4 of the Acts respectively.

[26] *Supra* note 21, sec.6.

[27] See sec. 7 of the Acts. See also Punjab Act, 2011 sec.9 (1) (a); The Jammu and Kashmir Act, 2011, ss. 10, 11 & 12.

[28] *Ibid*. For quantum of penalty, see the provisions for imposing penalty.

[29] The Chhattisgarh Act, 2011, sec. 4(4). Apart from penalty the Act of Jammu & Kashmir too provides for compensation to be determined by the second appellate authority, as it may deem fit. For detail, see The

Karnataka, apart from the compensatory cost at the rate of twenty rupee per day up to a maximum of rupee five hundred per application, imposed by the competent officer,[30] penalty shall be imposed as per the service rules as applicable to the employees of the government or public authority concerned.[31] There is only liability to pay cost by every government servant for failure of delivery of service at the rate per day up to a maximum of two hundred rupees per application in Delhi.[32] In Bihar, the appellate authority impose penalty upon the designed public servant as notified by government by rules from time to time.[33] The penalty is recoverable from the salary of the defaulting officer in Rajasthan.[34] Such penalty so imposed shall be in addition to that prescribed in any Act, rules, regulation and notification already existing.

IV. SHORTCOMINGS IN STATE PUBLIC SERVICES ACTS

In the wake of the enactment of the right to information and right to services, globally, as hallmarks of corruption-free and accountable governance, the Government of India set out for administrative reforms initiatives towards complementary capacity building. One such endeavour was the "Pathways for Inclusive India Administration (PIIA)" Project in collaboration with United Nations Development Programme (UNDP) aimed at citizen centric administration. As a part of that project, a two day national consultation was convened by the Government of Madhya Pradesh and UNDP on "Strengthening Accountability Framework under Public Service Guarantee Acts" in Bhopal on 8-9 December, 2011.[35] The purposes of the consultation was to share the progress of the state public service guarantee Acts, (PSGAS) also known as right to services Acts, enacted by various states of India by then, as a key administrative reform. The consultation provided a common platform for interaction among states, for exchange of ideas and for evolving consensus on the key areas of concern in the implementation of the Acts. The Challenges identified at the NC were:

- Defining the scope of the Acts (i.e. the number of services covered in a scenario where complaints and grievances were also added).
- Demands side sensitization and awareness among citizens about the provisions of the Acts and its functioning/ application.
- Supply side sensitization, awareness and training of service providers.
- Addressing capacity related challenges- shortage of manpower and financial resources.

Jammu & Kashmir Public Servives Guarantee Act, 2011, sec. 13 see also , the Punjab and Uttrakhand Acts.sec. 9(2); the Delhi and Karnataka Acts, sec. 8; the Himachal Pradesh Act, 2011, sec. 8(2) and the Madhya Pradesh and Rajasthan Acts, sec.7(3)

[30] The Karantaka Act, 2012, sec.9.

[31] *Ibid*., sec.16.

[32] The Delhi Act, 2011, sec. 6.

[33] See *Supra* note 26, sec. 7.

[34] The Rajasthan Act, 2011, sec. 7(1)(c); see also the Karanataka Act, 2012, sec.11(2).

[35] See, the Report of National Consultation. available at: *http:///wwwundp.orgg.in/sites/default/files/PIIA Facts sheet.pdf* (last accessed on July 20, 2016).

- Lack of availability of an efficient management information system (MIS) with ready access to government records and data for monitoring and tracking of applications.
- Reduction of complexity in procedures and clarification on identification and documentation requirements for a particular service for the purpose of eliminating subjectivity.
- Incentives and disincentives for government officials including, but not limited to penalties, impact on performance assessment, promotions, and rewards.
- Grievance redressal mechanisms/ appeal mechanisms.
- Technology options and business models for efficient and timely service delivery/ tracking/ monitoring of service requests.
- Consistency of the legal framework.
- Consistency with state decentralization agenda and local self-government responsibilities.[36]

The national consultation evolved consensus on the fact that the PSGAs have gone one step ahead of the UK Public Services Guarantee Reforms through including the provision for time bound delivery of services, failing which the erring public servant would be penalized as well.

Overall, the participants formed a general consensus that the Acts should not be punishment-centric, but motivation-oriented in order to facilitate attitudinal changes and to offer sustained reforms. The need to create awareness among citizens as well as strengthening the capacity of service providers was also highlighted. Further the use of public private partnership (PPP) business models for providing services and use of information and communication technology (ICT) based tools for tracking and monitoring service provisions was also encouraged for bringing about transparency, accountability and efficiency in public services.[37]

Addressing legal concerns, the members of the group accentuated the need to re-examine the legal framework of the right to service Acts. They expressedapprehensions about the varied nomenclatures of the Acts in various states, the scope of those Acts, redressal mechanisms, institutional provisions and control Mechanisms. As a suggestion it was advocated that the oversight mechanism for public service guarantee should be internal because a self-corrective, self disciplining bureaucracy was the need of the hours.[38]

The Government of India's Citizens Right to Grievance Redress Bill, 2011 was looked at by the participants as the overarching framework within which one has to look at the provisions of the state Acts were harsh and could affect the motivation of service providers, which need to be reviewed. There was also a suggestion that the applicants should not be allowed to file a case else there would be a surge of litigation possible. It

[36] *Ibid,* Summary of key challenges and recommendations.

[37] *Id.*, Annexure 111.

[38] *Id.*, "Addressing Legal Concerns".

was further recommended that the States would explore creating a trust fund (e.g. Torrens compensation fund in Australia) to compensate applicants in case of systemic delays.[39]As highlighted during the closing remarks by the representatives of the states, Central Government and UNDP, administrative reforms and governance improvements were to be necessitated. Thus citizen centric administration has to become citizen participatory as well. Establishing entitlements based approach in public service delivery not only empowers citizens to demand service but also offers an opportunity to the governments to provide service effectively. The consultation ended with the vision that the move to make public service provision legally binding on the government displayed a political will to make citizens, active agents within administrative processes rather than as mere recipients of service.

V. CONCLUSION

Now, in nutshell, to analyse, the States of Delhi, Karnataka, Chhattisgarh and Bihar have enacted their right to services Acts, comprehensively by including any public servant of government, of any department of government, or of its local bodies, or of other public authorities covered by article 12 of the constitution of India. The public services law of those states are intended to provide the citizen, his right to obtain time bound delivery of services notified, within the time limit. The intention is not to penalize the government servants but to sensitize the public servants towards their duty towards the citizen and to enhance and imbibe in them a culture to deliver services promptly. The state laws are thus opting for reward mechanism so as to encourage and motivate the public servants in their rendition of services to citizen in the stipulated time period rather than introducing disincentives.

The other state Acts are in essence, mostly punishment- centric to achieve the object of time bound guaranteeing of services to citizen. They provide for penalizing the officer or for recovery of compensation from his salary. Thus public servants are punished a second time through disciplinary action in accordance with the service rules. The state would treat default as an offence only to the extent of assuring the citizens of an accountable and responsive public service. In pursuance of which the state government shall aim at a more participative democracy through facilitating the direct involvement of citizenry in the administration processes.

Most of States have enacted the legislation for right to public services to the people of States in India , but some States ,in India, have not enacted the legislation for such right so far. Not only this, unfortunately, there is no any legislation at National level for right to public services. Now, it can be said that there are three categories in India, first, the States which are providing public services to the people of States as a matter of right, second, the States, which are not providing such services as a matter of right, at present, third, Govt. of India through its ministries or departments, is providing public services to the people by way of citizen's charter, but not as a matter of right, because it cannot be legally enforced .Now, time has come to make law by Govt. of India and some States ,which have not made law so far, to provide public services to the people as a matter right.

[39] For recommendation, *id.,* annexure III.

CURRENT TRENDS TOWARD INTELLECTUAL PROPERTY PROTECTION FOR FARMERS IN INDIA: AN ANALYSIS

Digvijay Singh*

Abstract

Significant contribution has been made by farmers in conserving and developing new varieties of plants worldwide. However, their status as conserver and developer of plant genetic resources remains a task to be achieved in most of the countries. One may argue that an efficient sui generis system of intellectual property protection for farmers shall enhance their status. But, the question, what does constitute efficacy of such sui generis system remains unanswerable. Efficacy of Indian sui generis system may be examined having in mind the number of applications received under such system. The present paper examines the efficacy of Indian sui generis system. It also analyses data available at Indian PPV&FR Authority to understand its current trend.

Key words

Farmer's Rights, Breeder's Rights, Plant Variety Protection, Intellectual Property and Sui generis system.

I. INTRODUCTION

Farmers have made significant contributions in the development of new crops through use of their knowledge.[1] They have been an important agency in conservation and supply of plant genetic resources to seed companies, plant breeders, and research institutions. Contributions made by these people are also vital for ensuring present and future food security. This endorses for realization of farmer's contribution to ensure conservation and the availability of sufficient funds for these purposes; assisting farmers and farming communities throughout the world, and allowing the full participation of farmers and their communities in the benefits derived.[2] It is in this context, the concept of farmer's rights has been recognized in many jurisdictions.

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[1] *See,* Enrico E. Bertacchini, "Coase, Pigou and the Potato: Whither Farmers' Rights?", 68 *Ecological Economics*, 2008, pp.183-193, at 183; *See also,* Elizabeth Verkey, "Shielding Farmer's Rights", 2(12) *Journal of Intellectual Property Law and Practice*, 2007, at 826

[2] Juanita Chaves Posada, "Achieving Farmers Rights in Practice", *Discussion Document,* Global Forum on Agricultural Research, 2013, at 11

It is argue that farmer's rights do not fit comfortably into intellectual property (IP) frame work because it concern with the stimulation of innovations, providing incentive of monopoly rights for a limited period. On the other hand, farmer's rights are retrospective reward of unlimited duration for the conservation of plant genetic resources and it is often difficult to identify beneficiaries. However, importance of these rights becomes more compelling with the grant of plant breeders rights (PBR) to commercial plant breeders under intellectual property protection regime.[3] In this context the debate over farmer's rights protection has attracted much attention in the recent time all over world.[4] The Agreement on Trade Related Aspects of Intellectual Property Rights, 1994 (The TRIPs Agreement) does not explicitly provides for IP protection for farmers but, it gives option to the member states to legislate on the matter.[5] India has opted for sui generis system, which explicitly provides for various rights of farmers.[6] The present paper outlines historical development of concept of farmer's rights in brief and examines international instruments for its protection. Further, having in mind the genetic pool of the country and the mandates of World Trade Organization (WTO), it focuses on IP protection for farmers in India. It also analyses data available at Protection of Plant Variety and Farmer's Rights Authority (PPV&FR Authority) of India to understand the current trend towards IP protection for farmers in India.

II. FARMER'S RIGHTS: ORIGIN AND JUSTIFICATION

Farmer's rights are traditional rights which farmers have on the seeds or the propagating materials of plant varieties. It is about enabling farmers to continue their works as stewards and innovators of agricultural biodiversity, and recognizing and rewarding them for their contribution to the global pool of genetic resources.[7] These rights arise from the important role farmers have been playing to conserve and enrich varieties and the knowledge they hold on the total genetic variability of the country. Farmer's rights fall within one of two main aspects.[8] First, the ownership approach refers to the right of farmers to be rewarded for genetic material obtained from their fields and used in commercial varieties and protected through intellectual property rights.[9] Second, the stewardship approach refers to the rights that farmers must be granted in order to enable them to continue as stewards and as innovators of agro-biodiversity. Legal space is required for farmers to continue their works and their role should be recognized and rewarded for their contributions. The following part traces origin and gives justification for protection of farmer's rights.

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[3] Elizabeth Verkey, *supra* note 1, at 827.

[4] Mohan Dewan, "IPR Protection in Agriculture: An Overview", 16 *Journal of Intellectual Property Rights,* 2011, pp.131-138, at 135.

[5] The Agreement on Trade Related Aspects of Intellectual Property Rights, 1994 (The TRIPs Agreement), Article 27(3)(b) gives three options to member states, which are patent, *sui generis* system or combination of these two.

[6] India has enacted the Protection of Plant Variety and Farmer's Rights Act, 2001. It is considered as one of the first legislation worldwide which explicitly provides for farmer's rights protection.

[7] S. Bala Ravi, "Manual on Farmers Rights", *M.S. Swaminathan Research Foundation*, 2004, at 17.

[8] Available at: *http://www.farmersrights.org/about/fr_contents.html*

[9] The idea is that such a reward system is necessary to enable equitable sharing of the benefits arising from the use of agro-biodiversity and to establish an incentive structure for continued maintenance of this diversity.

Origin of Farmer's Rights

The origin of farmer's rights are traced in the debates held within the Food and Agricultural Organization (FAO) on the asymmetry in the distribution of benefits between farmers as donors of germplasm and the producers of commercial varieties that ultimately rely on such germplasm. The basic concept is that while a commercial variety could generate returns to the commercial breeder on the basis of plant breeder's rights (PBRs) no system of incentives for the providers of germplasm had been developed.[10] The International Undertaking on Plant Genetic Resources (IUPGR) for Food and Agriculture, 1983 first time recognized the rights of farmers in response to the broadening scope of plant variety protection (PVP) afforded to commercial plant breeders under the International Union for the Protection of New Variety of Plant, 1961 (UPOV).[11] The undertaking recognized enormous contributions made by farmers worldwide in conserving and developing crop genetic resources, and provides for measures to protect and promote rights of farmers, however, the description of the farmer's rights does not seem to be granting any positive right to farmers over their intellectual assets.[12]

The Resolution 5/89, defines farmer's rights as rights arising from the past, present and future contribution of farmers in conserving, improving and making available plant genetic resources, particularly those in the centre of origin/diversity. These rights are vested in International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers and supporting the continuation of their contributions.[13] The purpose of these rights is stated to ensure full benefit to farmers and supporting the continuation of their contributions. Further, Resolution 3/91 endorses that nations have sovereign rights over their plant genetic resources and farmer's rights will be implemented through an international fund on PGR which will support PGR conservation and utilization programmes, particularly but not exclusively in the developing countries. Further, the Convention on Biological Diversity, 1992 (CBD) attempted to establish for the fair and equitable sharing of benefits to indigenous people arising from the utilization of genetic resources.[14] The Agreement on Trade Related Aspects of Intellectual Property Rights, 1994 (the TRIPs Agreement) obliges members to provide protection for plant varieties either through patent or through an effective sui generis law or through any combination of the two.[15] Though it does not explicit provide for protection of farmer's rights.

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[10] Carlos M. Correa*, "Options for the Implementation of Farmers Rights at National Level"*, 8 *South Centre TRADE Working Papers*, 2000, at 3.

[11] The UOPV, 1961 provides an international legal framework for plant breeder's rights which is important in encouraging breeders to pursue and enhance their search for the improvement of varieties.

[12] Available at: *http://www.farmersrights.org/about/index.html*

[13] Available at: *www.farmersrights.org/about/fr_history_part4.html; See also*, Gerald Moore and Witold Tymowski, *Explanatory Guide to International Treaty on Plant Genetic Resources for Food and Agriculture,* IUCN Environmental Policy and Law Paper No. 57, IUCN- The World Conservation Union, 2005, at 8.

[14] Thomas Greiber, Sonia Peña Moreno, Mattias Åhrén, Jimena Nieto Carrasco, Evanson Chege Kamau, Jorge Cabrera Medaglia, Maria Julia Oliva and Frederic Perron-Welch in cooperation with Natasha Ali and China Williams, *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing,* IUCN Environmental Policy and Law Paper No. 83, 2012, at xvii.

[15] The TRIPs Agreement, 1994, Article 27(3)(b).

The FAO Commission on Genetic Food Resources for Agriculture, 2001 (CGFRA) agreed on the text of IUPGR and accepted that each contracting party should, subject to its national legislation, take measures to protect and promote farmer's rights. It includes protection of traditional knowledge relevant to plant genetic resources for food and agriculture; the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and the right to participate in making decisions at the national level.[16] In addition to above, it also provided for rights of farmers to save, use, exchange and sell farm-saved seed, subject to national law. This agreed provision was later incorporated in the FAO International Treaty on Plant Genetic Resources (ITPGR), 2001.[17] However, the understanding of farmer's rights and the modalities for their implementation still remained vague.[18]

Justification for Farmer's Rights

John Locke says that mankind has a right to possession of property and labourer is entitled to payment for his labour.[19] In the same manner concept of farmer's right provides the means for the farmer to obtain reward for his labour because value of plant genetic resources is preserved and enhanced by their utilization. Traditional farmers create economic value for others, but cannot benefit themselves from it. There is no market for the value they create, however, other agents in the plant genetic resources system do benefit from the materials provided by traditional farmers and obtain specific rights over the germplasm that incorporates what traditional farmers have developed in the past.[20] The development of the concept of farmer's rights may be regarded as the result of natural justice considerations under which there is a moral obligation to ensure that traditional farmers receive a fair share of the benefits arising from the use of plant genetic resources that they conserve and improve.[21]

Conservation of plant genetic resources involves investment of time, patience, skill, creative endeavour and money. Such investment should be protected and if it is not protected farmer will lose the incentive to undertake the project. Consequently it is necessary to give farmers the incentive to carry out their work by providing intellectual property protection.[22] Justification for farmer's rights protection is advanced in the text of IUPGR, which recognizes the enormous contribution that the local and indigenous communities and farmers of all region of the world, particularly those in the centers of origin and crop diversity, have made and will continue to make for the conservation and

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[16] Shawn N. Sullivan, "Plant Genetic Resources and the Law Past, Present, and Future", 135(1*) Plant Physiol*ogy, 2004, pp.10–15, at 12.

[17] The FAO International Treaty on Plant Genetic Resources for Food and Agriculture, 2001 (ITPGR), Article 9.

[18] "Farmers Rights in the International Treaty on Plant Genetic Resources for Food and Agriculture", available at: *http://www.farmersrights.org/about/fr_in_itpgrfa.html*

[19] J.A.L Sterling, *Word Copyright Law* (London: Sweet & Maxwell Publication 1998) at 56.

[20] Carlos M. Correa, *Traditional Knowledge and Intellectual Property Issues and Options Surrounding the Protection of Traditional Knowledge* (2001) A Discussion Paper, Quaker United Nations Office Geneva, at 6.

[21] Anil K. Gupta, *Rewarding Conservation of Biological and Genetic Resources and Associated Traditional Knowledge and Contemporary Grassroots Creativity* (2003) *Indian Institute of Management Ahmedabad (India), Working Paper No. 2003-01-06,* at 5.

[22] J.A.L Sterling, *supra* note 19, at 57.

development of plant genetic resources.[23] The provision puts responsibility for realizing farmer's rights, as they relate to plant genetic resources for food and agriculture, on the national governments. A farmer's rights regime predicates that farmers are in the centers of origin and crop diversity will continue to use landraces and traditional varieties in preference to the modern high yielding varieties which are available in the market.

III. IP PROTECTION FOR FARMERS: INTERNATIONAL PERSPECTIVE

The industrialized countries initiated for plant variety protection in domestic and international markets. The International Union for the Protection of New Varieties of Plants, 1961 (the UPOV Convention)[24] was the first inter-governmental treaty dealing with protection of plant varieties.[25] It provides and promotes an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants for the benefit of society through the grant of protection, which serves as an incentive to those who engage in commercial plant breeding.[26] It provides an international legal framework for the grant of plant breeder's rights which is important in encouraging breeders to pursue and enhance their search for the improvement of varieties.[27] According to Jay Sanderson, by influencing the development and use of new plant varieties, the UPOV Convention is also a key aspect of a global push to promote food security, reduce climate change and enhance economic development.[28] It is important to note that the developing countries argue that the Convention is a western platform regulating plant breeder's rights for the industrial nations and it is controlled by the life science corporations.[29]

The UPOV Convention constitutes an alternative to patents insofar as plant breeder's rights provide slightly weaker rights to commercial breeders.[30] However, it does not recognize farmers as breeders, and does not provide for rights of farmers over their varieties. It implies that plant varieties are developed in laboratories and assumes that the development of plant varieties is only undertaken for commercial gain.[31] It thus, provides a partial framework which is inherently incapable of granting rights to farmers despite the fact that an overwhelming majority of seeds planted are farm-saved seeds. In

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[23] The International Undertaking on Plant Genetic Resources (IUPGR) for Food and Agriculture, 1989, Art. 10.

[24] The Convention was signed in 1961 and entered into force in 1968. The Convention has been revised three times in 1972, 1978, and 1991.

[25] Philippe Cullet, *The International Treaty on Plant Genetic Resources for Food and Agriculture, IELRC* Briefing Paper, 2003, at 99.

[26] S.K. Verma, "TRIPs *and Plant Variety Protection in Developing Countries" 17(*6) *European Intellectual Property Review,* 1995, pp.281-289, at 282.

[27] Elizabeth Verkey, *supra* note 1.

[28] Jay Sanderson, "Why UPOV is Relevant, Transparent and Looking to the Future: A Conversation with Peter Button", *Journal of Intellectual Property Law and Practice,* 2013, pp.1-9, at 1.

[29] S. Sahai, "Plant Variety Protection and Farmers' Rights Law", XXXVI(35) *Economic and Political Weekly,* 2001, pp.3338-3342, at 3338.

[30] Philippe Cullet, "Farmer's Rights in Peril" 17(7) *Frontline,* 2000, available at: *http://www.frontline.in/static/html/fl1707/17070710.htm*

[31] *Ibid.*

the 1978 revision of the UPOV Convention provided two important exceptions to breeder's rights for the protection of farmer's interest. First, the freedom of other breeders to use the protected variety as starting material for breeding further variety without any requirement for an authorization and any payment of royalty (known as the breeder's exemption) and second, the freedom of farmers to re-use saved seed of the protected variety (known as farmer's privilege).[32] The first was explicitly provided while the second was an implicit consequence of the minimalist scope of protection and in effect it is optional.[33] Farmer's privilege refers to the privilege of farmers to save seed or reproductive material of the protected variety from their harvest for sowing on their land to produce a further crop.[34] This saving of seed from their harvest out of the protected variety is not an infringement under the 1978 version of UOPV. However, the 1991 revision of the UPOV Convention strengthen the protection offered to the breeders and dilutes the privilege granted to the farmers. The Convention does not allow the farmers to save seed unless individual government with the consent of the breeders, allow limited exemptions.[35]

The International Undertaking on Plant Genetic Resources (IUPGR), 1983 provides that plant genetic resources were freely exchanged on the reasoning that they constitute the common heritage of mankind. The undertaking seeks to ensure that plant genetic resources are of economic and social interest, particularly for agriculture will be explored, preserved, evaluated and made available for plant breeding and scientific purposes.[36] It provides a hope for equity for farmers to receive their share of benefits from Plant Genetic Resources (PGRs) they have long been providing to the world.[37] It provides a measure of counter balance to formal IPRs that compensate for the latest innovation with little consideration of the fact that, in many cases, these innovations are only the most recent step of accumulation of knowledge and inventions that have been carried out over millennia by generation of men and women in different parts of the world.[38] In subsequent years the principle of free exchange was gradually narrowed. In November, 1989 the 25th session of the FAO Conference adopted two resolutions providing an agreed interpretation that plant breeder's rights were not incompatible with the IUPGR. The acknowledgement of plant breeder's rights obviously benefited countries in the North, which were engaged in commercial seed production. In exchange of these conclusion developing countries endorsed of the farmer's rights as parallel to breeder's rights.[39]

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[32] Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (New Delhi: Oxford University Press, 2001) at 137.

[33] *Ibid.*

[34] S.K. Verma, *supra* note 26, at 285.

[35] Michael Blakeney, "Protection of Plant Varieties and Farmers' Rights", 24(1) *European Intellectual Property Review*, 2002, pp.9-19, at 9.

[36] *Ibid.*

[37] *Patricia Lucia Cantuaria Marin, Providing Protection for Plant Genetic Resources Patents Sui generis System and Bio-partnerships* (New York: Kluwer Law International 2002) at 49.

[38] Available at: *http://www.fao.org/docrep/x0225e/x0225e03.htm* at 2

[39] *Ibid.*

The International Undertaking on Plant Genetic Resources in the Conference Resolution 5/89 defines farmers' rights as:

> "Rights arising from the past, present and future contribution of farmers in conserving, improving and making available plant genetic resources, particularly those in the centre of origin/diversity. These rights are vested in International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers and supporting the continuation of their contributions."[41]

One of the objectives of farmer's rights is to allow farmers, their communities, and countries in all regions, fully to participate in the benefits derived, at present and in the future, from the use of plant genetic resources, through plant breeding and other scientific methods.[42] The concept of farmer's rights was adopted with a view to realizing the objective of balancing the rights of traditional breeders and of plant breeders, while allowing the farmers to benefit, in some way, from the value that they have creatively contributed.[43] Though the concept only defines it imprecise manner, it recognized the role of farmers as custodians of biodiversity and helped to call attention to the need to preserve practices that are essential for a sustainable agriculture.[44] The adoption of the concept fostered an intense debate on the ways to recognize and reward traditional farmers, not only to the current benefit of such farmers but in order to ensure the continuity of activities that are crucial for humanity at large.[45]

As part of this Resolution, the 25th Session of the FAO Conference endorsed the concept of farmers rights with a view to ensure global recognition of the need for conservation and the availability of sufficient funds for these purposes; to assist farmers and farming communities throughout the world, especially those in areas of original diversity of plant genetic resources, in the protection and conservation of their PGR and of the natural biosphere; and to allow the full participation of farmers, their communities and countries in the benefits derived, at present and in the future, from the improved use of PGR[46]. During the 26th Session of the Conference, Resolution 3/91[47] was also adopted unanimously, endorsing that nations have sovereign rights over their plant genetic resources and farmers rights will be implemented through an international fund on PGR which will support PGR conservation and utilization programmes, particularly, but not exclusively, in the developing countries.[48]

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[40] The Twenty-Fifth Session of the FAO Conference, Rome, 11-29 November, 1989.

[41] *Ibid*.

[42] Jay Sanderson, *supra* note 28, at 3.

[43] Carlos M. Correa, *supra* note 10, at 4.

[44] Kamalesh Adhikari, "Farmers Rights over Plant Varieties in South-East Asian Countries" (2008) *SEACON*, at 15.

[45] Carlos M. Correa, *supra* note 10, at 4.

[46] *Ibid*.

[47] The Twenty-Sixth Session of the FAO Conference, Rome, 9-27 November 1991.

[48] Jayashree Watal, *supra* note 32, at 137.

In 1991, the Conference adopted Resolution 3/91which recognizes the sovereign rights of nations over their own genetic resources. Further, Resolution 7/93 called for the revision of the International Undertaking in harmony with the Convention on Biological Diversity. It recognized that certain matters which the Convention had not addressed such as the issue of access to ex situ collections not acquired in accordance with the Convention, and the realization of farmer's rights were to be dealt with by the FAO's Global System on Plant Genetic Resources, of which the International Undertaking was the corner stone.[49]

The Convention on Biological Diversity, 1992 does not explicitly address the issue of farmer's rights. However, an obvious vehicle for the enactment of farmer's rights legislation is pursuant under Article 8, which provides that each Contracting Party shall as far as possible and as appropriate subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.[50] This provision is programmatic in nature and requires to be implemented by the Contracting Parties through specific measures to be adopted at the national level.[51] Since these collections are invariably made up of germplasm contributed by traditional farmers, farmer's rights could be built into the rules for the utilization of national ex situ collections.[52] Convention may be considered as a relevant framework for the implementation of some components of such rights, particularly with regard to the sharing of benefits[53] and for funding. These benefits[54] include access to and transfer of technology, which makes use of the genetic resources;[55] participation in biotechnological research[56] using such genetic resources and priority access to the results and benefits arising from such biotechnological research. It is argue that the Convention does not conflict with intellectual property rights.[57] For example, Article 16(2) contain the statement that in the case of technology subject to patents and other intellectual property rights, such access and transfer shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights. Similarly, Article 15(4) provides that access to genetic resources where granted shall be upon mutually agreed terms and Article 19(2) provides

[49] Philippe Cullet, *supra* note 30, at 2.

[50] The Convention on Biological Diversity, 1992, Article 8.

[51] Carlos M. Correa, *supra* note 10, at 26.

[52] Michael Blakeney, *supra* note 35, at 15.

[53] Benefit sharing refers to the compensation to farmers who contributed to the creation a new variety or the development and conservation of existing varieties. It essentially refers to the rights and reward that farmers deserve for contribution to agricultural innovation and growth.

[54] The Convention on Biological Diversity, 1992, Article 15(7).

[55] *Id.,* Article 16(3).

[56] *Id.,* Article 19(1).

[57] Michael Blakeney, *supra* note 35, at 14.

that access to the result and benefits arising from biotechnologies shall be on mutually agreed terms. Since 'mutually' is a precondition for an agreement of any sort, it is apprehended that these provisions may only remains mere rhetoric.

The TRIPs Agreement establishes minimum standards for protection and enforcement of intellectual property rights.[58] A proper interpretation of several provisions can considerably assist developing countries to overcome the problem which IP regimes may bring in the area of agriculture.[59] While the entire system of patent protection is based on some basic tenets, it has left wide void in the matter of protection of natural assets which are owned by nation states, communities or individuals. Such assets include biological resources of plant, animal and microbial origin as well as intangible assets of traditional knowledge (TK), practices, cultural expressions, art forms and even folklore belonging to rural communities in many countries of the world.[60] According to Article 7 of the Agreement, the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology. The most obvious provision which assist for farmer's rights regime is those dealing with patents, and as well as Article 27.3(b) which obliges member of WTO to exclude from patentability plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and micro-biological processes.[61] However, this provision makes it mandatory that WTO members provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The wording of this obligation reflects the differences between the existing legal systems.[62] For example, the insertion of farmer's rights into TRIPs Agreement will bind those countries which failed to ratify the CBD and if a state chooses to implement its obligation under Article 27.3(b) by means of sui generis system that system would have to be effective. In this sense the TRIPs Agreement appears to be in conflict with other international agreements, such as the International Undertaking on Plant Genetic Resources for Food and Agriculture, which provide for the right of farmers to save seed.[63] While TRIPs Agreement calls for an effective sui generis system, there is no reference to

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[58] Jayashree Watal, *supra* note 32, at 137.

[59] M.D. Nair, "GATT, TRIPs, WTO and CBD: Relevance to Agriculture", 16 *Journal of Intellectual Property Right,* 2011, pp.176-182, at 178.

[60] M.D. Nair, "TRIPS, WTO and IPR: Protection of Bio-resources and Traditional Knowledge", 16 *Journal of Intellectual Property Rights,* 2011, pp.35-37, at 35.

[61] It is worth mentioning that this provision follows the European Patent Convention level of protection, not the more protectionist level of the US law, where article 53(b) EPC provides that patents shall not be granted in respect of plants or animals varieties or essentially biological processes for the production of plants or animals; this provision does not apply to microbiological processes or the products thereof.

[62] J. Straus, "*Bargaining Around the* TRIPs Agreement*: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions", A Comment on the Paper Presented by David Lange and J.H. Reichman, 9(91) Duke Journal of Comparative & International Law,* 1998, at 100.

[63] *Ibid.*

UPOV or call to adhere to any version of it. Developing countries were of the view that farmer's rights aspect has been dealt adversely in the UPOV Convention and accordingly they took advantage of this clause to device their own sui generis system.[64]

The FAO Commission on Genetic Food Resources for Agriculture (CGFRA) considered a number of negotiating text of IUPGR between 1994 and 2001, with a view to its adoption as a binding legal obligation by members of the FAO. At its Sixth Extraordinary Session in June, 2001 the members of CGRFA agreed on farmer's rights.[65] This agreed Article on farmer's rights was later incorporated in Article 9[66] of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR)[67] which replaced the IUPGR, 1989. The ITPGR affirms the rights to save, use, exchange and sell farm-saved seed and other propagating material, and to participate in decision-making regarding, and in the fair and equitable sharing of the benefits arising from the use of plant genetic resources for food and agriculture are fundamental to the realization of farmer's rights, as well as the promotion of farmer's rights at national and international levels.[68] It further gives broad guidelines to states concerning the scope of the rights to be protected under the concept of farmer's rights. This includes the protection of traditional knowledge, farmer's entitlement to a part of benefit-sharing arrangements, and the right to participate in decision-making regarding the management of plant genetic resources. However, the Treaty is silent with regard to farmer's rights over their landraces.[69] In 1996, the International Technical Conference on Plant Genetic Resources (ITCPGR) adopted the Global Plan for the Conservation and Sustainable Utilization of Plant Genetic Resources for Food and Agriculture, which also shared the vision of the need to recognize and protect farmers' rights.[70]

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[64] R.K. Singh, "Protection of Farmer's Rights under the Plant Varieties Protection Regime: National and International Perspectives", *National Capital Law Journal,* 2004, at 137.

[65] The FAO Commission on Genetic Resources for Food and Agriculture, Sixth Extraordinary Session Rome, 25-30 June, 2001 agreed on farmer's rights.

[66] The ITPGR, 2001, Article 9: Farmers' Rights: 9.1 The Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centers of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world. 9.2 The Contracting Parties agree that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including: a) Protection of traditional knowledge relevant to plant genetic resources for food and agriculture; b) The right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and c) The right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.9.3 Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.

[67] The International Treaty on Plant Genetic Resources on Food and Agriculture was adopted on 3 November 2001 under the auspices of FAO, after seven years of negotiations. This legally binding treaty, which replaced the non-binding International Undertaking on Plant Genetic Resources, covers all plant genetic resources relevant to food and agriculture.

[68] The ITPGRFA, 2001, Preamble.

[69] Philippe Cullet, *supra note 25,* at 2.

[70] Kamalesh Adhikari, *supra* note 44, at 15.

Farmers are not granted any exclusive right over their varieties, but rather the Treaty find a way to provide a counterbalance to intellectual property rights by establishing benefit sharing arrangements consonant with notions of community as opposed to individual or private, property.[71] The recognition of farmer's contribution to plant genetic resources conservation and enhancement under the ITPGR are residual rights to save, use, exchange and sell farm-saved seeds.[72] Although the ITPGR enhances farmer's rights, the treaty is silent with regard to the form of legal protection. The adoption of the ITPGR was not sufficient to create meaningful realization of farmer's rights internationally. It is now the responsibility of individual states to vindicate the rights outlined in the ITPGR in the face of TRIPs Agreement by creating national policies that support the rights of farmers. Countries like India lead the way in creating national legislation that supports farmers as stewards of PGR.

IV. INDIAN APPROACH TOWARDS IP PROTECTION FOR FARMERS

The flexibility that the TRIPs Agreement contains relating to the sui generis system of plant variety protection is of immense importance and advantage to developing countries as a viable option. Therefore, it is for developing countries to make the most of the inbuilt flexibility and India has responded to the TRIPs requirement by enacting a sui generis legislation which grants rights to both breeders and farmers under the Protection of Plant Varieties and Farmers' Rights Act, 2001 (PPV&FR Act).[73] It recognizes the phenomenal contribution of farming communities in conserving biodiversity and developing new plant varieties.[74] The Act attempts to evolve a multiple rights system which could pose several obstacles to the utilization and exchange of plant genetic resources among farmers. The Indian law emerged from a process that attempted to incorporate the interests of various stakeholders, including private sector breeders, public sector institutions, non-governmental organizations and farmers within the property rights framework.[75] This Act recognizes intellectual property protection for new plant varieties. The need for a sui generis system for PVP in India is to enable the nation to protect and preserve its farmer's rights on the one hand and at the same time grant rights to plant breeders on the other hand.[76] It is the only legislation in this area that grants formal rights to farmers in a way that prevents their self reliance from being jeopardized while at the same time recognizing the efforts of the plant breeders in developing new plant varieties.[77]

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[71] Daniel J. Gervais, "*The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New",* 12(4) *Fordham Intellectual Property Media & Entertainment Law Journal,* 2002, at 972.

[72] Philippe Cullet, *supra* note 25, at 2.

[73] Mrinalini Kochupillai, "The Indian PPV&FR Act, 2001: Historical and Implementation Perspectives", 16 *Journal of Intellectual Property Rights,* 2011, pp.88-101, at 89.

[74] Shanti Chandrashekaran and Sujata Vasudev, "The Indian Plant Variety Protection Act Beneficiaries: The Indian Farmer or the Corporate Seed Company?", 7 *Journal of Intellectual Property Rights,* 2002, pp.506-515, at 506.

[75] *Ibid*.

[76] *Ibid*.

[77] Sumit Chakravarty, Gopal Shukla, Suman Malla and C.P. Suresh, "Farmers Rights in Conserving Plant Biodiversity with Special Reference to North-East India", 13 *Journal of Intellectual Property Rights,* 2008, pp.525-533, at 531.

The existing Indian legal framework under the PPV&FR Act, 2001 allows farmers to save, sow, resow, exchange, share or sell farm produce, including seeds of the protected variety.[78] However, the farmer in India is not entitled to sell branded seed of a protected variety. This is inhibitory, since as long as the farmer continues to be just a 'grain producer' and is not given the right to be called a 'commercial seed seller' of the developed plant, he would lose his rights as an innovator.[79] The legal right to the exclusive ownership, provided by a patent for a limited period of time, ensures that entities who invest heavily in research and development have an opportunity to earn those costs and are provided a return for their investors through subsequent marketing.[80] But, in case of plant variety protection non recognition of farmer's role as innovator leads huge economic loss to the traditional farming community. The Act seeks to protect farmers from exaggerated claims by seed companies regarding the performance of their registered varieties.

Section 39 of the Act deals with farmer's rights and provides that any farmer who has bred or developed a new variety of plant shall be entitled for registration and other protection in the like manner as a breeder of a variety. The farmer's variety shall also be entitled for registration. Any farmer who is engaged in the conservation of genetic resources of landraces and wild relatives of economic plants and their improvement through selection and preservation shall be entitled to recognition and reward. Farmer shall be deemed to be entitled to save, use, sow, re-sow, exchange, share or sell his farm produce including seed of a variety protected under this Act. Farmer's rights under the Act define the privilege of farmers and their right to protect varieties developed or conserved by them.[81]

One may identify following nine rights accorded to farmers under this Act:[82]

Rights to Seed

The PPV&FR Act, 2001 aims to give farmers the right to save, use, exchange or sell seed in the same manner as entitled before the enactment of Act. However, right to sell seed is restricted in that the farmer cannot sell seed in a packaged form labeled with the registered name.[83]

Right to Register Varieties

Farmers like commercial breeders can apply for IPR over their varieties. The criterion for registration of varieties is also similar to breeders but novelty is not a requirement.[84] The

[78] The Protection of Plant Variety and Farmers Rights Act, 2001, Section 39.

[79] Mohan Dewan, *supra* note 4.

[80] *Ibid*.

[81] *Pratibha Brahmi, Sanjeev Saxena, and B.S. Dhillon*, "The Protection of Plant Varieties and Farmers' Rights Act of India", 86(3) *Current Science,* 2004, at 394.

[82] Saksham Chaturvedi and Chanchal Agrawal, "Analysis of Farmer Rights: In the Light of Protection of Plant Varieties and Farmers' Rights Act of India", 33(11) *European Intellectual Property Review,* 2011, pp.708-714, at 712.

[83] *Supra* note 78, Section 39(1)(iv).

[84] *Id*., Section 39(1)(i)&(ii).

ability to gain IPRs type rights over "farmer's varieties"[85] is a unique aspect of Indian law.[86] The Act provides that a farmer who has bred a new variety is entitled for registration and protection as a breeder of a new variety.[87] The definition of breeder also clarifies this position by including within the fold of breeder, farmer or group of farmers.[88] Apart from the right of registration of a new variety, the farmer has the right to register a farmer's variety. This allows ownership rights to the farmers apart from privileges.

Right to Reward and Recognition

A farmer who is engaged in conservation of genetic resources of landrace and wild relatives of economic plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from National Gene Fund (NGF). Provided that material so selected and preserved has been used as donors of genes in varieties registrable under the Act.[89]

Right to Benefit Sharing

Benefit sharing would be facilitated through NGF to the farmers/community who can prove that they have contributed to the selection and preservation of material used in the registered variety. The authority invites claims of benefit sharing.[90] It is important to note that the Indian law allows claims of benefit sharing only once the breeder's variety is registered. The Act further recognizes the rights of communities because of their role in conserving traditional knowledge in area of farming plant varieties.[91] It provides that any person, group of persons (irrespective of whether actively engaged in farming) or any governmental or non-governmental organization may file claim on behalf of any village or local community which is attributable to the contribution of that village or local community in the evolution of any variety for the purpose of staking a claim on behalf of such village or local community. It may be argued that the settlement of benefit sharing aspect must be a precondition for registration of a variety.

Right to Information and Compensation for Crop Failure

The Act provides that breeders must give information about expected performance of the registered variety. If the material fails to perform, the farmers may claim for compensation.[92] This provision attempts to ensure that seed companies do not make exaggerated claims about the performance to the farmers. It enables farmers to apply to the authority for compensation in case they suffer losses due to the failure of the variety to meet the targets claimed by the companies.[93] The provision, however, does not sound

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[85] Farmers varieties is defined as "A varieties which has been traditionally cultivated and evolved by farmers in their fields; or is a wild relative or land race of a variety about which the farmers possess common knowledge".

[86] Saksham Chaturvedi and Chanchal Agrawal, *supra* note 82, at 712.

[87] *Supra* note 78, Section 39(1).

[88] *Id.*, Section 2(c).

[89] *Id.*, Section 39(1)(iii).

[90] *Id.*, Section 26.

[91] *Id.*, Section 41.

[92] *Id.*, Section 39(2).

[93] Saksham Chaturvedi and Chanchal Agrawal, *supra* note 82, at 713.

practical in the context of India. Indian farmer, particularly small farmers may not be able to provide the input required by the breeder and thus the farmer's claim for compensation may never be allowed. However, it may be ensured at the time of registration that breeder must not make out of proportion claims and promises about the performance of the variety.

Right to Compensation for Undisclosed Use of Traditional Varieties

When breeders have not disclosed the source of varieties belonging to a particular community, compensation can be granted. NGO, individual or government institution may file a claim for compensation on behalf of the local community in cases where the breeders has not disclosed traditional knowledge or resources of the community.[94]

Right to Adequate Availability of Registered Material

The breeders are required to provide adequate supply of seeds or material of the variety to the public at a reasonable price. If after three years of registration of the variety, the breeder fails to do so, any person can apply to the authority for a compulsory licence.[95] It is not out of context to mention that the corresponding provision in the Patent Act uses the words reasonably affordable price rather than reasonable price as used in the plant variety legislation.

Right to Free Services

The PPV&FR Act exempts farmers from paying fees for registration of a variety, for conducting tests on varieties, for renewal of registration, for opposition and for fees on all legal proceedings under the PPV&FR Act.[96]

Protection from Legal Infringement in Case of Lack of Awareness

Taking into account the low literacy rate in the country, the Act provides safeguards against innocent infringement by farmers. Farmers who unknowingly violate the rights of breeder shall not be punished if they can prove that they were not aware of the existence of breeder's rights.[97]

The above list of farmer's rights indicates that the initiative taken by Indian Government has definitely yielded results but the true impact of the law will unfold in years to come. A full chapter on farmer's right is a big step forward and we need to propose strong arguments to prove that Indian law is consistent with the TRIPs. The sui generis plant varieties protection system in India has been developed in such a manner that farmers have been given different positive rights. It takes into consideration IPR on plant varieties as well as equitable prior rights on genetic resources. In the light of foregoing observation, the various provisions in respect of farmer's rights envisaged in the Indian

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[94] *Supra* note 78, Section 40.

[95] *Id.,* Section 47(1).

[96] *Id*., Section 44.

[97] *Id*., Section 42.

[98] Sudhir Kochhar, "Rights and Obligations in Context of the Indian *Sui Generis* Plant Variety Protection System" *National Capital Law Journal,* 2001, at 7.

sui generis PVP system appear to be in conformity with the TRIPs Agreement.[98] Further a key requirement is that the sui generis system must be an effective system. In order to ascertain its effectiveness, there must be effective implementation of the mechanism for the realization of rights and obligations provided for in the system.

V. CURRENT TREND TOWARDS IP PROTECTION FOR FARMERS IN INDIA

India sui generis system recognizes the rights of commercial plant breeders and also grants positive right to farmers and goes beyond the widely recognized international sui generis regime represented by the International Union for the Protection of Plant Varieties (UPOV).[99] The Indian sui generis system for protection of plant varieties was developed integrating the rights of breeders, farmers and village communities, and taking care of the concerns for equitable sharing of benefits.[100] It offers flexibility with regard to protected genera/species, level and period of protection, when compared to other similar legislations existing or being formulated in different countries.[101]

The Plant Variety Registry of India has started the process receiving application for registration and protection of eligible varieties of notified genera of crops from 21st May 2007. In the meanwhile eight years have passed since the registration of plant varieties started in India. The assessment of applications for registration of plant variety would help us to conclude the working of this institution. As it has been provided in the Act that the Central Government shall specify the genera/species for the purposes of registration of varieties other than extant varieties and farmer's varieties and one of the function of the Authority is that it has to advice the Central Government for specifying the genera/species for the purposes of registration of new varieties of plant. Provisions are made for the protection of extant varieties so as to make their best use in Indian agriculture. Registration of extant varieties in the country has to be completed in a fixed time limit of within five years of the gazette notification for the genera/species eligible for PVP.[102]

Specified Genera/Species of Crops

In exercise of power conferred under section 29(2) and section 14, first time the Central Government specified twelve crops[103] for registration in 2006,.[104] The first list covered genera of only food crops of five coarse cereals/millets (rice, bread wheat, maize, sorghum, pearl millet), and seven pulse crops (chickpea, pigeon pea, green gram, black gram, lentil, field pea and kidney bean).With this first notification for registration of

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[99] Prabhash Ranjan, "Recent Developments in India's Plant Variety Protection, Seed Regulation and Linkages with UPOV's Proposed Membership", 12(3) *The Journal of World Intellectual Property,* 2009, pp.219–243, at 220.

[100] *Pratibha Brahmi, Sanjeev Saxena and B.S. Dhillon*, "The Protection of Plant Varieties and Farmers' Rights Act of India", 86(3) *Current Science,* 2004, pp.392-398, at 392.

[101] *Ibid*.

[102] The Protection of Plant Variety & Farmers Rights Rule, 2003, Rule 24.

[103] These twelve crops were rice, lentil, maize, green gram, kidney bean, black gram, chickpea, pearl millet, pigeon pea, sorghum, field pea, and bread wheat.

[104] The Gazette of India: Extraordinary, Part II, Section 3, Sub-section (ii) No. 1316, New Delhi November 1, 2006.

varieties the office of the Registrar has started receiving applications for registration in India. In 2007,[105] two other crops were specified for registration[106]. In 2009, three[107] other crops with its genera and species were specified for registration.[108] In 2010, the Central Government specified two notifications in the Official Gazette for registration of crops. In the first notification it specified eleven crops[109] eligible for registration.[110] In the second notification other eleven crops[111] were specified by the Central Government as eligible for registration.[112] These varieties were other than extant varieties and farmer's varieties. In 2011, the Central Government specified nine new crops[113] with its genera or species for registration.[114] In 2012, the Central Government specified three[115] new species for registration.[116] On 15th April, 2014 the Central Government has specified twenty[117] other new crop with their genera/species eligible for registration under the Act on 15th April.[118] Further, in the same year seven[119] new genera or species were specified eligible for registration.[120] In 2015, the Central Government notified four[121] new genera or species eligible for registration under the Act on 21st January.[122] Further, the Central Government

[105] These two crops were cotton and jute.

[106] The Gazette of India: Extraordinary, Part II, Section 3, Sub-section (ii), No. 1619New Delhi, December 31, 2007.

[107] These three crops were sugarcane, ginger and turmeric.

[108] The Gazette of India: Extraordinary, Part II, Section 3, Sub-section (ii), No. 1200 New Delhi, August 3, 2009.

[109] These eleven crops were Black Pepper, Small cardamom, Indian Mustard, Rapeseed, Sunflower, Safflower, Castor, Sesame, Lineseed, Groundnut, and Soyabean.

[110] The Gazette of India: Extraordinary, Part II, Section 3, Sub-section (ii) No. 828 New Delhi April 30, 2010.

[111] These eleven crops were Onion, Tomato, Brinjal, Cabbage, Cauliflower, Lady's finger, Rose, Mango, and Chrysanthemum.

[112] The Gazette of India: Extraordinary Part II Section 3 Sub-section (ii) No. 2445 New Delhi December 2, 2010.

[113] These nine new crops were Wheat (Triticum Durum Desf), Wheat (Triticum Dicoccum L.), Wheat (Triticum Species other than Triticumaestivum L., Triticum Durum Desf and TriticumDicoccum L.), Coconut, Periwinkle, Indian Pennywort, Rose, Blond Psyllium, and Menthol Mint.

[114] The Gazette of India: Extraordinary, Part II, Section 3, Sub-section (ii), No. 1595, New Delhi, August 18, 2011.

[115] These three bamboo leaf orchid or boat orchid, spray orchid or singapore orchid, and vanda or blue orchid.

[116] The Gazette of India: Extraordinary, Part II, Section 3, Sub-section (ii), No. 536, New Delhi, March 27, 2012.

[117] These twenty crops are Pomegranate, Orchid (Cattleya Lindl), Orchid (Phalaenopsis Blue), Eucalyptus, Casurina, Bitter Gourd, Bottle Gourd, Cucumber, Pumpkin, Barley, Coriander, Fenugreek, Almond, Apple, Pear, Apricot, Cherry, Walnut, Grapes, and Indian Jujube.

[118] The Gazette of India: Extraordinary, Part II, Section 3, Sub-section (ii), No. 900, New Delhi, April 15, 2014.

[119] These seven crops are Tea, Acid Lime, Mandarin, Sweet Orange, Banana, Orchid, and Bougainvillea.

[120] The Gazette of India: Extraordinary, Part II, Section 3, Sub-section (ii), No. 2116, New Delhi, October 15, 2014.

[121] These four crops are Canna, Gladioulus, Muskmelon, and Watermelon.

[122] The Gazette of India: Extraordinary, Part II, Section 3, Sub-section (ii), No. 141, New Delhi, January 21, 2015

[123] These ten crops are Jasmine, Tuberose, Papaya, China Aster, Peach, Japanese Plum, Strawberry, Chilli, Bell Pepper and Paprika, Finger Millet, and Foxtail Millet.

[124] The Gazette of India: Extraordinary, Part II, Section 3, Sub-section (ii), No. 1415, New Delhi, July 2, 2015

again notified ten[123] new genera or species eligible for registration under the Act on 2nd July.[124] Thus, by the end of 2015 total 92 genera/species were notified eligible for registration by the Central Government.

Application for Registration

The Plant Variety Registry of India has started the process receiving application for registration and protection of eligible varieties of notified genera of crops, which opened up a new era of protection of intellectual property rights on the varietal products used in Indian Agriculture.[125] A perusal of the applications to assess the working of the Act may be relevant. A total of 1,654 applications from 17 notified crops with their genera and species were filed at the Plant Variety Registry Office as on 10 June, 2010 which included 1,130 applications for extant varieties. The number rose to 5840 applications with 1843 for extant varieties by August 2013. Further, by 30 January, 2014 number of total applications rose to 6222 and by end of 2015 total number of applications rose to 10998 out of which 6322 applications were filed for farmers varieties.

The above figures assume importance to understand current Indian trend. It is important to note that the situation prior to 2009 was very poor. The PPV&FR Registry issued only 66 certificates of registration of extant varieties until 30th September, 2009 and 112 certificates up to 10th June, 2010. Initial post-implementation experience has indicated that the farmers in India had little overall interest in the IPR domain in plant varieties as is evident from a negligible number (18) of applications of only 4 crops filed for protection of farmer's varieties in the country in nearly two-and-a-half years till 30th September, 2009. It is obvious that on the expiry of the grace period for the registration of extant varieties of food crops, where maximum variability is expected in farmer's varieties, only the new farmer's varieties would be left eligible for their PVP. Therefore, the implementation and enforcement of new, sui generis PVP law in India was crucial for availing the due advantage of this safeguard provision in the early period of the PVP regime. Now, the current data shows that Indian farmers are becoming inclined towards registration of their varieties with approximately half of the applications.

VI. CONCLUSION

Farming communities have substantially contributed in conserving and developing new plant varieties and it has been widely agreed that there should be some form of recognition to their contribution to genetic pool of diversity. It is the need of hour to make a concerted effort to ensure that emerging IPR regime must not undermine the contribution of farming community. Indian sui generis law, which goes beyond the widely recognized international sui generis regime, is significant both in the domestic and international context. It offers flexibility with regard to protected genera/species, level and period of protection, when compared to other similar legislations of different countries. The efficacy of institutional framework established under Indian sui generis law adds to the cause of promoting farmer's rights as intellectual property rights, but it still facing the task of implementation. The initial trends of registration of farmer's variety and extent variety were alarming but it is good to observe that now Indian farmers are becoming inclined towards registration of their plant varieties. The trend of

[125] Sudhir Kochhar, "How Effective is *Sui Generis* Plant Variety Protection in India: Some Initial Feedback", 15 *Journal of Intellectual Property Rights,* 2010, pp.273-284, at 273

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