UTTARANCHAL UNIVERSITY

DEHRADUN law REVIEW

(A Peer Reviewed Journal)

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EDITORIAL

Expansion of the contours of legal epistemology has resulted into paradigmatic shifts in legal perceptions around the world. As a natural corollary, the organic character of law incessantly keeps it evolving with the changing dynamics of socio-economic development. Dehradun Law Review has always been prompt to address and accommodate pressing socio-legal concerns as well as valuable insights of *lex* matrix or legal academia of the globe. Articles of the legal scholars inculcated in Dehradun Law Review, Volume 11, Issue-1(2019) are the testimony of the fact.

Our intellectual sojourn keeps on moving with the solemn objective of constantly exploring pearls in the academic ocean. To our great satisfaction, the journal continues to sail successfully towards the accomplishment of its well-cherished objectives. The editorial team of Dehradun Law Review has so far made sincere efforts to maintain the quality and standard of the journal so as to live upto the expectations of the legal fraternity.

We feel immensely spirited while bringing up this current issue of Dehradun Law Review, a journal of Law College Dehradun, faculty of Uttaranchal University. We feel honoured to receive contributions from eminent law scholars and jurists from India and abroad. Issues like 'The Post Truth Era in the Context of Contemporary Politics', 'Money Bill, Non-Money Matters and Damage to Democracy', 'Sentry Approach Of Judiciary For The Protection Of Environmental Pollution In India', 'Applicability of The Rule in Smith v. Selwyn in Common Law Countries', 'Comparative Analysis Between Human Trafficking and Migrant Smuggling', 'Right to Free and Compulsory Education in Nepal with Special Reference to India's Right of Children to Free and Compulsory Education Act, 2009', 'Constitutional Safeguards to Civil Servants', and, 'Patentability of Artificial Intelligence Creations' have been extensively discussed and analysed offering valuable insights in the different sub-spheres of legal knowledge.

Shri Gopal Krishna Sharma in his research paper titled "The Post-Truth Era: An Analysis with Reference to Contemporary Politics" has analyze the statements relating to the truth and falsehood, in the specific reference to Post Truth Era. He has also investigated the circumstances relating to the social and political aspects of truth in the present politico-legal system.

Dr. Anil Kumar Maurya in his article titled "Money Bill, Non-Money Matters and Damage to Democracy" highlighted the misuse of provisions of Article 110 of Indian Constitution by the government just for the political motives rather than the welfare of the country.

Dr. Sukhwinder Singh, in his research paper titled "Sentry Approach of Judiciary For The Protection Of Environmental Pollution In India: A Bird Eye View" points out the various issues relating to the Environmental pollution which have become major concern and challenge today for our country. He has also highlighted the vigil of Indian higher judiciary over the same and various doctrines and methods used by the judiciary for dealing with such issues.

Mr. Leke Bashir Ijaiya in his research paper titled "A Critical Analysis of the Application of the Rule in Smith v. Selwyn in Common Law Countries: A Case of Nigeria" has analyzed the application of Rule propounded in the famous case of Smith v. Selwyn about the citizen suit in Nigeria.

Mr. Zubair Ahmed Khan in his research paper titled "Comparative Analysis between Human Trafficking and Migrant Smuggling: Indian Perspective" has evaluated the concept of Human Trafficking and Migrant Smuggling and reflected their gravity and easy victimization of migrant refugees.

Mr. Jivesh Jha, in his research paper titled "Right to Free and Compulsory Education in Nepal: A Study with Special Reference to India's Right to Free and Compulsory Education Act, 2009" highlights the inclusion of Article 31 in the Nepalese Constitution providing for Right to Education to Nepalese children and its comparison with India's Right to Education Act, 2009.

Dr. Babita Devi in her article titled "Constitutional Safeguards to Civil Servants: An Analysis" examines the increasing vigil of the State on the Conduct of Civil Servants and the safeguards available to them especially in respect to the security of tenure. She also discusses the constitutional provisions and Courts' approach for securing the interests of civil servants.

Mr. Mayank Tyagi in his article titled "Patentability of Artificial Intelligence Creations: Issues and Challenges" addresses the new phenomenon of Artificial Intelligence and instances where machines have created inventions with no or minimum human interventions. It further delves into the issues related to Artificial Intelligence inventorship and its challenges.

No intellectual endeavour is full-proof and without inconsistencies or errors. Admitting the same with humility, we sincerely look forward to constructive criticism, valuable suggestions and feedbacks as these are intellectual inducements which multiply our efforts manifold for 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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THE POST-TRUTH ERA: AN ANALYSIS WITH REFERENCE TO CONTEMPORARY POLITICS

Gopal Krishna Sharma

Abstract

At one time we had truth and lies. Now we have truth, lies, and statements that may not be true but we consider too benign to call false. This is post-truth. In the post-truth era, borders blur between truth and lies, honesty and dishonesty, fiction and nonfiction. Deceiving others becomes a challenge, a game, and ultimately a habit. Sometimes Post Truth is also posited as a social and political condition whereby citizens or audiences and politicians no longer respect truth but simply accept as true what they believe or feel. The present article will analyse how this post truth concept affects the political system of India as well as of world.

Key words

Truth, Post Truth, Emotions, Objectivity and Politics

I. INTRODUCTION

Post-truth is not a new phenomenon. What we call post-truth today, in other decades was called propaganda. Alternative realities are not based on facts, but on emotions. Alternative realities based on perception and not on data. The difference compared to other eras is that we now have a double-edged tool within our reach. First, they do not allow access to the sources of information required to point out and combat lies. And at the same time, they give lies an unprecedented boost, spreading like wildfire and floating on the surface for years. It is possible and impossible at the same time.[1]

After Jawaharlal Nehru, Indira Gandhi and Atal Bihari Vajpayee, no Prime Minister of India has perhaps displayed the talent to deliver words in an impassioned and rhetorical manner that Modi has in recent years. But the problem arises when an orator becomes a demagogue. When the word demagogue was first used in ancient Greece and Rome, it simply described a leader who championed the cause of common people. Over time, the word acquired a distinctly negative connotation to mean a political personality who plays up to popular prejudices rather than use rational arguments to seek support and gain power.[2] Perhaps during the gradual development of the society the term "post-truth" has took place of "Demagogue" in the post-modern era.

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[1]Albert Medran, In The Kingdom of Post-Truth, Irrelevance is the Punishment, , www.uno-magazine.com/wp content/uploads/2017/03/UNO_27_ENG_alta.pdf, p. 33

[2]Editorial, Post-truth India, Economic & Political Weekly, Vol. 52, No. 1, P. 7

I. A BRIEF HISTORY OF POST-TRUTH

The compound word post-truth exemplifies an expansion in the meaning of the prefix post- that has become increasingly prominent in recent years. Rather than simply referring to the time after a specified situation or event – as in post-war or post-match – the prefix in post-truth has a meaning more like 'belonging to a time in which the specified concept has become unimportant or irrelevant'. This nuance seems to have originated in the mid-20th century, in formations such as post-national (1945) and post-racial (1971).[3]

Post-truth seems to have been first used in this meaning in a 1992 essay by the late Serbian-American playwright Steve Tesich in The Nation magazine. Reflecting on the Iran-Contra scandal and the Persian Gulf War, Tesich lamented that 'we, as a free people, have freely decided that we want to live in some post-truth world'. There is evidence of the phrase 'post-truth' being used before Tesich's article, but apparently with the transparent meaning 'after the truth was known', and not with the new implication that truth itself has become irrelevant.[4]

A book, The Post-truth Era, by Ralph Keyes appeared in 2004, and in 2005 American comedian Stephen Colbert popularized an informal word relating to the same concept: truthiness, defined by Oxford Dictionaries as 'the quality of seeming or being felt to be true, even if not necessarily true'. Post-truth extends that notion from an isolated quality of particular assertions to a general characteristic of our age.[5]

The term "post-truth politics" was coined by the blogger David Roberts in a blog post for Grist on 1 April 2010, where it was defined as "a political culture in which politics have become almost entirely disconnected from policy".

II. POST-TRUTH IN 2016

Long ago, six curious Hindu wise men gathered to discover what an elephant was like. They were blind, and decided to search for this pachyderm to dispel any of their doubts. After a long walk, they found an enormous and tame elephant. Each wise man approached the animal eager to touch it. The first caressed its trunk, and immediately compared it to a snake. The second touched its tusks which made him think of a spear. The third rested his hand on the hairy tail, believing it to be a brush. And so forth until six different descriptions of the same animal were given. They all believed that they knew an elephant's true appearance but without managing to come to an agreement. By changing positions, they realized that there was more than one way of looking at the animal.[6]

[3] Available at: https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016, (visited on 23/03/2018)

[4] Ibid.

[5] Ibid.

[6] Anthony Gooch, In Pursuit of The Truth, available at: www.uno-magazine.com/wp content/uploads/2017/03/UNO_27_ENG_alta.pdf, p. 14

The moral of this short story is to illustrate and remind us that the notion of truth and the search for it are complex and inherent to human beings. In fact, truth requires the analysis of objective facts and a discussion of the evidence-requirements that bestow it with great value which professionals in any field have a duty to preserve.[7]

The Oxford Dictionary chose the term "post-truth" as Word of the Year for 2016, affirming that it is used to refer to "circumstances where objective facts have less influence over public opinion than appeals to emotions and personal beliefs." This should come as no surprise to many people, with 2016 being a year of controversial surprises and unexpected events. The political and social panorama during the next few months will be marked by this post-truth climate, where objectivity and rationality give way to emotions, or to a willingness to uphold beliefs even though the facts show otherwise.8 Albert Medrán says that post-truth is nothing more than a kingdom of lie.

Since August 2016, before the start of the U.S. presidential election debates and up to the eve of voting day, checking platforms were busy performing what is referred to as "fact-checking". They counted up to 217 untruths in the candidates' speeches and statements-79 percent of which were attributed to Donald Trump and 21 percent to Hillary Clinton. Univision News' Data Unit in Miami determined that, a week prior to the presidential election, for every lie told by the Democrat candidate, the Republican candidate told four. Journalist Borja Echeverría systematically and comprehensively provides the statistics in the latest edition (January 2017) of Cuadernos de Periodistas. He is currently the Managing Editor of Univision Digital News, which is based in Florida. Borja has become a reference in the sector of communication and journalism by calling for a relatively new activity to fight against fake news, alternative truths and hoaxes. All of these concepts take refuge under the semantic umbrella of post-truth. However, fact-checking would be the antidote against the word-better described as a concept-that the Oxford Dictionary has considered as 2016's newest and most utilized expression.[9]

Post-truth is not synonymous with lying; however, it describes a situation where, when creating or manipulating public opinion, the objective facts have less influence than emotions and personal beliefs. Post-truth consists in the relativization of truth, in the objectivity of data becoming commonplace and in the supremacy of emotional speeches. It is far from being a new phenomenon.Eric Alterman conclusively defined it as a "political weapon of disinformation". This author quotes Noam Chomsky who, avoiding the term post-truth, developed a famous list: 10 Manipulation Strategies. This includes emotionally softening message techniques, aiming at short-circuiting citizens' critical and analytical senses.[10]

I. EFFECTS OF POST-TRUTH

We live in an era when people have less patience for facts, data and truths. This era, when emotions and "statements that 'feel like the truth' but are not based on reality" prevail over what is objective and real, is an enormous challenge.

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[7]Ibid.

[8]Id,p.9.

[9]Id,p.11.

[10]Ibid.

Post-Truth distorts the basic principles of human coexistence, such as the cult of truth and honesty, favoring misleading and lying behavior in order to promote its own interests and greed. It is either the truth or it is not. Half-truths do not exist, and neither does subjective truth. To speak of "my truth" is an assault on reason. Opinions can exist, and in this sense, every person has every freedom to express their own, and on any subject. But when dealing with objective facts, such as, for example, the number of inhabitants in the country, its gross national product, its citizens' level of education, a company's financial situation, public debt, or the budget deficit, only the objective reality counts-and there is only one. Everything that is disguised as the truth, whether grossly modifying it such as the manipulation of statistics, hiding facts that misinform the reader, or leveraging devices that distort accounts, are adulterations of the truth.[11]

Populist trends require that power be obtained as an end in itself, regardless of the methods used. The British have decided to leave the European Union believing or accepting as true-affirmations that are false or probable at best. Similarly, Americans have given credence to gross untruths because with them, they have challenged the power of the ruling classes, bringing them down. This theory is also by Luis Meyer. Indeed, in politics, lies or half-truths are resources that have always been handled with aplomb. But now, the response to the political and economic status quo has been to introduce sentimental and emotional elements, with their false messages carrying a sweeping force.

In the post-truth era, filled with major developments such as Great Britain's exit from the European Union and the contentious American electoral campaign, it is clear that warriors of "truth" and warriors of "lies"-both switching positions-prosper in highly flammable and radicalized situations. The dispute between those that shout "it is a coup" and those that shout "it is constitutional" in Brazil, during the fall of Dilma Rousseff, gives shape to the idea that the world revolves around passions and beliefs; where truth is no longer needed.[12]

I. POST-TRUTH AND INDIA

Current political events are shaped by the spread of misleading or utterly fake information, particularly operated by alternative news channels, mainly through the internet. Political debates are therefore no longer based on any truth or factual accuracy, but on "post-truth", whereby truth is simply abandoned as a shared ground whereon opinions should successively be constructed. The right sense has been lost, and so the sensitivity to questions of truth, with all the political consequences. Unfortunately the matter is far more complex than it appears, and this

way of framing the issue of post-truth is problematic at best.[13] However, by the rules of the game in democratic contests, politicians generally only bend the truth. When caught lying outright – for example in attempts to escape responsibility for their actions – they provide complex justifications and near-apologies.[14]

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[11]Id p. 49

[12]Id, p. 23

[13]Raberto Orsi, The Politics of Post-truth, blogs.lse.ac.uk/eurocrisispress/2017/05/05/the-politics-of-post-truth/, Visited on 26/12/2017

[14]Editorial, Post-Truth?, Social Studies of Science (2017), Vol. 47(1), p. 3

The 31 December 2016 address to the nation by Narendra Modi was a classic case of Post-truth. The 45-minute speech, delivered first in Hindi and then in English, was filled with half-truths that were clearly aimed at assuaging the huge hardships that had been caused to virtually each and every citizen of the country by his arbitrary and sudden decision to cancel the legal tender status of high-denomination currency notes on 8 November. The series of announcements that the Prime Minister made towards the end of his speech, almost akin to a "mini budget," is clear evidence of his unstated intentions. By announcing rebates and waivers for low-cost housing and farm loans; credit limit increases and tax incentives for small businesspersons and traders; the doubling of the corpus of funds to be used for irrigation projects under various programmes of the National Bank for Agriculture and Rural Development; the move to deposit cash directly into the bank accounts of pregnant women; and the higher interest rates to be given to senior citizens on their bank deposits—all point towards the segments of the population that Modi was seeking to target in his New Year eve speech. His address thus tacitly acknowledged that those who have been hurt the most by demonetization and the continuing shortage of currency notes across the country are farmers, women, the elderly, the homeless and those running small businesses.[15]

The demagoguery came in the form of a strong dose of unsubstantiated statements. Modi claimed that excess cash in the system was fuelling inflation. He alleged that "nations similar to us do not have the amount of currency that we had." He also claimed that "over the last 10 to 12 years, `500 and `1,000 currency notes were used less for legitimate transactions and more for a parallel economy." None of these claims stand up to close scrutiny, as any of Modi's economic advisers will tell him. The half-truths were in the form of claiming that the government is "introducing" a scheme for depositing `4,000 into the bank accounts of pregnant women and the conversion of three crore Kisan Credit Cards (or KCCs that can be used only in a bank) to RuPay Debit Cards (that can be used anywhere). The facts are different. There is already a pilot project in place to deposit funds in the bank accounts of pregnant women (named after Indira Gandhi, much to Modi's chagrin) under the National Food Security Act which is yet to be universalized due to inadequate budgetary support from the union government. Moreover, the scheme to convert KCCs into RuPay cards is four years old.[16]

In fact, the slowdown in the functioning of the economy has already destroyed livelihoods—a fact that President Pranab Mukherjee has conceded and which the government is trying hard to

play down. Instead of creating new employment opportunities through its much-touted "Make in India" programme, the rate of growth of the index of industrial production has fallen for seven out of the 12 months between November 2015 and October 2016. Since then, the state of the country's economy has not improved. There is every reason to believe that the situation has deteriorated on account of demonetization with economic activities having declined in many sectors.[17]

The short point is that the Prime Minister's rhetoric cannot conceal the grim reality on the ground. It suits him to paint the picture in binary terms. Either you are corrupt or you

[15]Editorial, Post-Truth India, Economic & Political weekly, Vol. 52, No. 1, p. 7

[16]Ibid

[17]Ibid.

are honest, and if you have not supported demonetization then you must be corrupt. This is in keeping with his past record of reinforcing popular prejudices by dividing the country into people who are either good or bad, patriots or traitors.

I. CONCLUDING OBSERVATION

The idea of democracy is in a state of flux. An ordinary citizen doesn't know how to read the events that unfold around him. He knows that democracy is a relationship between knowledge and power. But what does he do when the power of truth confronts the truth of power?[18] Post-truth is a traumatic word, a word that pigeonholes beat changes in the democratic society, especially in terms of politics and electoral institutions.

For a decade now, politics has become more backstage, more managerial and more technologically fixated. Once sacrosanct idea such as transparency of information, necessity of participation, power of the public-ideas that made democracy an act of faith and trust-have been eroded. Elections, rights, governance and leadership are becoming empty words. Facts seem like illusions while the latter become facts. The charisma of political leadership is now nothing more than propaganda. It is as if Watergate politics has become the DNA of all politics.[19]

Shiv Vishvanathan says that a sense of trust has led to unprecedented political solidarity. Politics is unpredictable and new interpretations overturn old facts. Trust is no longer a habit but a cultivated alertness demanding more from the regime and even more from citizens. He is of the opinion that sometimes when a word is born, a world is born with it. Post-truth might be one such word. A performative word that one senses might enact the politics of the future.

The social consequences of post-truth may be disturbing. In politics, the deterioration of the notion and value of truth is a danger to society. The most likely script indicates increasing intolerance and stimulation of totalitarianism. Some post-truth era thinkers are of the opinion that Post-Truth could prove costly.

[18]Shiv Visvanathan, The Year We Reinvented the Truth, The Hindu (Dec. 3, 2016).

[19]Ibid.

MONEY BILL, NON-MONEY MATTERS AND DAMAGE TO DEMOCRACY

Dr. Anil Kumar Maurya

Abstract

Separate provisions relating to money bill in the constitution were kept for a purpose by the constitution makers however on different occasions it has been noted that governments, both centre and state, choose to amend general or special laws through money bill. Such blatant and authoritarian use of power by the government jeopardizes democratic norms and restricts further academic evaluation. A challenge to the Constitutionality of Finance Act 2017(decision expected anytime in 2019) being similar case, provides enough reason for Supreme Court to reconsider its stand and question speaker`s decision in this case.

Key words

Money Bill, Non Money Matter, Speaker`s Decision, Amendment, Unconstitutionality, Supreme Court

I. INTRODUCTION

The Finance Act 2017 was passed by lower house and most of the provisions came into force on the 1st day of April, 2017. Generally finance bill is passed each year as money bill since it gives effect to tax changes and related matters proposed in the union budget. This is evident from the preamble of the Act itself which reads as 'An Act to give effect to the financial proposals of the Central Government for the financial year 2017-18.'Preamble of the previous Finance Acts has been similar as that of 2017.

Constitution of India prescribes different norms and procedures for money bills. Article 109 of the Constitution provides that money bill shall not be introduced in the council of states. With regard to money bill, lower house enjoys absolute privilege as it can reject or accept any of the recommendations of the council of states on money bill. In either case money bill will be considered as passed by both the houses. According to Article 110, for a legislation to be classified as a money Bill, it must comprise of 'only' provisions dealing with the following matters: (a) imposition, regulation and abolition of any tax, (b) borrowing or other financial obligations of the government of India, (c) custody, withdrawal from or payment into the Consolidated Fund of India (CFI) or Contingent Fund

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of India, (d) appropriation of money out of CFI, (e) expenditure charged on the CFI or (f) receipt or custody or audit of money into CFI or public account of India; or (g) any matter incidental to any of the matters specified in sub-clauses (a) to (f). Sub clause (3) of Article 110 says that "If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final."

Except money bill and other financial bills, a bill may originate in either house of the parliament and need to be passed by both the houses. Procedure for making any amendment in an existing law also needs to observe the same procedure. However, many times it has been noted that amendments were made in several laws through money bills (latest being the finance Act 2017) although amended law can hardly be related to any of the matter enumerated in Article 110. Such blatant and authoritarian use of power by the government jeopardizes democratic norms and restricts further academic evaluation. It is also needless to mention that this route is generally adopted by governments only when it falls short of majority in the other house. Such practices are not new to the Indian legal system; it has been vehemently used by state governments on different occasions. In the back drop of these observations this article proceeds to evaluate the permissibility, if any, of judicial review of power of speaker and constitutionality of such practices by governments.

I. JUDICIAL REVIEW AND POWER OF SPEAKER

In a democracy conferring privileges to the lawmakers is necessary for them to function freely. The powers, privileges and immunities of either House of the Indian Parliament and of its Members and committees are laid down in Article 105 of the Constitution. Article 194 deals with the powers, privileges and immunities of the State Legislatures, their Members and their committees. The language of Article 105 is "mutatis mutandis" the same as that of Article 194 except that for the expression "Parliament" in Article 105 the expression "legislature of a State" is used in Article 194. Hence, a discussion on Article 105 would be relevant to Article 194 also. Taking note of the complexities in defining privileges constituent assembly had decided to leave the powers, privileges and immunities of each house of the parliament and state legislatures and as well as their members and committees to be defined by law by the respective house from time to time.[1] During the constituent assembly debates, H.V. Kamath and others had argued for a schedule to exhaustively codify the existing privileges. However, Dr. Ambedkar pointed out that it was not possible rather practicable to enact a complete code on privileges and immunities of the parliament as a part of the constitution. Therefore British Parliamentary practice was retained in the constitution. Shri G.V. Malvankar opined that[2]

"It is better not to define specific privileges just at the moment but to rely upon the precedents of the House of Commons. The disadvantage of codification at the present moment is that whenever a new situation arises, it will not be possible for us to adjust ourselves to it and give members additional privileges. In the present set up any attempt at legislation will very probably curtail our privileges. Let us therefore, content ourselves with our being on par with the House of Commons"

[1]Constitution of India, 1949; Sub clause (3) of Article 105 and 195

[2]Chatterjee, A.P. (1971) Parliamentary Privileges in India, Calcutta, New Age Publishers, p.116.

In the absence of an exhaustive code various cases came before the courts to determine the extent of privilege enjoyed by parliamentarians. In the last few decades, a judicial position has emerged that it can exercise limited degree of scrutiny over privileges.[3] For example in *P.V. Narsimha Rao v. State*, the court accepted that the privilege of immunity extends even to bribes taken by members of parliament for the purpose of voting in a particular manner but this privilege is not available to the member who even after giving/taking bribe did not participate in the voting.

Article 122 prohibits the courts from questioning the validity of any proceedings in parliament on the ground of any alleged 'irregularity' of procedure. This privilege is strictly limited to irregular proceedings and shall not apply to illegal proceedings. In the case of *Raja Ram Pal v. The Hon`ble Speaker, Lok Sabha*,[4] the Supreme Court while dealing with Article 122, held that proceedings which may be tainted on account of substantive or gross irregularity or unconstitutionality are not protected from judicial scrutiny.

This issue was further dealt by Supreme Court in *Mohd. Saeed Siddiqui v. State of U.P. and Anr*.[5] This petition, Under Article 32 of the Constitution of India was filed by the Petitioner seeking a writ of *quo-warranto* against Mr. Justice N.K. Mehrotra (retd.), then Lokayukta for the State of Uttar Pradesh for continuing as Lokayukta after 15.03.2012. The Petitioner has also challenged the constitutional validity of the Uttar Pradesh Lokayukta and UP-Lokayuktas (Amendment) Act, 2012 to the extent being ultra vires to the provisions of the Constitution of India. The petitioner argued that the Amendment Act is violative of the provisions of the Constitution of India and the same was wrongly introduced as a Money Bill in clear disregard to the provisions of Article 199 of the Constitution of India. Article 199 and 212 of the constitution make it clear that the finality of the decision of the Speaker and the proceedings of the State Legislature being important privilege of the State Legislature, viz., freedom of speech, debate and proceedings are not to be inquired by the Courts.

The court held that the decision of the speaker of state legislative assembly, in determining a bill to be a money bill, could not be judicially reviewed and that the procedure adopted by the state legislature was beyond judicial review by virtue of Article 212. Supreme Court has ruled that even if it is established that there was some infirmity in the procedure in the enactment of the Amendment Act, in terms of Article 255 of the Constitution the matters of procedures do not render invalid an Act to which assent has been given to by the President or the Governor, as the case may be.Judicial review on the ground that certain provisions of the Act are inconsistent with the rest and are not compatible the preamble of the Act can also be argued in a limited sense. As a matter of general practice parliament has seldom used such methods to pass any bill or to make an amendment in other laws.

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[3]Amber Sinha, Can the Judiciary Upturn the Lok Sabha Speaker's Decision on Aadhaar? Available at https://thewire.in/110795/aadhaar-money-bill-judiciary/

[4](2007) 3 SCC 184

[5]A I R 2014 SC 2051

I. PROTECTION FOR 'IRREGULARITY OF PROCEDURE' NOT FOR 'ILLEGALITY'

As noted above Supreme Court in the Raja Ram case has clearly made a distinction between procedural irregularity and illegality in the context of Article 122 (1). The court observed that Article 122 (1) extends its protection only to matters of procedural irregularity and not an illegality.

Between 'illegal' and 'irregular' there lies great difference. Illegality makes an act or transaction null and void ab initio. On the other hand, irregularity is pardonable and the defect can be cured. In *United Bank of India v. Naresh Kumar*[6] the Supreme Court held that procedural defects that do not go to root of the matter should not be permitted to defeat a just cause.

Question that need to be addressed is whether inclusion of non money matters in money bill would be procedural irregularity or illegality. In *Sat Pal Dang v. State of Punjab*, Supreme Court made a difference between 'mandatory' and 'directory' provisions of the constitution. Court further said that only violation of mandatory provision will lead to judicial scrutiny and no immunity will be provided in such cases. By that logic, if Article 110 (1) is seen as a mandatory provision, a breach of its provisions could lead to an interpretation that the Supreme Court may well question an erroneous decision by the speaker of the Lok Sabha to certify a legislation as a money Bill. The use of the word "shall" in Article 110 (1), the nature and design of the provision, its overriding impact on the other constitutional provisions granting the Rajya Sabha powers are ample evidence of its mandatory nature.[7]

IV. NON MONEY MATTERS IN FINANCE ACT, 2017

Finance Act, 2017 not only included money matters but also provided for amendments in almost forty other laws. Some of the matters that were included in the finance Act were proposal for enhanced power to taxmen by allowing them not to disclose the 'reason to believe' for a search to an individual. Proposal to make the furnishing of Permanent Account Number (PAN) mandatory for filing of tax returns from July 1, along with provisions for the merging of tribunals are the other controversial subject matters passed through Act. Finance Act has also been criticized for pushing more confidentiality in contribution made to political parties by the companies. The government removed the cap for companies for their contributions to political parties by making amendments in Companies Act, 2013. Although companies are still required to disclose the amount of contribution but requirement for disclosure of name of beneficiary party is now done away with.

Carrying out a major institutional change through the Finance Bill, the government has

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[6](1996) 6 S.C.C. 660

[7]Dr. Anup Surendranath, Aadhaar Act As A Money Bill -- Judicial Review Of Speaker's Determination Concerning Money Bills,

available at: http://ccgdelhi.org/doc/(CCG-NLU)%20Aadhaar%20Money%20Bill.pdf (accessed on 18.09.2019)

not only merged some tribunals, it has also proposed to regulate the appointment process of officers of tribunals. The amendments propose that the government may make rules for qualifications, appointments, term of office, salaries and allowances, resignation, removal and other conditions of service for these tribunals including chairperson, vice-chairpersons and members of specified tribunals, appellate tribunals, and other authorities. This has raised the apprehension for bigger executive role in the affairs of tribunals.

Challenging the constitutional validity of finance Act a writ petition was filed by Mr. NipunSinghvi before Gujrat High Court. The petitioner has requested the court that the provisions of the finance Act, particularly sec. 156 to Sec. 189, which relate to certain laws to merge tribunals and the appointment of their member, should be held as unconstitutional because it violates the doctrine of separation of power and independence of judiciary.[8]

Sec. 156 to 189 of the Act and the Tribunal, Appellate and other Authorities (Qualifications, Experience and other conditions of Service of Members) Rules, 2017 were further challenged by Madras Bar Association.[9] The petition contends that these provisions are not matters relating to money bill and hence should have been legislated through separated legislations and bills with the assent of Rajya Sabha.

The petition says thatthe Lok Sabha has firstly certified a Financial Bill as a Money Bill and thereafter adopted the special procedure laid down for Money Bills in Article 107 of the Constitution and effectively negating any sort of interference from the Rajya Sabha and

Council of States. It is thus submitted that when proceedings which are tainted on account of substantive illegality or unconstitutionality, the same cannot be immune from judicial scrutiny and review. Since the Finance Bill, 2017 was wrongly voted as a Money Bill despite the fact that it is not, the passing of the Finance Bill, 2017 is illegal, invalid and a fraud on the Constitution".

In the philosophy of Indian constitution, amending powers of a statute by parliament are subject to only 'basic structure doctrine' as propounded by Supreme Court in the famous case of Keshvanand Bharti. Extent and ambit of the term 'basic structure' was left open to be decided in each case by the constitutional courts. Madras bar Association has argued that the present Finance Act, 2017 insofar as it amends the structure and re-organisation of various Tribunals including the 19 Tribunals set out in the Schedule of the Impugned Rules, 2017 is unconstitutional and violative of the basic structure of the Constitution. The impugned provisions and the Impugned Rules, 2017 violate the principles of separation of powers which is not only part of basic structure but also an elementary component of the rule of law.

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[8]TNN, Merger of Tribunals through Finance Act Challenged in High Court, June 29, 2017 https://timesofindia.indiatimes.com/city/ahmedabad/merger-of-tribunals-through-finance-act-challenged-in-hc/articleshow/59359861.cms

[9]Apoorva Mandhani, 'Any Appointments to 19 Tribunals Under Finance Act Would be Subject to Outcome of Challenge: Madras HC'June 29, 2017

http://www.livelaw.in/appointments-19-tribunals-finance-act-subject-outcome-challenge-madras-hc/

Writ Petition 15147 Of 2017 Madras Bar Association v. Union Of India.

The Information Technology Act, 2000 was passed in the wake of UNCITRAL Model Law particularly to give effect to provisions relating to e commerce and related issues. However, Indian Legislature back then had chosen to enact an exhaustive law to cover maximum issues relating to Information Technology and Internet. The Act was granted overriding effect on other statutes.[10] Information Technology Act was first amended in 2008 which came in effect in 2009. Amendment in the IT Act in 2008 has followed the same procedure as envisaged for passing of a bill in the Constitution. Second amendment in the Information Technology Act was made through Finance Act 2017 which is a money bill.

Comparing it with *Mohd. Saeed Siddiqui case*, where validity of second amendment bill was sought to be established on the ground that first amendment bill was also passed through money bill, will brings us at a confusing state. If we go by the same logic with regard to second amendment in Information Technology Act, it fails to follow the process adopted in the first amendment.

I. CONSTITUTIONALITY OF INCLUSION OF NON MONEY MATTERS IN MONEY BILL

Use of the word 'only' in Article 110 is important one. A bill can be called as money bill 'only' if it incorporates certain specific matters. During the constituent assembly debates Mr. Ghanshyam Singh Gupta argued for removal of this term but his demands were

rejected. It shows that constitution makers were of the view that money bills has limited ambit and separate provision for money bill were for specific purpose. These provisions and procedures cannot subvert other parts of the constitution. The arguments raised by G.V. Mavalankar, the first speaker of House of the People, that the word 'only' must not be construed so as to give an overly restrictive meaning is naïve one. He was of the view that matters enumerated in Article 110 are the 'core' matters. While dealing with these 'core' matters the money bill may touch other ancillary or closely connected issues. But most of matters (as discussed above) included in finance Act 2017 are either not connected or remotely connected with the core matters therefore not making a sufficient nexus with the preamble of the said Act.

I. CONCLUDING OBSERVATION

In the light of said observation it may be said that inclusion of non money matters in money bill which do not establish sufficient connection with matters enumerated under Article 110 is a blatant misuse of constitutional silence. As discussed above, speaker`s decision being a qualified privilege need to be judged at occasions when settled constitutional procedures and norms are avoided. The discretion casted on the speakers has to be exercised judiciously and mere rubber stamping of such bills as money bill has resulted into violation of various rights such as right to caste vote, right to information, right to object etc. of the Upper House members. Therefore, in such matters where there is gross misuse of procedure Court must intervene and restrain the legislature to act against the constitutional objectives and democratic norms.

[10]According to Sec. 81 of the Act, "The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 (14 of 1957) or the Patents Act, 1970 (39 of 1970).

SENTRY APPROACH OF JUDICIARY FOR THE PROTECTION OF ENVIRONMENTAL POLLUTION IN INDIA: A BIRD'S EYE VIEW

Dr. Sukhwinder Singh*

Abstract

Indian democracy is based on three pillars which are Legislature, Executive and Judiciary. Separation of powers amongst these three bodies is also a distinct feature of Indian Constitution. In reality it is very tough to stop interference of legislature and executive into the functions of each other. So in present times judiciary can be considered as a sole body which can create the balance.

Courts in India have played a very crucial role to prevent environment from pollution. Period of 1970s and 80s can be marked as active period of legislation relating to environmental protection. And this time period is also remembered for the active role played by the courts in India for the protection of environment. To boost up the awareness and to remove hindrances, concept of Public Interest Legislation was introduced in this period only, when rule relating to locus standi was relaxed. Supreme Court as well as High Courts at State level passed various orders to curb the problem of pollution. With the mushroom growth of industrial establishments in India, discharge of effluent into rivers and emission of smoke also increased which causes the environmental pollution at alarming level. This piece of research is a bonafide attempt to have a glance at principles propounded and recent trends of Indian judiciary for the protection of environmental pollution in India

Key words

Pollution, Environment, Judiciary, Industrialisation.

WRIT JURISDICTION TO DEAL WITH ENVIRONMENTAL ISSUES:

Supreme Court and various High Courts passed most of the orders for the protection of environment while acting under its writ jurisdiction. It is the beauty of Indian Constitution that not only considers the right to healthy environment but also provides for the instrument to enforce the protection.

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1.1 Writ Jurisdiction of Supreme Court of India:

Enforcement of fundamental rights given under Part-III through writ jurisdiction of Supreme Court is provided under Article 32. Right to approach the Apex Court of country for the enforcement of fundamental right is itself a fundament right. Importance of this fundamental right is summed up by Justice Gajendragadkar,[1] he observed that it is the Article 32 because of which Supreme Court is considered as protector and guarantor of fundamental rights as enshrined in Part-III of Indian Constitution. Dr. Bhim Rao Ambedkar also considered this provision as the soul of the Constitution. In the exercise of its writ jurisdiction Supreme Court can pass following writs:

a) Habeas corpus

b) Mandamus

c) Quo Warranto

d) Prohibition

e) Certiorari

In *MC Mehta v. Union of India*,[2] Supreme Court while discussing the ambit and scope of Article 32 of the Indian Constitution observed that it is open for the court to adopt any procedure for the protection of the fundamental rights. Court is empowered to pass any order, direction or writ so that fundamental rights remain under the protective shield. Article 32 is injunctive as well as remedial in nature.

In *MC Mehta v. Union of India*,[3] it was contended that since the petitioner was not a riparian right holder, his writ petition under Article 32 is not maintainable. It was held by the Supreme Court that although petitioner was not a holder of riparian rights but being a public spirited person he is concerned with the infringement of rights of those persons who are living around the river Ganga. So the present writ petition under Article 32 of the Indian Constitution is maintainable.

1.2 Writ Jurisdiction of High Courts:

To enforce fundamental rights, like Supreme Court, all the High Courts are also conferred with the power to issue writs.[4] In this aspect all the High Courts are having concurrent jurisdiction as of Supreme Court. High Courts are conferred with vast powers in this regard as compared to the Supreme Court of India. Under Article 226, Writ jurisdiction of High Court can be invoked for the purpose of enforcement of fundamental rights as well as for any other purpose. High Courts have played an important role for the implementation of principles contained in Article 48A and Article 51-A(g).

In *V. Lakshmipathy v. State*,[5] plan for the establishment and construction of various industrial establishments on the land meant for residential purposes was challenged under Article 226 of the Indian Constitution. It was contended that establishing

[1] Premchand Garg v. Excise Commissioner AIR 1963 SC 996

[2] AIR 1987 SC 965

[3] AIR 1988 SC 1115

[4] Constitution of India; Article 226

[5] AIR 1992 Kar 57

industries in residential area will violate the right to life under Article 21 of the residents. State contended that this case is not fit to be entertained under writ jurisdiction of high court. High Court making the point clear observed that Article 226 is very apt provision under which any person can seek the help from judiciary for the protection of fundamental rights.

2 PUBLIC INTEREST LITIGATION:

It is general rule that only affected person can seek remedy from any court of law, which means that he shall have locus to institute a case. The concept is based on the proposition that remedies are always associated to rights. So to claim remedy one must be vested with the right. No person can approach the court for the enforcement of other person's rights. This proposition caused hindrance when rights are of public nature. Sometime the persons vested with the rights found it very difficult to approach the court for the enforcement of their fundamental rights for one or other reason. Concept of Public Interest litigation provides solution to this problem. According to this concept any public spirited person can file a case in the court of law for the enforcement of public rights and it is not mandatory for him to prove his locus. Concept found its origin in America. In India it was Justice P.N. Bhagwati who used this term for the very first time in early 1980s.[6] With the introduction of Public Interest Litigation, Supreme Court now becomes Peoples' Court.

Earlier trends of the concept of Public Interest Litigation favoured those who were incapable to institute suits for the protection of their fundamental rights. With the passage of time Public Interest Litigation has transcended its limitation. Now a variety of case including the cases for the protection of environment can be filed under Public Interest Litigation.

In *Sachidanand v. State of West Bengal*,[7] Supreme held that Public Interest Litigation is a sharp edged weapon and it must be used with caution and care. In this regard court

mentions following points to be considered

a) Areas which are purely under the jurisdiction of Executive or Legislature, must not be encroached under the guise of Public Interest Litigation

b) Whenever any Public Interest Litigation came before the courts of law it must be dealing with the injury inflicted to general public. There is no scope to institute Public Interest Litigation for the enforcement of legal rights which are connected to individuals.

c) Litigations in which personal or self interest is involved must not be considered as Public Interest Litigations

d) Public Interest Litigation can be used by petitioners to settle personal rivalries, Courts must ponder upon these cases and shall not consider those petitions as Public Interest Litigations

e) Petitioner must be a public spirited person

[6] In the case of S.P. Gupta v. Union of India 1981 (Supp) SCC 87

[7] AIR 1987 SC 1109

In recent times Public Interest Litigation successfully addressed various issues to curb the problem of water pollution. Some are

1. Protection of Rivers
2. Protection of Ground Water
1. Prevention of illegal mining
2. Prevention of discharge of trade effluents
3. Problem caused by tanneries
4. Problem caused by Chemical Factories

Public Interest Litigation also provide us various forums, some are:-

1. Animal Protection forums
2. Rural Voluntary Associations
3. Urban Social Activists
4. Environmentalists
5. Welfare Forums
6. Forums to address environmental issues
7. Tribal Welfare Societies
8. Water Protection Bodies

3 PRINCIPLES PROPOUNDED AND ADOPTED BY INDIAN JUDICIARY

Various efforts are made by Indian judiciary to overcome the menace of pollution in India. In doing so various principles are also propounded for the effective implementation of environmental related provisions. Some of them are discussed below:

3.1 CONCEPT OF ABSOLUTE LIABILITY

Until 1987, rule of strict liability as propounded in *Raylands v. Fletcher*[8] was prevalent in India. In 1984 when dangerous gas from Sriram Fertilizers Company escaped, it was held that a new set of doctrine is in need to cover these kinds of cases so that speedy remedy can be given to the affected persons.[9] Unlike the principle of strict liability, principal of absolute liability is not having any kind of exception.

3.2 Polluter Pays Principle

This principle provides that if any pollution is caused in the process of any manufacturing, industrial operations or other activities, the responsibility for the same shall be borne by the person incharge of such activity. Basically this principle found its birth in France, where the head office of Organisation for Economic Cooperation and Development is situated. It is an intergovernmental body in which following countries

[8](1868)LR 3 HL 330

[9]M.C. Mehta v. Union of India 1987 SCC(1) 395

are member:

i.	Austria	xx.	Latvia
ii.	Australia	xxi.	Lithuania
iii.	Belgium	xxii.	Luxembourg
iv.	Canada	xxiii.	Mexico
v.	Chile	xxiv.	Netherlands
vi.	Colombia	xxv.	New Zealand
vii.	Czech Republic	xxvi.	Norway
viii.	Denmark	xxvii.	Poland
ix.	Estonia	xxviii.	Portugal
x.	Finland	xxix.	Slovakia
xi.	France	xxx.	Slovenia
xii.	Germany	xxxi.	South Korea
xiii.	Greece	xxxii.	Spain
xiv.	Hungary	xxxiii.	Sweden
xv.	Iceland	xxxiv.	Switzerland
xvi.	Ireland	xxxv.	Turkey
xvii.	Israel	xxxvi.	England
xviii.	Italy	xxxvii.	United States of America
xix.	Japan		

Although this principle was adopted at international level in 1970s, but in India principle was implemented and quoted in *Indian Council for Enviro-legal Action v. Union of India*.[10] Court observed that while conducting any activity in relation to hazardous substances if any damage is caused than the person incharge of the activity must pay for the damage irrespective of the precaution take by him. Court further added that offending industry must be made responsible to repair the damages caused and observed that Section 3 and Section 5 of the Environment Protection Act sufficiently empowered the Governmental Bodies to implement this principle. In Tamil Nadu Tanneries Case[11] for the first time, Apex Court merged Polluters Pay Principle and Principle of Absolute liability, and observed that both these principles are necessary to implement the concept of sustainable development. Although there is clear cut distinction between these two principles, Polluters Pay Principle observes no boundaries for its implementation but it is not so with the application of principle of

[10]AIR 1996 SC 1446

[11]Vellore Citizens Welfare Forum v. Union of India AIR 1996 SC 2715

Absolute Liability. Absolute Liability can only be imposed when accident happens involve the handling of hazardous substances.

In *Re Bhawani River- Sakthi Sugar Limited*[12] attention of the court was drawn towards the deterioration of water of river Bhawani. Untreated industrial effluents were discharged into the river making its water unfit for domestic use. Supreme Court relied on Polluters Pay Principle and makes it clear that public interest should always be paramount over the development. Court passed the order against the polluter to pay for the restoration of environment.

In *Uttar Pradesh Pollution Control Board v. Mohan Meakins Ltd*.,[13] Respondent Company was discharging untreated effluent of the establishment into river Gomati, which made the river polluted and its water unfit for human consumption. Polluters demanded that they must be absolved for their liability as the case was pending from last 17 long years. Court, while implementing Polluters Pay Principle held that there is no exception under this doctrine and if any other officer is found to be indulged in the activity of polluting the water, he can also not be absolved.

3.3 Precautionary Principle

This principle was conceived by the apex judicial body of the country in *Vellore Citizens Welfare Forum v. Union of India Case*.[14] This principle is a distinct part of the concept of sustainable development. This principle is based on the proposition that prevention is better than cure. It is easy and desired to take appropriate steps to prevent anticipated pollution. Court suggested following elements in this regard:

a) All authorities whether governmental of statutory must anticipate and prevent environmental degradation

b) In the event of serious irreversible damage, prevention of environmental degradation shall not be postponed on the pretext of lack of scientific instruments[15]

c) Occupier of the industrial establishment or actor shall have onus of proof to show that actions taken by him are environmentally benign

This principle should be applied by the government and by other concerned persons whenever the establishment of any industrial establishment is proposed. So in this regard this principle is a policy and not a law, but for the implementation of this policy only strict laws can pave the way.

In *Vijaya Nagar Education Trust v. Karnataka State Pollution Control Board*,[16] High Court while applying the Precautionary Principle emphasised on the importance of this Principle. Court held that application of Precautionary Principle is the part of constitutional mandate while pondering over the cases relating to environmental issues.

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[12](1998) 6 SCC 335

[13](2000) 3 SCC 745

[14]AIR 1996 SC 2715

[15]Principle 15 of Rio Declaration on Environment and Development, 1992

[16]AIR 2002 Kar 123

Another important case which emphasised the importance of Precautionary Principal is *A.P. Pollution Control Board v. M.V. Nayudu*.[17]

3.4 Doctrine of Public Trust

According to well settled Roman law *Res Nullius* belonged to nobody, *Res Publicae* belonged to the State and Res Communes belonged to everyone. So far as this doctrine is concerned it is based on the concept that air, water and other natural things are gifted to humans by Mother Nature so ownership of all these things must not lie with specific individuals or bodies. Availability of water should not be dependent upon the status of any person in the society.

It was the case of *M.C. Mehta v. Kamal Nath*[18] in which the doctrine of public interest was observed. In this case a motel was proposed to be constructed on the bank of beas river. For which forest area was supposed to be utilised. Plans were also there to divert the water of river which can lead to the grave deterioration of the environment. Forest area was taken on lease and agreements were formed between State Government, Central Government and the intended company. Supreme Court interfered and issued orders to quash lease agreement and also instructed to state government that the area must be restored to its original and natural state. State Government was also held liable for the breach of public trust by making agreement for the lease of intended forest area. Court added that water of river belongs to public and must be kept available for their use.

In *M.P. Ram Babu v. Divisional Forest Officer*,[19] question for consideration before Andhra High Court was to determine the ownership of the underground water. Matter was related to the exploitation of underground water by making excessive use of the same. Court applied the the Doctrine of Public Trust and answered the question. Court held that underground water belongs to the State. Even if no specific law is made for the regulation of this water, its use is subject to the regulations of the State. Like a riparian owner can only use the water, he cannot change the flow of the water and he cannot pollute the water as well. So is the case with underground water. Every person is under obligation to protect this water.

In *Hindustan Coca Cola Bevarages Private Limited v. Perumatty Gram Panchayath*,[20] Dotrine of Public Trust was again invoked. In 1999 Coca Cola Company established its plant in the tribal area of Plachimada. Licence was granted to the company for the extraction of the water. 60% of the population was dependent over agricultural functions. This area was called as the rice bowl of Kerala so for the cultivation of paddy crop they need plenty of water which was not in scarcity at that time. Coca cola company drawn 1.5 million litres of water which produces scarcity of the same in the region. Also the ground water gets polluted because of the industrial operations. Water samples were analysed and it was found that water now contained cadmium and carcinogen which are toxic for humans.

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[17] AIR 1999 SC 812

[18] (1997) 1 SCC 388

[19] AIR 2002 A.P. 256

[20] 2005 (2) KLT 554

Coca Cola Virudha Janakeeya Samara Samiti was formulated to oppose the industrial activities of the company. High Court observed the Doctrine of Public Trust and held that ground water is public property and nobody can pollute it or use it in unregulated manner.

Appeal was instituted in Supreme Court, where recently on 15 July 2017, Coca Cola Company withdraws its proceedings in this 12 year old case by stating that they are not willing to resume the production.

3.5 DOCTRINE OF INTERGENERATIONAL EQUITY

The doctrines states that everyone belonging to present generation is duty bound to utilise natural resources in such a way that it can remain available for future generations. This doctrine is similar to the concept of sustainable development, under it is made clear that development shall not be made at the cost of our sustainability. Brundtland Commission's Report which is titled as "Our Common Future" emphasized on the intergenerational equity. Report also makes an appeal to all that everybody must adopt a life style which should be within the ecological parameters and marks it as the requirement of Sustainable Global Development.

4 RECENT IMPORTANT DECISIONS

Some important decisions are being given by the judicial bodies recently to protect environmental pollution. Some are discussed below

In *Ayisha w/o Late Komu v. District Collector, Kalpetta & other*,[22] matter came before Kerala High Court, in which a restaurant and bakery were carrying on some unregulated activities because of which water of a well situated in the adjacent house gets contaminated. Restaurant owner had not acquired necessary permissions for the local authorities. Court passed interim order to stop the operation of the restaurant till he acquires the necessary permission on fulfilment of conditions in this regard.

In Court on its own *Motion v. State of Himachal Pradesh & others*,[23] a letter was received by the Himachal Pradesh High Court and Court considered it as a writ petition under Article 226 of the Indian Constitution. A cement factory called ACC Cement factory was in operation in village Salapar of district Mandi. Allegations were levelled on the said cement factory and the governmental authorities not adopted proper measures to check water pollution and the rehabilitation of the villagers. An affidavit in this regard was demanded from the Deputy Commission of Mandi, who admitted that nearby villages are facing pollution problem though all the mandatory permits were taken by the said cement factory.

Court held that issue of environmental pollution is of a grave concern. In the light of affidavit filed by the Deputy Collector of Mandi, the grievances of the residents of the village Salapar must be addressed by the State in a given time period. For this, following orders are passed

[21] Available at http://www.un-documents.net/our-common-future.pdf (Visited on 25.06.2018)

[22] 2018 Indlaw Ker 541

[23] 2018 Indlaw HP 368

i. Chief Secretary of the State shall constitute a committee for the said purpose

ii. Committee shall include expert officers from following departments

a. Department of Environment, Science and Technology

b. Department of Health

c. Himachal Pradesh State Pollution Control Board

d. Department of industries

iii. Committee shall access the impact of industrial operation on the environment and health of the residents

iv. An action plan must be prepared by the committee and shall also be implemented to protect the environment

In *Mariyapuram Poura Samit v. Leo V. J. and others*,[24] because of the industrial operations of a factory, water of all the wells in the region got acidic. Court taking the cognizance of this grave and serious mater held that State pollution Control Board must identify such wells and affected persons. Directions to the occupiers of the factory to clean the wells to eradicate pollution from them are passed and they are also directed to supply drinking water to the affected people till the work of cleaning is not done.

In *Abhinandan Stone Crushers v. State of Karnataka and another*,[25] petitioners were carrying on the operation of stone crushing under a valid licence in this regard. After the expiry of the licence, an application was made to the Deputy Commissioner for the extension of the licence, which was rejected by the Deputy Commissioner. This writ petition was filed by the petitioner for the issuance of a mandamus writ for the grant of further extension. It was observed that various complained about the pollution of water and air was forwarded by the residents of nearby villages. It was also contended by the respondent that rejection of the application is decided because a study of the impacts of crushing activities on the environment is in need. Court held the preservation of environment is important so decision of Deputy Commission is sound.

5 CONCLUSION

When governmental bodies failed to implement the legislative and policy framework, the whole burden shifts to the judiciary, which unfortunately is already overburdened. Still judiciary is playing active role for the protection of environmental pollution. It is pertinent to mention here that number of separate judicial and quasi judicial bodies is in need if we are to deal with the long pendency of cases. Unfortunately judiciary is forced to step into the shoes of legislature by framing various policies for the protection of environmental pollution.

[24] 2018 Indlaw Ker 402

[25] 2018 Indlaw Kar 4032

A CRITICAL ANALYSIS OF THE APPLICABILITY OF THE RULE IN SMITH .v. SELWYN IN COMMON LAW COUNTRIES: A CASE OF NIGERIA

LEKE BASHIR IJAIYA

Abstract

Nigeria is one of the common law countries that received the bulk of English law into her legal system. One of such laws received in Nigeria is the Rule in Smith v. Selywn through the doctrine of stare decisis. The rule is all about hindering access to court of a citizen to ventilate his grievances in a civil court while a criminal charge is on-going simultaneously in a court of law on the same subject-matter. The application of the English received law is however subject to local circumstances premised upon local values, traditions, beliefs, norms and customs. The aim of this paper is to examine the extent of the applicability of the Rule in Smith v. Selywn vis-à-vis the judicial powers of court as enshrined under the Constitution of the Federal Republic of Nigeria 1999 (as amended). It is also to examine the right vested on a citizen to seek civil relief in court simultaneously as the wrong done him is being prosecuted by the appropriate State apparatus. In Nigeria, it is discovered that the Rule though died and buried in England since 1967 but still rule us from the grave. Citizens are hindered to ventilate their grievances in a civil court while criminal charge is slammed on the accused/suspect Ii is therefore suggested that every citizen should have access to court unhindered and more importantly, the legislatures are commended to enact a law to abolish the Rule in its entirety in our judicial system

Key words

Civil law, Fraud, Contract

I. INTRODUCTION

The intendment of the Rule in Smith v. Selwyn[1] is primarily to avoid the compounding and the concealment of a felony hence it dictates a hold on further proceedings in an action for damages founded on a felonious act alleged to have been committed by the defendant against the plaintiff until the defendant has been prosecuted or a reasonable excuse offered for his non-prosecution.[2] That is to say that the rule forbids concurrent hearing of a civil action as well as a criminal

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[1][1914] 3KB 98

[2]Ibe v. Ibhaze (2016) LPELR-4156 (CA)

prosecution arising from the same incident unless the plaintiff can explain that the delay in prosecution was due to no fault of his[3]

The concept of non-simultaneous prosecution of a criminal charge and a civil suit in respect of the same transaction was introduced into the common law jurisprudence by the English case of *Smith v. Selwyn*. The Rule is founded on public policy which required that the offenders against the law shall be brought to justice and for that reason a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property or any equivalent or compensation for a felony without suit and off course be allowed to maintain a suit for that purpose.[4]

The history of the question involved in the case of *Smith v. Selwyn* shows that it has at different times by different authorities been resolved in three distinct ways: - namely (i) that the private wrong and injury has been entirely merged and drowned in the public wrong and therefore no cause of action ever arose and could arise (ii) that although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public rights should have been vindicated by prosecution of the felon; and (iii) that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon, but that there is a duty imposed upon the injured person, not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. These three aforementioned ways were enunciated in the cases of *Midland Insurance Co v. Smith*[5] and *Ndibe v. Ndibe*.[6]

It is essential to note that in none of three stated instances or ways of application of the rule in *Smith v. Selwyn* was the criminal prosecution ever struck out, stayed or prevented from proceeding because of a pending civil litigation on the same transaction of the criminal charge. It was always the civil action that had to await the criminal prosecution. This was illustrated in the case of *Ndudi v. Anglo*,[7] *Haco v. P. V. Udeh*[8] and *Ibekwe v. Pearce*.[9] Further, the rule was considered anachronistic and was abolished in England by the Criminal Justice Act[10]

2. 0. JUDICIAL POWERS OF COURTS IN NIGERIA

The judicial power of courts in Nigeria[11] is enshrined in the Constitution of the Federal Republic of Nigeria. The jurisdiction of the court is a hard matter of law that can only be determined in the light of the enabling statute. A court of law cannot add to or subtract from the provisions of a statute. As a matter of law, a court must blindly follow and apply the jurisdictional limits and limitations as contained or

[3] Ibid

[4] Ibid

[5] (1880-81) 6 QBD 561

[6] (1998) 5 NWLR (Pt. 551) 632)

[7] (1958) NRNLR 96;

[8] (1959) NRNLR 61

[9] (1960) NRNLR 12

[10] Criminal Justice Act 1967; Section 1

[11] Id, Section 6 (6) (a) & (b)

provided in a statute. The statute is the master and all that a court of law can do is to interpret the provisions of a statute to obtain or achieve the clear intentions of the lawmaker. A court cannot do more than this.[12] Thus, there is no statutory or principle of law that forbids a trial court from hearing a criminal charge brought against an accused person on the ground of there being a pending civil litigation against the accused person for the same transaction[13]

The words judicial power was defined by the Court of Appeal in the case of *Mbanefo v. Molokwu & Others*[14] as the right to determine actual controversies arising between diverse litigants duly instituted in courts of proper jurisdiction. Also, it is also described in the case of *Anakwenze v. Aneke & Others*[15] to include all the inherent powers and sanctions of a court of law puts the matter beyond that it has power to deal with anyone who flouts its orders. It is also described as the power that a sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects whether the right relates to life, liberty or property

Furthermore, the right of an individual to invoke judicial powers especially in a matter that affects his person causing him injury was fortified in the case decision of the Supreme Court in the case of *Attorney-General Federation & Others v. Abubakar & Others*[16] which is to the effect that, an individual is at liberty to invoke judicial power if he can show that either his personal interest will immediately be affected by the action or that he had sustained injury to himself and which interest is over and above the interest of the general public. This being the case, an individual whose interest has been affected can simultaneously seek civil relief while criminal charge is slammed on an accused/suspect

3.0. Application of the Rule in Smith v. Selwyn in Nigeria

It is essential to note that, there are two kinds of proceedings under the Nigeria legal system namely, civil and criminal proceedings. The difference in the two proceedings is appreciated in the manner of proving each proceeding in the court of law. Whereas, a civil proceeding requires proof on the preponderance of evidence, criminal proceedings require proof beyond reasonable doubt. The time within which criminal matters are prosecuted in Nigeria calls for concern and it will work injustice on a victim if he has to wait till the final determination of the criminal charge against the accused/suspect before he brings action for remedy against the wrong done him. Also, the issue of limitation period is another factor that needs be considered. An aggrieved party needs to bring and seek redress in some civil wrongs within a time prescribed by law. Failure to explore the right to so do may bar him from ever litigating on the issue if he waits to the end of the determination of a criminal charge.

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[12]Atiku v. Bodinga (1988) 2 NWLR (Pt. 76) 369; Oloba v. Akereja (1988) 3 NWLR (Pt. 94) 508 and Anibi v. Shotimehin (1993) 3 NWLR (Pt. 282) 461

[13]Federal Republic of Nigeria v. Lalwani (2013) LPELR-20376 (CA)

[14](2008) LPELR-3696 (CA)

[15](1985) LPELR-481 (CA)

[16](2007) LPELR-3 (SC)

To further illustrate the applicability of this rule, the Court of Appeal of Nigeria in the case of *Okafor & Another v. Madubuko & Another* [17] was confronted to interpret Section 9 of the Actions Law of Anambra State. Ubaezonu, JCA has this to say

"This appeal turns entirely on the interpretation of Section 9 91) of the Actions Law of Anambra State. It provides: "9 (1) Subject to any written law in force in the State where an act constitutes a felony and at the same time infringes some right of, or causes damages to a person, the person whose right is thus infringed or who thus suffers damages shall not bring an action against the person doing the felonious act until such person shall have been prosecuted for the felony, unless satisfactory explanation is given for non-prosecution". The above provision of the Statute seems to me to be an importation into our law of the old English rule enunciated in *Smith v. Selywn* (1914) 3 K.B 98 popularly known as the Rule in *Smith v. Selywn*… It is surprising that a Rule which was abolished in England in 1967 was copied into the Statute Book of Anambra State in 1986-Nineteen years after it had been abolished in England. It is no wonder that the learned brother Tobi JCA in *Veritas Insurance Co. Ltd v. Citi Trust Investment* (1993) 3 NWLR (Pt. 281) 349 at 365 stated that the rule does not apply in this country and that… it does not even seem to be a sensible thing to stop a plaintiff from instituting an action merely because the criminal action in the same matter has not been prosecuted.

The purport of the above is that the entire policy behind *Smith v. Selwyn* will work injustice, particularly in Nigeria where it, at time stakes so much time to apprehend an accused person. And what is more, proof of criminal matter as stated earlier is quite different from proof of civil matter and there is really no justifiable reason why the two should be so related in terms of prosecution. Thus, the rule in *Smith v. Selywn* has been dead and buried in England but in Nigeria, it seems to rule us from the grave. It is a rule that does nobody any good. It is anachronism.

Another classical example of the sort of problem is the case of *Ndibe v. Ndibe*[18] where a criminal act of assault and battery was committed against the Plaintiff in May 1991. A report was duly made to the Police but the Police did not immediately commence prosecution until almost 5 years had elapsed. The Plaintiff sued, called his witnesses and closed his case. The Police thereafter commenced prosecution. When the appellant was to open his case, he filed a motion for stay of proceedings pending the completion of the criminal prosecution. The High Court refused a stay of proceedings at that stage. On appeal, the Court of Appeal per Salami JCA in a well reasoned and properly articulated judgment dismissed the appeal. Supposed the fact in this case disclosed a felony at the time the plaintiff commenced his action almost 5 years after the commission of the act, the plaintiff in the case could claim to have come under the 2nd limb of Section 9 (1) of the Actions Law of 1986 of Anambra State. When the police subsequently commenced prosecution, what does the plaintiff do? Withdraw his action? No. His action will either continue or be stayed pending the completion of the prosecution. The discretion of the court shall be paramount depending on the circumstances of the case. In this case, the court rightly refused to stay proceedings holding that it would be inequitable to do so in the circumstances of the case

[17](1999) LPELR- 5550 (CA)

[18](1985) 5 NWLR (Pt. 551) 632

Furthermore, in the case of Ibe v. Ibhaze[19] , Adefope-Okojie JCA stated that

"…where a person is accused of criminal offence is accused of a criminal offence, he must be tried in a Court of law where the complaint of his accusers can be ventilated in public and where he would be sure of getting a fair hearing. His Lordship, Fasanmi JCA, was however emphatic that he should not be misconstrued in standing against disciplinary proceedings where criminal allegations are involved, but that "once criminal allegations are involved, care must be taken that the provisions of Section 33 (4) of the Constitution are adhered to." That case is however, no authority for the proposition that where criminal proceedings are brought, the same must be concluded before civil proceedings can be commenced. In *Onoh v Maduka Enterprises (Nig) Ltd* (2007) 13 WRN Page 176 at 186 lines 20-25, it was held by Ogebe JCA (as he then was)as follows: "... once a claimant has set in motion the prosecution of the felon by ensuring that the matter is charged before a Court, he has accomplished his role in prosecuting the matter. The outcome of the prosecution is not within his control and I cannot see the rationale for him to await the outcome of the prosecution before he commences his civil action. See Okonkwo a Obunlesi Supra". Underlining Mine. In the case referred to above by Ogebe JCA (as he then was) of *Okonkwo v Obunseli* (1998) 7 NWLR (Pt.558) 502, the dispute was whether the Respondents, as Plaintiffs in the Court below, were right in instituting a civil action against the Appellants (Defendants) while the criminal prosecution of the Appellants was still going on at the Chief Magistrates Court or whether the Respondents should have waited for the completion of the said prosecution before instituting the civil action. The Court of Appeal (Enugu Division) in the lead judgment of Akpabio JCA held at page 572 Para A-B as follows: "On the totality of the foregoing, I am of the firm view that this appeal has been a hopeless waste of judicial time, as the appellants have been unable to point to any section of any written law that stipulates that unless and until the Appellants have been "prosecuted to conclusion" no civil proceedings can be instituted against them in respect of the same subject matter." Underlining Mine Tobi JCA (as he then was), concurring, added at page 512:- "...the entire policy behind Smith v. Selwyn will work injustice particularly in Nigeria where it, at times, takes so much time to apprehend an accused person. And what is more, proof of a criminal matter is quite different from proof of a civil matter and there is really no justifiable reason why the two should be so related in terms of prosecution." From the foregoing authorities, it is clear that there is no law that precludes the Respondent from instituting the action before the lower Court, even though there was pending a criminal prosecution against some of the Appellants"

There are authorities of our Court of Appeal that are of the view that the rule is no longer applicable in Nigeria - *Veritas Insurance Co Ltd. v. Citi TrustInvestment*,[20] *Ndibe v. Ndibe* (supra), *Okafor v. Madubuko* (supra) and *Ekerete v. United Bank for Africa*[21] Thus, apart from specific local legislations such as the Tort Law of Anambra State, as was noted by the Court of Appeal in *Ndibe v. Ndibe* (supra), *Okafor v. Madubuko* (supra), there is nothing preventing a simultaneous prosecution of a criminal charge along with a civil suit arising from the same transaction. And even where such specific local legislations

[19](2016) LPELR-41556 (CA)
[20](1993) 3 NWLR (Pt 281) 349,
[21](2005) 9 NWLR (Pt 930) 401

exist, it is the civil matter that awaits the criminal prosecution, and not vice versa.

The application of the rule has since stopped in England. However, the rule has been followed in a number of cases in Nigerian Courts. Such cases include (1) *Ojikutu. v.African Continental Bank*[22] . (2) *Haco Ltd. v. Udeh*[23] and (3) *Fulani v. Idi*[24]

In the case of *Alao v.Nigerian Industrial Development Bank*[25] , the appellant in his brief of argument contended that the rule, is still in force in Nigeria as no decree or act has been promulgated repealing it nor has the Supreme Court, the highest court of the land, overruled its earlier decisions where in which it applied the rule. On the other hand, the respondents, through its brief of argument contended that the rule has constituted a clog in the wheel of proper administration of justice and this is an anachronism. It defeats the end of justice. It further contended that the combined effect of Section 5 of the Criminal Code Act 1958 (now Cap 77 of the Laws of the Federation, 1990) and Section 8 of the Interpretation Act is that a pending criminal matter must never be allowed to stand in the way of an aggrieved person from seeking a redress in the court of law. Section 5 of the Criminal Code provides: "When by the code any act is declared to be lawful, no action can be brought in respect thereof. Except as aforesaid, the provisions of this Act shall not affect any right of action which any person would have had against another if this Act had not been passed." Section 8 of the Interpretation Act 1964 provides: "An enactment shall not be construed as preventing the recovery of damages in respect of injury attributable to any act by reason only of the fact that the enactment provides forfeiture or punishment in respect of the act." Let me say straightaway that Nigerian Courts preserve and follow, stricto sensu, the common law doctrine of stare decisis - which literally translated means that a lower court must for all times hold itself bound by the decisions of a higher court or better put by the decisions of the Highest court of the land until they are seen to have been overruled. The highest court of our land undoubtedly, is the Supreme Court. Such decisions of the Supreme Court can only be annulled by legislation, or a Decree or by rules regulating the practice and procedure as given by the judicial decision of the Supreme Court itself given intra judicially when it is satisfied that its previous decision was reached per incuriam or that it would perpetuate injustice. See *Bucknor-Maclean v. Inlaks Ltd*.[26] . It follows that it is only the Supreme Court, sitting as a full court that can depart from its previous decisions. See *Yonwuren v. Modern Signs (Nig.) Ltd*[27] and *Ojokobo v. Alamu*[28] . I shall now examine the cases in which Nigerian Courts have considered the applicability of the rule in *Smith v. Selwyn*. In *Ojikutu v. African Continental Bank* (supra) which touches on banking transaction and the Supreme Court considered the circumstances for the application of the rule in Smith and Selwyn. In that case the defendant had averred in his statement of defence paragraph 5 thereof thus:- "The defendant avers that there is a written agreement for a loan of £13.000.00 between the plaintiff and defendant and that the said agreement was altered and forged without the knowledge and consent of the defendant." Based on this

[22](1968) 1 All NLR 40;
[23](1959) NMLR 61
[24](1990) 5 NWLR (Pt.150) 311
[25](1999) LPELR- 6673 (CA)
[26](1980) 8-1 1 S.C. 1
[27](1985) 1 NWLR (Pt.2) 244; (1985) 2 S.C. 86
[28](1987) 3 NWLR (Pt.61) 377

averment the counsel for the defendant had, argued before the Supreme Court that the application was sufficient to bring the rule into force. That argument had been overruled by the trial Judge. The Supreme Court said at page 45: "Mr. Ojikutu submitted to us that the principle in *Smith v. Selwyn*...was that the plaintiff must be deprived from benefiting from his felonious act and so could not be permitted to sue if the defendant alleged that he based his claim on a felonious act. We do not see that *Smith v. Selwyn* decided anything of the sort. It was dealing with exactly the opposite situation where a plaintiff was bringing an action against a defendant for damages based on a felonious act of the defendant...No authority was cited to us to show the converse applied and we consider the learned trial Judge was right to reject the submission that *Smith v. Selwyn* could be extended in the way that was suggested." It will be seen from the above quotation that the Supreme Court never held that the rule in *Smith v. Selwyn* was applicable to the case before it. In the recent case of *Okonkwo & Others v. Obunseli & Another*[29] in which the dispute was as to whether the respondents (plaintiffs in the court below) were right in instituting a civil action against the appellants (defendants in the court below), while the criminal prosecution of the appellants was still going on or pending at the Chief Magistrates Court or they should have waited for the completion of the said prosecution before instituting this action, this court (Enugu Division) per the leading judgment of Akpabio JCA said at page 511:- "In my respectful view, I think that the emphasis in both the Torts Law and the Law of Actions Law including even the rule in *Smith v. Selwyn* (supra) itself was on the commencement of prosecution rather than on its conclusion. This is borne out of the fact that even in Section 5 (1) of the Torts Laws 1987 under the last two subparagraphs (b) and (c) set out above, it is not even necessary that any prosecution should have been commenced. Under sub-para. (b) it is sufficient that a mere report is made to the police who fail to prosecute or sub-para. (c) reasonable excuse is offered for failure to prosecute the felony." In the same case Tobi JCA added at page 512 and I quote:- In the light of the state of the statutory laws at the Federal level which make the English Common Law rule in *Smith v. Selwyn* no more applicable in Federal matters it is a matter of some serious concern why Section 9 (1) of the Law of Actions Laws (1981) and Section 5(1) of the Torts Law 1987 of Anambra State should still operate. That apart, the entire policy behind Smith v. Selwyn will work injustice particularly in Nigeria where it, at times, takes so much time to apprehend an accused person. And what is more, proof of a criminal matter is quite different from proof of a civil matter and there is really no justifiable reason why the two should be so related in terms of prosecution." Section 8 of the Interpretation Act 1964 now embodied in the Laws of the Federation 1990 Cap. 192 Section 8(2) thereof which I quoted above is a Federal Legislation: it is unambiguous; the wordings are very clear and straight forward and giving same the ordinary and simple grammatical meaning and connotation which the law enjoins. See *Olanrewaju v. Arewa*[30] the only conclusion I can reach and which I reach is that the English Common Law Rule in *Smith v. Selwyn* is no more applicable in Nigeria. To hold otherwise is to deny an aggrieved person the right to seek a redress in the citadel of justice. The Limitation Law with all its excruciating weight will be allowed to descend on him prostrate having been tied down by that rule. Even in England where process of seeking justice is not tardy as here, the rule in *Smith v. Selwyn* has in their collective wisdom

[29](1998) 7 NWLR (Pt.558) 502
[30](1998) 11 NWLR (Pt.573) 239;

been rendered out of operation. To encourage its application in this country giving the prevailing conditions is to allow for the rolling out of a clog in the wheel of administration of justice

4. 0. Conclusion and Recommendations

Conclusively, it is essential to note that the rule in Smith v. Selwyn has for sometime rule us from the grave since it was died and buried in England in 1967. The rule hitherto forbids and hinders a citizen from access to court simultaneously while a criminal charge is slammed on accused/suspect has been abolished and individual could now access to court to seek civil relief while the criminal charge is on- going. This is really in tune with the powers of the court to adjudicate on all matters between individuals who approach court for relief. It is also in accordance with the provision of the Constitution of the Federal Republic of Nigeria on right of a citizen to gain access to court. The abolishment of the rule regarded to be anachronistic is in tandem with reasoning most especially when the time and resources put together to prosecute criminal cases in Nigeria is unpredictable. Citizen no longer need to await the outcome of the criminal charge before approaching court to seek civil reliefs

It is therefore suggested that every citizen should have access to court unhindered. Citizen needs not to await the outcome of the criminal charge on the same subject-matter before gaining access to court to seek civil reliefs

Also, since the role of the court is to interpret and apply law in the law courts in matters arising between individuals and other authority, the legislatures are commended to enact a law to abolish the Rule in its entirety in our judicial system so that access to court by an aggrieved citizen could become unhindered as being erroneously apply in Nigerian courts

Above all, members of the judiciary are commended to abreast themselves with the trend of the law and stop living in the past. The era of applying archaic principles of law is gone and gone forever. The time is ripe to administer justice on the modern principles of law in our courts so as to continuing to uphold the rule of law and justice

COMPARATIVE ANALYSIS BETWEEN HUMAN TRAFFICKING AND MIGRANT SMUGGLING: INDIAN PERSPECTIVE

Zubair Ahmed Khan*

Abstract

Human trafficking is one of the severe & horrendous offence where blatant violation of basic civil rights is inherent in nature. There are many reports which indicate that hundreds of male, female and children become prey of such crime either in their own nations or different nations. It is quite obvious that such crime-based traffickers are professional in nature and quite acquainted with transport formalities. The acts of commercialized sexual abuse are one of the important basis for trafficking of children and women. Less conviction rate further aggravates the trafficking trade of children &women which is profitable in nature. These particular victims doesn't go brothels by their own, in fact they are taken to such places by organized nexus of trafficking groups who are involved in human sale of trading for many years and further exploitation in the form of sex tourism. This brutish and ruthless nexus of misplaced minors and trafficking of women have to be checked and inhibited through strategic action plans. So it is important to analyze current criminal law regime and assess how so far it can tackle the issue of human trafficking in more sincere &appropriate way. Similarly, Migrant smuggling is also one of serious problem, which has many legal implications. It is understood as the migration of people beyond the political territory of any country through illegal means.

Key words

Human Trafficking, human smuggling, illegal migration, sex trafficking.

INTRODUCTION

The word trafficking itself means those, which are not subject matter of trading, now it has been commercialized & transacted illegally[1]. The trafficking as commercial practice varies from state to state because of its illegal demand & supply and its unhindered leeway. Its amplitude exists under various categories like arms, drugs, human (women& children), cattle, etc.

Human trafficking is undoubtedly a very profitable enterprise. It is very difficult to enumerate the exact data of number of trafficking victims throughout the world though some rough standard form of data has been compiled by United Nation and various countries through its respective national crime report bureau (NCRB) at national level. Since it is global phenomenon because of its secretive practice, it is not easy to identify & locate trafficking victims. Another important issue, which is clearly noticed that

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[1]See Dictionary.com

vulnerable categories of women &children are prime sufferers of trafficking. Their exploitation whether it sexual or non-sexual depends upon two obvious reasons namely, criminal practice & specific category of human trafficking profession to get illicit money, secondly, choice & specific demand of final purchaser or trader for inevitable exploitation. It is undeniable fact that this kind of degrading act is violative of fundamental human rights. These victims are also deprived off completely from basic amenities like education, livelihood, autonomy, and self-reliance. Consistent infliction of different sort of physical & mental suffering, inhumane behavior and gross manipulations are very prevalent. Traffickers are often accomplished in capturing their preys by seduction, inducement, menace or even by abduction. The major issue that needs to be tackled whether push& pull theory for understanding root cause of human trafficking is universal or not.

FACET OF HUMAN TRAFFICKING

There is a need for comprehensive analysis to understand commercial hardship and compelling circumstances. Social and economic inequalities may have ruinous consequences like human trafficking and human smuggling. Condition of destitution, extreme deprivation of necessary amenities, illiteracy, impecuniosities due to lack of economic opportunities, grave gender partisanship, socio-economic discrimination and unemployment of victim, parents, spouse are the main reasons of trafficking. Overlapping strategy and inequitable accessibility of social security against marginalized section of society and vulnerable class of women and children. Political instability and lack of stringent legislation that prevent human trafficking and protect victim's rights also give undue opportunity totraffickers to proceed in their action without any hesitation. This apathy also encourages trafficker groups to adopt various types of deceptive practice either without knowledge of government officials (including law-enforcement agencies) or by bribing government officials. This is further added and supported by another harsh reality that trafficking is generally stimulated and encouraged by poor parents, sibling & relatives of trafficking victim for the monetary as well as non-monetary benefits.

There is other numerous factors where demand & requirement of trafficking victim are different and commercial in nature. Trafficking victims are required for cheap labour or bonded labour, early marriage, prostitution, sex slavery, etc.Overall, there is possibility that trafficking victims can be transited/ deported from one country to another country.It has been understood that cross border trafficking usually involve two or three types of countries:

1. Outset / source countries- Trafficking victims belong to these countries and the very derivation & genesis of human trafficking initiate here. It is also possible that human trafficking can be pervasive within different states, cities in the country due to lack of stringent mechanism.[2]

[2]Sarasu Esther Thomas, Introduction, Global Concerns on Trafficking, Cooperation to Combat Cross Border Trafficking: India-Nepal- Bangladesh, WISCOMP Perspective, WISCOMP Foundation for UniversalResponsibility, available at:Sarasu Esther Thomas, Introduction, Global Concerns on Trafficking, Cooperation to Combat Cross Border Trafficking: India-Nepal- Bangladesh, WISCOMP Perspective, WISCOMP Foundation for Universal Responsibility.

2. Shipment countries- It is also feasible that trafficking victims are deported from one country to many different countries. Sometimes, these victims are kept in a temporary abode in these countries during en route to final destination.

3. Terminal countries - These are the same countries where trafficking victims are transported and exploited finally.

So, it has been realized that human trafficking exists in two ways namely internal trafficking and cross-border trafficking. Victims are trapped and shoved into different kind of illicit & immoral activities. The transnational character shows that acts of human trafficking are executed by organized criminal group and thus become a type of transnational organized crime. India has become a hub of human trafficking due to lack of efficient border control with neighbouring countries like Nepal and Bangladesh. As a result of which traffickers are generally succeeded in getting illegal access in the form of infiltration and illegal portal from the other side with the help of touts/ brokers in the absence of valid papers.

The foundation of global jurisprudence on trafficking issue is the Palermo Protocol, 2000. This protocol has a main aspiration to contend & thwart against trafficking in the interest of safety & security of women and children. Its pursuit is in elevation and inter-state alliance for synergic approach and robust investigation at global level.[3]

There are three facet of trafficking as described in the protocol namely[4] ,

(i) A sort of induction & engagement of vulnerable category of persons for most disparaging acts executed by professional trafficker.

(ii) Illegal displacement & migration purposefully executed by scrupulous and covertly manner

(iii) Procurement of trafficked victims through illegal demand & supply at both ends perpetuated by facilitators and conspirators of the crime

The definition included the practice of treachery, improbity and deceit that is supplemented with the exchange of kickbacks. The nature of complexity, multitude is inherent in this illicit design of depravity. As a result of which human trafficking is enacted with different tactics including intimidation, inflexible subjection, captivity and hostage for the illegal financial trade.

Smuggling of migrant is a concept where one or two persons allow illegal access of migrants to a foreign country for illicit financial advantage. This kind of ingression is generally done by some middleman or tout in coordination with border patrol by facilitating graft. Now the main question is whether the victimization &exploitation remains the same just like in matter of person based trafficking or not. It is explicit that the person smuggled is not subject matter of exploitation because he is voluntarily involved in the illegal en route to another country. State and society become subject

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[3]Preamble, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, OHCHR(Nov.,15, 2000), https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx.

[4]Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime§ 3(a) (2000).

matter of adversity and economic disadvantage due to this crime, not migrant unlike the case of human trafficking.[5]

The modus operandi of smuggling gangs is different from network of human trafficking. Though both type of criminal organization have more or less organizational structure, but push & pull theory won't be exactly helpful in understanding the main causes of human smuggling. The push factors like illiteracy, poor position of native country and unemployment in the country may be few of the compelling reasons through which migrants went for illegal access to another country. The practice of artifice and subterfuge may not be same in the case migrant smuggling like human trafficking where victims are exploited. The relationship between illegal migrants and border smugglers ends there only when illegal access is accomplished. So, it is clear that these smugglers find this illegal business a profitable venture and convenient due to weak security legislation. As per interpretation of Smuggling of migrants protocol, origin of illicit revenue lies in the mode of passing persons across international boundary in which migrant has to pay graft to smugglers for facilitating the same.

Exercise of network theory is another possibility where migrant smuggling become pervasive in the society.This action is conceptualized in the form social association, interdependence, interconnection between migrants living in domestic country & international country. It depends on the level of camaraderie, syndication, common lineage and nationality. Their ethnic, cultural, linguistic & religious groupism also form a tendency to adopt same or similar kind of profession in the informal labour sector.

Surprisingly, the legal framework related to human trafficking and migrant smuggling has adopted a very sluggish & inefficient development. The immoral Traffic (Prevention) Act, 1956 didn't cover complete substantive portion of definition including definition of trafficking. A bill was introduced in relation to the legislation in year 2006 by Lok Sabha having definition and strict punitive measures, but it was expired eventually. Finally trafficking is legally defined and got its substantive insight & annotation over stages of trafficking and its nefarious character in the form sexual abuse via amendment brought in IPC in the form of section 370.

Even, Ministry of Women& Child Development introduced a far-reaching & exhaustive draft Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill,2018. The bill is targeted towards fulfillment of social, economic security to victims of trafficking.[6]

Certain task force like safety homes and state anti-trafficking committee are created for institutional purpose. But there are some conspicuous lapses, which need to be tackled carefully. For example, the bill doesn't cover explicit categorization of victims. It mainly deals with victims of sex trafficking and drug trafficking, but not victims of bonded labour, domestic labour, children working in industries, etc. The bill doesn't cover specific functions to be performed by anti-trafficking committee/board at district level,

[5]Gabriella Sanchez, Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research, JMHS Vol.5 11 (2017), https://journals. sagepub.com /doi/pdf/10.1177/233150241700500102.

[6]Mayank Mohanti, As Parliament Readies to Discuss Anti-Trafficking Bill, Here's Why it Should be Passed at the Earliest, News 18(Mar 11,2019, 12.59 PM), https://www.news18.com/news/india/as-parliament-readies-to-discuss-anti-trafficking-bill-heres-why-it-should-be-passed-at-the-earliest-1820081.html.

state level & central level. It is important to maintain accountability of these institutional bodies so that their supervision can be don properly for better performance. It is also not clear as to why and how anti-trafficking fund will be utilized. It has become important now to devise proper mechanism for purpose related to rehabilitative practices and welfare of victims. There is even no scope of resettlement of such victims who suffered from adverse physical & psychological factors as to their livelihood, employment after leaving such protection homes or placement agencies. It is also important that specific targets & functions are to be assigned to investigating officer for preventing such offences. The officer should be properly trained to deal with difficult situation related to cross-border trafficking (secretive character) as well because the major challenge is in the form of feasibility& procedural technicalities in relation to identification of trafficking victims within & around the borders of the country.

There is a need for pertinent contemplation for legislative aspect related to human smuggling. It is necessary because there is no specific legislation which consider human smuggling as offence. So there is always a doubt over application human trafficking law in cases related migrant smuggling against touts/smugglers. It has reported that migrant smuggling is common in area of Gojadanga border near Bangladesh for the purpose of employment, accessible medical facility, etc.[7] Somehow these migrants are either involved or engaged themselves in various illegal activities.

SCOPE OF FOREIGNER ACT 1946

There is no doubt about the fact that the issue of illegal migration while going inside or outside country creates multi-dimensional problem. It raises a major threat to the whole egalitarian society where socio-economic security is adversely affected. The Foreigners Act is such an important legislation that legitimized & entrusted a responsibility on Central Government to make rules related entry & departure of foreigners. It further explains that foreigner can't make entry or departure from India without having proper travel documents.[8]

One of the peculiar features of the legislation is availability of reverse of burden of proof on the part of the suspect person to substantiate & prove his nationality on the basis of complete valid documents.[9] Even, the legislation criminalizes illegal stay of foreigner in the absence authentic travel documents.[10] Specific penalty is also imposed against those foreigners who reside in India more than exceeding time period as mentioned in their visa.[11]

There is also a possibility that illegal migrants arrange & use forged passport or passport through false & duplicate documents with the help of touts or travel agents for getting entrance illegally. Therefore, the Foreigners Act, 1946 criminalizes those people for

[7]Meha Dixit, Transit at Gojadanga, The Hindu(Sept.13, 2016,00.43 AM), http://www.thehindu.com/opinion/op-ed/Transit-at-Gojadanga/article14634931.ece.

[8]The Foreigners Act§ 3(1946).

[9] Id; Section 9.

[10]The Foreigners(Amendment) Act§14A(2004).

[11]Supra note 8; Section 14.

utilizing forged passport/travel documents with imprisonment of two to eight years as per seriousness of case.[12]

Butthe Foreigners Act 1946 has certain limitation as it has no clear position about illegal migrants in the capacity of trafficking victims. Even specific punishment is mentioned for crime associate in the form abetment only.[13]

In addition to the Foreigners Act,1946, Passport Act,1967 also criminalize the action of using forged/ fabricated passport, dispensation/ provision of distorted, fraudulent and disguising substantial information in order to get approved passport. Procurement &arrangement of spurious passport through aiding & abetting practice and unauthorized usage of other's passport illegally with malice intention also has been penalized in the legislation.[14]

The critical issue in both legislations is that there is not proper explanation regarding the type , nature of abetting factor because whereabouts of identification of real problem, role of active participant in this organized offence needs to be deciphered systematically.

As far as criminal liability of transporter or travel agent is concerned, The Immigration(Carrier's Liability) Act, 2000 has imposed penalty of one lakh rupees on any carrier who committed an illegal act of transporting a foreigner without having valid papers in breach of Passport(Entry into India) Act,1920.[15] This legislation also has serious limitation, which can adversely affect the process of immigration/ migration. First of all, the definition of carrier itself leaves an ambiguity. It doesn't include the wide ambit of someone who can also execute the process of recruitment, transfer migrants by either means. Even the criminal liability as mentioned in the legislation doesn't have deterrence effect and robust mechanism. There is complete absence of strict imprisonment for carrier who is responsible for unauthorized access of migrants within India and other security official without whom the whole criminal act won't be accomplished properly(criminal liability of such official is not mentioned anywhere in the legislation).

While going through legislative history, The Illegal Migrants (Determination by Tribunals) Act was passed in the year 1983 to determine &identify illegal migrants in the country so that they are evacuated from the country by the Central Government. Interestingly, the act only apples in the state of Assam but extension of illegal migration affected many northeast states in the country. Supreme Court struck down The Illegal Migrants (Determination by Tribunals) Act and held it is unconstitutional because of its ambiguous provision, which may create a great hurdle in the procedure of deportation. The court also emphasized the fact that large-scale illegal & undocumented migration is detrimental to the social & economic interest of the country.[16]

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[12]Supra note 10; Section 14B.

[13]Id; Section 14C.

[14]Offences and Penalties, Passport Act§ 12(1967).

[15]The Immigration (Carrier's Liability)Act§ 3 (2000).

[16]SarbanandaSonowal v. Union Of India,SC WP117 (2006).

The weak point in the legislation is that tribunal has to produce evidences of illegal migration against accused and its procedural aspect is very technical.[17] Police has to play important in identifying and collecting evidence against accused, which itself a tedious task. It is contrary to the basic interpretation of section 9 of the Foreigner Act, 1946 that says that the concerned person has to prove that he is not a foreigner.In fact the 1983 legislation didn't provide explicit power to investigating officers for search & seizing sensitive documents. Accordingly, the legislation didn't have substantive impact on identification & prevention of illegal migration.

There is no central legislation on human smuggling in India rightnow. It is difficult to include perspective of human smuggling within the interpretation of The Foreigners Act,1946 and Immigration (Carrier's Liability) Act,2000. Though there is one legislation in the state of Punjab related to Punjab Prevention of Human Smuggling Act 2012 which is now renamed as Punjab Travel Professional's Regulation Act, 2012 in the year 2014.[18] The main objective of the Punjab Prevention of Human Smuggling Act, 2012 is to regulate the functions & business of travel agents so as to check & prevent spurious practices engaged with others in an organized human smuggling in the Punjab state.[19]

The substantive portion of the legislation covers two important definitionsof human smuggling and travel agent. But definition of human smuggling has very narrow interpretation. It covers an illegal practice of transporting/sending person out of India with the presence of illegal consideration, though the execution of such an act can involve any element of inducement or dishonest practice.[20]

The definition doesn't cover the element of illegal migration & entry of a foreigner within India in the absence of valid travel documents where travel agent play substantial role in finalizing the same with the direct or indirect help of other associates including government officials. The legislation provide standardization of licensing system for travel agent. Their license can be cancelled or suspended when their action is prejudicial to socio-economic interest of India.[21] Even the offence of human trafficking is penalized with imprisonment of 3 to 7 years and five of 5 lakhs.[22]

Supreme Court gave its verdict in the year 2014 on the basis of three writ petition filed by Assam Sanmilita Mahasangha & Ors., Assam public Works and All Asaam Ahom Association & Others on the issue of prevention of illegal migration across border. Supreme Court emphasized that proper physical security arrangement must be re-scrutinized and directed Central Government to ensure that fencing must be done

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[17]The Illegal Migrants (Determination by Tribunals) Act§ 12 (1983).

[18]Notification No. G.S.R.49/P.A.2/2013/S.18/ Amd.(1)/2014, dated the 16th September, 2014, containing amendment in the Punjab Prevention of Human Smuggling Rules, 2013, In the Punjab Prevention of Human Smuggling Rules, 2013 , in sub-rule (1), in the title, for the words, "Prevention of Human Smuggling", the words "Travel Professionals' Regulation" shall be substituted, Part III,Punjab Government Gazette(Extra) ,September 2014(BHDR 26, 1936 SAKA), Department of Home Affairs and Justice, Government of Punjab.

[19]The Punjab Prevention of Human Smuggling Act, 2012(Punjab Act No.2 of 2013), Department of Legal and Legislative Affairs, Punjab, Part-I, Punjab Govt. Gaz.(Extra),January 04,2013.

[20]The Punjab Prevention of Human Smuggling Act§ 2(2012).

[21]Id; Section 6.

[22]Id; Section 13.

throughout the plain area near the border from village to village for preventing physical intrusion & infiltration. It was also instructed that border security forces should do consistent supervision by establishing check posts within reasonable distance & inspection.[23] The major issue is whether creation of physical fencing near border will absolutely prevent illegal migration in the form of human smuggling? What kind of safety & alternate arrangement can be made when entire border area can't fenced due to marsh or hilly area and especially with emergence of different kind of obstacles like environmental issues and indigenous people living near border?

In the judgment of *Neerja Chaudhary v State of Madhya Pradesh*[24], Supreme Court of India criticized the insensitive behaviour and practice of state authorities in recognizing, reinstating and restoring basic rights of bonded labourers in the country. The Court has reminded the state regarding obligations to bring serious attention on the rights of female labourers. Vulnerability of female labourers has to be introspected with the regard to social justice. The Court has further emphasized that state authorities should check activities of many crime syndicates which are responsible for extortion, other coercive practice related to forced labour or bonded labour.

In another case of *Gaurav Jain v. Union of India*[25] , it was emphasized by Supreme Court that women involved in the prostitution or illegal human trade for sexual acts, should be treated as victim of crime rather than principal offender or accessory to crime. The court has directed state authorities to adopt unswerving responsibility towards emancipation , redemption, vindication of trafficking victims in the society leads to a dignified life. There is no doubt that necessary process of rehabilitation of victims for their social development is difficult task to accomplish but, sincere effort should be made by State and voluntary organisations so as to remove sign of social stigma due to multiple entanglement and entrapment. Court has further directed state to create a mechanism through which victim can have liberty to choose any alternative profession or old profession like prostitution without any social restriction especially in the absence of societal acceptance and lack of economic opportunities. The landmark decision also raised other pertinent issue where it has been emphasised that diligent surveillance and investigation should be done by bodies like CBI in the matters of cross-border trafficking for various purpose. These bodies must look for inter-state inspection based mechanism to expedite the fact-finding mission. Another genuine concern was raised to provide explicit protection & shield to the victims of the crime by state authorities against all possible kind of intimidation for the purpose of successful prosecution.

Similarly, *Prerana v. State of Maharashtra*[26] also substantiate the point that vulnerabilities of child victim involved in trafficking needs to be understood in such way that he should be treated as child who is in need of reasonable care and safety within the interpretation of Juvenile Justice Act,2000.

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[23]Assam Sanmilita Mahasangha & Ors v. Union Of India, SC WP 562 (2012).

[24]Neerja Chaudhary v. State of Madhya PradeshSC AIR 1099 (1984).

[25]Gaurav Jain v. Union of IndiaSC AIR 3021(1997).

[26]Prerana v. State of Maharashtra 2 MLJ 105(2003).

Supreme Court of India directed government to prepare procedural issues related to rescue in the case of *Prajwala v. Union of India & Others*[27]. The Court raised grave concerns related to cross-border trafficking like problems related to jurisdiction, different legislations & policies in domestic countries and lack of proper border control. Legislation related to labour, prostitution, victim protection , illegal sale of women/girls are not efficient enough to include the element of trafficking.

Since the mode & approach of human trafficking and smuggling are already acknowledged , It is equally important to understand its practical modus operandi. The main problem lies in both issues is deep-rooted corruption without which an organised crime like human trafficking and human smuggling won't be completed. Corruption here is generally a dishonest act which is inclusive of bribery, impersonation, documents misrepresentation, forgery of travel documents, illicit money circulation among security forces. These corrupt practices have obviously eventual outcome in the form of actual illegal entry of foreigner across international border and forged travel documents.

Though the coercive & corrupt practices by border security forces are highly discouraged & criminalized as per The Border Security Force Act,1968,whereby penalty is imposed for such an offence of maximum imprisonment upto 10 years as convicted by Security Force Court.[28] Surprisingly, the legislation doesn't cover different modes of corrupt practices, its definitive character and purpose. It has been universally accepted fact that countries should manage border control systematically to check & abolish human smuggling. Strict administration over border control operation can only be possible with the help of strong inter-state cooperation by designing proper plan of action & proper communication.[29]

It is the prime responsibility of the states to provide certified quality to travel documents so that it can have character of unassailable security after issuance against any kind of unauthorised usage. State has to develop a efficient mechanism for the same purpose.[30]

CONCLUSION

It is an established fact that there is substantial difference between human trafficking and migrant smuggling and its difference needs to be shown in the legal texts and explicitly followed in practice by investigating officers and judiciary. Now it needs to be understood that corruption and different aspects of organized crime are the common linkage for the aggravation and surreptitious nature of human trafficking and migrant smuggling. So, if this kind of systematic and well-designed plan is executed by these criminals, it is very essential that investigation teams (anti-human trafficking units & anti-human smuggling units) have to adopt all modern tools of search & inspection (forensic science & efficient computer surveillance,etc) for identification of victim(human trafficking) , principal offenders including guilty associates and collection

[27]Prajwala v Union of India & Others 12 SCC 136(2005).

[28]The Border Security Force Act§ 31(1968).

[29]Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime§ 11(2000).

[30]Id; Article 12.

of evidence against them. But the multi-dimensional problem of trafficking & smuggling can be resolved properly by adopting executive approach as well as legislative approach. So,draft of the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill,2016 needs to be updated further so as to include specific functions of state anti-trafficking committee, district anti-trafficking committee and protection homes(with regard to rehabilitative practices) and accountability of these institution. Similarly, a central legislation needs to be introduced on the sound lines of Punjab Travel Professionals' Regulation Act 2012 with further increase in the ambit of human smuggling, definitive character of organized crime, action against corrupt practices done by public officials and travel agents. It is equally important for the government toinstitutionalize capacity building programmeamong border security forces, registered travel agents, immigration officers against corrupt practices to end trafficking &smuggling.

RIGHT TO FREE AND COMPULSORY EDUCATION IN NEPAL: A STUDY WITH SPECIAL REFERENCE TO INDIA'S RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009

Jivesh Jha

Abstract

Free and compulsory education of children of school going age is now a fundamental right in Nepal with the promulgation of Article 31 under 2015 Constitution and Right to Free and Compulsory Education Act, 2018. This right is governed by law of the land and the parliament felt its imperative to enact fair corpus of clauses laying down the duties and responsibilities of the Central government, provincial governments and their affiliates. The Act, 2018 is an instrument of guarantee in a sense that the onus to ensure free and compulsory education lies on the state. However, this burden of state has no effect on the private institutions. Nor has the Act laid down stringent measures to control the monopoly of private actors in education. This way, the Act has welcome provisions for the government schools and by the government schools. Unlike India, the Act does not slam collection of capitation fees. In India, the Act, 2009 prohibits institutions from carrying out any screening procedure of students or charging capitation fees. In doing so, the Act, 2018 falls short of adopting any measures to regulate the private school fees. So, balancing the autonomy of private institutions and public welfare functions have become a contentious issue.

1.1 Introduction

Education is the most powerful weapon which you can use to change the world," is the famous saying of Nelson Mandella. Indeed, its the education which can bring change in world. An educated person has the ability to differentiate between right and wrong or good and evil or virtue and sin. Its the foremost responsibility of the state to educate its citizens in order to create a just society. An educated person does not only gain something from education but also contribute in the growth of the nation.

Its been often said that education starts from the time a person comes out from the womb of his/her mother. A child acquires major chunk of education from his/her home as s/he spends major portion of time with his/her family members, relatives or known ones. S/he learns many things from the companions s/he keeps. Afterwards, s/he goes to schools, colleges and finally starts working. Yet, acquiring education in the days we live in has become an uphill task due to heightened inflation, commercialization of education, poverty or over privatization. In order to ensure the access of education to all and reduce the disparities experienced by a section of society with low access, the competent parliament of Nepal enacted "Compulsory and Free Education Act, 2018."

The Act, 2018 is in furtherance of right to education-related fundamental rights provisions embodied under the Constitution of Nepal, which entered into force on September 20, 2015. The legislation therefore reflects the legacies of the constitutional provisions and alongside new initiatives to address the emerging needs of country and

people's aspirations. The Act, which is home to 41 sections, demands a thorough reorientation of the education system through institutional and functional reforms in an endeavour to give effect to Article 31 of the Constitution. Article 31 that begins with a marginal note of "Right to Education" incorporates welcome provisions relating to free and compulsory education to citizens living under the Constitution. In doing so, the framers of the Act have tried their best to put the state under an obligation of imparting free and compulsory education to the children of school going age.

1.2 Country context

The Federal Democratic Republic of Nepal a is multi-lingual and multi-ethnic country bordered to the north by the People's Republic of China and to the south, east and west by the Republic of India. With an area of 1,47,181 square Kilometers and a population of 26494504[1], Nepal is situated between the two gigantic countries India and China. Richly endowed by the nature, Nepal is known for its mountain peaks. The Himalayan republic contains eight of the 10 highest peaks in world, including Mount Everest and Kanchenjunga-the word's tallest and third highest peaks respectively. Having Kathmandu as the capital city, the nascent republic is divided into three East-West ecological belt: the Northern Range-Mountain, the Mid Range--, the Mid Range-Hill and Southern Range-Madhesh. Madhesh, the Southern plains of Nepal, is the grain house and major source of income in terms of tax, industry and other forms of national economy.

It's also known for the birthplace of Gautam Buddha and Goddess Janaki (alias Sita), who was married to Lord Ram. Despite this, Nepal's lot has been poverty and marginalization since the unification of the country 250 years ago (and unified by the first Hindu monarch the great king Prithvi Narayan Shah) down to the present through Rana's oligarchy, monarchy, and ostensible unstable democracy. Federal Democratic Republic since July 2008, Nepal was previously ruled by hereditary Hindu monarchs. Nepali currency is known by 'Nepali Rupees' (NRs) which translates to NRs 160 against India's Indian National Rupees (INR) 100.

1.3 A brief on Federal Constitution

On September 20, 2015, Nepal embraced the latest Constitution. It is the first Constitution promulgated by people's elected representatives as per the mandate of the Comprehensive Peace Accord signed between the Government of Nepal and the Communist Party of Nepal (Maoists) in 2006 to formally end a decade-long (1996-2006) Maoist insurgency. Abolishing the 240-year-long autocratic rule of Hindu monarchy, the Constitution institutionalized republicanism, federalism and secularism for the first time. Now, Nepal is officially known as the Federal Democratic Republic of Nepal.

A few things about 2015 Constitution are worth remembering. One, it's the first formal Constitution to affirm federal republican democracy. Two, the conscience of the Constitution has been captured under Part-III (Fundamental Rights) and Part-IV (Directive Principles). They are evidence of the splendid collection of rights, worthy of a

[1]Central Bureau of Statistics, Government of Nepal, Report: Population Monograph of Nepal (National Planning Commission, Ministry of Population and environment, 2014), p.4

public welfare state and envisages for newly empowered citizenships. Thirdly, Nepal sets aside 33% of parliamentary seats for women, which is a major breakthrough. Fourth, the charter embodies plethora of progressive provisions for fundamental rights, including right to education.

Constitutional History

2.1 Introduction

The Constitution is regarded as the highest law of the land. It's a document which sets out the structure of the government of a nation. It ought to secure the natural and political rights of the national population in order to guarantee good governance and rule of law. So, far the Constitutions of Nepal are concerned, the Constitutions of 1959 and 1962 had miserably failed to show adherence to right to education. These two Constitutions lacked provisions relating to right to education.

It may be noted that Nepal has adopted and enacted seven Constitutions so far. The Government of Nepal Act, 1948 was the first Constitutional document in Nepal which conferred wide powers to the Rana Prime Ministers. This Constitutional Act was crafted to negate the existence or influence of the kings. The Rana rulers emerged as autocrats by invoking the undemocratic powers conferred under the Constitution. But, this Constitution was short-lived. In order to retain his powers, the then king Tribhuvan went on to seek help from the Indian Prime Minister Pt Jawaharlal Nehru to overthrow the Rana regime. In its effect, the days of Rana era ended and the king promulgated Interim Constitution of Nepal, 1951 which declared him as the head of the state. Afterwards, king Mahendra enacted Constitutions on two different occasions. The Constitutions of 1959 and 1962 conferred unlimited power on the royal institution and sovereignty was vested in the king. Then, king Birendra enacted 1990 Constitution which guarded democratic credentials in a healthy manner. It survived for more than a decade.

In order to depose the Hindu monarchy, Interim Constitution, 2007 was introduced by the parliament and finally the Constituent Assembly adopted and enacted the latest Constitution which is in force since September 20, 2015. The erstwhile Constitutions, save for 2007 Interim Constitution, were promulgated by the Kings while the 2015 Constitution has been crafted by the elected members in the Constituent Assembly. The 2015 Constitution makes a principled distance with the repealed Constitutions of Nepal. It institutionalized republicanism, federalism and secularism in the country.

2.2 Constitutional mandates for right to education in Nepal

The right to free and compulsory education of school going children has been a fundamental right in the country ever since Nepal adopted its first Constitution in 1948. In this light, the Government of Nepal Act, 1948 under Article 4 provisioned for free and compulsory primary education throughout the country.

However, the 1951 Interim Constitution, which was promulgated by then king Tribhuvan, lacked any fundamental rights relating to education. Still, there was something called Article 11 under the head of Directive Principles which cast obligation on the government to promote with special care the educational and economic interests of the weaker sections of people. The Constitution remained reluctant to envisage any express enactment relating to free and compulsory education. Surprisingly, the formal

Constitutions of 1959 and 1962 which were enacted by then king Mahendra had not incorporated any provision relating to right to education.

In contrast, Constitution of Nepal, 1990 too lacked provisions for free and compulsory education to citizens under the chapter of fundamental rights. However, Article 18 of the Constitution sought to guarantee each community the right to operate schools up to the primary level in its own mother tongue for imparting education to its children. In addition to this, Article 26 bearing a marginal note of "State Policies" contained a fair corpus of directive principles. It obliged the state to raise the standards of living to the general public through the development of infrastructures like education, health and among others. The state was also under obligation to formulate policies and special provisions for ensuring access of education to women. The state was directed to make necessary arrangements for free education to children and safeguard their rights and interests. Also, the charter commanded the state to bring special provisions for ensuring education to economically and socially background groups.

Similarly, the 2007 Interim Constitution of Nepal brought a paradigm shift in the entire system of governance and fundamental rights. After all, it was a document designed to dismantle the regressive agendas and initiate a new political dawn in the state. In this regard, Article 17 of 2007 Constitution envisaged for the first time in constitutional history of Nepal for the citizen's right to get free education up to secondary level from the state. However, there was no provision regarding 'compulsory and free' education in the scheme of this Constitution. Despite of this, the Directive Principles of State Policy had incorporated a good deal of education related rights and obligations. The state was put under an obligation to ensure the access of education to every citizen.

Nevertheless, the 2015 charter not only brought a substantial change in political landscape but also incorporated ambitious and progressive rights under the Part-III of the Constitution dealing with fundamental rights. Interestingly, the new Constitution for the first time under Article 31 advocated for the 'free and compulsory' education. In previous Constitutions, the right to education provision was not worded with 'free and compulsory' education. To put it simply, the erstwhile Constitutions of Nepal contained provisions for right to education but lacked the legislative intent showing the commitment for 'compulsory and free' education. At this backdrop, Article 31 envisions that every citizen shall have the right to access of school education. The provision imposes an obligation on the state to ensure free education up to the secondary level and compulsory and free basic education.

The expressions-basic education and secondary education-have been defined under the definition clauses of the Act, 2018. As per the mandate of the Act, 'basic education'[2] means school education up to eighth standard (from class one), whereas 'secondary education'[3] means school education between class nine and twelve. It may be noted that 'free education'[4] means no student would be burdened with any kind of fee or charges (under any head). The fundamental rights clauses provision that the physically impaired

[2] Section 2(d), Compulsory and Free Education Act, 2018

[3] Id; Section 2 (j)

[4] Id; Section 2(g)

and citizens who are financially poor would have the right to avail free higher education.[5] Likewise, the visually impaired citizens are also entitled to avail free education with the medium of brail script.[6] Also, the citizens have the right to acquire school education in their mother tongue and to conduct educational institutions accordingly.[7]

With this spirit, the competent parliament of Nepal came up with the Right to Compulsory and Free Education Act, 2018 to give effect to the constitutional provisions relating to right to education. This approach has been adopted to ensure the access of education to every citizen, including indigent persons. The researchers humbly submit that the adjudication of this right (under the current constitutional position) is challenging as this right is a positive obligation on the state which requires the state to provide necessary arrangements to make this right meaningful.

The enactment of Compulsory and Free Education Act, 2018

3.1 Introduction

The free and compulsory education of children is a fundamental right under the Constitution of Nepal. The law ensures that all children get free and compulsory education up to class eight and free education from class nine to twelve in government schools. In order to impose a mandatory obligation on the state to provide free and compulsory school education, the competent parliament of Nepal enacted 'Right to Compulsory and Free Education Act, 2075'that entered into force recently.

The Act is designed to quicken the pulse of right to education which is a sacrosanct fundamental right embodied under 31 of the Constitution. It hosts seven parts and 41 Sections. The legislation obliges the provincial governments, local bodies and central government as well to adopt every measure to implement the provisions of the Act in letter and spirits both.

3.2 Preamble

The preamble of the Act, 2018 details the commitment of the state in ensuring equitable and inclusive quality education by promoting the learning opportunities to all. It endeavours to ensure free and compulsory school education in a competitive, innovative and value oriented way to create an egalitarian society and foster the bases of socialism.

At the very outset, the crafters of the Act cast an obligation on the state to take appropriate steps to contribute to socio-economic development and ensure the reach of education to every section of society. In this way, the preamble entails reorientation of the governance and management of schools to fulfil the guarantee of 'free and compulsory basic education' and 'free secondary education.' In yet another sense, the preamble clarifies that the right to education is an inalienable human rights enhancing human dignity with the help of knowledge, wisdom and understanding.

As preamble is considered as window of the Act to cull out the objective the legislation has intended to achieve, the concluding part seeks to reaffirm the status of educational

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[5] Article 31(3), Constitution of Nepal

[6] Id; Article 31(4)

[7] Id; Article 31(5)

right as multi-faceted, i.e., socio-economic, competitive and cultural rights because its an aid to employment. Its a competitive and cultural right that strengthens the foundation of universal culture of human rights as well as competitive environment in the society. In nutshell, the preamble expresses the legislative intent in ensuring the free and compulsory education to school going citizens.

3.3 Objective

The Act intends to ensure free and compulsory basic education and free secondary education to all citizens. The law aims to secure education in mother tongue; special education to disabled or the victims of different political movements, and ensure the access of education to all.

3.4 Main features of the Act, 2018

When 'free and compulsory' education was adopted and enacted as one of the fundamental rights under the constitutional scheme, it was imperative to pass Right to Education Act, 2018 to fulfil the cherished dreams of Constitution makers and rights thinking members of our society.

It took the parliament three years (after the enactment of 2015 Constitution) to pass Act, 2018 which is devoted to enforce the provisions relating right to education in Constitution. The Act is home to 41 Sections. The features of the Act can be outlined as:

- Every child in the age group of 4-13 has the right to 'free and compulsory education in a neighbourhood school, till the completion of basic education, i.e. grade eight.
- Every child has the right to 'free' education in a neighbourhood school, till the completion of secondary education, i.e., grade 12.
- The appropriate government which means central government or provincial governments and its affiliates have to provide school within two Kilo Meters walking distance for children's resident. These schools are termed as 'neighbourhood schools' as per the mandate of Section 7 of the Act.
- 10 per cent seats are reserved for scholarship candidates where the number of students stand up to 500, and 12 per cent and 15 per cent scholarship seats where the number of students is up to 800 and above 800, respectively.
- The Act puts the students from economically poor or underprivileged groups at par with the relatively privileged children. This mix up would certainly set a milestone to build an inclusive, equal and just society. Eventually, it would enable the children from poor families to avail quality and competitive education.
- No child could be expelled and denied admission. The schools are bound to provide or arrange admission in neighbourhood school.
- The Act commands that every child shall have right to acquire school education from qualified and trained teachers.
- The Act specifies the duty and responsibilities of the central government, provincial governments and local bodies in providing free and compulsory education. Financial burden will be shared between the state and central government. The local bodies are mandated to play a constructive role in ensuring the admission of children. All the three-tier governments are obliged to play a creative role in

ensuring special education to disabled children or the issues of the martyrs. The central government would arrange funds for providing text books to students.

- The Act provides for the development of curriculum in consonance with the tradition, culture and norms embodied under the Constitution. Also, the students have right to receive education in mother tongue. The medium of instruction in schools could be Nepali, English or both, or mother tongue.
- It is the duty of parents to admit their children or ward to school and ensure that they receive school education. The Act provisions that the persons who does not have received basic education would not be eligible for any government or non-government jobs after 10 years (i.e., after BS 2085, Baisakh 1).
- Local bodies may make arrangements for medical treatments and snacks/Tiffin during school hours to students belonging to economically poor families.
- The state is also obliged to provide technical education in secondary level. The tiers of governments are under obligation to provide specialized education,
- The non-compliance of the provisions could cost dearly to outliers, whosoever it may be, as the Act lays down provisions for punishment. The concerned government department is empowered to monitor schools to ensure the better implementation of the Act.

The Act, 2018 has enacted comprehensive standards to be maintained by the schools and government authorities for creating favourable environment for learning.

3.5 Analysis of the Act

The Right to Compulsory and Free Education Act, 2018 is home to as many as 41 Sections that are devoted to ensuring the free and compulsory school education to the citizens at the government funded educational institutions. The Act entered into force on BS 2075-06-02 after receiving the assent of the President of Nepal.

This Act is brought into existence in order to give effect to Article 31 of the Constitution that is devoted to ensuring the right to education to every citizen of school-going age (up to secondary[8] level). In this light, Part-2 details the provisions relating to right to avail education and the responsibility of the state. The framers of the Act cast an obligation on the state to ensure equitable and qualitative school education to every citizen without any distinction.

There is also an obligation on the state to provide necessary requirements for ensuring school education in mother tongue, i.e., the language given by the mother. The expression "mother tongue" is defined under the Section 2 (k) which envisages that mother tongue could be one among any language spoken in Nepali community and mother tongue-based education could be multi-lingual education also. This provision serves two goals in particular. One, the Act directs the state to provide a favourable atmosphere for the school going children to acquire education in their mother tongue. Two, the crafters allow the imparting of education in multi language which may provide

[8]Supra note 2; Secondary education means school education from grade nine to 12 as provisioned under Section 2 (j)

an opportunity for students to learn more than one local language. This approach may cement the cause of linguistic diversity in the country.

Along with this, every student has been conferred with the right as per the prevailing laws to seek admission, study, acquire knowledge, participate in exam or avail academic certificates. In doing so, the citizens would have the right to acquire higher education as per his/her interest and capability.[9]

In contrast, the Act places a duty on the state to provide special education to differently-able citizens or economically poor or the issues of martyrs. The citizens belonging to the category of disabled, economically poor, Dalit or the issues of martyrs, persons with enforced disappearance or the victims of different political movements happened so far in the country have an inherent right to acquire "special education"[10] to be provided compulsorily and freely by the state. This provision is in furtherance with the mandates provisioned under Article 24(2)(b)[11] of Convention on the Rights of Persons with Disabilities, 2006.

In order to fulfil these obligations, the Act directs all the three-tier governments to enforce the provisions of the Act and achieve the goals the legislation has intended to achieve. In saying so, the architects of the Act intend to give a message that rights and duties are jural correlatives. With this spirit, Section 5 lays down a fundamental duty on every citizen and their parents to enrol their issues in schools from the early age, so that their sons and daughters could avail education.

3.5.1 Compulsory and Free Education

Furthermore, Part-3 of the Act bearing a head note of "Compulsory and Free Education" contains welcome provisions that are dedicated to activate the objectives of the Act. The legislation binds the state to ensure necessary arrangements for early child development; free and compulsory basic[12] level education (to every child of four to thirteen years of age); free secondary[13] level education; and higher education.

In India, the Right of Children to Free and Compulsory Education Act, 2009 commands the state to provide free and compulsory elementary (i.e., class one to eight) education to every child (of age six to fourteen years).[14]

The state through the agency of local bodies would ensure basic level education to every child in the age group of four to thirteen. The schools should also provide one year "early child development education"[15] to every child of four years age. Moreover, the local

[9]Id; Section 3(6)

[10]Id; Section 2(n), Special Education means imparting education through a particular medium and in separate groups to citizens who are blind, deaf, visually challenged, physically impaired or disabled, or the likes

[11]Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.

[12]Supra note 2; Section 2(d): School education from grade one to eight.

[13]Id; Section 2(j): School education from grade nine to 12.

[14]Right of Children to Free and Compulsory Education Act, 2009; Section 8,

[15]Supra note 2; Section 2(I), provides the definition of "Early child development education" which means an year of elementary education to children of 4 before they join class one.

bodies would ensure basic level education to the persons who are the victim of natural calamities, accidents or the other forms of the act of god.

Like the domestic laws, the international conventions of United Nations (UN) too host plethora of progressive provisions for ensuring right to education to all without any distinction. In this light, Article 26 of Universal Declaration of Human Rights (UDHR) provisions that everyone has the right to education and obliges the states to ensure elementary education free of cost. The instrument lacks any express provision directing the state parties to provide 'free and compulsory' education to the children of school going age.

Similarly, International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 places an obligation on the states to ensure right to education to all. Article 13 envisions that the primary education shall be compulsory and available free to all. As the Convention is observed as directory, not mandatory, in nature, it seeks to ensure free education up to secondary level by "progressive means"[16]. The Convention on Rights of Children (CRC), 1989 under Article 28 (1) (a) places an obligation on the signatory states to make primary education compulsory and available free to all.

Having gone through these international commitments, one could draw a conclusion that the national laws of Nepal stand (comparatively) progressive than the international obligations. The competent parliament of Nepal has enacted healthy legislative frameworks which further advances the international mandates in a further progressive ways.

Nevertheless, the accessible schools for the purpose would be those educational institutions established within the periphery of two kilometres. It means the state is duty bound to establish government school in every two kilometres in residential areas. The parents are strictly instructed to enrol their issues in schools. If they fail to admit their issues in schools or deprive their issues from acquiring basic level education, they would be deprived from the facilities provided by the local bodies. The local bodies are mandated to hold dialogues with the reluctant parents who are not willing to enrol their issues in schools and convince them to ensure the access of education to their children.

The Act commands the state authorities to establish schools within three years or ensure other alternatives where there is no school in the distance of two kilometres. The schools under no circumstances are entitled to say no to admission. But, this legislative intent is not exhaustive. The schools may refuse to enrol the admission if determined number of students is full, if he does not possess minimum qualification and physical infrastructure of school does not allow for more students. With the same spirit, the Supreme Court of Nepal in a landmark ruling of Sagar KC v. Ministry of Education, Government of Nepal (2071) observed that it would an uphill task for the schools to maintain quality education if they enrol students beyond its infrastructural strength.[17]

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[16]ICESCR 1966; Article 13 (2)(b), Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

[17]http://nkp.gov.np/full_detail/8299/?keywords=%20%E0%A4%B6%E0%A4%BF%E0%A4%95%E0%A5%8D%E0%A4%B7%E0%A4%BE%E0%A4%95%E0%A5%8B%20%E0%A4%B9%E0%A4%95 (Retrieved on December 26, 2018)

Notwithstanding anything contained in the Act, the schools shall ensure admission of disabled persons or economically poor children. Still, the head teacher would make arrangement of admission in accessible school if he could not ensure admission to those children in his school.

Apart from this, any students taking basic level education cannot be expelled from the school. If students are seen engaged in undisciplined activities, they would not be deprived from acquiring education or appearing in examinations. Rather, the school would provide them psychological consultation. On the other hand, there is a provision of readmission for the children who are dropped out from school without completing basic level education. Again if the children of the age group of five to 12 have not got admission in school due to various reasons, there is a provision of admission for such children. These arrangements have been floated to limit the school dropout rates. The available data shows that "About 86 per cent of children who enrol in grade 1 reach grade 5 and only 74.6 % survive to grade 8." [18]

On the contrary, at the instance of collapse or merger of any schools, the local bodies are shouldered with the responsibility to arrange admission or transfer of basic level students in accessible school. However, the local bodies have to give due consideration to the consent of parents while giving effect to this legal mandate. Similarly, if the students or parents want to get admission in another school due to various reasons, the head teacher will provide transfer certificate. The Act, 2018 of Nepal and ICESCR under Article 13(3) stand on the same plane in envisaging that the parents and legal guardians are at liberty to enrol their children in any school or institution.[19] Moreover, Article 13 also directs the state parties to ensure the full development of the human personality and the sense of its dignity, and strengthen the respect for human rights and fundamental freedoms.

3.5.2 Distance education and schools for the promotion of traditional values

Under the current legal framework, the children who are not able to achieve formal education through regular mode would have the facility to get secondary level education through non-formal or open schooling. If students do not get school in their access or they fail to take admission under regular mode, then such students would have the right to acquire option education under distance or open learning mode.[20] Further, the citizens who have completed basic level of education would have the right to avail secondary education or technical education equivalent to that.

In order to provide secondary level education, government of Nepal is directed to establish as well as conduct non-formal or open school education as per the necessity. Likewise, the children would have been given education about the traditional norms,

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[18]School Sector Development Program 2016/17-2022/23, Ministry of Education (2016), Kathmandu: Ministry of Education, p.9

[19]The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

[20]Supra note 2; Section 14

values, culture or etiquettes through Gurukul, Gumba or Madrasa.[21] Such institutions must be registered under local bodies and it has to follow the rules and regulations set by the local laws. This provision does not only supplement but also supplant the entry number 8[22] entry number 22[23] of Schedule-8 which details the powers and jurisdiction of Local Level.

The provincial governments are also empowered to enact laws or bring policies for the "Protection and use of language, culture, script, fine arts and religion."[24] Besides this, such institutions should also include curriculum set by the government of Nepal. This arrangement is in the line with the Article 13(3)[25] of ICESCR, 1966 and Article 18 (4) of International Covenant on Civil and Political Rights, 1966 which envisages that the state should impart religious and moral education in conformity with one's conviction.

Interestingly, this provision (i.e., Section 16) is in consonance with the fundamental rights provisions embodied under the Articles 32(2)[26] , and 32(3)[27] . The provision seeks to ensure the robust development of Article 32 bearing marginal note of "Right to language and culture." Arguably, Section 16, which allows a person to acquire education about traditional norms or culture, further provides life to Article 26 of our Constitution that provides every person to profess, practice and preserve his religion.

3.5.3 Education to child whose parents are not traced

The Act does not only provide fair corpus of provisions in the interest of 'free and compulsory education' but it also provides welcomes legal arrangements for the education of children whose parents are not known. The Act under Section 18 commands the Local Bodies to ensure school education up to basic level to every child whose paternity and maternity is not known.

In this way, Nepali laws don't only seek to ensure school education to children found in Nepal whereabout of whose paternity and maternity is not traced, it also intend to provide citizenship to them under Article 11(4)[28] .

3.5.4 Basic education essential for any government, non-govt. jobs

More so, the legislation clarifies that the persons who have not acquired basic level education would not be entitled to hold any posts in governmental offices, non-governmental institutions or others after BS 2085 Baisakh 1 (Section 19). Similarly, such

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[21]Id; Section 16

[22]Basic and secondary education

[23]Preservation and development of language, culture and fine arts

[24]Supra note 5; Schedule-6, Entry no. 18

[25]The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

[26]Every person and community shall have the right to participate in the cultural life of its community.

[27]Each community living in Nepal shall have the right to preserve and promote its language, script, culture, cultural civilization and heritage.

[28]Every child found in Nepal whereabouts of whose paternity and maternity is not known shall, until the mother or father is traced, be deemed a citizen of Nepal by descent.

persons would be debarred from holding membership in any company, firm or cooperatives or acquire shares in companies.

Still, there is an exception to this mandatory clause. The disabled, or physically impaired persons, who could not avail school education, are exempted and this law does not create any hurdle or barrier to them from seeking jobs in any private or government offices or any other. The motive behind this provision is to create an atmosphere of achieving basic level education compulsorily. In addition to this, the legislation also intends to ensure the access of secondary education to every citizen without any distinction.

3.5.5 Budget allocation

As provisions could not be implemented in letter and spirits without allocation of budget, the Act in part-5 floats provisions regarding the budget. Section 30 envisages that the government of Nepal would allocate budget to local bodies every year on the basis of number of students and the achievements of students. The provincial government, the central government and the local bodies are shouldered with the responsibility to allocate certain amount of budget as donation for the schools. To put it simply, the Central government and state governments have concurrent responsibility for providing funds for carrying out the provisions of the Act, 2018. The similar arrangement has been provisioned in India under Section 7(1) of Right to Education Act, 2009.

The schools are allowed to receive donations from any institution or trust with the prior permission of local bodies. Similarly, the schools are required to seek prior permission from Ministry from Finance, Government of Nepal while receiving donations from foreign institutions.[29]

In this light, the Act commands the state to provide books or provide certain budget three months before the new session starts. The provision intends to provide text books to students for free of cost. Besides this, local units can provide copy, pen or other necessary materials to poor students of basic level. The local units would make arrangements for necessary equipments like computer, laboratory, extra-curricular activities or materials regarding game and sports. The local bodies may make arrangements regarding health treatment or health services in schools in coordination with health institutions.

Apart from this, the law casts an obligation on the government of Nepal to make arrangements for snacks for the students belonging to marginalized community or poor family or disabled sections of society through local units. This facility would make students regular in class. Also, the students belonging to marginalized community or poor family are entitled to avail scholarship.

Much like Nepali laws, the 1966 ICESCR also provisions that the states would establish "fellowship"[30] for the better development of the school education. These provisions in one way or some other supplements the objectives of the Act.

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[29]Supra note 2; Section 31

[30]ICESCR, 1966; Article 13 (2) (e) 'The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved'

3.5.6 Medium of instruction

So far the medium of instruction is concerned, Nepali, English or the mother tongues could be the language of instruction in schools. While there were many constitutional changes in the country, the sections that immediately address language policy and education remained unchanged from those in the Constitution of 1990,[31] writes Miranda Weinberg, a research scholar of University of Pennsylvania. She argued that Nepali is dominant in school education as well. However, her observation may prove wrong with the implementation of this Act as the crafters have endorsed fair corpus of provisions for ensuring school education in mother tongue, and English or Nepali, or both.

Further, the Constitution, under Article 287, provisions for the establishment of 'Language Commission.' The functions of the Language Commission has been enlisted under Clause 6 which says that the Constitutional body would have to determine the basis for a language to acquire status of official language and forward a recommendation to the Government of Nepal; to forward a recommendation to the government of Nepal regarding the measures to be adopted for the protection, promotion and development of languages; to measure the standards for development of mother language, and to forward a recommendation to the Government of Nepal regarding its potentials for use in education and to carry out research, monitoring and studies of languages. Adopting a progressive measure, the Constitutional document places responsibility on the Center to take initiative for establishing branch offices of Language Commission at provincial level.

However, any foreign student would not be bound to study compulsory Nepali as a subject. Rather, s/he can opt for any other language subject as per his/her convenience.

3.5.7 Mandates for private schools

Interestingly, this Act is not only concerned with the government schools. It has incorporated provisions for the private owned boarding schools. The legislation says that the private boarding schools ought to be service oriented while conducting early child development or basic level education. The private schools up to grade twelve should provide scholarship to certain percentage of students as determined by the law of the land. For example, 10 per cent students should be given scholarship where the number of students is up to 500; 12 per cent scholarship where the number of students lies between above 500 and up to 800 and minimum 15 per cent students should be given scholarships where the number of students is above 800.[32] The scholarships will be awarded based on competition. This provision in one way or some other will enhance competitive environment in schools and promote philanthropy acts, i.e., corporate social responsibility, of the private institutions.

Still, the Act does not incorporate any provision relating to capping of fees or reasonable fees to be charged by the private schools. This leaves the private schools scot-free to charge or hikes the fees at their pleasure.

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[31]Miranda Weinberg (2013). Revisiting History in Language Policy: The Case of Medium of Instruction in Nepal. Working Papers in Educational Linguistics: A Journal of University of Pennsylvania, Volume 28(1), p. 67.

[32]Supra note 2; Section 27

3.5.8 Education in mother tongue

In part-4 of the Act, the drafters have incorporated provisions for education in mother tongues. Every citizen would have the right to get education up to basic or secondary level in mother tongue. A community is allowed to establish educational institutions accordingly. However, the local units or the provincial government should play an instrumental role in additional arrangement regarding the imparting of education in mother tongue. This provision seeks to foster the cause of fundamental rights, i.e., Article 32: Right to language and culture. If the students acquire education in mother tongue, his right to use his language or participate in cultural life would be secured. In nutshell, this provision supplements the cause of Article 32. This provision is in pursuance of Article 29(1)(c) of Convention on Rights of Children which places obligation on signatory states to provide education to children in his or her own cultural identity, language and values. In this regard, the government has developed and published text books in 24 mother tongues that include: Maithili, Bhojpuri, Awadhi, Tamang and Limbu.[33]

3.5.9 Penalties

The Act incorporates the provisions relating to penalties under part-6. If a child is expelled or deprived from appearing in any examination or not provided certificates, his/her parents are entitled to bring an action before judicial committee of local bodies with fifteen days. The Act clarifies that the Judicial Committee is an entity constituted under Article 217[34] of the Constitution. The Judicial Committee may impose fine up to five thousand on head teacher in case where he is found not proving certificates, debarring students from appearing in exam, or depriving students from acquiring school education. Likewise, the fine of three thousands could be imposed at the instance when the head teacher is found not issuing certificate, or transfer certificate, or violating laws or depriving students from acquiring education or appearing in exams. Similarly, if the private institutions fail to provide scholarships to as provisioned under Section 27, the Council may order the principal to refund the fees so collected or impose fine of Rs 25000, or the amount claimed or whichever sum is higher. Yet, the penalty provisions are not so stricter enough that could succeed to curb the commercialization or over privatization of education.

3.5.10 Special arrangements and role of local bodies, NGOs and Ministry

On a positive note, part-7 is devoted for the provisions of special arrangements. In this context, Section 33 provides that the visually challenged, deaf or blind students would have the right to acquire free school education. The students having eye-sight problem should be taught through Braille.

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[33]Central Bureau of Statistics, Education in Figures, 2017. Kathmandu: Ministry of Education, Science and Technology, p.6

[34]Judicial Committee: (1) There shall be a Judicial Committee under the Convenorship of the Deputy Head of the Village Executive in every Village Council and under the Convenorship of the Deputy Mayor of the Municipality in every Municipality to exercise power to hear cases, as entrusted to the Village Council or Municipality pursuant to Federal and Provincial laws. (2) The Judicial Committee, pursuant to Clause (1), shall have two members designated by the Head of Village Executive in case of Village Council and two members designated by the Mayor of the Municipal executive in case of a Municipality.

Similarly, the students having problem in hearing would be taught through sign language. The central, provincial or local government may establish specialized schools, model schools or mobile schools to realize this purpose. This legal arrangement echoes the provisions of Article 24(3) of Convention on the Rights of Persons with Disabilities, 2006 which seeks to facilitate the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring for the persons with disabilities.

The crafters have also enacted provisions for the monitoring. In this regard, Section 35 provides that the Ministry of Education shall formulate monitoring index for the better implementation of right to education. The index is to be made public by the Ministry. Apart from this, the legislation places an obligation on the village council or municipalities to submit the report containing the details of number of schools, number of students enrolled in each school in basic level and secondary level, number of private boarding schools and the students therein and among other details before the village council board or municipality board.[35] This provision empowers the local bodies to place a check on the schools in order to give effect to the provision of this Act. Along with this, the local bodies shall maintain an updated record of students belonging to vulnerable groups.[36] Also, the local units have to maintain the record of the number of students acquiring education in mother tongue. The available data projects a grim face of reality and requires state governments' interventions to improve the situations. The literacy rate (of five years and above) in province-1, Province-2, Province-3, Province-4, Province-5, Province-6, and Province-7 stands at 71, 50, 75, 75, 66, 63, 63 and 65, respectively.[37] The drafters of the Act provide ample powers to local bodies as well as provincial governments which may help the instrumentalities of the state to translate the provisions in action at grassroots level. After all, "the legislation intends to secure quality education in schools in order to prepare human resource for national development and to maintain good conduct, decency and morality of the people," held the apex Court of Nepal in the case of Kamala Wagle Bhattarai v. Office of Prime Minister, Government of Nepal[38] (BS 2071).

In addition to this, the schools are empowered to adjust coordination and cooperation with non-government organizations (NGOs) and local bodies for ensuring quality education in schools. This provision empowers the NGOs or the public spirited institutions to voluntarily engage in philanthropic activities and help the state in implementing this Act in letter and spirit both. Conversely, the government of Nepal is empowered to formulate necessary rules to implement the provisions of this Act.[39] The concluding provision (i.e., Section 41) of the Act obliges the Ministry of Education to formulate necessary policies as per the mandates of rules framed by the government of

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[35]Supra note 2; Section 36

[36]Id; Section 37

[37]CBS, 2011 , Education in Figures, 2017, p.4

[38]http://nkp.gov.np/full_detail/8277/?keywords=%20%E0%A4%B6%E0%A4%BF%E0%A4%95%E0%A5%8D%E0%A4%B7%E0%A4%BE%E0%A4%95%E0%A5%8B%20%E0%A4%B9%E0%A4%95 (Retrieved on December 26, 2018).

[39]Supra note 2; Section 40

Nepal by invoking Section 40. In this way, this Act is not an exhaustive law. The Act empowers the government to adopt all necessary measures for giving effect to the provisions contained there under.

3.6 Areas of Improvement

Unlike India, the Act does not slam collection of capitation fees. In India, the Act, 2009 prohibits institutions from carrying out any screening procedure of students or charging capitation fees.[40] In this way, the Act, 2018 falls short of adopting any measures to regulate the private school fees. So, balancing the autonomy of private institutions and public welfare functions have become a contentious issue.

The Supreme Court of Nepal has rightly observed that the instrumentalities of the state have so far failed to put a cap on the monopoly of private institutions to hike or charge fees. The topmost Court further observed that the private sectors are contributing in commercialization of education. The government should intervene to curb this commercialization process.[41] In the similar breath, the Supreme Court of India in the case of Modern School v. Union of India[42] recommended accounting standards for private schools. The Court ordered the government authorities to do regular inspection and watch over audits. "While the private educational institutions in the matter of setting up a reasonable fee structure may not resort to profiteering but they may take into consideration the need to generate funds to be utilized for the betterment and growth of the educational institution, the betterment of education in that institution and to provide facilities necessary for the benefit of the students. The fixing of a rigid fee structure would be an unacceptable restriction. The essence of a private educational institution is the autonomy that the institution must have in its management and administration," further held the Court.

The drafters of the Act, 2018 have measurably failed to take cognizance of the ruling of the Supreme Court. Likewise, Article 51(h)(2) obliges the state to increase the investment of the State in the educational sector, and "regulating and managing" the investment of the private sector in it to make education service oriented. However, the Act, 2018 fails to give effect to this obligation as it lacks legal arrangements to regulate and manage the private sectors.

Similarly, the Act does not suggest the schools to prepare 'school development plans' and seek the budgets accordingly from the government. Unlike India, the Act is also silent about maintaining teacher-pupil ratio in schools.

Moreover, the Act, 2018 does not prohibit a government school teacher to engage himself/herself in private teaching activities. In India, the Act, 2009 (under Section 27) disallows the government school teachers to engage in private tuition or teaching activities.

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[40]Supra note 14; Section 13 (1)

[41]http://nkp.gov.np/full_detail/462/?keywords=%20%E0%A4%B6%E0%A4%BF%E0%A4%95%E0%A5%8D%E0%A4%B7%E0%A4%BE%E0%A4%95%E0%A5%8B%20%E0%A4%B9%E0%A4%95 (Retrieved on December 26, 2018).

[42]AIR 2004 SC 2236 Also available at: https://indiankanoon.org/doc/1421376/ (Retrieved on December 26, 2018)

4.1 Conclusion

The long-stayed legal maxim--Salus Populi Suprema Lex-- intends to impart a message that law exists to serve the common cause and the welfare of people should be the supreme function of law. The makers of the Constitution and the Act, 2018 had realized that in a developing country like Nepal, political democracy would be of little value without consolidation of economic democracy. Accordingly, they have enacted plethora of clauses that oblige the state to impart free and compulsory school education to children. After all, "democracy without education is hypocrisy without limitation," says Ram Jethmalani, senior advocate of Supreme Court of India.

The Act, 2018 incorporates healthy provisions for free and compulsory school education to children. Unlike international instruments or India's free and compulsory education only up to grade eight, our laws seek to guarantee free school education up to grade twelve in state owned institutions. Similarly, the state has been directed to provide education in mother tongue and special education to the disabled persons or the victims of different political movements. The children's right to learn about the traditional norms or culture has been duly secured by the law. The students who could not complete formal education in regular mode could avail school education through distance learning. Still, the Act lacks any strict measures to control the over privatization or commercialization of education. The legislation also fails to provide teacher-pupil ratio in a state owned school. Over and above this, the Act is home to progressive provisions. The challenge lies in implementation.

Having gone through the provisions of the Act, 2018, the researcher humbly submits the following recommendations:

- The drafters could have introduced the provisions to adjust a balance between autonomy of private institutions and public welfare functions
- There could be a mandatory provision for the presentation of school development plan to get budget
- Like India, there could be legal arrangement regarding pupil-teacher ratio in schools
- Like India, the government school teachers could have been barred from giving private tuition or engage in other private teaching jobs

This way, the state is a step ahead in right direction by adopting and enacting free and compulsory education law. Over and above it all, the 'free and compulsory education' up to grade eight, 'free education' up to grade 12 and the 'state liability' things need to be guarded by the educational bureaucracy. Mere enactment of appealing laws is not going to serve the purpose.

Its high time to acknowledge the words of Nelson Mandella who rightly said, "Education is the most powerful weapon which you can use to change the world." We can bring a change in the country if we succeed to enforce the right to education related laws in our part of the world in true and material sense.

CONSTITUTIONAL SAFEGUARDS TO CIVIL SERVANTS: AN ANALYSIS

Dr. Babita Devi

Abstract

This paper gives increasing attention on the rules of conduct of civil servant and legislations that control civil services, aiming at enhancing disciplined efficiency and fair service conditions. The author discussed disciplinary proceedings such as suspension, removal and dismissal from service as well as reduction in ranks etc. Main focus was on evaluating the safeguards for the security of tenure of a person and to suggest the necessary legislative and jurisprudential parameters needed for safeguards of civil servants.

Introduction

Article 311 of the Constitution of India does not alter and affect the doctrine of pleasure exercised by the President or the Governor or any person authorized on the behalf of the President or the Governor enshrined in Article 310 of the Constitution of India but only provides for limitations on it. Article 311 only subjects the exercise of that pleasure to two conditions laid down in this Article.[1] Article 311 protects the civil servant holding civil post by providing safeguards and protects him from arbitrary arrest[2] .

Civil Post

'Civil post' means an office or appointment from the civil side of administration.[3] The Supreme court in *State of Uttar Pradesh v. A.N. Singh*[4] laid down certain factors to determine the relationship of employer and employee such as the employer's right to appoint , control the manner and method of doing the work of employee, the State is under duty to make payment for his work and the State has power to suspend or terminate his service.

Members of all India service, members of civil service of the Union, members of civil service of the state, persons holding a civil post under the Union or a State can claim these two safeguards.[5] Article 311of the Constitution of India is not applicable to the persons in Military services, including civilians in the defense sector,[6] employees of

[1]Moti Ram v. General Manager, North East Frontier Railway, AIR 1964 SC 600.

[2]Sujit Choudhary, Madhav Khosla, et.al (eds.), The Oxford Handbook the Indian Constitution, 1010 (Oxford University Press, 1st edn. 2016).

[3]M P Jain, Indian Constitutional Law 1482 (Lexisnexis Butterworths 7th edn. 2014).

[4]State of U.P. v. A. N.Singh, AIR 1965 SC 361.

[5]Narender Kumar, Law relating to Government Servants and Management of Disciplinary Proceedings 307 (Allahabad Law Agency 3rd edn. 2013).

[6]Union of India v. Chote Lal, AIR 1999 SC 376.

Statutory Pubic Corporation, P.G.I[7] etc., the employees of government companies registered under the companies Act, 1956, or of registered societies,[8] or of a university[9] are not holders of civil post and thus do not fall under these civil servants and where a person is appointed without following the recruitment and procedure, his appointment being illegal can be terminated without complying with the safeguards.[10] In *J.S. Sehrawat v. Delhi Urban Shelter Improvement Board*[11], Delhi Urban Shelter Improvement Board was an autonomous board and employee of board are not civil servants and thus they are not entitled for protection given under Article 311 of the Constitution of India. In *Rakesh Dhingra v. National Scheduled Castes Finance & Development Corporation and Ors*.[12] Court held that the employees of companies are not civil servants and they cannot claim protection in Article 311 (1) of the Constitution of India.

Article 311 reads these two conditions as follows: -

a. "No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by a authority subordinate to that by which he was appointed. [Article 311(1)]

b. No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges." [Article 311(2)]

Article 311(1) of Indian Constitution

This clause ensures to the civil servant certain degree of security of tenure. The government servant can be removed or dismissed by the appointing authority or authority superior to appointing authority or authority equivalent in rank with appointing authority but cannot be removed or dismissed by authority subordinate to appointing authority.

Appointing Authority

Appointing authority means the authority who is actually appointing the civil servant and that authority has power to remove or dismiss the service of civil servant. This power of removal or dismissal cannot be delegated to any authority subordinate to appointing authority.[13] Subordinate authority means subordinate in rank not in respect of powers or duties. Now the question is whether the departmental proceedings are initiated by the appointing authority only. The Supreme Court of India in *State of U.P v. Chandrapal*

[7]Gurjeewan v. Sumitra Dash, AIR 2004 SC 2530.

[8]Rajasthan S.R.T.C v. Zakir Hussain (2005) 7 SCC 447.

[9]Sher Singh v. State of Punjab, AIR 1969 P&H 391.

[10]State of Jharkhand v. Manshu Kumbhkar (2008) 1 SLR 1(SC).

[11]J.S. Sehrawat v. Delhi Urban Shelter Improvement Board (2017) SCC OnLine Del 7219 (Del HC).

[12]Rakesh Dhingra v. National Scheduled Castes Finance & Development Corporation And Ors. 2018 SCC OnLine Del 13096.

[13]State of U.P. v. Ram Naresh, (1970) 3 SCC 173 (SC).

Singh,[14] case it was held that the government is open to make rules prescribing that any other authority can initiate the disciplinary proceeding provided he is not subordinate to the appointing authority. If under rule any authority is empowered to make appointment but that authority has not made actual appointment doesn't make that authority the appointing authority.[15] In Smt. Kanti Devi v. Union of India[16], the power to make appointments to the subedars was made under the CRPF rules, 1955 under the Reserve Police force Act, 1949 which vested with the commandant general or inspector general. The SC upheld that where the power to make the appointments is vested in a statutory provision in one authority, to be exercised on the advice of another officer, then the former officer is considered as the appointing authority. Thus, in this case, the appointing authority is the commandant and just because IG's approval is required, the position of Commandant as appointing authority is not changed.

Meaning of Dismissal and Removal or Reduction in Rank

The Constitution of India has not defined terms Dismissal and Removal. Thus, according to the departmental Rules, while a person "dismissed" cannot be reappointed under the government whereas no such disqualification is attached to the "removal". The common for these punishments is both are awarded for the misconduct or deficient or inefficiency in service and both entail penal consequences, such as the forfeiture or postponement of future chances of promotion or of the right to salary, allowance or pension. Reduction in rank means reduction or demotion in status or position not in duties or powers. In *Hussain Sasansaheb v. State of Maharastra*,[17] the SC held that a person appointed to direct post cannot be reverted to lower post which was not held by him. Only the promote can be reverted back to lower post from which he was promoted. In *Debesh Chandra v. Union of India*[18], the appellant who was the chief secretary of Assam was appointed as the secretary in the central government, on a tenure post which was to expire on July, 1969. In 1966, he was asked to choose between reversion to service of his parent state or compulsory retirement. He contended that the order amounted to reversion with stigma attached to it. The SC held that the order of reversion could not be sustained as the appellant was reduced in rank without complying with Article 311. If government servant is promoted in officiating capacity and he is reverted to his original substantive post because of unsatisfactory work. The Supreme Court in *State of Mysore v. M.K. Godgoli*[19], held that the reversion to his original post does not amount to reduction in rank as the person promoted in officiating capacity has no right to hold the post.

Article 311(2) of Indian Constitution

Article 311(2) is attracted only when a civil servant is "reduced in Rank", "Dismissed" or "removed" against his will before the expiration of period of his tenure. Civil servant is entitled to the safeguard given under clause 2 of Article 311 only when the "reduced in

[14]State of U.P v. Chandrapal Singh, (2003) 3 JT 533 (SC).

[15]Ikramudin v. Suptd. of Police, Darrang, AIR 1988 SC 2245.

[16]Smt. Kanti Devi v. Union of India, 2003 JT 165 (SC).

[17]Hussain Sasansaheb v. State of Maharastra, AIR 1987 SC 1627.

[18]Debesh Chandra v. Union of India, AIR 1970 SC 77.

[19]State of Mysore v. M.K. Godgoli, AIR 1977 SC 1617.

Rank", "Dismissal" or "removal" is by the way of penalty.The two tests- a) Whether the employee has right to hold the post? b) Whether the employee has been visited with evil consequences? (evil consequences mean civil or penal consequences) were laid down by the Supreme Court in *Parshotam Lal Dhingra v. Union of India*,[20] to determine whether the dismissal or removal or reduction in rank is by the way of punishment.

In *Union of India v. Raghuwar Pal Singh*[21], the Apex court held that the order being termination simpliciter is no reflection on the conduct of the respondent. It merely explicates that his appointment was illegal having been made without prior approval which was required by the competent authority. The order is not stigmatic. If there is any irregularity in the appointment process that could have been enquired into by the department but without taking recourse to any inquiry, the termination order has been issued was violative of principles of natural justice and Article 311 (2) of the Constitution of India. Court further held that giving opportunity of hearing to the respondent before issuance of the subject office order was not an essential requirement and it would be an exercise in futility.

Termination of service or reduction in rank of contractual or permanent employee amounts to punishment which attracts Article 311(2) of the Constitution of India because both have right to hold post. Contractual employee has right to hold post till the termination of contractual period and permanent employee has right to hold post till the last date of his superannuation.[22]

Rule 6 of Central Civil Services ('Temporary Services) Rules, 1965 also provides that the termination of services of persons in "quasi -permanent" services amounts to punishment and it attracts Article 311(2) of the Constitution of India.

In all cases irrespective of the form of the order if an order made against an employee holding civil post in effect amounts to 'removal', 'dismissal' or 'reduction in rank', such an order to be valid must be preceded by an enquiry and a reasonable opportunity guaranteed under Article 311(2).[23]

In *Gang Ram Bhatia v. Union of India*,[24] the Supreme Court of India held that 'withholding of an increment' is merely of loss of prospects of earning more than what the government servant may be earning at the time. If charges have been levelled against the employee, he will be given a reasonable notice to make his defence during the course of inquiry and after inquiry the proposed action 'withholding of increment' is decided to be taken against him. He would not be entitled to the right conferred by Article 311(2).

'Reversion' generally means the posting of a government servant to officiate in a higher post to his original or substantive post. The civil servant who has right to hold post will be given safeguards under Article 311 of the Constitution of India on his reversion to the lower post or grade if that reversion attaches stigma.[25] Reversion to a lower post does not

[20]Parshotam Lal Dhingra v. Union of India, AIR 1958 SC 36.

[21]Union of India v. Raghuwar Pal Singh, (2018) 15 SCC 463.

[22]J.N.Pandey, The Constitutional Law of India 726 (Central Law Agency 54th edn. 2017).

[23]Supra note 20 at 36.

[24]AIR 1959 Punj 643.

[25]M. Rama Jois, Services under the State 242 (Indian Law Institute, New Delhi 2007).

per se amount to a stigma.[26] If the order for reverting the civil servant to lower post or grade does not contain any imputation but it seems innocuous on the face, the appropriate authority will see whether it was made by the way of punishment. It is tested by whether the misconduct is a mere motive or is the very foundation of the order.[27]

Inquiry and Reasonable Opportunity

Civil servant cannot be dismissed or removed or reduced in rank unless he is given the opportunity to make his defense. The preamble of the Constitution of India secures social, economic and political justice and also the liberty of thought, belief and equality of opportunity and this equality of opportunity also includes the equality is given to every employee to make his defense against the charges framed against him[28] in order to ensure fairness in administrative action which is bases on "the principles of natural justice."[29] Article 14 of the Constitution of India provides 'the equality before law and equal protection of law'. Equality before law means among equal law should be equal, it means like should be treated alike. Equal protection of law means all persons are not equal but they are different in their nature, attainments and circumstances so they need different treatment. The law or rule which makes classification giving different treatment is justified on the basis of two tests laid down by the Supreme Court in *Dalmia case*.[30] Article 14 of the Constitution of India is connected with the principles of natural justice. If any principle of natural justice is violated by the deciding authority while taking an action, the action will be considered arbitrary and equality enshrined in Article 14 of the Constitution of India is always anti-thesis to arbitrariness.[31] A rule of procedure laid down by law comes within the purview of Article 14 of the Constitution of India. The procedure adopted for making a classification must be just, fair and reasonable. The classification will not be considered reasonable if it is done without observing the principles of natural justice. If the service of a government employee is terminated without giving reasons on three months' notice is the denial of giving him a full opportunity of being heard which violates Article 14 of the Constitution of India and principles of *Audi Alteram Partem*. *Audi Alteram Partem* which contains the procedure from right to notice to final determination of complaint filed against an employee and this procedure is equally applied to every employee and gives the full opportunity of being heard.Article21 of the Constitution of India provides that no person can be deprived of his life or liberty except according to procedure established by law and if service of government employee is terminated without giving him the full opportunity of being heard is the violation of Article 21 of the Constitution of India.

The 'reasonable opportunity of being heard' means all aspects of principles of natural justice are not left unaddressed to give the employee a full opportunity to make his own

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[26]Debesh Chandra Das v. Union of India, 1969 SLR 485.

[27]State of Bihar v. Shiv Bhikshuk, 1970 SLR 863.

[28]The Constitution of India, preamble.

[29]Principles of Natural Justice In Indian Constitution, Available at http:// www.legalservicesindia.com/article/1519/Principles-of-Natural-Justice-In-Indian Constitution.html (last visited on July 15, 2018)

[30]Shri Ram Krishna Dalmia v. Justice S.R. Tendolkar, 1959 SCR 279

[31]I.P Massey, Administrative Law 186 (Eastern book Company, 8th edn. 2012).

defence.[32] It will be difficult to lay down the general principles to decide whether the employee concerned is given reasonable opportunity.[33] The general statement which is accepted is that an enquiry was followed after observing the principles of natural justice and it is conducted in fair manner.[34]

As to the rules of natural justice in relation to Article 311(2), Venkatarama Aiyer J Said:

Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that he should be given the opportunity of cross - examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. It is hardly necessary to emphasis that the right to cross- examine the witnesses who give evidence exercise of this right has been prevented by the enquiry officer by not giving to the officer relevant documents to which he is entitled, that inevitably would mean that the enquiry has not been held in accordance with the rules of natural justice.[35]

The SC in *Khem Chand v. Union of India*[36] held that the opportunity of being heard means the employee concerned is given an effective opportunity to establish his innocence when the charge sheet is issued to him and for this he will be allowed to cross examining the witnesses produced in the support of charge sheet and also for examining the witnesses produced in the support of his defence. An opportunity to make representation on proposed punishment can be given only when the competent authority after applying his mind on enquiry report submitted by an enquiry officer after completion of enquiry proposes to inflict any of major penalties i.e. dismissal, removal or reduction in rank.

Article 311(2) of the Constitution of India provides that an employee cannot be imposed with any of major penalties(dismissed or removed or reduced in rank) unless he has been given a reasonable opportunity to make his defence against the action proposed to be taken against him.[37] Prior to the Constitution (42nd Amendment) Act, 1976 the opportunity to make his own defence was at both stages (i) at inquiry stage where inquiry officer is given the opportunity to make his own defence and (ii) at punishing stage where the employee concerned is given the opportunity to make his representation against the penalty proposed to be imposed by the disciplinary authority

Now after the Constitution (42nd Amendment) Act, 1976, has abolished the second opportunity of being heard at the punishing stage.

The clause (2) of article 311 of the Constitution of India after amendment reads:

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[32]Principles of Natural Justice In Indian Constitution, Available at http://www. legalservicesindia. com/article/1519/Principles-of-Natural-Justice-In-Indian Constitution.html (last visited on July 15, 2018)

[33]Mahendra Pal Singh, (Revised) V.N. Shukla's Constitution of India, 952 (Eastern Book Company, U.P, 13th edn. 2017)

[34]U.P. Govt. v. Sabir Hussain, AIR 1975 SC 2045.

[35]Union of India v. T.R. Varma, AIR 1957 SC 882.

[36]Khem Chand v. Union of India, AIR 1958 SC 307.

[37]Supra note 22; at 725

No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such persons any opportunity of making representation of the penalty proposed.

In *Keya Kar v. The State of West Bengal*[38], petitioner not was afforded with an opportunity to defend herself against the order of punishment. Rules indicate that the employee concerned is not given second opportunity to make his defence on the proposed punishment. She was given due opportunity to defend herself in the enquiry. So, no violation of principles of natural justice.

Exclusion of Inquiry

Article 311 (2) of Indian Constitution provides that no person should be condemned unheard but this is not absolute but provides some exceptions where there is no need to give the opportunity of being heard and it does not amount to violation of principles of natural justice. These are as follows:

Exception I: "Conviction on a Criminal Charge" [proviso 2(a), Article 311(2)]

Proviso (a) to Clause (2) of Article 311 provides that "where a person is dismissed, removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge", the protection afforded under Clause (2) of Article 311 of the Constitution has no application.

When the employee concerned is prosecuted for any offence under criminal law and he is convicted by the criminal court for that offence, he is not given the opportunity of being heard under Article 311(2) of the Constitution before imposing any of major penalties. To apply this proviso, it is not necessary for the government to wait until the disposal of appeal or revision presented against the conviction.[39] But if the conviction is subsequently set aside then the order of dismissal will cease to exist.

Exception II: "Where Inquiry is not Reasonably Practicable" [proviso 2(b), Article 311(2)]

Proviso (a) to Clause (2) of Article 311 provides that "Where an authority empowered to dismiss or remove a civil servant or reduce him in rank is satisfied that, for some reason to be recorded by it in writing, it is not reasonably practicable to hold such inquiry".

In *Union of India v. Tulsiram Patel*[40], Explaining the scope of the clause, the Supreme Court has said,

a. "Whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so at the satisfaction of the disciplinary committee. It is not a total or absolute impracticability which is required by clause (b).

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[38]Keya Kar v. The State of West Bengal, 2018 (5) SLR 559 Cal.

[39]Kunwar v. Union of India (1969) Lab.I.C. 990 (SC).

[40]Union of India v. Tulsiram Patel, AIR 1985 SC 1479.

b. What is requisite is that the Holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation.

c. The disciplinary authority is to record the reasons in writing for dispensing with the inquiry. There is no obligation to communicate the reasons to the government servant.

d. The decision of the disciplinary authority is final by Article 311(3). However, it is not binding upon the courts so far as its power of judicial review is concerned."[41]

Application of Second proviso was involved in *Southern Railway Officers Association v. Union of India*[42], before the SC. In this case, Shri Krishnan acted as the disciplinary authority for workmen working in the workshop. A disciplinary proceeding was initiated against one Arputharaj and on the basis of it he was dismissed from his services but was reinstated in services. One day, when Shri Krishnan was waiting for a train on railway station, then the delinquent servant abused and used filthy language with him and threatened to kill him. Subsequently, on the basis of documents available with the disciplinary committee, the delinquent was dismissed from his service, without holding an inquiry. This was held proper by the SC.

In *Satyavir Singh v. Union of India*[43], the appellant who had taken part in disturbances was removed from service without an inquiry. The SC held that this was validity passed as it led to a very grave situation in the RAW as a protest.

In *Dashrath Lal (Deceased) through LRs v. DVB (Now BSES Rajdhani Power Ltd.) And Another*[44], in para 33 Court observed that

"It is a matter of common knowledge, and it would be proper to take judicial notice of the fact, that a large number of terrorists came to be acquitted during the period in question, on account of the fact, that witnesses did not appear to depose against them on account of fear, or alternatively, the witnesses who appeared before the concerned courts, for recording their deposition, turned hostile, for the same reason.

The situation presented in the factual narration noticed in the impugned order, clearly achieves the benchmark, for the satisfaction at the hands of the competent authority, that it would not have been reasonably practicable, to hold a departmental proceeding against the Appellant/Petitioners, in terms of the mandate contained Under Article 311 (2) of the Constitution of India."

Exception III: "Holding of Inquiry not Expedient in the Interest of State" [proviso 2©, Article 311(2)]

This exception provides that "Where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the state, it is not expedient to give to a civil servant such an opportunity".

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[41]M P Jain, Indian Constitutional Law 1509 (Lexisnexis Butterworths 7th edn. 2014).

[42]Southern Railway Officers Association v. Union of India, AIR (2010) SC 1241.

[43]Satyavir Singh v. Union of India, AIR 1986 SC 555.

[44]Dashrath Lal (Deceased) through LRs v. DVB (Now BSES Rajdhani Power Ltd.) And Another, 2019 SCC OnLine Del 7732.

Explaining the true purport and scope, the Supreme Court in *Union of India v. Tulsiram Patel*[45] observed that the satisfaction of Governor or President was with respect to "expediency or in expediency of holding and inquiry in the interest of the security of the state". Expediency involved matters of policy. The satisfaction mentioned here is subjective and is not circumscribed by any objective standards.

In *Union of India & Anr. v M. M. Sharma*[46], an Indian employer working in China. He gave certain confidential photos to their government. The SC held that his termination was in the "interest of the security of the state".

Clause D: Art. 311(3)

It states that "If in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in Clause (2), the decision thereon of the authority empowered to discuss or remove such person or to reduce him in rank shall be final."

This finality clause refers mainly to the situation covered by Art.311 (2) (b), proviso II, mentioned above. The Supreme Court has however ruled that Art. 311(3) do not completely bar judicial review of the action taken under Clause 2(b) of Art.311, second proviso. In *Jaswant Singh v. State of Punjab*[47], the Supreme Court has reiterated the proposition that in spite of Art. 311(3) the "finality can certainly be tested in a court of law and interfered with if the action is found to be arbitrary or *mala fide* or motivated by extraneous consideration or merely a ruse to dispense with the inquiry.

Conclusion

The Constitution of India through Article 311 protects and safeguards the rights of civil servants in Government service against arbitrary dismissal, removal and reduction in rank. Such protection enables the civil servants to discharge their functions boldly, efficiently and effectively. The purpose underlying these safeguards is to ensure a certain amount of security to a civil servant which is also required. Article 311(2) imposes a limitation on the power of the President or the Governor to determine the tenure of a civil servant by exercise of pleasure, as also the power of the authorities on whom the power to impose penalty of removal, dismissal and reduction in rank might be conferred by the law made under Article 309. None of the three major penalties specifies in the clause could be imposed by any authority including the President or the Governor except after giving a reasonable opportunity against the imposition of such of penalty. The public interest and security of India is given more importance than the employee's right of being heard. The principles of natural justice must conform, grow and be tailored to serve the public interest and respond to the demands of developing and growing society. These cannot, therefore, be rigid and their application has to be flexible taking into consideration all aspects of the case. By and large, these principles require that a person should be heard before a decision is taken. However, under certain circumstances, it may not be possible to hear the person before deciding his case. This is due to the fact that natural justice should not produce unnatural results. So conviction

[45]Union of India v. Tulsiram Patel, AIR 1985 SC 1483.

[46]Union of India & Anr v. M.M.Sharma S.L.P (C) No. 9032 of 2011.

[47]Jaswant Singh v. State of Punjab, AIR 1991 SC 385.

on criminal case, impracticability to hold the inquiry and inexpediency in the 'interest of the security of the State' are recognized as exceptions to principle of natural justice. On many occasions, the civil service litigations have been occasioned as the consequence of faulty enquiries. Therefore, they should be made compulsory for the departmental authorities to entrust enquiries to officials who possess a legal background. In cases of enquiries that involve complex technical issues or deal with the interpretation of law; or in a case, where the aggrieved civil servant has to face legal issues, the civil servant should be allowed to take the assistance of a professional lawyer. There is a pervasive tendency to avoid the Public Service Commission's advice on disciplinary matters. Therefore, the effective consultation by the departmental authorities with the Public Service Commission on disciplinary matters should be made mandatory. This would impart the aggrieved civil servant with a sense of confidence while fighting his case in a court of law. Further, proper classification of the alleged misconduct should be solely based upon the gravity of the alleged offence, without any regards to the status of the civil servant.

PATENTABILITY OF ARTIFICIAL INTELLIGENCE CREATIONS: ISSUES AND CHALLENGES

MAYANK TYAGI*

Abstract

Artificial Intelligencehas transformed the role of computers from being a simple calculating machine to an autonomously creative work generating system. Artificial Intelligence is helping machines to not only understand complex data and learn from it but also to generate novel works which are historically associated with human ingenuity.The rise of inventive Artificial Intelligence has created a stir in the traditional paradigm of patentability. Artificial Intelligence creations has posed a challenge to the inventorship criteria in patent system which does not recognize nonhuman entities as inventors. The recognition of Artificial Intelligence driven machines as inventors could lead to further complicated issues which the present patent system may not be able to accommodate.Rise in instances of independently generated creations by Artificial Intelligence raises certain issues with regard to patentability of such creations. This Article addresses this new phenomenon of Artificial Intelligence and instances where machines have created inventions with no or minimum human interventions. This article would further delve into the issues related to AI inventorship and what implications it would have for the current patent system.

Key words

Artificial Intelligence, Patentability, Inventorship.

I. INTRODUCTION

Three thousand years back Greek poet Homer described mechanical tripods created by god Hephaestus which could assemble itself automatically without any human assistance. Isaak Asimov in his science fiction book 'I, Robot' has written about robots with abilities to perform human tasks with ease and intelligence in 1950. The idea of intelligent machines has always been a part of myths and science fictions. But the development of Artificial Intelligence (AI) in the last three decades has certainly turned the science fictions into real science. AIsystems are the new technological marvel of the digital revolution we are witnessing in the 21st century. We are living in an era where computers are not mere number crunching machines but are now performing those tasks which require intelligence when performed by humans. Be it Google's AIAlphaGO machine beating world champion Lee Sudol in the board game 'GO'or Tesla's self-driving cars, AI systems are peaking the interests of scientists and investors worldwide. According to World Economic Forum, the estimated global revenue from AI systems is expected around 47 billion by 2020[1] .

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[1]Centre for the Fourth Industrial Revolution, Artificial Intelligence Collides with Patent Law, World Economic Forum (Aug. 2, 2019, 5:04 PM), http://www3.weforum.org /docs /WEF_48540_WP End_of_Innovation_Protecting Patent_Law.pdf.

AI systems are growing at an exceptional rate today, with more sophisticated forms of software being incorporated in them[2]. This rise has created ripples in the traditional paradigm of patentability. Now with the help of AI, machines are generating creative and novel works autonomously. From being used as a mere tool for invention, the AI driven machines are now creating inventions, leading to questioning of the status of human inventor in the patent system. This question further leads us to some more intricate issues which will be highlighted by this paper. The first part of the paper explains the concept of AI and what are the features of an AI driven machine. The second part explores instances where machines have actually created patentable inventions. The third part deals with certain issues related with the patentability of the AI creations which have posed a challenge to the traditional patent system. The paper concludes by providing certain recommendations on these issues.

II. WHAT IS ARTIFICIAL INTELLIGENCE?

It is impossible to provide a concrete definition of AI because of its diverse subjects and dynamic nature. The term AI includes a broad area that comprises reasoning and knowledge representation, robotics, natural language processing and machine learning making[3] it really difficult to confinethe essence of this term in a few words. However, we shall look into various definitions whichhave defined AI in a holistic way so that we could have a general understanding of the concept.The earlier usage of machines was confined to calculations and performing task based on pre-programmed software. However,for the past few decades the development in the field of AI has changed the role of computers from merely being a calculating device to a problem-solving device which can understand language, store information and can learn from its experiences, just like a human brain. The term AI was coined by John McCarthy at the Dartmouth conference 1956. According to McCarthy, "Artificial Intelligence means science and engineering of making intelligent machines, especially intelligent computer programs."[4] .The definition by McCarthy does not independently provide a definition of AI rather it states the goal of AI, which is to develop machines that behave as though they were intelligent. Elaine Rich has aptly described AI as the study of how to make computers do things which, at the moment, people do better[5]. AI is now moving towards making autonomous machines which could perform tasks which are currently exclusive to human beings.

Now the question arises what is intelligence? According to R Sternberg, "Intelligence is the cognitive ability of an individual to learn from experience, to reason well, to remember well, to remember important information and to cope with demands of daily living[6]."Anything can be called intelligent if it has general ability to learn, process and

[2]Swapnil Tripathi and Chandni Ghatak, Artificial Intelligence and Intellectual Property Law, 7 CHRIST UNIVERSITY LAW JOURNAL, 83, 84 (2017).

[3]Ana Ramalho,Patentability of AI Generated Inventions: Is a Reform in Patent System Needed? SSRN (Aug. 5, 2019, 11:32 AM), https://dx.doi.org/10.2139/ssrn.3168703.

[4]Beatriz Guillen Torres, The True Father of Artificial Intelligence, Open Mind (July 15, 2019, 2:05 PM), https: www.bbvaopenmind.com/ en/technology/artificial-intelligence/the-true-father-of-artificial-intelligence/.

[5]ELAINE RICH, KEVIN KNIGHT & SHIVASHANKAR B NAIR, ARTIFICAL INTELLIGENCE 3 (3 ed. Tata McGraw Hill Education Private Limited 2010).

[6]STEPHEN LUCCI & DANNY KOPEC, AI in 21st CENTURY: A LIVING INTRODUCTION 5 (2 ed. Mercury Learning and Information 2016).

solve problems in normal course[7]. Intelligence is the computational part of the ability to achieve goals in the world[8]. We measure another person's intelligence by conversing with them, posing questions to them and observing their responses. AI is the art of making machines act as if they are intelligent. It means that machines perform those tasks which require intelligence when performed by humans[9]. Since the machines lack conscience, hence the word 'Artificial' is attached with intelligence to denote intelligence displayed by a nonhuman entity. But since machines do not have a conscience, how can we say that a machine is an intelligent machine? Alan Turing tried to answer this question by defining machine intelligence in operational terms by applying 'Turing Test'. According to this test a human interrogator will sit in one room and two participants, one machine and other human in another room. The interrogator will ask questions to both of the participants through computer and the participants shall answer the questions through computer only, eliminating the chances of determining identity of the participants through voice or handwriting. The interrogator has to identify on the basis of the responses of the participants which one is machine and which one is a human. If the machine is successful in deceiving the interrogator, it passes the 'Turing Test' and would be considered as an intelligent machine[10]. AI is largely focused on simulating human intelligence and applying it for problem solving. The World intellectual Property Organization(WIPO) has considered AI systems as learning systems, machines that can become better at a task typically performed by humans with minimum or no human intervention[11].

III. INVENTIVE AI

The advancement AI has taken machines from being a mere tool for creation to an important contributor towards creation. AI machines are being used by the medical community for drug discoveries. Microsoft is working on a machine called 'Hanover' which will store all the data related to medicines used for cancer treatment and by using all the data will help in predicting the amalgamation of drugs that would be more efficacious for the diagnosis of individual patient[12]. These machines are called inventive AI, which produce new creations with minimum or no human intervention. We will look into two prominent inventive AI machines which have been contributing towards creating new inventions.

The "Creativity Machine" created by Dr. Stephen Thaler has been generating autonomous creations since 1994. This machine "came to the closest yet to emulating

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[7]Prof. Dalwinder Singh Grewal,A Critical Conceptual analysis of Definitions of AI as applicable to computer Engineering, 16IOSR-JCE 9 (2014).

[8]John McCarthy, what is AI, STANFORD (Jul. 27, 2019, 11:16 AM), http://jmc.stanford.edu/articles/whatisai / whatisai.pdf.

[9]Raymond Kurzweil,What is AI Anyway?73 AMERICAN SCIENTIST258,262 (1985).

[10]STUART RUSSELL&PETER NORVIG, ARTIFICIAL INTELLIGENCE: A MODERN APPROACH 5 (Prentice Hall, Englewood Cliffs 1995).

[11]WIPOTechnological Trends 2019, Artificial Intelligence, WIPO (Jul. 20, 2019, 4:33 PM), https:/ / www.wipo.int / edocs/pubdocs/en/wipo_pub_1055.pdf.

[12]Prashansa Agrawal, AI in Drug Discovery and Development, 6JOURNAL OF PHARMACOVIGILANCE 1 (2018).

the fundamental neurobiological mechanisms responsible for idea formation."[13] The machine has an artificial neural network which is a collection of on/off switches that automatically connect themselves to form software without human intervention[14]. The machine is first being fed a large amount of data and the artificial neural network will automatically wok out which data is useful which is not in creating a new creation. Dr. Thaler exposed the machine to his favorite music and the machine went on to create eleven thousand new songs in a single weekend[15]. Not only music, the machine also generated the design of cross bristle design of Oral-B cross action toothbrush.

Another example is IBM's Watson of Jeopardy! fame. It created headlines when it defeated former Jeopardy! winners Ken Jennings and Brad Rutter on the show in 2011. The game show is a quiz competition in which participants are provided general knowledge clues in form of answers and the participants have to phrase their responses in form of questions. What makes special is that it has capacity to store 200 million pages of contents and when asked a question it would analyze it by using more than 100 algorithms and after finding possible answers it would evaluate the best possible answers by using million logic rules[16]. Now IBM has decided to put Watson to more productive uses including healthcare and drug discovery for cancer. It has stored millions of data and by analyzing these data in couple of minutes, it will provide therapy alternatives for a single patient based on the type of cancer it has.

IV. IMPLICATIONS OF AI CREATIONS FOR PATENT SYSTEM

The above examples show the potential of AI and how AI driven machines could not only contribute in the development of a country's economy but could also generate inventive output which could utilized for the betterment of the society. However, AI creations have created ripples in the traditional paradigm of patentability. This new technology has posed new challenges to the patent system which calls for a brief analysis of certain issues which are relevant from patent perspective.

(A) Inventorship of AI creations

The patent system provides a limited monopoly over the invention to the inventor. The inventor is the owner of the patent rights and if inventor is not disclosed then patent may be held unenforceable. The issue with inventive AI is that if a machine is generating an independent creation, can the machine be called an 'inventor' and who will own the rights of patent in AI creation. Section 6(a) of the Indian Patent law allows patent application by any person claiming to be the true and first inventor of the invention[17]. Similarly, under the US law inventor is defined as an individual who invented or

[13]Imagination Engines, what is the ultimate idea,Imagination-Engines (Jul.17, 2019, 9:27 PM),http://www.imagination-engines.com/.

[14]Ryan Abbott, I Think Therefore I Invent: Creative Computers and the Future of Patent Law, 57 B.C.L. Rev. 1079, 1084 (2016).

[15]Tina Hesman, Stephen Thaler's Creativity Machine, Free Republic (Aug. 5, 2019, 5:47 PM),http://www.freerepublic.com/focus/f-news/1073587/posts.

[16]Katherine Noyes,It's (not) Elementary: How Watson Works, Network World, (Jul. 28, 2019, 9:30 PM), https://www.pcworld.com/article/3128401/its-not-elementary-how-watson-works.html.

[17]Indian Patent Act 1970.

discovered the subject matter of the invention[18]. It can be safely said that the word 'inventor' is presumed to be a person or an individual. In the case of *Diamond v. Chakrabarty*[19] , which actually expanded the subject matter criteria for patents in US, the court observed that "anything under the sun that is made by man is patentable". The reason for such an approach was to make sure that invention remain under the control of that individual who has actually conceived it rather than in the hands of a legal entity like a company because people conceive not companies[20] .

The inventor is a person who actually "conceives" of an invention, that means some mental application goes into it. In *Townsend v. Smith*, the word conception was described as "a formation in the mind of the inventor of a definite and permanent idea of the complete and operative invention as it is therefore to be applied in practice."[21] The invention must reveal the flash of creative genius, not merely the skill of the calling[22] . Such forms of idea can only come in human minds alone. However, the US patent law was changed in 1952 and the mental act requirement was done away by adding the following words in 35 U.S.C. 103 "Patentability shall not be negated by the manner in which the invention was made." The lawmakers indicated that what matters is the advancement of science or useful arts achieved by the invention, not the inventor's mental process[23]. It is obvious that lawmakers would have not in mind the AI development which could take place in future but this came as a blessing in disguise for AI creations, especially for those who advocate for including inventive AI under the ambit of inventor. But still, the legal position is far from clear. Giving inventor status to inventive AI could incentivise the scientists and could motivate further research and development in these machines leading to benefit of the society.On the other hand, it is argued that AI does not require patent protection because there are certain non-economic incentives like recognition, scientific curiosity which are enough to motivate research in this area. AI machines require a huge amount of investment in terms of resources and only a handful of big corporations are capable of providing that. Patent protection to AI creations could lead to monopoly of patent rights in the hands of these big corporations.

(B) Ownership of Patent Rights in AI Creations

Even if we assume that aninventive AI is eligible for patent, in whom the rights of patent will vest? The machine is incapable of holding the rights simply because it not considered as a legal entity. Also, the AI machines presently don't have the capability to exercise the rights autonomously. Another argument against giving inventor status to inventive AI is that it would fail to provide any incentive to the machine. The AI machines till now have not reached the level of emoting, and therefore patent incentive would be of no use to them. Instead of machine, therefore the ownership of the rights

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[18]35 USC§100(f).

[19]447 U.S. (1980).

[20]New Idea Farm Equip. Corp. v. Sperry Corp. 916 F.2d 1561,1566 (1990).

[21]36 F.2d 292,295 (1929)

[22]Cuno Eng'g Corp. v. Automatic Devices Corp. 314 US 84, 90-91(1941).

[23]Helen Li, Can aComputer be an Inventor, BILSKI BLOG, (Jul. 23, 2019, 10:47 AM),https://www.jdsupra.com/legalnews/can-a-computer-be-an-inventor-11706/.

must be vested in a human entity who could use these rights effectively. Another way is to make machine a joint inventor, vesting the ownership of the rights in the person jointly associate with it.

Now the question arises whether the owner of the machine will own the rights or the developer who has programmed the machine's software or the user who is actually giving tasks to the machine. If we take the user as the owner of the patent rights, it could turn out to be problematic. For instance, IBM's Watson is capable of interacting many numbers of users at the same time and IBM has made it available to medical sectors also. If Watson invents under the control of a user, then by the rule the user will become the owner of the that invention, which would encourage IBM to restrict user access[24]. While on the other hand if the ownership of the invention lies with IBM, then it would be motivated to grant more access to others. So, it is preferable to vest patent rights in the owner of the AI machine rather than the user of that machine. There are chances that this could lead to greater consolidation of patent rights in the hands of big corporations, but the benefits derived by it may outweigh the cost of such outcome[25].

Similarly, in case of developer also, the patent ownership right is better in the hands of owner of the machine rather than the developer of the software. The reason being that owner assignment would provide a direct economic incentive for developers in the form of increased consumer demand for creative computers. Having assignment of rights in favor of developers would interfere with the transfer of personal property in the form of computers, and it would be difficult for the developer to monitor inventions made by the machines they no longer own.[26] However, the developers provide a strong case for joint inventorship provided that they have been working towards the same end. A developer who merely wrote a general-purpose code would not be considered as an important contributor towards the claimed invention. Instead, they would merely have contributed a tool used by others to generate such contributions themselves[27]. They must have the idea of what specific end their software would be used to work to claim joint inventorship. But this approach may not be uniform in all the patent systems. In the EPO conference held in Munich in 2018, it was agreed that 'user' meaning the programmer, developer or implementer could be the inventor in case of AI generated inventions[28] . Since the personhood of computers is still not on the horizon, it is better to confine inventorship to humans only, even if an AI creates an invention autonomously.

(C) Liability Issue

Given the speed by which we are moving towards creating autonomous AI which can create on its own, the issue of liability in case of patent infringement by AI will surely

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[24]Ryan Abbott, I Think Therefore I Invent: Creative Computers and the Future of Patent Law, 57 B.C.L. Rev. 1079, 1115 (2016).

[25]Id. at 1119.

[26]Id. at 1116.

[27]Ben Hattenbach& Joshua Glucoft, Patents In An Era Of Infinite Monkeys and Artificial Intelligence, 19 STAN. TECH. L. REV. 32, 49 (2015).

[28]European Patent Office, Patenting Artificial Intelligence,Conference summary 30 May 2018, Munich, EPO (Aug. 2, 2019, 12:43 PM),https://e-courses.epo.org/pluginfile.php/23523 /mod_resource/content / 2 / Summary%20Artificial%20SIntelligence%20Conference.pdf.

pose a challenge to the patent system. As we have seen, inventive AI requires only minimum assistance by humans and it produces a unique product on its own. An AI machine created by Dr. John Koza which he calls as 'inventive machine' has already created independent invention on its own in which there are instances where it has duplicated or infringed an already existing patent[29]. There will be situations like these where the AI would create something which infringes the rights of an existing patent holder then question arises that who will be held responsible for the actions of AI? Currently, the patent system does not recognize non-human entity as an infringer. If we go by this practice, then most likely the owner or the user in few cases of the AI would be held liable for the infringement. But to what extent the liability would go? Since human intervention is limited to exposing the machine to already existing knowledge, any result which is autonomously being derived by the AI machine by using machine learning and various other logic algorithms is out of control of the owner of the machine and therefore tracing liability back to the owner would prove really difficult.

One way to resolve this issue is by applying the 'absolute liability' principle where in case of any potential infringement of patent by an AI machine, the owner will be held responsible. This principle may solve the liability issue, but it could seriously hamper the research and development in inventive AI machines where the companies would not be willing to invest in AI due to the risk of absolute liability, leading to a stagnation of innovation in this field which has the potential to transform the society. On the other hand, if there is a failure to identify infringer then it would encourage patent infringement through AI which would be against the interest of the patent holder as well of the society. The European Parliament Resolution on Robotics[30] provides some helpful guidance in regard to liability issue. The resolution explains that today, AI cannot be held liable and liability has to be traced back to a human agent which could be the owner, user or the developer if they could have foreseen and avoided the infringement. Their liability should be proportional to the actual level of instructions and training given by them to the AI machine. The greater a machine's learning capability and training, the greater the responsibility of its owner should be[31]. But the speed by which development is taking place in the AI field especially in cognitive and autonomous feature, the liability issue calls for a detailed look. The resolution suggests for a comprehensive insurance scheme where the patent infringement could be covered in cases where there was no part of a human agent. The resolution also acknowledges the fact that in future, AI may have to be clothed with legal personality, making it liable for its actions. The liability issue has surely made one thing clear thatfor a truly autonomous AI, the traditional rules may not suffice to give rise to legal liability for damage caused by an AI, since they would not make it possible to identify the party responsible for providing compensation[32].

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[29]J.R. Koza,Human Competitive Results, (Aug. 5, 2019, 8:25 PM),https://doi.org/10.1007/s10710-010-9112-3.

[30]European Parliament,European parliament resolution on civil law rules on robotics adopted on 16 Feb 2017, EUROPEAN PARLIAMENT (Aug. 9, 2019, 7:32 PM),http://www.europarl.europa.eu/doceo/document/TA- 8 - 2017-0051_EN.html?redirect#title1.

[31]European Parliament, supra note 30.

[32]supra note 1.

(D) Prior Art and Inventive AI

Prior art is an important threshold which a patent applicant has to fulfill to make sure that his invention is novel. An invention would be part of prior art if it was publicly known, used or was published to the public before the filing of the claimed invention[33]. Any document which is in public domain and there is unrestricted public access to it would come under the ambit of prior art. Now the issue here is whether AI generated claims could be considered as prior art? A patent applicant is presumed to be well versed in prior art related to their invention. For the purpose of determining non obviousness also, the applicant is presumed to be aware of all the pertinent prior art.[34] But the amount of information generated by AI is huge which cannot be expected to be read by a human being in his lifetime. This problem is mitigated in part because the applicant is required to know only about those prior art which are related the field of his invention. Bur even if we restrict the scope of prior art, the information is so huge that it becomes really difficult to filter relevant information and go through each of such information[35].

The amount of information generated by AI is enormous and since these machines are connected to the web, it results in cluttering of the internet with useful as well as irrelevant date which could pose a serious challenge in determining what is relevant and what is not from the view point of prior art. This could lead to rise in defensive publication, in which an entity discloses and disseminate an invention to the public as prior art to prevent its competitors from filing patent on the same invention, forcing them to narrow their claims, raising the bar for obtaining patent. Lowering this threshold of prior art would be harmful for the society as it would lead to patenting of knowledge already existing in the public domain, which would go against the principles of patent law. On the other hand, it is unrealistic to expect a human to have all the information analogous to his invention in the age of internet and AI which is creating date by combining many fields of knowledge at the same time. The possible solution to this issue would be to emphasis on the quality of the information generated by AI not the quantity.The manner of online publication and the ease of locating such information shall also serve to improve the quality of prior art information. Adding useless data would dilute the set of actual public knowledge which could eclipse the genuinely useful information leaving society worse off[36]. The distribution of quality information on the other hand would enrich the existing pool of knowledge benefitting the society. Only those autonomous AI generated information which is relevant for the case in hand and is analogous to the claimed invention shall be qualified as part of prior art.

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[33]35 USC§102(a), Indian Patent Act 1970 sec. 64(e).

[34]Custom accessories vs Jeffrey Allen industries F.2d. 955,962 (1986).

[35]Ben Hatten bach & Joshua Glucoft, Patents In An Era Of Infinite Monkeys and Artificial Intelligence, 19 STAN. TECH. L. REV. 32, 40 (2015).

[36]Ibid.

V. CONCLUSION

Patent law is unique in the sense that it is a meeting point of science and law. It presents a harmonious relationship between science and law. However, the patent system currently is experiencing growing pains in this era of AI. The speed at which the technology is advancing, it becomes imperative for patent system throughout the globe for a relook at the traditional principles of patent system. It is an undeniable fact that AI generated inventions will become more and more visible in coming future leading to rise of more complicated issues for the patent system. There is a requirement for a concerted effort globally to deal with such issues posed by AI and to equip international instrument like the TRIPS to provide for a common guideline for dealing with the issue of inventive AI. It is important that patent system must be adequately equipped to deal with future technological advancements like AI so that the interest of thesociety and the motivation for innovation for an individual remains balanced.This requires a dynamic approach in law to accommodate changes necessary to further the interest of the society. Some of the issues discussed can be resolved under present patent system but that does not mean that the future issues could also be resolved within the existing patent system. The patent system including the judicial set up is also need to be appraised with sufficient knowledge and resources to deal with AI generated inventions and how they should be treated under the patent system.

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