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Editorial

The dynamics of socio-political and economic changes taking place in the global scenario has brought symmetric changes in the legal paradigms. As a natural corollary, it has led to new scholastic inducements for in depth analysis in the legal sphere. Matching the pace, our journal, *DEHRADUN LAW REVIEW* sincerely endeavours to assimilate changing legal perspectives both in native and global context and intends to impel intellectual fraternity to address some of the pressing legal issues which bother the civil society. Uttaranchal University and its offshoot Law College Dehradun have always attempted to channelize all intellectual or academic endeavours in humanitarian direction aimed at promoting common welfare. Our journal sincerely adheres to this underlying principle in letter and spirit. Beginning from a wall journal, we have reached to the present stage is the testimony of the fact.

The Editorial Board of *DEHRADUN LAW REVIEW,* Law College Dehradun, Uttaranchal University, takes pride in bringing up Vol. 6, Issue 1 November, 2014 of the journal. This is in fact the sixth milestone of our intellectual sojourn. The current edition has included articles from across the academic spectrum addressing important legal issues of different fields of related to law. Issues like rape victims, surrogacy, intellectual property rights for small and medium enterprises, legal education, cruelty in matrimony, environmental conservation, crime against children and bio-diversity conservation have been thoroughly discussed and analyzed by the legal scholars in the current issue of this journal.

Dr. Bibha Tripathi in her article "Victims Precipitation Theory, Rape and the Judicial Trend: A Study in Feminist Criminology" attempts to analyse the role of female victims in actual happening of crime. It also endeavors to hypothesize the implications of victim precipitation theory in criminal justice system.

The desire for motherhood leads to search for alternative solutions and surrogacy presents itself as the most viable alternative. The article "Issues Relating to Surrogacy: Indian Perspective" written by Dr. J. P. Rai advocates for the passing of an effective legislation to regulate the system of surrogacy.

Globalization has enhanced competitiveness in the international market. Dr. Rajnish Kumar Singh in his article "Role of Intellectual Property Rights for SMEs: Need to Manage Knowledge" examines the issues related to intellectual property rights of small and medium enterprise in the context of India.

Praveen. B. Patil in his article "Handling Section 498A Cases: Policing Predicaments in Wake of Judicial Assertions and Compelling Real Time Imperatives and Need for Inclusive Deliberation" attempts to address the omnipresent power of the police to police section 498A cases which power has been judicially cut to size in the wake of increasing domestic violence against women.

"Legal Education in India: The Emerging Challenges and Prospects" written by Amit Dhall analyses in depth the problems and prospects of legal education in India.

The task of environmental conservation is an important task for humanity. Paper titled "Role of Judiciary in Environmental Conservation in India" written by Dr. Tarak Nath Prasad analyses the role of judiciary in environmental conservation in India lauding its pro-active approach.

Article titled "A Socio-Legal Perspectives on Crimes against Children in India" written by Vinod Kumar thoroughly discusses the issue of crime against children in the Indian context and offer valuable suggestions for the prevention of such crimes.

At length, Digvijay Singh in his article "Task of Biological Diversity Conservation and Role of Institutional Mechanism in India" strives to examine the working of institutional mechanism established at different levels in India under Biological Diversity Act, 2002 in consonance with the Convention of Biological Diversity, 1992.

A scholastic or an intellectual effort bereft of critical assessment is like a body without soul. Hence, soliciting critical comments is both our right and obligation which we owe to the intellectual fraternity. On behalf of Editorial Board of the Journal, I express my sincere gratitude and thanks to entire legal fraternity for their invaluable suggestions for upgrading the journal. I extend my heartfelt compliments and warm wishes to the legal scholars who have contributed their inquisitive articles in the journal and expect their constant and constructive support in our scholastic journey.

God Speed !

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

CONTENTS

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VICTIMS PRECIPITATION THEORY, RAPE AND THE JUDICIAL TREND: A STUDY IN FEMINIST CRIMINOLOGY

Bibha Tripathi*

Abstract

Victim precipitation theory deals with role of victim in actual happening of crime. Recent trend shows that considerable importance is now being given to victim precipitation theory in criminal justice system. Therefore, the question is, whether the theory should be applied in all the cases of violence, including rape with women or rape and alike offences should be kept out of the perview of the victim precipitation theory. So far as the origin and development of victim precipitation theory is concerned, it is clear that to have a more fair and just criminal justice system, one should fairly dealt with roles of offenders and their victims in actual crime happening. The propounders of victim precipitation theory have tried to establish that precipitated offender are merely culpable, potentially dangerous and in need of rehabilitation lest their precipitative tendencies lead to further crimes. Present paper is an attempt to hypothesize the implications of victim precipitation theory in cases of victims of rape. What has been the trend of authorities on victimology on this issue and what has been the trend of judiciary while deciding cases of rape. Whether the theory of victim precipitation has eclipsed the decisions of judges or they have still been sincere enough to show their sensitivity towards a victim of rape and considered their statements as sacrosanct statement or gospel truth. Whether judges' own personality matters in deciding the cases of violence against women? Whether an Indian woman who has been perceived to bear with chastity and shame is still continuing the same trend or has changed the mindset in the era of 21st century globalization. With the help of decided cases on rape and victims' version the paper proceeds to analyze the problem.

Key words

Victimolgy, Victim Precipitation, Feminist Criminology and Gospel Truth.

INTRODUCTION

"Always take no for an answer. Always stop when asked to stop. Never assume no means yes. If her lips tell you no but there is yes in her eyes, keep in mind that her words, not her eyes, will appear in the court transcript".[1]

Rape[2], a *mala in se* crime has a chequerred history of interpretation. It has been interpreted as most hated crime, a gender neutral crime, a social problem and as a

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[1]Asa Baber, "The Stud Muffin Quiz", Playboy, June 1992, at 36, cited in, Lani Anne Remick, "Read Her Lips: An Argument for a Verbal Consent Standard in Rape", 141(3) University of Pennsylvania Law Review, 1993, pp.1103-1151, at 1103

[2]It is understood that sexual offenders can be male or female, and victims can be of either sex; however, throughout this paper, offenders will be referred to as male, unless otherwise noted.

violent crime. Each interpretation is linked with the views with which woman has been seen and analyzed in a traditional/progressive/feminist/criminological perspective. Criminology as a body of knowledge, regarding crime, as a social phenomenon[3], is considered to be a development of seventeenth century. From demonological to postmodern criminology, each school is an attempt to understand the etiology of crime, the sociology of law and penology. Victimology is a recent addition of twentieth century dealing with the scientific study of victims of crime. In victimology, the era where all offences were viewed as perpetrated against the king or state, not against the victim or their family is considered as dark age from victim's point of view and the era where victims played a direct role in determining the punishment for actions of another committed against them or their property is considered as golden age from victim's point of view[4]. Victimolgy on the one hand, deals with sanctity of victimhood, the belief that victims are inherently good, honest, and pure, making those who defend them righteous and morally justified and on the other hand, victimology deals with theories of victimology, in victim precipitation theory attempt is made to establish that either crime is caused or partially facilitated by the victim. The term victimology is so wide to include not only the sufferer of crime but also the perpetrator of crimes, because it is a scientific study of victims and victimization, including the relationships between victim and offender, investigators, courts, corrections, media and social movements, in which there is every possibility that each can become either victim or perpetrator in a given context.

Feminist Criminology deals with three major dimensions *i.e.* women as criminal, women as victim of crime and women in criminal justice system. Victims' precipitation theory concentrates on the role of victim in commission of crime. Objectively, its purpose is either to hold victim responsible to some extent or to lessen the responsibility of the Accused. Against this backdrop, the present paper attempts to discern the approach of the Supreme Court of India on rape victims/survivors as to whether the court has been sensitive to the advancement in legal feminism at the global level while dealing with the cases of rape. The present paper attempts to analyze the value of statement given by a victim of rape in India as to how it should be taken as a sacrosanct or gospel truth or simply as bare statement subject to corroborative evidences.

SEXUAL OFFENDERS

So far as sexual offenders are concerned there is no definitive profile. It is not always a dirty old man reading erotica material in the back of a book store, a stranger in dark clothing lurking behind the bushes, a respected priest, and a decorated scout leader? The truth about sex offenders is that each of these individuals fits the profile of a sex offender. In reality, sexual offenders are not just socially displaced strangers. They are more commonly our teachers, our bankers, our fathers, children and friends.[5] Sexual offending crosses the barriers of gender, race, socio-economic status, age, religion and sexual orientation. There is no typical offender and no typical victim.

[3]Edwin H. Sutherland And Donald R. Cressey, Criminology And Criminal Law: Principles of Criminology, the Times of India Press, Bombay, 1968

[4]Hoyle, C. And Young, R., "Restorative Justice: Assessing the Prospects and Pitfalls", in M. Mc Conville And G. Wilson (eds.) The Handbook of The Criminal Justice Process, Oxford University Press, Oxford, 2002. Cited In Tony Kearon and Barry S. God Frey, "Setting the Science: A Question of History", in Sandra Walklate (eds.) Handbook of Victims and Victimology, William Publishing, 2007

[5]Fenton Z., "Faith in Justice: Fiduciaries, Malpractice and Sexual Abuse by Clergy", 8 Michigan Journal of Gender Abuse and Law, 2001 at 45, cited in Brent E. Turvey Wayne Petherick, "Sexual Offenders and Their Victims", Forensic Victimology, 2009, pp.445-471, at 446

Subsequently, no one is immune to the devastating impact that sex crimes can inflict, and most of us know someone who is a victim of sexual assault.

Rapes are of various kinds like rape by stranger, date rape, gang rape, statutory rape, partner rape etc. Stranger rape means rape by stalkers, guys in the bushes, the repairmen in the house, thieves who find a women at home alone etc. Date rapes are rapes committed by familiar persons with their victims. Their victims often consent to spending time with them and sometimes consent to some sexual contact. However, when the victim decides to stop the sexual contact or turns down a proposal for sexual contact, it becomes rape.[6] These rapists often deflect responsibility for the assault, claiming it was consensual or that they were unable to stop. Although rapists are being held responsible for their offences, blaming the victim still occurs. The victims of rape are sometimes physically injured, and they are always emotionally scarred.

VICTIM PRECIPITATION THEORY

A significant portion of the social science literature on rape has been marked by misogynist assumptions and a tendency to blame women for their own victimization.[7] It is assumed that, there often is some reciprocal action between perpetrator and victim.[8] The concept also assumes that the offender rests in a passive state and is set into motion primarily by the victim's behavior, that the victim's behavior is a necessary and sufficient condition for the offense. Precipitation means quick and hurried action -undue, unwise, or rash haste.[9] The term victim precipitation describes those rape situations in which the victim actually, or so it was deemed, agreed to sexual relations but retracted before the actual act or did not react strongly enough when the suggestion was made by the offenders. The term applies also to cases in risky or vulnerable situations, marred with sexuality, especially when the victim uses what could be interpreted as indecency in language and gestures, or constitute what could be taken as an invitation to sexual relations.

Among victim precipitated rapes, as compared with other rapes, higher proportions of white victims; white intra racial rapes; victims between 15 and 19 years of age; alcohol consumption, particularly by the victim; bad reputation of victim; residential proximity between victim and offender and/or place of offense; victims who met their rapist at a bar, picnic, or party; victims who were raped in a site other than their or the offenders' homes; use of coercion by the offender; subjection of victim to sexual humiliation and victim offender relationships involving all categories of primary relationships except those between relatives.[10] There is controversy over the linkage

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[6] Baker K., "Once a Rapist? Motivational Evidence and Relevancy in Rape Law", Harvard Law Review, 1997, at 110

[7] Wisan G., "The Treatment of Rape in Criminology Textbooks Victimology", 4(1) An International Journal, 1979, pp.86-99, cited in Ronald J. Berger And Patricia Searles, "Victim Offender Interaction in Rape: Victimological, Situational and Feminist Perspectives", 13(3/4) Women's Studies Quarterly, 1985

[8] Von Hentig, "Remarks on the Interaction of Perpetrator and Victim", 31 Journal of Criminal Law & Criminology, 1940, at 303, in which he dealt with the subject in its general aspects rather than with rape alone. For a theoretical background on the victim precipitation criminal homicide also anchored in Von Hentigs' work but containing other classic and modern theoretical statements, see James J. Gobert, "Victim Precipitation", 77(4) Columbia Law Review, 1977, pp.511-553

[9] Webster's New International Dictionary, 2nd ed.,1961

[10] Menachem Amir, "Victim Precipitated Forcible Rape", 58(4) The Journal of Criminal Law, Criminology, and Police Science, 1967, pp.493-502; see also, Menachem Amir, Patterns in Forcible Rape, The University of Chicago Press, Chicago,1971

between victim precipitation and level of resistance by the victim[11] and is concluded as women who are less traditional in their gender-role orientations are more likely to resist than are women who are more traditional. It is submitted by the propounders of the victim precipitation theory that it is not solely the vulnerable situations but also some characteristics of victim behavior which are important in precipitating the offense. It does not make any offender innocent but allows considering some of these men, at least, less guilty and leads to consider that the victim is perhaps also responsible for what happened to her. However, it seems that victimological theorists have adopted the offender's point of view, converted sexist rationalizations into causal explanations, and reinforced sexist legal practices. Situational theorists have ignored gender-role socialization and have often left the impression that a woman's independence increases her vulnerability to rape.

FEMINIST CRIMINOLOGY

Sigmund Freud is considered as traditional criminologist who has not only belittled the gravity of crime against women but also considered them as *participis criminis* in cases of rape. Freud bequeathed the notion of rape as a victim-precipitated phenomenon. If, as Freud insisted, women are indeed masochistic, rape-either in fantasy or in fact-can satisfy those self destructive needs. Helene Deutsch, a follower of Freud was the major contributor to the view that the female herself is responsible for her own rape. In this view, psychoanalytic descriptions of female psychology were merely descriptions of the male analysts' fantasies about women. Through Sigmund Freud and Helene Deutsch, it could be established that it was not only the victimologists dealing with victim precipitation but also some psychoanalytical criminologists who have dealt with the concept of victim's precipitation. Lombroso has given the theory of born criminals, if applied to women, as victims, it would certainly mean that women victims too are born victims. It is also quite supportive to the victim precipitation theory.[14]

Feminists have demonstrated the relationship between trivialization of rape and the cultural view of women as inferior and unimportant. The female stereotype includes the notion of a female vulnerability so great that women who have been raped are viewed as scarred for life, and the victims themselves often live according to this cultural expectation. One of the reasons of non-reporting of rape cases is that the police remain skeptical as to whether she consented.[15] Feminists assert the law of rape does not recognize women's right to sexual autonomy as absolute. Instead, rape law reflects the sexually coercive society in which it operates.[16] Though feminists

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[11] Pauline B. Bart and Patricia H. O'Brien, "Stopping Rape: Effective Avoidance Strategies, 10(1) Journal of Women and Culture in Society, 1984, at 86

[12] J.B. Miller, (ed.), Psychoanalysis and Women, Penguin Books, Baltimore, 1973; J. Mitchell, Psychoanalysis and Feminism, Random House, New York, 1974; J. Strouse, (ed.), Women and Analysis, Viking Press, New York 1974, cited in Rochelle Semmel Albin, Psychological Studies of Rape, 3(2) Journal of Women in Culture and Sociery, 1977, pp.423-435

[13] S. Freud, "Some Psychical Consequences of the Anatomical Distinction between the Sexes", 1925 in J. Stachey (ed.) Standard Edition of the Complete Psychological Works of Sigmund Freud, Hogarth Press, London, 1964; see H. Deutsch, The Psychology of Women: Motherhood, Grune & Stratton, New York, 1944

[14] See, Lombroso and G. Ferrero, "La Donna Delinquente, Torino, Roux," 1893; Lombroso, "Crime, Its Causes and Remedies," 1911 cited in, Frances Heidensohn, "The Deviance of Women: A Critique and an Enquiry" 19(2) The British Journal of Sociology, 1968, pp.160-175

[15] James J. Gobert, "Victim Precipitation", 77(4) Columbia Law Review, 1977, pp.511-553, at 517

[16] Ann Norton, "Talking Back To Sexual Pressure", Whole Earth Review, 1992, at 111

have taken strong exception over the work of Amir, a student of Marvin Wolfgang, who applied his supervisor's methodology not only to cases of homicide but also to rape too. It became an iconic target for a number of feminists who renamed victim-precipitation as victim blaming.[17] Amir's application of the concept victim precipitation to rape cases has been roundly criticized[18] and rejected in principle by feminists.

Feminist criminology had a radical change, and it arose in large measures as a protest against the domain assumptions of radical criminology. Women, it was said, were raped, abused and assaulted, and their neglect by male criminologists constituted not only a political and sexist affront but an analytic and empirical gap. It was also described as "unwarranted attack and unfounded ideological criticism", that revealed no flaws in the integrity of the idea of victim- precipitation itself, only in its execution, but damage had been done.[19]

Two of the most significant contributions of feminist criminology since the 1970s are the documentation of:-

(1) The significant amount of violence against women and girls perpetrated by men and boys.

(2) How girls' and women's victimizations and trauma, often at the hands of abusive men, are risk factors for their subsequent offending or labeling as offenders.[20]

Carol Smart lambasted the way in which women as offenders and victims had been anathematized, and she proposed their reinstatement within an analytic framework emphasizing the workings of patriarchal power and male myopia.

TESTIMONY OF RAPE VICTIM AND OBSERVATION OF COURTS

In the case of *Bodhisattwa Gautam v. Miss Subhra Chakraborty*[21] the Supreme Court observe that rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushed her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the fundamental rights, namely, the right to life contained in Article 21. It is an offence committed mostly in isolation from the sight of others and eye witness is seldom available in cases of rape. The evidence of a prosecutrix is considered at par with an injured witness whose presence at the spot is probable. If her sole evidence inspire confidence and not shaken in cross examination or otherwise, it is enough to arrive at a conclusion of guilt.

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[17] Clark, L. and Lewis, D. Rape: "The Price of Coercive Sexuality", cited in Paul Rock, Theoretical Perspectives on Victimization, Sandra Walklate, 1977

[18] Weis, Kurt and Sandra S. Borges, "Victimology and Rape: the Case of the Legitimate Victim" 8 Issues in Criminology, 1973, pp.71- 115 cited in Vicki McNickle Rose, "Rape as a Social Problem: A Byproduct of the Feminist Movement", 25(1) Social Problems, 1977, pp.75-89

[19] Fattah, E., "Victimology, Past, Present And Future", Criminology, 2000

[20] Joanne Belknapsource, "Offending Women: A Double Entendre", 100(3) The Journal of Criminal Law and Criminology, 1973

[21] AIR 1996 SC 922

The most horrific case on gang rape leading to the amendment in criminal law was *State v. Ram Singh* & *Ors* and *Pawan Kumar Gupta v. State*[22] popularly known as Delhi rape case awarding death sentence to the accused person except the juvenile in conflict with law. But, when one objectively goes through the judgment, and compares the case on the line of victim precipitation the question no. 11 becomes very- very important that "*Aapne puri ghatna key dauran 100 number par phone karne ki koshish ki ya police picket dekh kar chillaye?*" Which was answered as "*Ghatna shuru hone se pehle ladai-jhagde ke dauran hi un logon ne hamare phone cheen liye the isliye phone karne ka mauka hi nahi mila. Main aur mera dost chilla rahe the lekin shayad bahar kisi ne suna nahi*". The answer mentions that first of all they fought with the accused persons and then after they were subjected to torture and rape. Meaning thereby that the victim precipitators will certainly attempt to drag the case as one of the cases of victim precipitation.

Testimony

Disbelieving over the statement of victim has been prevalent in a country like USA. The Chicago police training manual, as recently as 1973, instructed officers that the first thing to do is determine if the woman, who reports the rape, is lying. This suspicion of the victim typically continues throughout the legal process.[23] The critics of corroboration requirements advocate that the elimination of all special rules concerning rape cases not applicable in other criminal cases.[24] Corroboration of the victim's word is not required by law in order to convict an offender of any other crime; therefore, any distinction between an uncorroborated charge of kidnapping, assault or robbery, and an uncorroborated charge of rape should be abolished.[25] In this view, the jury can weigh the credibility of the testimony and determine if there is enough evidence to support the defendant's conviction.

Victim precipitation theory in case of rape, treats the victim as an accomplice to the crime, which is contradicted by the Supreme Court in number of cases and it is settled now that there is no legal compulsion to look for corroboration of the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix if there is absence of circumstances which mitigate her veracity. But, still not only the High Court's but also the Supreme Court is passing verdicts contrary to the settled position, by observing that court cannot rely upon victim's statement as gospel truth. The journey of controversy over the sanctity of victim's statement can be traced back from the judgment of *Rameshware* v. *State of Rajasthan*[26]. The most celebrated observation of Fazal Ali and Vivian Bose JJ, may be quoted as "the rule, which according to the case has hardened into one of law, Is not that corroboration, as a matter of prudence, except where the circumstances make it save to disperse with it, must be present to the mind of the judge". In this case the judges were of the opinion that the High Court was right in not requiring the corroboration beyond the statement of the child to her mother. It is enough to make it safe to act on her

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[22] MANU/DE/0649/2014

[23] Grimstad, Kirsten and Susan Rennie (eds.), The New Womans Survival Catalog, Coward, McCann and Geoghegan Berkley Publishing Corporation, New York, 1973

[24] Ross, Susan C., "The Rights of Women: The Basic ACLU Guide to Women's Rights", Avon Books, New York, 1973

[25] Wood, Pamela Lakes, "The Victim in a Forcible Rape Case: A Feminist View", 11 American Criminal Law Review, 1972, pp.335-354

[26] AIR 1952 SC 54

testimony. In this case the appellant Ramesher was charged with committing rape on a young girl of 8 years age. The learned judges set aside the acquittal and restored the conviction and sentence. The SC upheld the decision of HC.

The law, which was perceived as almost settled in the year 1952, still remains unsettled due to different approaches of judges regarding the victims of rape. Still there is a great controversy over the victim's statement in rape as to whether her testimony should be regarded as gospel truth or not. Two judges of Supreme Court opine two different views on a same day in different occasions.[27] Speaking on strengthening of laws to tackle crimes against women while addressing a seminar on 'Improving Criminal Investigations' the then Chief Justice of India Justice P. Sathasivam said the statement of a rape survivor should be enough to secure conviction. He was of the opinion that "In our country, no girl will go to the police station and say she was raped by this man. When it comes from the heart, the presiding officer should accept her testimony and conviction can be based on it". Whereas, A bench of justices H.S. Bedi and J.M. Panchal said while primacy has to be given to victim's statement, there can be no presumption that she is telling the ultimate truth as the charge has to be proved "beyond reasonable doubt" as in any other criminal case. They opined that we are conscious of the fact that in a matter of rape, the statement of victim must be given primary consideration. But, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully.

Against this backdrop, the paper mentions some of those cases in which it has been shown that it is the judge particular that turns the settled position into unsettled situation. For example, *In State of HP* v. *Raghubir Singh*[28] the bench of Dr. A.S. Anand and N.P. Singh held that conviction can be recorded on the sole testimony of the proscutrix if her evidence inspires confidence and there is absence of circumstances which mitigate her veracity. Further, in *State of Punjab* v. *Gurmit Singh*[29] the court held that in cases involving sexual harassment, molestation etc. the court is, duty bound to deal with each cases with utmost sensitivity. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration.

In the case of *State of Punjab* v. *Gurmit Singh & Ors*[30] the bench of Dr. A.S. Anand and S. Sagir Ahmed observed that crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victim of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or

[27] The Hindu, 9th February, 2014

[28] (1993) 2 SCC 622

[29] (1996) 2 SCC 384

[30] Ibid.

insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. Justice Anand also held that, a girl, in a tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down upon by the society. In this case duty of court during cross examination of the victim of sexual assault was also highlighted. Further, J. Anand expressed strong disapproval of the approach of the trial court and it's casting a stigma on the character of the proscutrix as "a girl of loose morals or such type of a girl."[31]

In the case of *Ranjit Hazarika* v. *State of Assam*[32] the Supreme Court again observed that the court must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to

[31] Id., at 401

[32] (1998) 8 SCC 635

the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.

In *State of Orissa* v. *Thakara Besra & Anr*[33] the court held that the rapist degrades the very soul of the helpless female and therefore the testimony of the proscutrix must be appreciated in the background of the entire case and in such case, non-examination even of other witnesses may not be a serious infirmity In the proscution case particularly, where the witnesses had not seen the commission of the offence. It was also observed that the court may look for the some assurances of her statement to satisfy judicial conscience. The court should examine the border probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix like she was raped on 12 P.M or 6 P.M on the Basis of which the accused was acquitted.

In *State of UP v. Pappu*[34] the bench of Arijit Pasayat and S.H. Kapadia JJ, held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual interaction. It may not be a ground to absolve the accused from the charge of rape. The court further held that there can be conviction on the sole testimony of the proscutrix and in case, the court is not satisfied with the version of the proscutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. Further the bench relied upon the case of *State of Punjab* v. *Gurmit Singh.*

In *Vijay Alias Chinee* v. *State of Madhya Pradesh*[35] the bench of P. Sathasinam and Dr. B.S. Chauhan JJ, held that court may convict the accused on the sole testimony of the proscutrix and relied upon *Wahid Khan* v. *State of MP,* where the bench of J.M Panchal and Deepak Verma JJ, opined that it is also a matter of common law that in Indian society any girl or woman would not make sure allegations against a person as she is fully aware of the repercussions flowing there form. It would indeed be difficult for her to survive in Indian society which is of course, not as forward looking as the western countries are. The court also mentioned that corroboration is not the *sine qua non* for convictions in a rape case.

Approach of judiciary towards the cause of women is quite significant leading towards ultimate conviction or acquittal of the offender. In *State of UP v. Munesh*[36] a bench of P. Sathasivam and Ranjan Gogoi held that our primary concern is about the devastating increase in rape cases and cases relating to crime against women in the world. Although the statutory provisions provide strict penal action against such offenders, it is for the courts to ultimately decide whether such incident has occurred or not. The court should be more cautious in appreciating the evidence and the accused should not be left scot free merely on flimsy grounds. Though the high court has allowed the appeal filed by respondent accused and acquitted him of all the charges and also rejected the capital sentences references.

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[33] AIR 2002 SC 1963

[34] (2005) 3 SCC 594

[35] (2010) 8 SCC 191

[36] AIR 2013 SC 147

In the instant case, the accused had committed rape, which repels against moral conscience as he chose a girl of 11 year to satisfy his lust and subsequently murdered her, who had gone alone from her house at about 5:30 P.M on 5/3/2002 to prepare cow-dung cakes in the cremation ground of Jatavs'. The followers of victim precipitation theory may argue that since she had gone alone therefore she was raped. The law on the issue whether a conviction can be based entirely on the statement of a rape victim has been settled by this court in several decisions[37] and could be concluded as "Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

Contradicting with the cases on relying over the sole testimony of the victim, the bench of R.V. Ravindran and B. Sudershan in *Radhu* v. *State of Madhya Pradesh*[38] observed that, the court should, at the same time, bear in mind that false charges of rape are not uncommon; there have also been rare instances where a parent has persuaded a gullible or obedient daughter to make charge of a rape either to take revenge or export money or to get rid of financially liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case. Observed that, the court should, at the same time, bear in mind that false charges of rape are not uncommon; there have also been rare instances where a parent has persuaded a gullible or obedient daughter to make charge of a rape either to take revenge or export money or to get rid of financially liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case.

In Rajoo & Ors v. *State of M.P*[39] the Supreme Court had the occasion to observe that the evidence of the prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement, at best, is adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication.

In *Tameezuddin alias Tammu* v. *State*[40] H.S. Bedi and Aftab Alam observed that it is true that in a case of rape the evidence of the proscutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. In *Dinesh Jaishwal* v. *State of Madhaya Pradesh*[41] the Supreme Court observed that, though evidence of the victim prosecutrix is liable to be believed save in exceptional circumstances, but to hold that a proscutrix must be believed irrespective of improbabilities in her story, is unacceptable.

In *State of HP* v. *Mano Singh*[42] the court held that testimony of the prosecutrix is not

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[37] State of Haryana v. Basti Ram AIR 2013 SC 1307

[38] (2008) 2 SCC (Cri)

[39] AIR 2009 SC 858

[40] (2009) 15 SCC 566

[41] (2010) 2 SCC (Cri) 60

[42] 2011 Cri.L.J. 121 HP

inspiring confidence and prosecution case becomes doubtful in view of the observation of SC made in *Radhu's* case. Here, the court observed that if victim proscutrix of 16 year of age was alone at the time of occurrences and she appears to have consented for the sexual interaction with the accused respondent, therefore the appeal was dismissed. The decision of *State of UP* v. *Munesh* was adverted to and followed in *State of Rajasthan* v. *Meena*[43]. In this case the judgement was delivered by the bench of A.K Patvaik and Chandramauli Kr. Prasad. The bench opined that the conviction can be based on the sole testimony of the prosecutrix, if found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be classified into three categories, namely, wholly reliable, wholly unreliable and neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of a single witness, the conviction can be founded without corroboration, this principal applies with greater vigor in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option then to acquit the accused. In the background of the aforesaid legal position, the court considered that the statement of the prosecutrix was wholly unreliable because at the time of cross examination she could not explain the discrepancy in her statement. Therefore the court upheld the decision of acquittal of the accused by the trial court.

The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weigh but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration. Therefore the convict appellant was given the benefit of doubt and accordingly he was acquitted of the charge and set at liberty.

CONCLUSION AND SUGGESTIONS

A first step towards including rape in a psychology for women is correction of the biased manner in which mental health professionals have designed rape research. Such a methodological change would indeed be revolutionary. After a scientific revolution, many old measurements and manipulations become irrelevant and are replaced by others instead. In order to achieve this, scientists must acknowledge such bias as a scientific and methodological issue and not only a feminist one. The hope is that, as the methodologies change, the paradigms change, and the world itself changes with them.[44] Victim Precipitation theory in case of rape could be seen as statements made by *Abhijeet Mukherjee* and *Others* after the famous *Nirbhaya's* rape case means applications of victim precipitation theory in rape will only ridicule

[43] 2013 (2) SCALE 479

[44] T. S. Kuhn, "The Structure of Scientific Revolutions", 2nd ed. University of Chicago Press, Chicago, 1970

the victim and bring mockery of justice and nothing else. The court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before an order of conviction.

Some victimologists have warned against the tendency to overdo the emphasis on the role of the victim and reach the conclusion that the victim is the real criminal.[45] Feminist critics have objected most strenuously to the concept of victim precipitated rape. The entire concept of victim precipitated rape should be abandoned because it confuses precipitation and responsibility with women's vulnerability. Feminist theories of victim offender interaction in rape can serve as an important corrective to recent research by explicating the link between this interaction and the structural dimensions of sexual inequality and gender role socialization. There are three theories propounded by feminist scholars to encounter victim precipitation, situational contingencies and victim resistant theories *i.e* feminist oriented symbolic interactionism; feminist theories that conceptualize rape as a violent act; and feminist theories that conceptualize rape, including its violence, as an expression of male sexuality.[46] It is submitted by them that rape is a crime, whether it be date rape, intra-familiar rape, acquaintance rape, stranger rape or spousal rape. Rape is rape.

At last it can be concluded that the victim precipitation theory, if not understood correctly, does seem to imply that the victim is to blame. When read and applied properly, it theorizes that the victim's action and/or behaviors, whether intentionally or not, contributed to their victimization. If the woman gets raped, proponents of the victim precipitation theory are in no way implying that the victim caused the rape to occur. What the theory is saying is that this woman's passive precipitation may have influenced the dynamic of the situation thereby rendering her a sheep. They want to submit that the potentially hazardous situation was not created by either the man or the woman alone; it was formed by the dynamic interaction between the two people. Therefore, it is submitted that, in the present scenario neither one should be absolutely governed with the concept of traditional Indian woman in each and every case because now contradictions are also being experienced. Neither the pro women nor the anti women rather the just approach is the need of the hour.

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[45] Drapkin. I., and E. Viano, (eds.) Victimology: A New Focus, Lexing Ton Mass, 1974

[46] MacKinnon, C.A., "Feminism, Marxism Method, and the State: Toward Feminist Jurisprudence". 8(4) Journal of Women in Culture and Society, 1983, pp.635-658

ISSUES RELATING TO SURROGACY: INDIAN PERSPECTIVE

J.P. RAI*

Abstract

The desire for motherhood leads to search for alternatives solutions, and surrogacy presents itself as the most viable alternative. The practice of surrogacy arouses positive as well as negative emotions ranging from mild taste to revulsion. Despite the demand, surrogacy has its share of critics in India due to the moral, ethical and legal issues that swirls around it. The regulation of the system of surrogacy, through an effective legislation, dealing all aspects and issues of surrogacy will be beneficial to all concerned and society as a whole.

Key words

Surrogacy, Surrogate Motherhood, Assisted Reproductive Technology and Regulation.

INTRODUCTION

The feeling of motherhood is something incomparable with any other experience. It is considered to be a very important part of the human life. It makes the family life complete. Indeed, it is very difficult to understand the pain and emptiness of the couples who are not blessed with the boon of having a child of their own. Some women, due to various reasons, are unable to give birth to their own offspring. The desire for motherhood leads them to search for alternatives solutions, and surrogacy[1] presents itself as the most viable alternative.[2] Modern technological advancement such as Assisted Reproductive Technology (ART) is an offspring of technological revolution and medical advancement. Advances in assisted reproductive techniques such as In-Vitro Fertilization (IVF)[3] and Intra Uterine Insemination (IUI) methods have revolutionized the reproductive environment, resulting in "Surrogacy", as the most desirable option.

The practice of surrogate motherhood, though not unknown in previous times, came to international attention in the mid seventies of the twentieth century. Because of lower cost, less restrictive laws, lack in regulation of ART clinics and availability of

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1 The word surrogate has its origin from a Latin word surrogatus meaning a substitute, that is, a person appointed to act in the place of another.

2 According to the World Health Organization, infertility rate in India is 3%. According to recent National Family Health Survey in India, 3.8% of women between the age of 40 and 44 years have not had children and 3.5% of currently married women are declared barren, moreover it is also estimated that 15% of couples around the world are infertile, available at: *http://libdoc.who.int/HQ/2002/9241590300.pdf*

3 Available at: *http://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization*

surrogate mothers India has become a booming centre[4] of a fertility market with its reproductive tourism industry reported at estimated Rs. 25000 Crores in total.[5] India has become most favored destination for issueless couples from across the globe.[6] The surrogate mothers in India cost about $ 25,000, roughly a third of the typical price in the United States.[7]

Despite the demand, surrogacy has its share of critics in India due to the moral, ethical and legal issues that swirls around it. This paper makes an attempt to examine various legal, ethical and human rights issues connected with the practice of surrogacy along with Indian perspective to deal with such issues. In this regard, an analysis of the status of surrogacy in various countries; legal status of surrogacy in India and attempt being made by the Indian Parliament to handle the issues connected with surrogacy, its efficacy and contribution made by Indian judiciary in this field has been analyzed to assess the preparation of India to deal with surrogacy issues and to suggest some steps to improve the situation.

CONCEPTUAL FRAMEWORK

Surrogacy is not of recent origin. Examples can be found in the birth of Lord Hanuman as the fetus from the womb of '*Mohini*' was transferred to the womb of '*Anjani*' and the birth of Lord Krishna, as the fetus from the womb of *Devaki* was transferred to the womb of *Rohini*[8]. The first infertile couple in history is Abraham and Sarah and the first known surrogate mother is Hagar, their maid who bore a child in about 1910 BC (Gen. 16.1-15).[9] Until the 1960, surrogacy was usually carried out by a friend or relative, as a favour to someone in need. In 1976, the first formal surrogacy arrangement was set up in the United States. The birth of the first child, Louise Brown in 1978, through the technique of in vitro fertilization by Robert G Edwards and Patrick Steptoe, was a path breaking step in control of infertility, and within the few decades, surrogacy has become socially acceptable.[10]

Surrogacy can be traditional, gestational and donor surrogacy. Traditional surrogacy involves the artificial insemination of the surrogate mother by using the sperm of the intended father. Gestational surrogacy, on the other hand, involves the creation of an embryo in a Petri dish and its implantation into the womb of the surrogate who carries it to the term. Lastly, in donor surrogacy there is no genetic relationship between the child and the intended parents as the surrogate is inseminated with the sperm, not of the intended father, but of an outside donor. Biological[11] and

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4 In India, it is estimated that the number of births through surrogacy doubled between 2003-2006 and estimates range from 100-290 each year, see Krittivas Mukherjee, "Rent-a-Womb in India Fuels Surrogate Motherhood Debate, REUTERS, available at: *www.retuers.com/article/latestCrisis/idUSDEL298735*

5 Anil Malhotra, "Business of Babies", The Tribune, 14th December, 2008

6 Surrogacy cases have been reported from various regions in India but one area that appears to be over-represented is Anand district in the western state of Gujarat, Available at: *http://www.dailymail.co.uk/news/article-492733/India-takes-outsourcing-new-level-women-rent-wombs-foreigners.html*

7 "India Nurtures Business of Surrogate Motherhood", The New York Times, 10th March, 2008

8 Available at: *http://randommiaeducation.blogspot.in/2014_05_01_archive.html*

9 Available at: *http://www.jurconsult.ru/publications/ethical_dillemas/13_Legal%20control%20of%20surrogacy%20-%20international%20perspectives.pdf*

10 Available at: *http://www.delhi-ivf.com*

11 From the biological point of view, surrogacy is of two types; first, Full surrogacy/Gestational surrogacy or Host method and second, Half surrogacy/Traditional surrogacy or Straight method.

sociological[12] are the two perspectives of surrogacy.[13] To deal with various legal, ethical and human rights issues, there is an urgent need of changes in municipal laws. This change may not only provide legal status to surrogacy agreements, but also empowers administrators to deal with issues; protects interest of the various persons concerned with the process of surrogacy and makes arrangements for remedy in case of breach of contract.

SURROGACY: INTERNATIONAL PERSPECTIVE

The right to procreate should not depend on gender, family, or sexuality. It is a natural, inalienable right of any person to provide intergenerational continuity and further evolution of *homo sapiens*. One of the main principles of modern bioethics is that the interests and welfare of the individual should have priority over the sole interest of science or society.[14] Refusing to allow childless people to become parents (when they can have children through surrogacy) means refusing to treat them equally and is a classic example of selective discrimination. People who desperately want to become parents are excluded from reproduction and deprived of existing reproductive technologies.

Regulation of surrogacy, in modern times, varies greatly from one country to another, with two main types. In the first one, surrogacy is regulated by legislation. In the second one, it is not mentioned in laws and thus is not regulated. In United Kingdom, it is a criminal offense to advertise that one is willing to enter into a surrogacy arrangement. Based on the recommendations of 'Warnock Committee,'[15] the Surrogacy Arrangements Act, 1985 was brought in to force.[16] Under this Act, surrogacy arrangements are made legal and the Act prohibits advertising and other aspects of commercial surrogacy.[17]

United States of America is a unique country with a mixed legal landscape concerning surrogacy.[18] Seventeen States and Washington, DC, have laws that regulate surrogacy. Ten states have laws allowing surrogacy under certain circumstances. Six of those states limit the compensation for surrogacy arrangements; the other four require account approval. Three states allow the surrogate to change her mind or challenge the contract and the other six require prescreening for the surrogates and the prospective parents. In Australia, the surrogate mother is considered by the law to be the legal mother of the child and any surrogacy agreement giving custody to others is void and unenforceable in the court of law. Usually couples who make surrogacy arrangements must adopt the child rather than being recognized as birth parents, particularly if the surrogate mother is married.[19]

In Russia, liberal legislation makes attraction for reproductive tourists. Costs for ART

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[12] From the sociological perspective, there are too two kinds of surrogacy; first, Altruistic surrogacy/Non commercial surrogacy and second Commercial surrogacy.

[13] Available at: *http://lifethroughsurrogacy.com/SurrogacyTypes.html*

[14] The Universal Declaration on Bioethics and Human Rights, 2005, Article 3.2

[15] The Report of the Committee of Inquiry in to Human Fertilization and Embryology, Her Majesty's Stationery Office, 1984

[16] Available at: *http://www.legislation.gov.uk/ukpga/1985/49*

[17] Available at: *http://www.jiarm.com/MAY2014/paper12962.pdf*

[18] Aarons J., "Future Choices: Assisted Reproductive Technologies and the Law", Center for American Progress, 2007, Available at: *http://www.americanprogress.org*

[19] Available at: *http://ivfsurrogacy.in/Surrogacy/Legaleties_in_your_country.php*

are also lower in Russia than in the European Union, and foreigners have the same rights for assisted reproduction as Russian citizens. If delivery in a gestational surrogacy program takes place in Russia, commissioning parents may obtain a Russian birth certificate with both their names on it.[20] In France, surrogacy is not mentioned directly in the law per se, but since 1994, according to Article 16 and 17 of the Civil Code, any convention related to procreation or gestation for another person is null and void. Furthermore, in terms of criminal penalty, any person participating in a surrogacy program (whether it consists of artificial insemination or a donor's embryo transfer) commits a crime punishable by a three year imprisonment. In accordance with a law passed in 1989 about adoption intermediaries, the same measures are implemented for those who arrange contacts with a surrogate mother (Articles 13 and 14b). However, neither the surrogate mother nor the clients bear any responsibility. [21]

In Germany[22], the restrictive law for the protection of embryos strictly prohibits artificial insemination of a woman who is willing to hand the child over to commissioning parents upon birth in accordance with a surrogacy agreement. Criminal sanctions are applied for noncompliance, ranging from heavy fines to imprisonment.[23] In China, surrogacy is a grey area, but a report by the Southern Metropolis Weekly estimated that around 25,000 surrogate children have been born in China. Prospective surrogate mothers are openly recruited via the Internet and are paid 50,000-100,000 Yuan.[24] In Italy, the law[25] on Norms in the Area of Medically Assisted Reproduction completely bans heterogonous (third party) reproduction, including surrogacy. The use of medically assisted procreation techniques is limited to cases of sterility or infertility established and certified through a medical act within officially married heterosexual couples only, banning from the IVF clinic heterosexual couples just living together as well as single women and men who, though fertile, for such or another reason would like to use services of reproduction experts to become parents.

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In Israel, in March 1996, the government legalized gestational surrogacy under the Embryo Carrying Agreements Law. Surrogacy arrangements are permitted only to Israeli citizens who share the same religion.[26] According to the law, the commissioning father must supply the sperm and the ovum must come from either the commissioning mother or from a donor who is not the surrogate.[27] Greece Law

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[20] Svitnev K., "Legal Regulation of Assisted Reproduction Treatment in Russia", 20 Reprod BioMed Online, 2010, pp.892-894

[21] Available at: *http://www.lider-lab.sssup.it/lider/attachments/011_LoFP%20Contract%2015April2010.pdf*

[22] Schreiber H., "The Legal Situation Regarding Assisted Reproduction in Germany", 20 Reprod BioMed Online, 2010, pp.892-894

[23] Available at: *http://www.alertnet.org/thenews/newsdesk/HKG3611 96.htm*

[24] According to the exchange rate of 6.5 Yuan to U.S. Dollar, it is US$7,657-$15,314

[25] Available at: *www.jurconsult.ru/.../13_Legal%20control%20of%20surrogacy%20-%2*

[26] Siegel-Itzkovich J. "Israel Legalizes Surrogate Motherhood", BMJ 312, pp.729-730

[27] Available at: *http://en.wikipedia.org/wiki/Surrogacy_laws_by_country*

allows gestational surrogacy via a court order or ruling issued before the embryo transfer provided there is a written agreement that excludes any financial agreement between the involved parties (the prospective parents and the surrogate mother). If the latter is married, the written consent of her husband is required, and she must also provide a medical attestation of her inability to gestate the child. In addition, both the prospective parent and the surrogate mother must reside in Greece.[28]

SURROGACY: INDIAN PERSPECTIVE

Surrogacy, in India, is regulated only by the ICMR Guidelines, 2006, which was issued on the basis of report of the Law Commission of India.

Report of the Law Commission of India on Surrogacy

The 228th Report of the Law Commission of India[29] emphasizes the need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy.[30] The report recommended that banning surrogacy completely, on vague moral grounds would be futile. Since surrogacy is a complex concept, the law must be equally comprehensive in defending human liberty and distributing positive entitlements. Legislation should facilitate the correct or ethical use of ART technology for the benefit of childless couples. The situation in which India finds itself necessitates the abandonment of an insular approach to surrogacy, legalization of altruistic surrogacy and a ban on commercial surrogacy. It maintains that surrogacy agreements be governed by a contract concluded between the parties. This agreement will include the consent of surrogate mother, her husband and other family members to bear the child, her willingness to hand over the child immediately after birth. It should include details of the reimbursement of medical expenses and also include life insurance cover for the surrogate mother. Surrogacy agreements in India should be legally binding for all parties, under the existing Indian Contract Act. The right to privacy for both gamete donors and surrogates must be protected.[31] The Report has come largely in support of the Surrogacy in India, but it is lacking the legal hold on many aspects such as strengthening laws regarding commercializing surrogacy. India currently is in heavy need of laws which can regulate and can have a check on this activity.

Indian Council for Medical Research (ICMR) Guidelines[32]

To address issues relating to surrogate motherhood and to regulate surrogacy arrangements, the Government of India took certain steps including the introduction and implementation of National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics in 2006, and guidelines were issued by the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare, Government of India.[33] The main drawback of the

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[28] Available at: *http//books.google.co.in/books?isbn=3110240211*

[29] Available at: *http://lawcommissionofindia.nic.in/reports/report228.pdf*

[30] Available at: *www.lawcommissionofindia.com*

[31] Ibid.

[32] The Indian Council of Medical Research (ICMR) is the apex body in India for the planning, formulation, coordination, implementation and promotion of biomedical research and is one of the oldest medical research bodies in the world. India currently has no laws regulating assisted reproductive technologies. In 2000, the ICMR released a Statement of Specific Principles for Assisted Reproductive Technologies. Available at: *http://www.icmr.nic.in/ethical_guidelines.pdf*

[33] Available at: *http://www.icmr.nic.in/ethical_guidelines.pdf*

Guidelines was its non-binding nature. These are merely guidelines and have very little or no legal implications.[34] Guidelines gave a model draft for surrogacy contracts. However, whether a contract of surrogacy will be held as 'legal contract' or not, was not clear. If a child is born handicapped, the parents may back out from accepting it. In such cases, the surrogate mother may have to bear the brunt, for no fault of her, as that is not her genes. And if she also backs out, what will be the rights of the child? Guidelines were silent about it. What will be the fate of the child, if during this duration both parents decide to separate and go their own ways? If both deny accepting the child, what will happen to it? In the ICMR guidelines, it was mentioned that the age of surrogate mothers should be between 21-45 years.[35] But that does not prevent any minor from becoming a surrogate.

SURROGACY IN INDIA: LEGAL ISSUES

Till now, in India there is no legal provision dealing directly with surrogacy to protect the rights and interests of the surrogate mother, the child, or the commissioning parents. Nonetheless, no Indian law expressly prohibits surrogacy.[36] The surrogacy agreement under Indian Contract Act, 1872 is not enforceable because it is against public policy. By the drafting of the Assisted Reproductive Technology (Regulation) Bill, 2010 the surrogacy treatment is enforceable, but this bill is still pending.[37] In such a situation, several legal issues arise:

a) Who will be the Legal Mother: In India, the surrogate mother is not considered to be the legal mother. The birth certificate is made in the name of the genetic parents.[38] *Baby Manji Yamada*[39] was the first case where identity certificate was issued by the Indian government to a surrogate child born in India. The certificate did not mention nationality, mother's name or religion and it was valid only for Japan. This decision is growing public concern in India that there should be a legislation which deals with problem relating to commercial surrogacy. In *Jan Balaz* v. *Anand Municipality*,[40] Gujarat High Court conferred Indian citizenship on two twin babies fathered through compensated surrogacy by a German national in Anand district.[41] The Assisted Reproductive Technologies (Regulation) Bill, 2010[42] takes care of this issue. This bill deals with the parenthood of child very well but is still to be converted into Act.

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[34] The Baby Manji Case has exposed the lacuna that exists in the current legal framework in India regarding surrogacy. In this case, the intending father was debarred from taking the custody of the child as there was no law governing the effect of surrogacy in India.

[35] Available at: *http://www.icmr.nic.in/ethical_guidelines.pdf*

[36] The concept of surrogacy raises two pertinent questions; firstly, whether surrogacy is legal, and secondly, whether a baby born out of surrogacy is legitimate one. Article 16.1 of the Universal Declaration of the Human Rights, 1948 says, inter alia, that "men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family". For details see J.P. Rai, "Regulation of Surrogacy in India: Need of the Day", 7(7) Chotanagpur Law Journal, 2013-14, at 105

[37] Available at: *www.legalserviceindia.com*

[38] According to the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics, evolved in 2005 by the Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences.

[39] Baby Manji Yamada v. Union of India JT 2008 (II) SC 150

[40] 2010 (2) All MH Law Reporter, 14 Gujarat HC

[41] Ibid.

[42] The ART (Regulation) Bill, 2010, Clause 35

b) Nationality of Child Born through Surrogacy: If a foreigner or a foreign couple seeks sperm or egg donation, or surrogacy in India and a child born as a consequence, what shall be the nationality of the child? The Assisted Reproductive Technology (Regulation) Bill, 2010 Clause 35(8) provides that the child even though born in India, shall not be an Indian citizen. The birth certificate of a child born through the use of assisted reproductive technology shall contain the name or names of the parent or parents, as the case may be who sought such use.[43]

c) Custodial Parent of a Surrogate Child, in case of Gay Parents: In the case of *Baby Manji Yamada*[44], the court held that the intended parent may be a single male or a male homosexual couples. So in India, gay parents can be considered as a parent of a surrogate child. In Clause 35(4) of the ART (Regulation) Bill, 2010 the expression 'unmarried couples'[45] has been used, recognizing heterosexual relationships.

d) Custody of Child if Born by Surrogate Mother: Assuming that most surrogate arrangement are completed without conflict, parental rights should vest with the initiating parents. Problems arise where the surrogate decides to keep the child and refuse to relinquish the child to the couple especially, if she also happens to be the genetic mother. It is argued that section 13(1) of Hindu Minority and Guardianship Act 1956 and Section 17(1) of the Guardians and Wards Act, 1890 makes it clear that in declaring a person as the guardian, the best interests of the minor are to be a paramount consideration. ART (Regulation) Bill, 2010 considering this issue provides that the birth certificate issued in respect of a baby born through surrogacy shall bear the name of individual who commissioned the surrogacy as parents.[46] It shows that the custody of surrogate child shall be with the commissioned parents.

e) Case of physically and mentally retarded Surrogate Child: Earlier, there was no law to regulate the situation if surrogate child born physically and mentally retarded. The person or persons who have availed of the services of a surrogate mother should be legally bound to accept the custody of the child/children irrespective of any abnormality that the child/children may have and the refusal to do so should constitute an offence under this Act. The Bill takes care of this issue.[47]

f) Status of Divorced Biological Parents in Respect of the Custody of Child: In *Baby Manji Yamada*[48], a surrogacy agreement was entered into between the biological father and biological mother on one side and the surrogate mother on the other side. There were matrimonial discord between the biological parents and they refused to accept the child. Then the question arose about the custody of child. Here the Supreme Court did not decide the issue relating to custody of child to the divorced parents. If a commissioning couple opts for divorce after going for surrogacy but before the child is born than still in that case also the child should be considered to as the legitimate child of the couple.[49]

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[43] Id., Clause 35(7)
[44] JT 2008 (II) SC 150
[45] Supra note 42, Clause 35(4)
[46] Id., Clause 35(10)
[47] Id., Clause 35(11)
[48] JT 2008 (II) SC 150
[49] Supra note 42, Clause 35(4)

g) Confidentiality of Information Regarding Surrogacy: All the information regarding surrogate mother should be kept confidential.[50] No assisted reproductive technology clinic should provide information on or about surrogate mothers or potential surrogate mothers to any person and any assisted reproductive technology clinic acting in contravention of this provision should be deemed to have committed an offence.[51]

h) Rights of the Child Born in Surrogacy: A child, who has attained the age of 18 years, must have the right to ask for any information relating to the donor or surrogate mother except personal identification.[52] Personal identification of the genetic parent or parents or surrogate mother must be released only in case of life threatening medical conditions which require physical testing or samples of the genetic parents or parents or surrogate mother.[53]

i) Enforceability of Surrogate Agreement: Traditionally, the contract entered by the surrogate mother is not free contract because surrogate mother enters into contract only for money consideration so it is not free contract.[54] The contract entered by the mother is also against the public policy and immoral.[55] If surrogate mother denies fulfilling the contract, it is not enforceable by court of law.

Now, the ART (Regulation) Bill, 2010 acknowledges the concept of "surrogacy agreements"[56] and the fact that surrogate mother is entitled for monetary compensation[57] apart from the expenses borne by her for carrying on the pregnancy.[58] Now, this is a step in the right direction because merely turning a blind eye towards these kinds of arrangements won't serve the purpose. Also, the draft Bill states that the surrogate agreements shall be legally enforceable in the court of law.[59] This will ensure that these surrogacy agreements are treated at par with other standard contracts and the principles of the Indian Contract Act, 1872 and any other laws will be applicable over these kinds of agreements. So this will ensure better regulation of these agreements by the authorities and this will also ensure the protection of rights of surrogate mother.

j) Appointment of Legal Guardian by the Foreign Couples coming to India for Surrogacy: Ensuring arrangement, for appointment of a legal guardian, will

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[50] Id., Section 34(12)

[51] Id., Sections 34(14) and (15)

[52] Id., Clause 36(1)

[53] Id., Clause 36(3)

[54] The Indian Contract Act, 1872, Section 14

[55] Id., Section 23

[56] In Section 2(cc) of the draft Bill, Surrogacy agreement has been defined as a contract between the persons availing of Assisted Reproductive Technology and the surrogate mother.

[57] Section 34(3) of the Bill states that she is entitled for monetary compensation.

[58] Section 34(2) of the Bill states that all expenses, including those related to insurance, of the surrogate related to a pregnancy achieved in furtherance of assisted reproductive technology shall, during the period of pregnancy and after delivery as per medical advice and till the child is ready to be delivered as per medical advice, to the biological parent or parents, shall be borne by the couple or individual seeking surrogacy.

[59] Section 34(1) of the Bill states as follows:- Both the couple or individual seeking surrogacy through the use of assisted reproductive technology, and the surrogate mother, shall enter into a surrogacy agreement which shall be legally enforceable.

ensure that unfortunate incidents such as the *Baby Manaji's* case are not repeated in India again. When a foreign couple comes to India for surrogate agreement to avail the services of the surrogate mother, they should appoint a legal guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy,[60] till the child/children are delivered to the foreigner or foreign couple or the local guardian. Further, the party seeking the surrogacy must ensure and establish to the ART clinic through proper documentation that the party would be able to take the child/children born through surrogacy, including where the embryo was consequence of donation of an octoyee or sperm, outside of India to the country of the party's origin or residence as the case may be.[61] For the first time, this kind of provision is going to be introduced in India. Certainly, one can say that the authorities have considered the fact that majority of the commercial surrogate agreements involve a foreign party.

k) Screening of Surrogate Mother: The surrogate mother should be properly screened so as to ensure the suitability regarding her age[62] and health[63]. This step is to ensure that the surrogate is of minimum age preventing her exploitation. And also by screening her for various infectious diseases, this will ensure that the baby doesn't inherit any one of the disease which is affecting the surrogate mother.

l) Certificate to the Surrogate Mother by Persons availing Services: Still further, the surrogate mother should be issued a certificate by the persons who have availed of her services acknowledging the fact that she has acted as a surrogate for them.[64] In a nutshell, after going through these prominent provisions of the ART (Regulation) Bill, 2010 regarding commercial surrogacy agreements and the rights of surrogate mother and child, one can definitely say that for the first time, various issues which were raised from time to time have been acknowledged and discussed in detail in the Bill. But still it remains to be seen that how these provisions are adopted in actuality by the legislature and even more important is the fact that how far these provisions will be enforced in letter and spirit.

SURROGACY IN INDIA: ETHICAL ISSUES

The practice of surrogacy arouses positive as well as negative emotions ranging from mild taste to revulsion. Some say there is nothing wrong, in principle, with surrogate motherhood as it is a way of helping infertile women to fulfill a fundamental human longing. Those who believe that surrogacy is ethically wrong argue that surrogacy exploits women, particularly those from lower economic classes, thus constituting a new form of 'slavery'. Others contend that it is dehumanizing babies, amounting to a

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[60] Section 34(19) of the Bill

[61] Ibid.

[62] Section 34(5) of the Bill states that no woman less than twenty one years of age and over thirty five years of age shall be eligible to act as a surrogate mother under this Act. Provided that no woman shall act as a surrogate for more than five successful live births in her life, including her own children.

[63] Section 34(6) of the Bill states that any woman seeking or agreeing to act as a surrogate mother shall be medically tested for such diseases, sexually transmitted or otherwise, as may be prescribed, and all other communicable diseases which may endanger the health of the child, and must declare in writing that she has not received a blood transfusion or a blood product in the last six months.

[64] Section 34(17) of the Bill Draft

new variety of 'baby selling' and that surrogacy contracts are "against public policy". Major moral and ethical issues involved with surrogacy, on which the public policy considerations are grounded, are:

a) **Considering Women as Commodity:** It is said that surrogate arrangements may lead to considering women as a commodity and devaluation of both the gestational and expecting mother.[65] Surrogacy arrangements, even dressed up in altruistic terms, constitute bargain and exchange over the incidents of parenthood and allow society to view a woman's reproductive abilities, not only as a biological source of procreation, but also in a contractual and perhaps commercial nature.[66] No topic related to surrogate motherhood is more contentious than compensation of the surrogate mother by the intended parents. Hence, the requirement of the day is to take care of this issue.

b) **Baby Selling:** The great majority of assisted reproduction is centered on private health care and, even with in a public health service, there is indirect payment for obstetric expertise. People who express a strong distaste for surrogate motherhood are quick to label it 'baby-selling'[67]. This aspect of surrogacy must be regulated by way of public awareness and suitable provisions, lest the entire purpose of the coming legislation will fail.

c) **Exploitation of Women:** Some critics of surrogate motherhood opposes it as exploitative of women. This makes it to appear that surrogacy is unethical because of the type of practice it is namely a form of exploitation. It is always going to be poor women who have the babies and rich women who get them. To offer money to a poor, unemployed woman to bear the child of another woman is probably to offer her an undue inducement. It is an offer that may be difficult for a person of little financial means to refuse and would, in that case, be coercive. Exploitation of women in an Exploitation of women in any form should be prevented.

SURROGACY IN INDIA: HUMAN RIGHTS ISSUES

Assisted reproductive technologies have raised a number of human rights issues, including right to dignity, individual autonomy, right to know, etc. Human dignity is an engine of individual empowerment, reinforcing individual autonomy and the right to self determination.[68] The autonomy of the individual includes the dignity and worth as a human person and the individual rights of freedom of choice. However, the claim to respect for private life into contact with public life or into close connection with other protected interests, the weighing of which requires legal regulation and is of some import to the acceptance or expansion of modern birth technology.[69] The contest between public and private interests or individual and group rights, sometimes creates a lot of confusion in legal field.

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[65] ichelle Pierce-Gealy, "Are You My Mother? Ohio's Crazy-Making Baby-Making Produces a New Definition of Mother," 28 Akron L. Rev, 1995, at 535, available at: https://www.uakron.edu/dotAsset/726634.pdf

[66] B. Bartlett, "Re-Expressing Parenthood", 98 YALE L.J, 1988, at 332 &333

[67] JK Mason, et al, Law and Medical Ethics, Butterworths Lexis Nexis, 2002, at 106

[68] Timothy Caulfield & Roger Brownsword, "Human Dignity: A Guide to Policy Making in the Biotechnology Era?" 7 Nature Review/Genetics, 2006, at 72

[69] Bartha Maria Knoppers, "Modern Birth Technology and Human Rights", 33 The American Journal of Comparative Law, 1985 at 24

Artificial insemination is the insertion of sperm into a woman's vagina to cause pregnancy using a method other than sexual intercourse. Where the male genetic material of the husband is introduced artificially into the women's body, it is known as "Artificial Insemination Homologous" or Artificial Insemination Husband" (AIH). Where the genetic material is obtained from male other than the woman's husband, it is called "Artificial Insemination Donor (AID)". From the human rights point of view AID generates much heated debates.

One of the most problematic human rights aspects relating to Artificial Insemination Donor (AID) is concerned with the anonymity and non-anonymity of gamete donor. In the age of human rights, there remains a great conflict between the child's right to know and parent's rights not to tell the genetic origin.[70] Many societies in the present time have begun to place greater emphasis on the rights of child. Article 7 of the UN Convention on the Rights of Child, 1989 can be seen as being of fundamental importance which provides the right to know one's parents. In the context of donor anonymity, it has been expressed as the child's right to know the identity of gamete donor.

There may be arguments that it is not in the best interest of child to tell about the gamete donation because there is a fear that telling a child how they are conceived would cause severe social and psychological problems. A further reason for not telling the child is that parents should have a right to privacy and if they keep such information confidential that is their prerogative. Balancing of these competing interests is a difficult matter that requires a full debate and consequent, legislative attempt to create a balance between these conflicting interests.

Surrogate arrangements have created a lot of confusion in legal circle, posing new challenges. Questions posed by reproductive technologies challenge the most basic tenets of family law. The bifurcated role of woman in surrogate arrangements is prompting renewed assessment of the meaning of motherhood and the designation of maternal rights.[71] Once the embryo is implanted in the womb of the surrogate the process enters a realm of privacy which entails substantial personal freedom for gestating mother. The inviolability of this personal realm prohibits enforcement of the surrogate contract through specific performances during gestation. Damage remedies against the surrogate mother for non-performance must be severely limited to preserve the fundamental rights of privacy and procreative autonomy. The terms of the contract should save primarily as indications of the parties' intent including a willingness on the part of the surrogate mother to abide by the terms. However, punishing the surrogate mother for inadequate birth is misplaced in the traditional scheme of maternity, which accords pregnant woman the freedom to lead their life without fear of sanction.[72] A surrogate mother is no more a machine and no less a human, should not be held to a higher standard of procreation than a natural mother. The surrogate mother cannot be made to bear the burden of human procreative fallibility[73]. This all poses a great challenge for the policy makers.

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[70] For details see Lucy Frith, "Gamete Donation and Anonymity", 16 Human Reproduction, 2001, at 819, available at: humrep.oxfordjournals.org/content/16/5/818.long

[71] Andres E. Stumpf, "Redefining Mother: A Legal Matrix for New Reproductive Technologies", 96 The Yale Law Journal, 1986, at 186

[72] Id., at 202-03

[73] Ibid.

CONCLUDING OBSERVATIONS

The improvement and regulation of the system of surrogacy would be beneficial to potential parties and society as a whole. Regulation is superior to either the prohibition or even criminalization of surrogacy, actions which would be of questionable constitutionality[74] and in all likelihood drive surrogacy underground. Carefully drafted legislation can minimize the potentially exploitative aspects of surrogacy and protect the individuals who choose it as a reproductive option. There cannot be a law to arrest the development of science and technology but there can be a law to prevent misuse of the same and channelize its use in proper direction. Science is bound to progress. Medical advancements cannot be prevented for the sake of societal non-acceptance and legal inadequacies. The cause for societal non acceptance should be sorted out and inadequacies of law should be identified. The moral and ethical issues eternally ebb and flow in the tides of medical and technological advancements and technological advancement and a good law should have ethical foundation and morality is ultimately a concern of subjective analysis. We have ICMR guidelines, but it is ineffective and insufficient to tackle and regulate the challenges emerging out of surrogacy in India.

Because the assisted reproduction practice is regulated primarily by non-enforceable guidelines, arbitrary procedures regulate them. As surrogate arrangements have become normal and routine course, the legislature should pass clear legislation governing surrogacy. People view their procreative rights as sacrosanct: too important to be left to the unpredictable rulings of courts and/or the sometimes arbitrary policies of infertility clinics and assisted reproduction centers. Developing ideal laws to govern surrogate parenting arrangements will be no easy matter. In order to have effective regulation of surrogacy in India, the ART (Regulation) Bill, 2010 should be enacted with provisions expressly authorizing and regulating assisted reproductive technology and commercial surrogacy arrangements with certain limitations.

[74] Larry Gostin, "A Civil Liberties Analysis of Surrogacy Arrangements", in Larry Gostin (ed.), Surrogate Motherhood: Politics and Privacy, 1990 pp.3-7

ROLE OF INTELLECTUAL PROPERTY RIGHTS FOR SMEs: NEED TO MANAGE KNOWLEDGE

Rajnish Kumar Singh*

Abstract

Globalization has enhanced competitiveness in the international market and has deep influence on the way enterprises work. Small and Medium Enterprises (SMEs) are too becoming increasingly involved in the market basically aspart of supply chains and also due to expansion and growth. But, they face the problem of responding to the new economic world order because they are not familiar with the best ways to manage their knowledge assets. They face different types of Intellectual Property Rights (IPRs) challenges and do need to evolve strategies suiting different conditions to exist in competitive market. In this context, it is important to re-look at the basic issues relating to need for protecting intellectual wealth, policy measures and steps taken for creating IPR culture in SMEs. The paper argues that the ability to create, access and use knowledge is the fundamental determinant of global competitiveness of enterprises and economies which highlights the importance of IPRs. The paper examines all these issues in the context of Indian Small and Medium Enterprises.

Key words

Globalization, International Market, Small and Medium Enterprises, Innovation and Intellectual Property Rights.

INTRODUCTION

Globalization, it is believed, has fuelled competitiveness in the international market. The key organizations of globalization- Multinational Corporations, World Bank, and International Monetary Fund emphasize on the need of competition in international trade. While, globalization is not a new phenomenon, the true impact of globalization started becoming visible after the establishment of World Trade Organisation (WTO). The obligation on member states to reduce tariff barriers and reduction in quantitative restrictions in export etc. has deep influence on the way enterprises work today. Like any other sector even the Small and Medium Enterprises (SME) face the problem of responding to the new economic world order.

The traditional factors/determinants of wealth creation (Land, Labour and Capital) does not occupy the central position in today's market economy.[1] It is the manner one manages Knowledge that decides the competitive edge. SMEs are becoming increasingly involved in global competitive markets, basically as part of supply chains and also due to expansion and growth.[2] SMEs have traditionally relied more on local markets and are currently less equipped to face market challenges of a highly competitive environment. In addition to local government help, SMEs in these

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regions need to re-examine and modify their competitive strategies by fully incorporating innovation within their people, processes and products.[3]

SMEs face a major challenge in the new environment because they are not familiar with the best ways to manage their knowledge assets. They face different types of Intellectual Property Rights (IPR) challenges and do need to evolve strategies suiting different conditions to exist in competitive market. In this context, it is equally important to re-look at the basic issues relating to, reasons for economy environment change, need for protecting intellectual wealth, policy measures and steps taken for creating IPR culture in SMEs.[4] The ability to create, access and use knowledge is the fundamental determinant of global competitiveness of enterprises and economies[5] which highlight the importance of IPRs. The paper examines all these issues in the context of Indian SMEs.

INDIAN SMALL AND MEDIUM INDUSTRIES IN THE ERA OF GLOBALIZATION

Worldwide, SMEs account for approximately 95% of the business population. Given the significant role of SMEs in the national economy in terms of their sizeable contribution to GDP, employment generation, export performance, and achieving sustainable national economic development, most governments have placed increasing emphasis on facilitating the creation and development of the national SMEs sector.[6] In the context of increasing international trade, specialization seems to be a better mode to achieve prosperity rather than diversity in activities of an enterprise. The majority of the world's large companies provide multiple services but purchase many components and goods from smaller companies that are engaged in one activity. Thus, SMEs can prove to be an effective player for economic growth through their participation in global trade. SMEs also drive economic development by creating a valuable source of employment.

Definition of SMEs

A typical SME can be defined as an enterprise in market economies founded on the basis of innovation and with the help of entrepreneurial spirit, usually governed by owners or partial owners in a personalized way.[7] A classification of SMEs is

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1 The phrase 'knowledge-based economy' describes the new economic environment in which the generation and management of knowledge play a predominant part in wealth creation, as compared with the traditional factors of production, namely, land, labour and capital. Esteban Burrone, "Intellectual Property Rights and Innovation in SMEs in OECD Countries", 10 Journal of Intellectual Property Rights, 2005, pp.34-43

2 Cagliano R, Blackmon K, Voss C, "Small Firms under the Microscope: International Differences in Production/Operations Management Practices and Performance", 12(7) Integrated Manufacturing Systems, 2001, pp.469-482. Cited from Vijay Jain and Ravi Kiran, "Technology Management Strategies and Small and Medium Enterprises of Punjab Manufacturing: A Use-based Sector Analysis", 17 Journal of Intellectual Property Rights, 2012, pp.64-72, at 64

3 Vijay Jain and Ravi Kiran, Supra note 2

4 Vidhan Maheshwari and Pratishtha Bhatnagar, "Small Scale Industries and IP Management: Need to Recognize Intellectual Assets", 13 Journal of Intellectual Property Rights, 2008, pp 139-144, at 139

5 Esteban Burrone, Supra note 1

6 Id., at 35

7 Milan Stamatovi? and Nebojša Zaki?, "Effects of the Global Economic Crisis on Small and Medium Enterprises in Serbia", 5(1) Serbian Journal of Management, 2010, pp.151-162, at 154

determined by the criteria that vary across countries. Some adopt registered capital, capital expenditures or turnover as a standard. In accordance with the provision of the Micro, Small and Medium Enterprises Development Act, 2006 of India, the small and medium enterprises are classified into two classes.[8]

i. **Manufacturing Enterprises[9]:** The Enterprises engaged in the manufacturing or production of goods pertaining to any industry specified in the first schedule to the Industries (Development and Regulation) Act, 1951.The manufacturing enterprises are defined in the terms of investment in plant and machinery. For Small enterprise, the investment in plant and machinery has to be more than twenty five lakh rupees but should not exceed five crore rupees; and for Medium enterprise, the investment in plant and machinery has to be more than five crore rupees but it should not exceed ten crore rupees.

ii. **Service Enterprises[10]:** The enterprises engaged in providing or rendering of services and are defined in the terms of investment in equipment. If investment in equipment is more than ten lakh rupees but does not exceed two crore rupees, it is a small enterprise; and if investment in equipment is more than two crore rupees but does not exceed five crore rupees, it is medium enterprise.

Role of SMEs in Economy

Globalization[11] of world economy and technological developments in the last few decades have transformed the majority of wealth creating work from physically based to knowledge based and has greatly enhanced the values of information to business organisation by offering new business opportunities. While, for the last two hundred years, economics has recognised only two factors of production: labour and capital, this is now changing. Information and knowledge are replacing capital and energy as the primary wealth creating assets.[12]

At the global level several WTO Members raised SME-related issues at early stages of the Doha Round. Among the impediments identified in meetings of the *Council for*

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[8] Annual Report, 2012-13, Government of India, Ministry of Micro, Small and Medium Enterprises; There is no acknowledged universal definition of SME. The definition of the Organisation for Economic Cooperation and Development [OECD, 2002] is based on employment figures. The widely accepted definition points to Small Sized Enterprises with between 1 to 49 employees, while Medium Sized Enterprises are firms with between 50 to 100 employees. According to this definition, Small Sized Enterprises are defined as firms that are registered and have less than 50 employees. On the other hand, Medium Sized Enterprises are defined as registered firms with less than 100 employees. Mihane Berisha-Namani, "The Role of Information Technology in Small and Medium Sized Enterprises in Kosova", Fulbright Academy, 2009 available at: http://www.fulbrightacademy.org/123570.

There are some widely used criteria such as number of employees, annual turnover and, occasionally, sales, asset values, market shares or investment. According to a definition applied by the World Bank Group, small enterprises have total assets and annual sales between US $ 100,000 and US $ 3 million, while the assets and sales of medium enterprises fall within a bracket of up to US $ 15million. WTO document TN/S/W/5 of 1 October 2002; Independent Evaluation Group (IEG), 2008, Financing Micro, Small, and Medium Enterprises: An Independent Evaluation of IFC's Experience with Financial Intermediaries in Frontier Countries, Washington D.C.: International Financial Corporation (IFC), at 5

[9] Manufacturing SMEs feed supply chains of local large enterprises, global large enterprises or local consumer markets. Food processing is the key manufacturing industry. Further, a large number of small and medium enterprises in the food and textile industries are export-oriented and serve large global supply chains or global consumer markets.

[10] Service SMEs operate in traditional transaction-based industries such as retail trade, small transport operations and knowledge-based industries such as information technology, human resource consulting among others.

Trade in Services were discriminatory and non-transparent regulatory frameworks; insufficient information about regulatory conditions; commercial presence requirements; lack of recognition of qualifications; restrictions on movement of personnel; burdensome licensing requirements that raise costs and impede access to the Internet; uncertainties surrounding the applicable legal framework, payment modalities and conditions governing the electronic delivery of services; and difficulties in obtaining related services (e.g. legal services, advertising, accounting services). SMEs were also deemed to suffer from genuine financial and human resource constraints, which limit their capacity to enter foreign markets other than via cross-border supplies and the movement of personnel.[13]

The globalization of business has increasingly drawn SMEs into global value chains through different types of cross-border activities. Many entrepreneurs are recognizing the opportunities that this process offers and gaining access to global markets has become a strategic instrument for their further development. SMEs account for less than 30 per cent of total exports in the Asia-Pacific region. In Europe, exporting activity rises with firm size. The share of medium-sized enterprises engaged in exporting is more than twice that of micro-enterprises. US experience suggests that exporting SMEs often confine their efforts to one market. Around one-third of SMEs report an increasing number of international business contacts, ranging from 30 per cent for micro-enterprises to 50percent for medium sized enterprises. Few SMEs invest abroad. Only 3 per cent of SMEs in Europe have subsidiaries, branches or joint ventures in other countries.[14] Globally, the number of Micro, Small and Medium Enterprises (MSMEs) per 1,000 people grew by 6 per cent per year from 2000 to 2009. In the high-income economies, MSMEs are not only denser in the business structure, but also employ a higher percentage of the workforce. In half of the high-income economies covered, formal MSMEs employed at least 45 per cent of the workforce, compared to only 27 per cent in low-income economies. Formal MSMEs employ more than one-third of the global population, contributing around 33 per cent of employment in developing economies. From a regional perspective, East Asia and the Pacific have the highest ratio of MSME employment to total employment. This is mainly driven by China, where formal MSMEs account for 80 percent of total employment. The low ratio of formal MSME employment to total employment in South Asia could be explained by the fact that in the three countries covered, Bangladesh, India, and Pakistan, the informal sector is large. These indicators

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[11] Globalization refers to the web of linkages and interconnections between states, societies, and organizations that make up the present world economic system. Globalization creates new structures and new relationships, with the result that business decisions and actions in one part of the world have significant consequences in other places. Underlying and reinforcing these globalization trends is the rapidly changing technological environment, particularly in biotechnology, information processing, and telecommunications. Changes in telecommunications and data processing capabilities make it possible to coordinate research, marketing and production operation around the world. Almost instantaneous communications makes it possible to trade financial instruments twenty-four hours a day: and thus more return-sensitive are location of resources within firms, industries and countries. Zoltan J. Acs and Lee Preston, "Small and Medium-Sized Enterprises, Technology, and Globalization", 9(1-6) Small Business Economics, 1997, at 1

[12] Mihane Berisha-Namani, Supra note 8, at 3

[13] Rudolf Adlung and Marta Soprana, "SMEs in Services Trade: A GATS Perspective", Staff Working Paper ERSD-2012-09, World Trade Organization, Economic Research and Statistics Division, at 7

[14] "Promoting Entrepreneurship and Innovative SMEs in a Global Economy: Towards a More Responsible and Inclusive Globalisation", Executive Summary of the Background Reports, Organisation for Economic Co-operation and Development, Istanbul, Turkey, 3-5 June 2004, pp.26&27

highlight the importance of MSMEs to economic development and job creation.[15]

It is important to note that the perceived role of SMEs, traditionally, has been distributive. SMEs are viewed as the best agents of decentralized growth and growth spillovers in any economy. Despite such a strategic role, the practice of SME development in most countries of the world remains largely *ad hoc* and not integrated with the main stream models of economic growth which continue to guide economic policy in these countries.[16] There is growing recognition worldwide that SMEs have an important role to play in the present context given their greatest resource use efficiency, capacity for employment generation, technological innovation, promoting inter sectoral linkages, raising exports and developing entrepreneurship skills.[17]

In India the number of MSMEs has increased from 67.87 lakh units in 1990-91 to 311.52 lakh units in 2010-11. There has been a steady growth in investments production employment and exports during 2010-11 over 1990-91. The share of MSMEs sector to total exports increased consistently from 23.8 per cent during 1980-81 to 27.6 per cent during 1989-90 and to 46.58 per cent during 2008-09.[18] Total Employment generated by MSMEs (in lakh) is 805.24; The estimated numbers of enterprises and employment have increased at an annual compound growth rate of 28.02 per cent and 26.42 per cent respectively during the period 2001-02 to 2006-07. It is also important to that 31.79 per cent of the enterprises in the MSME sector were engaged in manufacturing, whereas 68.21 percent of the enterprises were engaged in the services.[19] MSMEs contribute about 40 per cent of India's total exports; about 45 per cent of India's manufacturing output; the sector manufacture more than 6,000 products.[20] Their contribution to India's GDP has been growing consistently at 11.5 per cent a year, which is higher than the overall GDP growth of 8 per cent.[21]

Impediments for the Growth of SMEs

Although the SME sector has been growing at a faster rate than the overall industrial sector, SMEs experience such constraints as inadequate market linkages, lack of infrastructure, inadequate finance, lack of managerial competence, and obsolete technology that threaten to derail the sector's growth trajectory.[22] While industries such as automotive, forging, software development sector require advanced technologies in operations, the majority of the small and medium enterprises do not have that kind of technological edge. A low technology base results in low productivity, which makes these enterprises uncompetitive. Financial institutions

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[15] MSME Country Indicators, available at: http://www.ifc.org/msmecountryindicators

[16] P.M. Mathew, "Policy Prescriptions for Small and Medium Enterprises", XLVIII(39) Economic & Political Weekly, 2013, at 37

[17] Puli Subramanyam and B. Ramachandra Reddy, "Micro, Small and Medium Enterprises in India: An Overview", II(XI) VSRDIJBMR, 2012, at 538

[18] Ibid.

[19] Annual Report, 2012-2013, MSME, Government of India.

[20] Mukund Chandra Mehta, "Challenges and Opportunities in Micro, Small and Medium Enterprises in India", 2nd International Conference on Management, Humanity and Economics, May 6-7, 2013, Kuala Lumpur (Malaysia)

[21] "Micro, Small and Medium Enterprise Finance in India: A Research Study on Needs, Gaps and Way Forward", International Finance Corporation, World Bank Group, November 2012, at 13, available at: http://www.ifc.org/wp. Current estimates of MSME contribution to GDP do not take into consideration the contribution made by unorganized private enterprises for which asset and sales data is not tracked by government agencies.

[22] Id., at 32

associate lack of technology within competitive businesses and therefore are wary of financing enterprises which are not technologically up-to-date in operations. These enterprises too have limited awareness about new technologies.[23]

All economies are trying to speed up liberalization of their business conditions by carrying out regulatory reforms, deregulating business environment, simplifying and reducing the costs of various types of administration procedures, which would have, to a significant extent, an impact on competitiveness of enterprises, and economy as a whole. Favourable business conditions contribute to the growth of local enterprises, but also invite companies of the world to export to this emerging market, or to develop their products and services through direct investments. This means that local SMEs even if they do not have the intention to operate on the world market, will be facing the world competition anyway on the national market, in the same way as if they were exporting.[24] It is thus important to note that in the context of WTO obligations of reduction in trade barriers and quantitative restrictions in export etc. coupled with the recent outcome of 9th Ministerial Conference at Bali in December, 2013 in the form of trade facilitation[25] deal[26] makes it imperative for every single individual enterprise in India, small or large, whether exporting or serving the Indian market, to enhance innovation so as to face the challenges of competitiveness.

In order to provide competitive edge to the units in the MSME Sector in the global environment and with a view to build the capacity of the Indian micro, small and medium manufacturing enterprises for overcoming competition in the global markets and facing challenges being posed by the entry of the multi-nationals in the domestic markets, the Ministry of MSME is implementing the National Manufacturing Competitiveness Programme (NMCP). The objective of NMCP is to ensure healthy growth of the MSME Manufacturing Sector. Following are the components of the Programme:[27]

i. Marketing Support/Assistance to MSMEs (BAR CODE)
ii. Support for Entrepreneurial and Managerial Development of SMEs through incubator (INCUBATOR)
iii. Setting up Mini Tool Room & Training Centers (MTR)
iv. Building Awareness on Intellectual Property Rights (IPR)
v. National Programme for Application of Lean Manufacturing (LEAN)
vi. Enabling Manufacturing Sector to be Competitive through Quality Management Standards and Quality Technology Tools (QMS/QTT)

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[23] Ibid.

[24] Igor Brkanovi?, "Small and Medium-Sized Enterprises and Intellectual Property", Center for Development of Entrepreneurial Society, Study prepared with the support of World Intellectual Property Organization, at 8, available at: http://www.zis.gov.rs/upload/documents/pdf_en/pdf/Study_SMEs_and_Intelectual_Property-EN_final.pdf.

[25] Trade facilitation includes, apart from other things, the following: Improving the availability of information for traders, Establishing advance rulings on tariff classification and applicable duties to expedite customs clearance, Introducing pre-arrival clearance to allow goods to be released immediately upon arrival, Introducing pre-arrival clearance to allow goods to be released immediately upon arrival, Enhancing transparency in customs rulings and administrative procedures, Improving coordination among border agencies, and Developing a uniform administration of trade regulations etc.

[26] C.R.L. Narasimhan, "The Real Winner at Bali", The Hindu, 16 December, 2013

[27] Micro, Small and Medium Enterprise Finance in India, Supra note 21 pp.40&41

vii. Technology Upgradation and Quality Certification Support to SMEs (TEQUP)

viii. Marketing Assistance for SMEs and Technology Upgradation Activities (MARKETING)

ix. Design Clinic Scheme to bring Design expertise to the Manufacturing sector (DESIGN)

x. Promotion of Information Communication Technology in Indian Manufacturing Sector (ICT)

The above list of components has an emphasis on innovation in technology, marketing including brand promotion and design in terms of enhancing the value of product on the basis of visual appearance. Thus, to become and remain competitive, SMEs need a coherent business strategy to constantly improve their efficiency, reduce production costs and enhance the reputation of their products by investing in research and development; acquiring new technology; improving management practices; developing creative and appealing designs; and effectively marketing their products.[28]

It is believed that SMEs must develop an understanding on knowledge management (KM). KM encompasses the notions of information management, knowledge and skill development and data collection. The concept also touches upon intellectual properties invented or designed by SMEs, and innovation that enables higher-quality products and unique methods of production. In light of the present situation where organizations must adapt to structural change of the domestic industry and government policies on trade, service and investment liberalization, SMEs are likely to face an even more condensed competitive rivalry. Thus, SME supporting plans and policies are demanded to place an emphasis on how the organizations could achieve competitiveness through the exploitation of intellectual property.[29] The ensuing part examines the connection between Intellectual Property Rights (IPRs) and growth of SME industry.

INTELLECTUAL PROPERTY MANAGEMENT FOR SMES

Keeping in mind the contribution of SMEs in the developing economy of India and changing environments, their strengthening in innovations and management of knowledge, should now occupy the centre stage.[30] SMEs can stabilize and survive if they are able to innovate new products and processes to meet the market demands in time. It is at this point, that the management of knowledge and Intellectual Property Rights (IPR) become extremely crucial. Intellectual Property (IP) protection will help in preventing competitors from copying or closely imitating an industry's products or services; avoiding wasteful investment in research and development (R&D) and marketing; creating a corporate identity through a trademark and branding strategy;

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[28] Guriqbal Singh Jaiya, "The Importance of Intellectual Property (IP) for Enhancing the Competitiveness of Small and Medium Sized Enterprises (SMEs)" at 12, available at: *http://www.wipo.int/export/sites/www/sme/en/activities/meetings/singapore_03/singapore_jaiya_3b.pdf* A similar argument is seen in the OECD declaration, "The development of a vibrant and dynamic SMEs sector, requires constant creativity and innovation to adapt to fast-changing market conditions, short product cycles and intense market competition", See Istanbul Ministerial Declaration, Fostering the Growth of Innovative and Internationally Competitive SMEs, adopted at the Second OECD Ministerial Conference on SMEs, 2-5 June 2004.

[29] Piriya Pholphirul and Veera Bhatiasevi, "Why Thai SMEs do not register for IPRs?: A Cost-Benefit Comparison and Public Policies", available at: *http://www3.qeh.ox.ac.uk/slptmd/Pholphirul_Bhatiasevi.pdf*

[30] Vidhan Maheshwari, *Supra* note 4, at 140

negotiating licensing, franchising or other IP-based contractual agreements; acquiring venture capital and enhancing access to finance; and, obtaining access to new market.[31]

Understanding the importance of the IP system and using it effectively, as an integral part of the business strategy of SMEs, is a crucial necessity for success in the market place. Wolfgang Starein explains it with the help of an illustration. A small manufacturing company has developed a new product, which is, in many ways, superior to competing products existing in the market. This product is characterized by a number of new distinctive designs, and is marketed under a new brand name. To advertise the new product, the company creates or uses its own web site, in addition to putting out a radio advertisement with a distinctive jingle. Such a company could protect the new functional features through a patent or a series of patents, the new design through industrial design registration, the associated technical drawings and its web site through copyright, the associated knowledge through trade secrets, the brand name through trademark registration, etc. In other words, the small company has a great deal of IP, which could be protected and used through a combination of different types of IPRs.[32]

Effective IP management enables companies to use their intellectual property assets to improve their competitiveness and strategic advantage. Acquiring IP protection is a crucial initial step, but effective IP management means more than just protecting an enterprise's inventions, trademarks, designs, or copyright. It also involves a company's ability to commercialize such inventions, market its brands, license its know-how, conclude joint ventures and other contractual agreements involving IP, and effectively monitor and enforce its intellectual property rights. Indeed, a company's portfolio of IP must be viewed as a collection of key assets that add significant value to the enterprise.[33]

Intellectual Property: Meaning and Kinds

The term 'intellectual property' has been used for almost one hundred and fifty years to refer general area of law that encompasses copyright, patents, designs and trademarks, as well as a host of related rights.[34] IP laws regulate creation, use and exploitation of intellectual creations which are *sine qua non* for the economic and technological development of a nation and the prosperity achieved by any nation is the result of exploitation of their intellectual property.[35] In this era of globalization, especially after the establishment of WTO, intellectual property laws have assumed great importance.

The system of intellectual property rights creates property rights over knowledge. IP rights may be defined as exclusive rights granted by the State giving the owner the right to exclude others from the commercial exploitation of a given invention, new/original design, trademark, literary and artistic work and/or new variety of plant. By providing a fair degree of exclusivity over the exploitation of innovation(s), the system of IP rights creates an incentive to invest in scientific, technological, and organizational R&D activities so as to reduce the risk of free-riding by others while

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[31] *Ibid.*

[32] Wolfgang Starein, "A Tool to Enhance Competitiveness of SMEs", 7 *Journal of Intellectual Property Rights*, 2002, pp.436-439, at 437

[33] "Intellectual Property and Small and Medium-Sized Enterprises", World Intellectual Property Organization, available at *www.wipo.int*

[34] Bently Lionel and Sherman Brad, *Intellectual Property Law,* Oxford University Press, London, 2003, at 1

[35] V.K. Ahuja, *Law Relating to Intellectual Property Rights*, LexisNexis Butterworths Wadhwa, 2007, at vii

commercially exploiting product and process innovations.[36]

India is a fast developing economy and there is growing concern as to how the stronger IP protection, demanded by the TRIPs Agreement, is going to affect such an economy. After India became party to the TRIPs agreement all the existing intellectual property laws in India were subjected to considerable changes. New laws were also introduced to satisfy her obligations under the TRIPs. There is considerable increase in the litigation in India in the last decade.

Various kinds of IP performing different functions have been incorporated in municipal laws. While a patent is an exclusive right granted for an invention, which is a product or a process that provides a new way of doing something, or offers a new technical solution to a problem, a trademark or brand-name is a distinctive sign which identifies certain goods or services as those produced or provided by a specific person or enterprise. An industrial design or simply design is the ornamental or aesthetic aspect of an article produced by industry or handicraft; registration. Copyright is a legal term describing rights given to creators for their literary and artistic works (including computer software). Related rights are granted to performing artists; producers of sound recordings and broadcasting organizations in their radio and television programmes. A geographical indication, a form of community IP, is a sign used on goods that have a specific geographical origin and often possess qualities or a reputation that are due to that place of origin. Another form of IP which is not generally known among or readily accessible to persons that normally deal with the kind of information in question is known as Trade Secrets or Undisclosed Information. It has commercial value because it is secret, and has been subject to reasonable steps to keep it secret by the person lawfully in control of the information.[37] It is important to note that enterprises attach more importance to patent and trademark in the context of economic growth. The growing importance of patent in particular is visible from the increasing applications filed by firms in foreign countries. The reasons for the above according to Esteban Burrone include - the shift towards knowledge-based industries making intangible assets as the source of competitive advantage for firms, the outsourcing of manufacturing activities to subcontractors, legislative changes at the national, regional and international levels, the expansion of patentable subject matter, and a surge in patenting among universities and public-sector R&D institutions.[38]

Role Performed by Intellectual Property

Effective intellectual property management enables companies to use their intellectual property to improve their competitiveness and strategic advantage. Acquiring IP protection is a crucial initial step, but effective IP management means more than just protecting an enterprise's inventions, trademarks, designs, or copyright. It also involves a company's ability to commercialize such inventions, market its brands, license its know-how to other companies, conclude joint ventures and other contractual agreements involving IP, and effectively monitor and enforce its intellectual property rights. Indeed, a company's portfolio of IP must be viewed as a collection of key assets that add significant value to the enterprise.[39] Role of intellectual property for enterprises may be summarized as follows:

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[36] Esteban Burrone, *Supra* note 1

[37] For details on the meaning of various kinds of IP see *http://www.wipo.int/about-ip/en/* and relevant WIPO leaflets

[38] Esteban Burrone, *Supra* note 1

[39] *Supra* note 33

a) IP enhances the market value and the competitiveness: IPR has become an important parameter influencing trade, transfer and exploitation of technology. As generation of intellectual property is closely linked to innovations, there is now a lot of competition in innovation. In other words, each player in a given field would try to outpace its competitors by introducing new products through innovations.[40]

b) IP as business assets: An enterprise's assets may be broadly divided into two categories: physical assets including buildings, machinery, financial assets and infrastructure and intangible assets ranging from human capital and know-how to ideas, brands, designs and other intangible fruits of a company's creative and innovative capacity. In recent years, the situation has changed significantly. Increasingly, and largely as a result of the information technologies revolution and the growth of the service economy, companies are realizing that intangible assets are often becoming more valuable than their physical assets.[41]

c) IP as an investment: Markets will value a company on the basis of its assets, its current business operations and expectations of future profits. Expectations for future profit may be considerably affected by the acquisition of key patents.[42] Patents are important tools for indicating the value of an R&D project to investors, thereby mitigating the problem of information asymmetry between new firms and investors, which can undermine access to financing. Overall, the quality of an innovative enterprise's patent portfolio is positively correlated with the willingness of investors to support its projects.[43] Investment in developing a good IP portfolio is, therefore, much more than a defensive act against potential competitors. It is a way of increasing a company's market value and improving future profitability.[44]

d) IP is crucial for marketing the products and services: Intellectual property, when efficiently used, is an important tool in creating an image for your business in the minds of your current and potential customers and in positioning your business in the market. IP rights, combined with other marketing tools (such as advertisements and other sales promotion activities) are crucial for:[45]

- Differentiating a trader's products and services and making them easily recognizable
- Promoting the products or services and creating a loyal clientele
- Diversifying market strategy to various target groups
- Marketing products or services in foreign countries

Thus, the foregoing clearly suggests that IP protection will help in preventing competitors from copying or closely imitating an industry's products or services; avoiding wasteful investment in research and development (R&D) and marketing; creating a corporate identity through a trademark and branding strategy; negotiating licensing, franchising or other IP-based contractual agreements; acquiring venture

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[40] Vidhan Maheshwari, *Supra* note 4, at 141

[41] *Tran Viet Hung,* "SMEs and Supply Chains", available at: *Tran Viet Hung,* "SMEs and Supply Chains", available at: *http://www.unescap.org/tid/projects/iptrade_s7hung.pdf*

[42] *Ibid.*

[43] Jennifer Brant and Sebastian Lohse, "Enhancing IP Management and Appropriation by Innovative SMEs", Innovation and Intellectual Property Series, Research Paper 1, International Chamber of Commerce at 12, available at: *http://mercatorxxi.com/merc/wp-content/uploads/2009/07/SME-appropriation-paper.pdf*

[44] *Tran Viet Hung, Supra note 41*

[45] *Ibid.*

capital and enhancing access to finance; and, obtaining access to new market.[46]

SME Specific IP Issues

Good management requires especially that in the up and coming SMEs, young technocrats should be encouraged to invent and innovate. Even if it takes time, the SMEs should promote inventiveness in the production of indigenous brands of technology in which they have both competence and price edge.[47] IP adds value at every stage of the value chain from creative/innovative idea to putting a new, better, and cheaper, product/service on the market.[48]

SMEs, however, are an extremely heterogeneous group. Their innovative capacity and ability to develop new and innovative products, processes and services vary significantly. In certain high-technology sectors, such as semiconductors and biotechnology, patenting activity is comparatively much higher than in other sectors and small firms rely heavily on patents to signal expertise, either to attract research partners or investment. In a number of other sectors, however, innovation by SMEs mainly consists of minor adaptations to existing products, innovation in designs, mode of service delivery or management and marketing practices. In many such sectors, SME's innovations are mainly of an informal nature, without formal R&D investments, R&D laboratories or R&D personnel. In such cases, other intellectual property rights, such as industrial designs, trade secrets, and trademarks may play a bigger role than patents in providing a competitive edge to SMEs.[49]

In addition to the key purpose of appropriating the benefits of their investments in R&D, Innovative SMEs file patents for a range of strategic motivations, such as trade with other technology firms via cross-licensing, and the use of patents as bargaining chips in negotiations with other firms.[50] Also, patents play a key role in partnerships. A strong patent portfolio can help an innovative SME to attract the right partners, enabling it to obtain the funds and expertise, especially manufacturing and marketing capabilities that it needs to bring a product to market.[51] To summarize, in addition to providing relative legal certainty and enforceability, patents have two advantages that are of particular interest to innovative SMEs. First, they can assume an important signaling function, to the market in general and to potential investors and partners in particular. Second, registered IP rights can be used to manage collaboration with other companies, which is a necessity for many SMEs in part due to their limited internal capacities.[52]

There are important reasons why SMEs appear to make less effective use of patents. First, SMEs reliance on patents as a source of competitive advantage may be hindered by costs that either on average or at the margin are higher than those for large firms. Secondly, the ability to recognise and develop an efficient level of protection through patenting may be hindered in SMEs because they do not have sufficient internal competence to manage effectively this aspect of their business development. Finally, even where SMEs are able to recognise the importance of patenting and put in place appropriate patents, they may be at a substantial

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[46] Vidhan Maheshwari, *Supra* note 4, at 140

[47] Shahid Alikhan, "Intellectual Property Management for Enhancing Competitiveness Particularly in Small and Medium Enterprises", 6 *Journal of Intellectual Property Rights*, 2001, pp. 85-93, at 89

[48] *Guriqbal Singh Jaiya, Supra note 28*

[49] Esteban Burrone, *Supra* note 1, at 36

[50] Jennifer Brant, *Supra* note 43, at 10

[51] *Ibid.*

[52] *Id.* ,at 13

disadvantage in enforcing them. This is particularly likely to be the case with respect to larger firms who not only may have a sufficiently deep pocket to protect their own IP or challenge the IP of SMEs, but may have greater competence at both designing and defending their own patent position against emergent rival patents.[53] From the viewpoint of SMEs the costs of IP enforcement quite clearly works against the use of patents.[54] Today, most of the SSIs in India are unfriendly with the terms of IPR. SSIs have to pay attention to build their brand equity as soon as possible through trademarks and domain names. Registration of domain names would become indispensable as soon as electronic trade picks up and industries start doing business on networks. There is a need to go into the merits of the patent also to see if the concerned patent can be revoked or not. Unfortunately, most of the industries lack the expert knowledge and financial resources to proceed in this direction.[55] The lack of financial resources to obtain and maintain patents in India has been identified as an important factor by the industry for the low activity. It may be reckoned that protecting inventions in foreign countries could be very expensive which most SSIs would not be in a position to afford.[56]

Planning New Initiatives for SMEs

The biggest challenge is enhancing IPR awareness. The Ministry of Small-Scale Industries has taken steps to create awareness about IPR. It is important to note that a plan for promoting the IP culture keeping in view the existing bottlenecks needs to be evolved. Looking at the nature of the SMEs and their financial capabilities it is imperative for the government to intervene into the matter and take actions for facilitating more IP registrations. Protecting inventions in foreign countries could be very expensive which most SSIs would not be in a position to afford. It will be wise to exempt R&D type SMEs from paying the official fee for patenting and maintaining patents. Most of the SMEs in India do not have the financial stability to take the innovation to the final stage and many a times the invention falls short on account of inventive step and thus not granted patent, in this context sound arguments in favour of allowing registration for utility models need to be advanced. Further, it is also important to note that managing Knowledge requires proper understanding of the value of IP which in turn largely depends on the process of IP auditing. Thus a brief examination of Utility Model Protection, IP valuation and IP audit in the context of SMEs is not out of place.

a) Utility Model: As the international documents on IP are silent on the meaning of utility model, a survey of national laws[57] suggest that Utility models are a form of patent-like protection for minor or incremental innovations. They tend to protect the functional aspect of a product. One of the main rationales behind this second-tier patent systems is that such systems improve access to patent protection for

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[53] Alan Hughes and Andrea Mina, "The Impact of the Patent System on SMEs", Intellectual Property Office, CRB at 1-,2, available at:*http://www.ipo.gov.uk/ipresearch-impact-201011.pdf*

[54] *Id.,* at 36

[55] Vidhan Maheshwari, *Supra* note 4 at, 141

[56] *Id.,* at 142

[57] Utility model protection is referred to in Australia as "innovation patent", in Malaysia as "utility innovation", in France as "utility certificate", and in Belgium as "short-term patent". Some systems define utility models as intangible subject matter such as technical concepts or inventions or devices, while others anchor their definitions to three-dimensional forms. Yet others profess to grant "utility model" protection which, in actuality, is equivalent to patent protection without examination and for a shorter duration. Uma Suthersanen, "Utility Models and Innovation in Developing Countries", UNCTAD-ICTSD Project on IPRs and Sustainable Development at 1, available at: *http://unctad.org/en/docs/iteipc20066_en.pdf*

individuals and SMEs. In addition, the quick grant of a second-tier patent is thought to make such protection suitable for products with a short life-cycle.[58]

It is often claimed that utility model systems are particularly advantageous for SMEs, especially in developing countries. It is quite likely that SMEs have a large presence in those industries where cumulative innovation is the norm and copying is rife. Indeed, it is also often argued that a cheap and rapid second tier patent regime would improve the legal environment for SMEs, especially those which are engaged in an ongoing process of innovation and adaptation. This is more so in relation to certain product sectors which are concerned, not so much with revolutionary technological breakthroughs, but more so with incremental or improvement innovation. For another, it may even be that more innovations, both of the breakthrough and incremental varieties, emanate from SMEs than from larger multinational conglomerates. If this is so, it is important to gauge whether the current patent regime is attuned to the needs of SMEs and the types of inventions they produce. Another reason why utility models may be good for SMEs is that the cost factor may inhibit them from using the patent system as much as they would desire.[59]

Juma put forward five reasons why utility models are appropriate for developing nations. The first is that they enable artisans to secure protection for innovations that do not meet the stricter novelty and inventive step requirements of patent law. Second, they make it possible to increase the role of small-scale innovators and artisans in economic development and help them stay in business in the face of new technologies that might threaten their livelihoods. Third, they act as a spur to enhanced levels of innovation. Fourth, they are cheaper to acquire than patents. And finally, they may become a source of data on innovative activity and experience in technological management.[60]

India needs to legislate for utility model protection in the interest of its small and medium size enterprises. It will not go against the public interest, it may be expected that such a system will also increase the amount of technological information available in the public domain for use by various organizations. With the right kind of legislation in place, the sum total of innovations that can be ultimately protected by petty patents can become a major intellectual asset for India, as also a major negotiating instrument.[61]

b) IP Valuation[62]: While big enterprises have become leaders by the effective

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[58] Mark D. Janis, "Second Tier Patent Protection" 40 *Harvard International Law Journal,* 1999, at 151, cited from Andrew F. Christie and Sarah L. Moritz, "Australia's Second-Tier Patent System: A Preliminary Review", IPRIA Report No. 02/04, at 7, available at: *http://www.ipria.org/publications/reports/ AU_2nd-tier_Report-revised.pdf*

[59] Uma Suthersanen, *Supra* note 57 at xiii & xiv

[60] Juma, C. *The Gene Hunters: Biotechnology and the Scramble for Seeds*, Princeton University Press, Princeton, 1989, at 231-2, cited from Uma Suthersanen, "Utility Models and Innovation in Developing Countries", UNCTAD-ICTSD Project on IPRs and Sustainable Development at 8,available at: *http://unctad.org/en/docs/iteipc20066_en.pdf*

[61] Jyoti S. A. Bhat, "Small and Medium Enterprises and Intellectual Property Rights", 37(1) *ASCI Journal of Management*, 2007, pp.6-13, at 8

[62] There are very less instances in law where the method of valuation of intellectual property assets has been laid down by law of any country. Internationally, the valuation of intangible asset standards released by the International Valuation Standard Commission provides some guidelines as to what should be the approach and methods of valuation of intangible assets. Since they are not binding and are not tailor made for intellectual property, they cannot be applied to all situations as such. Akshat Pande, *Valuation of Intellectual Property Assets*, Eastern Law House, 2010, at 49

creation, extraction and leveraging of their IP through efficient IP management, the SMEs have been slow in realizing the potential of IP management in increasing their competitiveness. The primary reason for valuing IP is to maximize its value and therefore the value of the owner organization through optimum management decisions. There are various scenarios where valuation is required and needed, some examples are:[63]

i) An accurate IP valuation is required for buying or selling a company, establishing joint ventures, and executing mergers and acquisitions.

ii) When negotiating a license contract, both parties must be clear about the values involved.

iii) To finance their development plans, many knowledge intensive companies can only offer their own IP as collateral. Due to insufficient knowledge about IP and valuation, banks are as yet reluctant to accept such assets.

iv) Knowing the value of their IP is important for possible tax deductions and tax compliance. Accounting standards are generally not helpful in representing IP in company accounts and as a result these are often under-valued and mismanaged.

v) Accurate IP appraisal is required in the event of IP rights infringement or breach of contract.

vi) Research, development, legal, industrial protection application and commercialization decisions involve high but measurable levels of risk. IP valuation facilitates cost effective decision-making and helps to understand and deal with the risks involved.

It is important to note that in view of the managerial and resource constraints typically confronting SMEs, it seems unlikely that the negative cost-benefit conclusions arrived at by most large firms in regard to greater disclosure of intangibles will be any less stark. Managerial and other limitations within SMEs make the measurement, management and development of knowledge and other intangible assets difficult and costly to achieve because of the absence of the necessary formalized systems of feedback, reporting and the detailed statistical information and monitoring systems necessary to underpin these practices. The high set-up costs associated with developing the above managerial infrastructure tends, therefore to result in most SMEs concluding that such intangible management systems will "not find a suitable home in a SME environment, and will typically be deemed 'unworkable' by SME management"[64]. The observation justifies the state intervention at two levels, first, spreading awareness about the utility of valuation and thus efficient management of IP assets and second, making assistance available for the SMEs so that the cost involved in the process may be minimal. It is further substantiated by the observation of Robert Watson that 'the valuation and reporting of SME intangible assets is likely to produce few benefits whilst potentially being very costly in terms of its usage of scarce resources, namely the owner-manager's time and energy and the financial costs of engaging outside professionals. Nevertheless,

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[63] Valuation of Intellectual Property, Students Handbook, Module 4, IP for Innovation, available at: *http://www .nada.kth.se/utbildning/grukth/exjobb/rapportlistor/2012/rapporter12/hult_susanna_12060.pd f*

[64] Huggins, R. and Weir, M., "Intellectual Assets and Public Policy", 8(4) *Journal of Intellectual Capital,* 2007, pp. 708-20, cited from Robert Watson, "Small and Medium size Enterprises and the Knowledge Economy: Assessing the Relevance of Intangible Asset Valuation, Reporting and Management Initiatives", *Journal of Financial Regulation and Compliance*, 2010, at 136

the general point that creating and growing any form of successful businesses today involves significant investments in intangible assets and requires their efficient management is fairly uncontroversial'.[65]

Roya Ghafele raises very important questions as to can you manage what you cannot measure? And can you finance what you cannot measure? It may be noted that the management of a company becomes a much greater challenge since adequate information on all the assets and liabilities of a company are not available. Further, since IP is literally absent from the accounting, reporting, and managerial discourse, investors find it difficult to access information on how a firm's IP portfolio relates to its income streams.[66]

c) IP Audit: In an enterprise setup, a large number of intellectual assets may be involved. In such a situation, how can the company's officers be confident that they are aware of all of the company's intellectual property assets? One solution is to perform an intellectual property audit.[67]

The intellectual property audit is a management tool for the assessment of the value and risk of intellectual property assets. The IP audit, once completed, should provide a significant volume of data and analysis that addresses how well an enterprise is equipped to participate in economic growth based on intellectual property assets. It should give an objective, comprehensive picture of existing strategies, infrastructure, capacity, need, institutions, competitive advantages and challenges. Such data and analysis are a precondition for defining realistically attainable economic and development objectives.[68] Thus an IP audit is an inspection of the intellectual property owned, used, or acquired by a business as well as a review of its management, maintenance, exploitation, and enforcement. It is believed that the focus on short-term results causes intellectual property, and related corporate performance, to remain somewhat behind.[69]

The purpose of the intellectual property audit should be financial, technical and legal. Any aspect if left would not suffice the audit exercise.[70] It has to include an evaluation of the procedure in place at the company for maintaining the company's IP assets, avoiding unauthorized use of the intellectual property rights of others and valuation of intellectual assets.[71] It is a continuous exercise as the value of intellectual property asset is generally not stagnant. There are many stages of the life of an intellectual property asset and at each of such stages; the value of the concerned asset may differ.[72] Just as companies develop varying personalities in their corporate culture, such as brand awareness, competitiveness, and innovativeness, they should similarly strive to make IP awareness a trait that spans all parts of their business all of the time. This is how companies evolve to more sophisticated levels of

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[65] Robert Watson, *Supra* note 64 at 137

[66] Roya Ghafele, "Accounting for IP ?", 5(7) *Journal of Intellectual Property Law & Practice*, 2010, at 528

[67] Akshat Pande, *Supra* note 62, at 18

[68] Intellectual Property Audit Tool, IP Assets Management Series, WIPO, at 4, available at: *http://www.wipo.int/export/sites/www/freepublications/en/intproperty/927/wipo_pub_927.pdf*

[69] "IP Audits: Driving by the Rear-View Mirror-*The Necessary Evolution to Proactive, Business-Oriented Intellectual Property Management Systems", Innovation Asset Group, July 2008, at 4, available at: http://www.innovation-asset.com/content/white-papers/IAG*

[70] Akshat Pande, *Supra* note 62, at 20

[71] *Id.,* at 19

[72] *Id.,* pp. 19&20

IP management, in which intellectual property is not something measured on a periodic basis but is in fact measured and managed on a daily basis.[73]

CONCLUSION

The foregoing discussion suggests that intellectual property has business implications at various points across the enterprise, and each of these points has a role to play in its management. An effective IP management scheme for SME includes appreciation of the fact that the value and role of intellectual asset keeps changing with time. Thus, it must adapt to business objectives and changes in technology. IP audit is therefore the starting point. After having realized the importance of IP for SMEs in India, it is now imperative for the government to work in the direction of promoting competitiveness of SMEs and thus making them equipped to manage their knowledge resources. The present paper presented arguments for evolving a plan for aspects like utility model protection, IP valuation and IP audit for SMEs in the special context of India. The paper thus takes us to the conclusion that growth depends on managing knowledge which in turn depends on acquiring knowledge about the amount and kind of knowledge possessed by an enterprise.

[73] IP Audits: Driving by the Rear-View Mirror, *Supra* note 69, at 9

HANDLING SECTION 498A CASES: POLICING PREDICAMENTS IN WAKE OF JUDICIAL ASSERTIONS AND COMPELLING REAL TIME IMPERATIVES AND NEED FOR INCLUSIVE DELIBERATION

Praveen B. Patil*

Abstract

Cruelty in matrimonial milieu is criminally prohibited offence. The offence being cognizable and non-bailable vests enormous powers in the hands of police and complainant as well. Police can cause havoc under the guise of policing such cases. Judicially noticing such 'police attitude' different guidelines have been laid in different context which have become contextually contrary. The aim of the paper is to address the omnipresent power of the police to police section 498A cases which power has been judicially cut to size.

Key words

Cruelty, Matrimony, Offence, Police and Judiciary.

INTRODUCTION

Several enactments and provisions have been brought on the statute book during the last two or three decades to address the concerns of liberty, dignity and equal respect for women.[1] The insertion of Section 498A IPC is one such move and it penalizes offensive conduct of the husband and his relatives towards the married woman.[2] Section 498A was introduced in the year 1983 to protect married women from being subjected to cruelty by the husband or his relatives. A punishment extending to 3 years and fine has been prescribed. Section 498A is in statue book on the premise that the dowry is a social evil and the law designed to punish those who harass the wives with demand of dowry should be allowed to take its full course instead of putting its seal of approval on the private compromises. The social consciousness and the societal interest demands that such offences should be kept outside the domain of out-of-court settlement.[3] This law has served its purpose but failed in its direction. The law which was supposed be protective turned to be defensive of 'hidden agenda' of ill minded. This law has been misused to such an extent that the government of India had to appoint law commissions to study the misuse of this law. The reports of such commissions have stamped the already arrived conclusions. The law as such has always been good but it has been failed by police and complainant (beneficiaries of this law). In the following sections deliberation is attempted to reconcile police powers, legal imperatives and rights of common man.

THE TEETH OF SECTION 498A

There is phenomenal increase in matrimonial disputes in recent years. The institution

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1 *Section 498A of IPC,* 243rd Report, 2012, Law Commission of India, at 2

2 *Ibid.*

3 *Compounding of (IPC) Offences,* 237th Report, 2011, Law Commission of India, at 16

of marriage is greatly revered in this country. Section 498-A of the IPC was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives.[4] Section 498A reads as under

498A. Husband or relative of husband of a woman subjecting her to cruelty:

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.[5]

Explanation.- For the purpose of this section, "cruelty" means-

(a) Any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of woman; or

(b) Harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

The expression 'cruelty' has been defined in wide terms so as to include inflicting physical or mental harm to the body or health of the woman and indulging in acts of harassment with a view to coerce her or her relations to meet any unlawful demand for any property or valuable security. Harassment for dowry falls within the sweep of latter limb of the section. Creating a situation driving the woman to commit suicide is also one of the ingredients of 'cruelty'.[6] It is, unfortunate to note that, this law far from serving the real purpose has been a tool in the hands of 'few' to harass husband and in-laws. Of late, complaints under S. 498A were being filed with an oblique motive to wreck personal vendetta[7]. Exaggerated versions of the incidents are reflected in a large number of complaints.[8]

The harsh law, far from helping the genuine victimized women, has become a source of blackmail and harassment of husbands and others.[9] Unprecedented numbers of persons are implicated in courts of law.[10] The implication of the relatives of husband was found to be unjustified in a large number of decided cases.[11] It has become a tool of educated and learned[12] to bring the husband and in law to their terms.

POLICING 498A CASES AND TRIPLE PROBLEMS

Section 498A cases are essentially criminal and quasi-criminal cases. Explanation A attached to section 498A speaks of certain circumstance which assume all essential ingredients of crime. However Explanation B attached to section 498A is more of matrimonial in nature rather than criminal. It is the legislature which chose to classify such offence as criminal in response to spurt in relevant crimes.[13] This distinction is not dubious in the sense that, the swiftness of policing in the former is not warranted in the latter. In latter cases police may have enough time to investigate and conclude the seriousness or otherwise of a situation which is not possible in the

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4 *Arnesh Kumar* v. *State of Bihar & Anr* Criminal Appeal No. 1277 of 2014 Special Leave Petition (Crl.) No.9127 of 2013, decided on July 2, 2014 at 3

5 The offence under section 498A is cognizable, non-compoundable and non-bailable.

6 *Supra* note 1, at 1

7 *Sushil Kumar Sharma v. UOI* 2005 6 SCC 281

8 *Preeti Gupta v. State of Jharkhand* AIR 2010 SC 3363

9 See Government of India Report, 2003, *Committee on Reforms of Criminal Justice System* (hereinafter called Malimath Committee's Report)

former. Further, conciliation is best suited for latter cases which may not be advisable in the former though not totally ruled out. In spite of these academic yet practical distinctions, the policing does not cease in either of the case and resultantly all 498A cases are treated as 'police cases'.

Section 498A is cognizable and non-bailable and these features that bring in the conflicting interest of policing rights of the society at large and personal rights of individuals. Since the offences under section 498A are cognizable the police are bound statutorily to register the complaint. Though in cases of non-bailable offences also bail can be obtained, the rigours process of convincing the police or magistrate is not ruled out in which cases generally bail is denied or routine basis. The third element is of compoundability. Though police do not have much role to play in compounding of offences, the non availability of such option make the police to stringently view Section 498A cases. On the other hand, police themselves may feel that complaints under section 498A may be the result of momentary emotions which may result in frivolous and vexatious complaint. Therefore, the informed police may seek to have 'preliminary investigation or so to say enquiry' before registering such complaint. But in the presence of imperatives of section 154 police have to register such cases and consequently proceed to spot for investigation.[14] Non observance of

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[10] The Law Commission reported that "According to information received from the Hon'ble High Courts (during the year 2011) 340555 cases under Section 498A IPC were pending trial in various courts towards the end of 2010. There were as many as 938809 accused implicated in these cases. This does not include cases pertaining to Punjab and Haryana (statistics not available)". Crime in India 2012 Statistics published by National Crime Records Bureau, Ministry of Home Affairs shows arrest of 197762 persons all over India during the year 2012 for offence under Section 498A of the IPC, 9.4% more than the year 2011. Nearly a quarter of those arrested under this provision in 2012 were women i.e. 47951 which depict that mother and sisters of the husbands were liberally included in their arrest net. Its share is 6% out of the total persons arrested under the crimes committed under Indian Penal Code. It accounts for 4.5% of total crimes committed under different sections of penal code, more than any other crimes excepting theft and hurt. The rate of charge-sheeting in cases under Section 498A, IPC is as high as 93.6%, while the conviction rate is only 15%, which is lowest across all heads. As many as 372706 cases are pending trial of which on current estimate, nearly 317000 are likely to result in acquittal.

[11] 243rd Report, Law Commission of India, at 2

[12] While so, it appears that the women especially from the poor strata of the society living in rural areas rarely take resort to the provision, though they are the worst sufferers.

[13] Section 498A has to be seen in the context of violence and impairment of women's liberty and dignity within the matrimonial fold. Mindless and senseless deprivation of life and liberty of women could not have been dealt with effectively through soft sanctions alone, see 243rd Report, Law Commission of India, at 14

[14] See *Lalita Kumari* v. *Govt. of U.P. & Ors* Writ Petition (Criminal) No. 68 of 2008, decided by Constitutional Bench consisting of P. Sathasivam, CJ, Dr. B.S. Chauhan, Ranjana Prakash Desai, Ranjan Gogoi, S.A. Bobde JJ on November 12, 2013. The court held that registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given *ex facie* discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR."

procedural imperatives may result in substantive punishment, departmental strictures and remarks by the committee/commission[15] reports. Therefore, police appear to be less sensitive and intolerant in respect of section 498A cases. Thus, the triple problems that have cropped up in the course of implementation of the provision are:

i. The police straightaway rushing to arrest the husband and even his other family members (named in the FIR)

ii. Tendency to implicate, with little or no justification the in-laws and other relations residing in the marital home and even outside the home, overtaken by feelings of emotion and vengeance or on account of wrong advice, and

iii. Lack of professional, sensitive and empathetic approach on the part of the police to the problems of woman under distress.

The fact that Section 498-A is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision.[16] Various High Courts[17] in the country have also noted that in several instances, "that omnibus allegations are made against the husband and his relations and the complaints are filed without proper justification". Delhi High Court observed that "there is no iota of doubt that most of the complaints are filed in the heat of the moment over trifling fights and ego clashes. It is also a matter of common knowledge that in their tussle and ongoing hostility, the hapless children are the worst victims".[18] It was also observed that "by misuse of the provision, a new legal terrorism can be unleashed".[19]

However, the predicament that results from registering section 498A cases 'routinely' without thought process has been succinctly depicted by Justice Malimath Committee as

> "A less tolerant and impulsive woman may lodge an FIR even on a trivial act. The result is that the husband and his family may be immediately arrested and there may be a suspension or loss of job. The offence alleged being non-bailable, innocent persons languish in custody. There may be a claim for maintenance adding fuel to fire, especially if the husband cannot pay. Now the woman may change her mind and get into the mood to forget and forgive. The husband may also realize the mistakes committed and come forward to turn over a new leaf for a loving and cordial relationship. The woman may like to seek reconciliation. But this may not be possible due to the legal obstacles. Even if she wishes to make

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15 Malimath Committee Report, *supra* note 9, observed that "It has come to the notice of the Committee that even in cognizable cases quite often the Police officers do not entertain the complaint and send the complainant away saying that the offence is not cognizable. Sometimes the police twist facts to bring the case within the cognizable category even though it is non-cognizable, due to political or other pressures or corruption. This menace can be stopped by making it obligatory on the police officer to register every complaint received by him. Breach of this duty should become an offence punishable in law to prevent misuse of the power by the police officer."

16 *Arnesh Kumar* v. *State of Bihar & Anr, supra* note 4

17 See for example, the observation of Delhi High Court in *Chandrabhan v. State* (order dated 4.8.2008 in Bail application No.1627/2008) and of the Madras High Court in the case of *Tr. Ramaiah Vs. State* (order dated 7.7.2008 and 4.8.2008 in MP No.1 of 2008 in Crl. O.P. No.10896 of 2008). Delhi High Court *in Court on its own in Motion v. CBI,* reported in 109 (2003) Delhi Law Times 494

18 *Chandrabhan v. State* order dated 4.8.2008 in Bail application No.1627/2008

19 *Sushil Kumar Sharma v. UOI,* 2005 6 SCC 281

> amends by withdrawing the complaint, she cannot do so as the offence is non-compoundable. The doors for returning to family life stand closed. She is thus left at the mercy of her natal family…This section, therefore, helps neither the wife nor the husband. The offence being non-bailable and non-compoundable makes an innocent person undergo stigmatization and hardship. Heartless provisions that make the offence non-bailable and non-compoundable operate against reconciliations."[20]

It is in this context that the predicament of police in registration of FIR and arrest of persons surfaces. Section 498A cases being cognizable, police have to register FIR and arrest the offenders if need be. However this is not as easy as said and done. The real time experience at the spot and hovering judicial guidelines at the neck speak of different situations sandwiching the police in discharge of their functions. The predicaments of registration of FIR and arrest are as under.

REGISTRATION OF FIR

Whether a police officer shall register the FIR straight way in section 498A cases or not is not a question which has not been completely resolved. Offence under section 498A being cognizable offences invoke simultaneous and subsequent sections of the criminal procedure code.[21] In terms of section 154(1) a police officer is bound to register a First Information Report (FIR) upon receiving any information relating to commission of a cognizable offence under Section 154 of the Code of Criminal Procedure, 1973.[22]

Though section 154 is clear in wordings, preliminary inquiry was read into it by the judiciary. According to certain cases, police are not bound to register every information as FIR unless they are satisfied that sufficient causes exist for recoding so.[23] On the other hand, *Lalita Kumari* v. *Govt. of UP & Ors*[24] has ruled that Section 154(1) is mandatory as the use of the word 'shall' is indicative of the statutory intent of the legislature and therefore there is no discretion left to the police officer except to

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[20] Therefore, the committee *suggested making this offence bailable and compoundable to give a chance to the spouses to come together.*

[21] See Chapter XII of Code of Criminal Procedure (From Section 154 to 176) deals with 'Information to the Police and Their Powers to Investigate'

[22] The Cr.P.C., 1973, section 154- Information in cognizable cases: (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

[23] These are few rulings of the Supreme Court which have advocated that if the police officer has a doubt about the veracity of the accusation, he has to conduct preliminary inquiry. See *S.M.D. Kiran Pasha* v. *Government of Andhra Pradesh* (1990) 1 SCC 328, *D.K. Basu* v. *State of W.B.* (1997) 1 SCC 416, *Uma Shankar Sitani* v. *Commissioner of Police, Delhi & Ors.* (1996) 11 SCC 714, *Preeti Gupta (supra), Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi* (1981) 1 SCC 608, *Common Cause, A Registered Society* v. *Union of India* (1999) 6 SCC 667, *District Registrar and Collector, Hyderabad* v. *Canara Bank* (2005) 1 SCC 496 and *Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra* (2005) 5 SCC 294. *Vineet Narain* v. *Union of India* (1998) 1 SCC 226, *Elumalai* v. *State of Tamil Nadu* 1983 LW (CRL) 121, *A. Lakshmanarao* v. *Judicial Magistrate, Parvatipuram* AIR 1971 SC 186, *State of Uttar Pradesh* v. *Ram Sagar Yadav & Ors.* (1985) 1 SCC 552, *Mona Panwar* v. *High Court of Judicature of Allahabad* (2011) 3 SCC 496, *Apren Joseph* v. *State of Kerala* (1973) 3 SCC 114, *King Emperor* v. *Khwaja Nazir Ahmad* AIR 1945 PC 18

[24] *Supra* note 14

register an FIR.[25] Consequently, the condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the requirement of Section 154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of Section 154 of the Code is mandatory and the concerned officer is duty bound to register the case on the basis of information disclosing a cognizable offence.[26]

In the presence of this general ruling, there is s second school of thought which advocates for 'restraint' in registration of FIR in section 498A cases. In *Chandrabhan* v. *State*[27] it was observed that "there is no iota of doubt that most of the complaints are filed in the heat of the moment over trifling fights and ego clashes. It is also a matter of common knowledge that in their tussle and ongoing hostility, the hapless children are the worst victims". The following directions[28] were given to the police authorities:

i. FIR should not be registered in a routine manner.

ii. Endeavour of the police should be to scrutinize complaints carefully and then register FIR.

iii. No case under section 498-A/406 IPC should be registered without the prior approval of DCP/Addl. DCP.

iv. Before the registration of FIR, all possible efforts should be made for reconciliation and in case it is found that there is no possibility of settlement, then, necessary steps should, in the first instance, be taken to ensure return of sthridhan and dowry articles to the complainant.

This decision which has been mandatorily followed in Delhi and followed as persuasive in other states is contrary to the recent judgment of *Lalita Kumari*[29] v. *Govt. of UP & Ors* which requires compulsory registration of cognizable cases. The juxtapositioned reading of these two judgments presents a contradictory position for

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[25] Following judgments were relied upon to conclude the same. See *B. Premanand and Ors.* v. *Mohan Koikal and Others* (2011) 4 SCC 266, *M/s Hiralal Rattanlal Etc. Etc.* v. *State of U.P. and Anr. Etc. Etc.* (1973) 1 SCC 216 and *Govindlal Chhaganlal Patel* v. *Agricultural Produce Market Committee, Godhra and Ors.* (1975) 2 SCC 482. *Bhajan Lal (supra), Ganesh Bhavan Patel and Another* v. *State of Maharashtra* (1978) 4 SCC 371, *Aleque Padamsee and Others* v. *Union of India and Others* (2007) 6 SCC 171, *Ramesh Kumari* (*supra*), *Ram Lal Narang* v. *State (Delhi Administration)* (1979) 2 SCC 322 and *Lallan Chaudhary and Others* v. *State of Bihar and Another* (2006) 12 SCC 229. *CBI* v. *Tapan Kumar Singh* (2003) 6 SCC 175, *M/s Hiralal Rattanlal (supra), B. Premanand (supra), Khub Chand* v. *State of Rajasthan* AIR 1967 SC 1074, *P. Sirajuddin (supra), Rajinder Singh Katoch (supra), Bhagwant Kishore Joshi (supra), State of West Bengal* v. *Committee for Protection of Democratic Rights, West Bengal* (2010) 3 SCC 571. *H.N. Rishbud and Inder Singh* v. *State of Delhi* AIR 1955 SC 196, *Bhajan Lal (supra), S.N. Sharma* v. *Bipen Kumar Tiwari* (1970) 1 SCC 653, *Union of India* v. *Prakash P. Hinduja* (2003) 6 SCC 195, *Sheikh Hasib alias Tabarak* v. *State of Bihar* (1972) 4 SCC 773, *Shashikant (supra), Ashok Kumar Todi* v. *Kishwar Jahan and Others* (2011) 3 SCC 758, *Padma Sundara Rao (Dead) and Others* v. *State of T.N. and Others* (2002) 3 SCC 533, *P. Sirajuddin (supra), Rajinder Singh Katoch (supra), Bhagwant Kishore Joshi (supra)* and *Mannalal Khatic* v. *The State* AIR 1967 Cal 478.

[26] *Supra* note 14, at para 39

[27] Order dated 4.8.2008 in Bail application No.1627/2008

[28] Even In an earlier judgment of Delhi High Court in the case of *Court on its own in Motion v. CBI,* reported in 109 (2003) Delhi Law Times 494, similar directions were issued to the police and courts regarding arrest, grant of bail, conciliation etc.

[29] *Supra* note 14

the police and readers. In *Chandrabhan*[30] the court has provided enough opportunity to the police to make preliminary enquiry, before noting such offence, to ensure the occurrence or otherwise of the cognizable offences. The generalized reading of this judgment would have gone to the extent of saying that police may reconcile the parties to section 498A cases even without registering it in FIR or general diaries. Conversely, the 'general' power of preliminary inquiry has been taken away by constitutional bench in *Lalita Kumari*[31] which mandated compulsory registration of FIR on disclosure of offence of cognizable nature.

It does not, however, mean that power of the police officer to ensure himself the occurrence or otherwise of the events alleged is totally taken away by the judgment. Even this judgment admits of a situation (illustrative off course) in which preliminary enquiry is admissible. The constitutional bench held that:

> Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offence, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time.

(vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under Matrimonial disputes/ family disputes.[32]

(vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.[33]

(viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.[34]

The effect of this ruling is that the earlier direction of Delhi High Court etc has been overruled in letter but not in spirit. Even in *Lalita Kumari*[35] the court has admitted of preliminary enquiry in certain cases. Though section 498A has not been specifically named, it is not omitted either from the categories. Further, *Lalita Kumari*[36] , provides two way opportunity for preliminary investigation that is in some cases (as has been named in the judgments illustratively) it can be carried out even before registration of FIR and in remaining, the police may register the compliant of section 498A cases in their General Diary/Station Diary/Daily Diary and may seek a time line of seven days to make preliminary inquiry. Needless to say that, this deduction from the judgment is related only in respect of cases falling in explanation B to section 498A cases. In respect of Explanation A cases, where life or limb is at threat, immediate registration of FIR and proceeding towards the spot to take actual stock of the thing is statutory duty and constitutional obligation of the police.

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30 *Supra* note 27
31 *Supra* note 14
32 *Id.,* at Para 111
33 *Ibid.*
34 *Ibid.*
35 *Ibid.*
36 *Ibid.*

ARREST OF PERSONS

The common misconception that surrounds the common man and police as well is that 'because FIR has been registered, it would require arrest of the accused as well'. In some of the cases, in-laws and distant relatives have been picked up from railway station, airport and public places in filmy style. While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. The registration of FIR under Section 154 of the Code and arrest of an accused person under Section 41 are two entirely different things. It is not correct to say that just because FIR is registered, the accused person can be arrested immediately. In most of the cases ingredients of section 41 are missing yet the police resort for arrest. Despicable consequences of arrest have well been documented by the Supreme Court as under:

> "Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police. There is a battle between the law makers and the police and it seems that police has not learnt its lesson; the lesson implicit and embodied in the Cr.PC. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive."[37]

The court observed that

> "We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation."

The court further held that

> "We are of the opinion that if the provisions of Section 41, Cr.P.C which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 Cr.PC for effecting arrest be discouraged and discontinued'.

Issuing detailed guideless for arrest the court observed that

> "Our endeavour in this judgment is to ensure that police officers do not arrest

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[37] *Arnesh Kumar* v. *State of Bihar & Anr, Supra* not 4

accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following direction:

i. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.P.C;

ii. All police officers be provided with a check list containing specified sub- clauses under Section 41(1)(b)(ii);

iii. The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

iv. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

v. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

vi. Notice of appearance in terms of Section 41A of Cr.PC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

vii. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.

viii. Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

ix. We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A of the I.P.C. or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

x. We direct that a copy of this judgment be forwarded to the Chief Secretaries as also the Director Generals of Police of all the State Governments and the Union Territories and the Registrar General of all the High Courts for onward transmission and ensuring its compliance.

Observance of these guidelines is mandatory for the reasons well stated above. However, this is not for the first time that such guidelines have been issued. The efficacy of such guidelines depends to a large extent on the level of maturity and understanding of the police. Police need to be trained now and then by appraising such guidelines to them. Forwarding of judgment copy should never result in 'another correspondence' by the Supreme Court.

Further it is not easy to distinguish cases of section 498A falling in Explanation A and Explanation B. If the case were to fall in Explanation B, police have to swiftly initiate

the process of initial investigation by visiting the house of the husband and have a firsthand account of the version of husband and other relations and take such measures as may be necessary (including arrest) to ensure that the accused do not indulge in acts calculated to endanger the safety and liberty of the complainant.

There is pressing need, therefore, to maintain a balance between individual liberty and societal order while exercising the power of arrest. This can be done by the police themselves. The police have to learn that "The existence of the power to arrest is one thing, the justification for the exercise of it is quite another."

CONCLUSION

In view *Lalita Kumari* v. *Govt. of U.P. & Ors*[38] and *Arnesh Kumar*[39] it has been made clear that though section 498A offences are cognizable warranting registration of FIR and arrest procedurally, police have to exercise a restraint in invoking arresting powers though they have to register FIR on receipt of information disclosing cognizable offences. Law commissions/ committees have, apart from demanding section 498A to be bailable, even advocated for making section 498A compoundable.[40] The distinction of explanation A and B attached to section 498A shall be understood which itself may solve substantial problems as such. Though court order copies are circulated to police stations, they are never seriously viewed. Police have to be educated and trained in handling cases under section 498A. the fact that larger percentages of cases filed have been found to vexatious in nature goes to indicate that, a little more attention at the police station itself would have avoided the judicial wastage of time. It is at this juncture that the recommendation of law commission of India appears to be relevant which advocated for insertion of sub-section (3) to Section 41 of Cr.PC on the following lines:

"Where information of the nature specified in clause(b) of subsection(1) of Section 41 has been received regarding the commission of offence under section 498-A of Indian Penal Code, before the police officer resorts to the power of arrest, shall set in motion the steps for reconciliation between the parties and await its outcome for a period of 30 days, unless the facts disclose that an aggravated form of cruelty falling under clause (a) of Explanation to S, 498-A has been committed and the arrest of the accused in such a case is necessary for one of the reasons specified in clause (b) of Section 41."

It is high time that the police should note that mechanical, casual and hasty application of the power of arrest is counter-productive and negates the fundamental right enshrined in Article 21. Such attitude is at the root of misuse of S. 498A. The provisions in Cr.P.C regulating and channelizing the power of arrest should act as guiding star to the police and their spirit and purpose should be foremost in their minds. Overreach is as bad as inaction.[41]

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38 *Supra* note 14

39 *Arnesh Kumar* v. *State of Bihar & Anr, Supra* note 4

40 See, *The Code of criminal procedure 1898,* 41st Report, Law Commission of India, 1969; *Law Relating To Arrest*, 177th Report, Law Commission of India, 2001, *Committee on Reforms of Criminal Justice System* Parliamentary Standing Committee, 111th Report, the 128th Report of the said Standing Committee, 2008, the Committee of Petitions, 2011, *Compounding of (IPC) Offences,* 237th Report, Law Commission of India, 2011, *Section 498A IPC*, 243rd Report, Law Commission of India, 2012. The view point of National Commission for Women represented by Member-Secretary was placed before the Parliamentary Committee on Petitions on 07.09.2011

41 243rd Report, Law Commission of India, at 25

LEGAL EDUCATION IN INDIA: THE EMERGING CHALLENGES AND PROSPECTS

Amit Dhall*

Abstract

Education plays a vital role in bringing out social change. As a potential instrument and a powerful medium of bringing changes in the society it enables drawing out of the best in the body, mind and spirit of individuals. It equips an individual with ability to understand and reflect upon knowledge and processes and to act in a responsible manner. Legal education is a species of main stream education involving the study of law. It inculcates the ability to make use of law, to analyze it and to criticize it as a member of the legal community. It focuses on the individual freedom as also on the development of society, solidarity and strengthening of rule of law. The progress of high quality legal education is a prerequisite to high quality legal practitioners. The present papers analyses emerging challenges and prospects in the context of India.

Key words

Legal Education, Social Change and Development.

INTRODUCTION

Education plays a vital role in bringing out social change. As a potential instrument and a powerful medium of bringing changes in the society it enables drawing out of the best in the body, mind and spirit of child and man. It equips an individual with ability to understand and reflect upon knowledge and processes and to act in a responsible manner. The purpose of education is to impart knowledge to dispel ignorance. Ignorance is the mother of all the evil and all the misery we see. Education is a liberating force to get rid of such miseries. Proper education of the people helps to cure their miseries. The purposes of higher education are several folds. They relate to growth and development of student, the discovery and refinement of knowledge, and social impacts on the community.

PURPOSE OF LEGAL EDUCATION

Legal education is a species of main stream education involving the study of law. It inculcates the ability to make use of law, to analyze it and to criticize it as a member of the legal community. It focuses on the individual freedom as also on the development of society, solidarity and strengthening of rule of law. The progress of high quality legal education is a prerequisite to high quality legal practitioners.[1] Law is the guardian and vindicator of justice and liberty. Legal education involves the

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1 "Developing Legal Education in the Common Wealth: Some Current Issues", Commonwealth Legal Education Association, 2006, at 12

education of laws generally to lawyers before entry into law profession. Law of a society is the standard of its social values The need to assess and revise the curricula and methodologies of law courses with an objective to upgrade them for meeting the new challenges and the needs of the society is felt worldwide.

Legal education may serve the society by imparting to law students general and cultural education making them good law abiding citizens. The aim of legal education is to bring out among students the aptitude, interest, commitment, skills and knowledge necessary to perform variety of roles in society including works for socially excluded people and the poor at the local level, to espouse the cause of justice. The rapidly growing Indian economy needs to update its legal education mechanism to suit to the requirements of the competitive world.

Legal education and Legal Aid is State's duty and not Government's charity. Equally affirmative is the implication that while legal services must be free to the beneficiary, the lawyer himself has to be reasonably remunerated for his services. The Supreme Court in Hoskot's case held that even so we uphold the right to counsel not in the permissive sense of Article 22(1) but in the peremptory sense of the Article 21 confined to prison situations. The legal assistance to a poor or indigent accused who is arrested and put in jeopardy of his life or personal liberty is a constitutional imperative mandated not only under Article 39-A but also by Articles 14 and 21 of the Constitution. It is *sine qua non* of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundations of democracy and rule of law. In a democracy the machinery of justice must be readily accessible to all. Equality before law and equal protection of law guaranteed by our Constitution will merely be a formality.

The progress of high quality legal education is a prerequisite to high quality legal practitioners. The need to assess and revise the curricula and methodologies of law courses with an objective to upgrade them for meeting the new challenges and the needs of the society is felt worldwide. Law of a society is the standard of its social values. The aim of legal education should be to equip the law students with qualities of good lawyer having mastered the theory of law, its philosophy its functions and its role in a democratic society. The emphasis of legal education must be on preparing legal professionals as also good citizens including legislators, judges, policy makers, public officials, civil society activists having altruistic feelings and sense of social service.

LEGAL EDUCATION SYSTEM IN INDIA

Traditionally universities in India offered Legal education as a three years graduate degree. The eligibility requirement for the Bachelor of Law was that the applicant already has a Bachelor's degree in any subject from a recognized institution. The legal education was imparted only at law departments in the university system and through affiliated law colleges. Now some institutions also offer an integrated five years BA-BL course after twelve years of schooling.

In India the legal education is regulated and controlled by Bar Council of India. It is imparted the at different levels, namely, law Universities, government law colleges, private law colleges (government aided) and private law colleges (non-aided). Imparting practical skills to law students is a compulsory component of legal education in all the institutions imparting the legal education. The University Grants Commission approved one-year LL.M. courses in India on 6 September 2012 and the guideline for the same was notified in January, 2013.[2] "We have an immense problem with the faculty, especially with more than 900 plus law schools all over the country,

we suffer for want of faculty. The curriculum needs to be regulated and we will have to gradually upscale and upgrade,"

Impact of Globalization on Legal Education in India

Globalization has thrown up new challenges to legal profession. It is the process by which a given local condition or entity succeeds in expanding its reach over the globe and by doing so, develops the capacity to designate a rival social condition or entity as local under its impact. Globalization makes it increasingly difficult for legal study to be contained within the territorial boundaries of national legal systems. The operation of formal State law can be understood by taking into account the proliferation of supranational sources of law such as those emanating from the European Union or WTO. Sovereignty at the international level is being undermined by greater acceptance of interference in the internal affairs of states egg through the doctrine of humanitarian intervention. While traditional jurisprudence focused exclusively on municipal and public international law; globalization requires notice of other forms of legal ordering, such as the sue generis legal order of the ED. A prominent example is transnational *lex mercatoria*, which regulates interactions between global commercial firms outside official law through practices such as international arbitration. We need to construct a theory of law that reaches across legal cultures .and to develop a conceptual language that can make sense of the relations between *e.g.* national and supranational, formal and informal, sub-state and non-state contexts.

There is a need to expand the list of concepts includes in general jurisprudence to provide more apposite terminology *e.g.* group, dispute, institution, process, function, decision, regulation, efficiency, effectiveness etc, for enhancing understanding across legal cultures. To meet challenges of globalization, a lawyer needs to have a vision of emerging problems, zeal to serve the cause of justice and the ability to forge new tools and techniques appropriate to the changing needs and times. At present the legal education is inadequate to the tasks ahead calling for an all out effort by taking stock of past attempts and chalking out the future cause of action. The basic element of a free and fair society is a 'well functioning legal system.' A successful legal system provides all the facilities and fulfils all the requirements of the peoples. The 'rule of law' makes a system good legal system in which all persons are subject to law In India, the legal profession and legal education both are administered by the Bar Council of India. The Indian legal rules including the constitution of India are flexible because a rigid law can't survive in progressive society and in context to this the law usually changes from time to time towards the progressive future of Indian society. To have a successful legal system, there must be a 'rule of law', and to contend this we need some qualified soul and in this regard the role of lawyers and the judges mainly in interpretation is very crucial. So, we need to robust the mettle of the future lawyers and further the mythology of the law colleges according to global legal education system.

The concept of National Law Universities is the latest institutional development which is making our students at par with foreign students in the global scenario, at present there are 10 NLU's operating. These are established with the view of revamping the whole legal set up in the country with the latest trends gaining ground around the globe

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[2] UGC released guidelines and course structure for One Year LL.M degree on 9 February 2013. This may be introduced from academic year 2013-14.

WEAKNESS OF INDIAN LEGAL EDUCATION

The course content for these courses is decided by the universities with guidelines from the bar council of India, under the Advocates Act inter alia has the function to promote legal education to lay down standards of such education in consultation with the Universities in India imparting such education and the State Bar Councils. The Bar Council of India, Rules provide for compulsory and optional subjects to be taught in the LL.B course Rule (9) (1) lists 6 subjects for Part- 1(compulsory): Rule 9 (2) lists 21 subjects for Part 11 (compulsory). Rule 9(3) lists 15 subjects (optional) out of which three have to be selected.[3] A fresh UGC Model Curriculum was prepared by the Curriculum development committee constituted by UGC in 2000 which was circulated to various universities for revision of their law courses. Despite measures and recommendation to equip the Indian Law graduates with better professional capabilities the challenge posed from international as well as the cross country institutions is imminent. Some major shortcomings of our legal education system are:

a) **Easy Entry in Legal Education:** Legal education has nowadays emerged as a promising business activity for the law institutions which are mostly run by builders and industrialists. The main problem is that the team of Bar Council and the university which is responsible for the inspection of colleges seeking permission to start law courses.

b) **The teaching facilities and techniques:** The law schools are still accustomed to the age old method of teaching through lectures in a class room. No heed is paid to these suggestions and recommendations made by the committees assigned the role of upgrading education. The students are least concerned about gaining knowledge rather their emphasis is on the fulfillment of minimum requirement of passing the course.

c) **The faulty Examination system:** The laws schools adopt the traditional examination pattern. The malady of covering a part of the prescribed syllabus and fallacy of memorizing the selected questions rules the roost. The grade card of students is reflection of their ability to mug up few topics instead of their analytical and practical attributes.

d) **The irrelevant syllabus:** Even after being asked by the UGC Committee and Bar Council of India for upgrading of syllabus of law courses here remain a lack of uniformity in law curriculum of different Universities. Further the inclusion of too many subjects in the syllabus has diluted the concept of teaching skills and research orientation .Law education must be made more relevant to the profession and its challenges.[4]

e) **Vast differences among Law Institutions:** The increasing level of differences amongst the level of educational institutions have created a big divide into 'elite 'education groups and the rest of institutions. The culture and teaching learning process of these law institutions differs widely as regards the student learning outcomes as also behavioral growth of the passed out candidates.

f) **Shortage of good teachers:** Generally the law colleges fail to attract talented law professional for joining as teachers in their institution. The requirement of requiting the NET qualified applicants as lecturers has invariably limited the

[3] The Advocates Act 1961, Section 7(1)(b)

[4] The Legal Education and Professional Training, 184 Report, Law Commission of India, 2002, at 53

choice of appointing good teachers. Also selection committees, in different universities are restricted to make free judgments of the quality of teacher.

g) **Problem of Placement:** Students usually complete their placement with a lawyer, NGO or a corporate house. The law students are expected to learn the skill of reading and maintaining case files, legal research, drafting and client interviewing and counselling. Students are required to maintain a diary of their visits to lawyer's chamber and courts recording the work they did there and the proceeding observed. Their diaries and their preparation for the mock trail and mood court do reflect their learning from placement. Practical training in law schools imparted though choosing one of these methods or their combination, namely, legal and clinic, class based lectures and simulation, and external placement.

CHALLENGES BEFORE LEGAL EDUCATION IN INDIA

The emergence of new economy, globalization, privatization and deregulation has thrown up new challenges in the field of legal education throughout the world. The revolutionary changes in information and communication technologies require corresponding changes in the legal system. Globalization and the retreat of the state from traditional role have raised new legal issues concerning methods of protection of poor and marginalized section from further impoverishment. The very nature of law and legal institutions are in the midst of paradigm shift. The expectations of the country and the people from law and legal services in the coming years requires the State to evolve the best strategy to strengthen professional legal education while promoting wider instruction in law as a liberal academic discipline. This requires an appropriate model to achieve supervisory and control mechanism to ensure accountability on the part of professional schools of law in maintaining standards of teaching, research and extension activities The unmet legal needs of different sections of society, delay and cost in accessing justice, impact of globalization on equality and human rights, vast technological changes especially in information and communication, the relative incapacitation of the state by market domination and the role of professions in justice, peace and development.[5] In bringing forth all these changes law and lawyers playa decisive role of facilitation, moderation and control. It is the nature of and access to institutions and procedures which make justice possible. In structuring the institutions and procedures, particularly in periods of transition, lawyers will have to assist communities, interest groups and governments keeping in mind the requirements of equity, justice and fairness.

Following are some of the challenges facing legal education in the country:

a) **Physical infrastructure and financial resources:** The law schools in India have to recognize the need for creating sound physical infrastructure and for developing research projects and should take initiatives to encourage faculty members. Though, the infrastructure of the national law schools is better than what exists in the law departments of traditional universities its improvement should be across the board, including in universities. The law graduates should be inspired and trained so that they are involved in reflecting upon the various problems that confront society. Academic freedom to think and contribute can only be ensured if universities have the necessary physical infrastructure and financial resources.

[5] 184th Report, Law Commission, 2002, pp. 55-56; Report of National Knowledge Commission, 2007

b) **Promotion of philanthropic initiatives in field of Legal Education:** In legal education philanthropy is rare and is by and large a states sponsored endeavour or an unimpressive commercial enterprise devoid of high academic standards. Initiatives to encourage philanthropy are required for promoting excellence in legal education and research in the country. In fact the proportion of philanthropic contributions in total expenditure on higher education has declined in the last decades. Efforts ought to be made by all stakeholders, including the law schools, the bar, the bench, the law firms and corporations for promoting philanthropic initiatives in legal education and research.

c) **Qualified teachers and research aptitude:** Good teachers and researchers in the law schools is also a great required in legal education to motivate the students and impart better education of law, including clinical legal education .However because of poor incentives the young talents do not prefer to choose teaching as profession or those who are in these fields are switching towards other lucrative professions.

d) **Privatization of Legal Education:** The privatization of legal education has resulted in mushrooming of law colleges resulting in the degrading of Indian image of legal education at internationally. It has not been helpful to raising the academic standards in terms of either the quality of the faculty and students or the promotion of research within institutions which has become mediocre commercial ventures.

e) **Coming of Foreign Universities and Legal Professionals in India:** The emergence of foreign universities and legal professionals in India have also posed serious problem before legal education .The question arises that when in the same expense foreign degrees can be obtained why a student to study in Indian law schools. Similarly, the avenues of legal professionals in India will be obtained by foreign professionals. Our aim should be to produce lawyers who will be most sought after professionals to appear in foreign countries. When multinationals establish firms in India, they too will require the services of lawyers whose competence is comparable to the best anywhere. Further, the law schools in the country should also have special topics dealing with the Corporate, Taxation and Bankruptcy laws of different countries. The curriculum should be designed to equip the students for handling problems that involved more than one legal system. The students should combine language skills and cultural familiarity with rigorous and direct legal training. The progress in the field of internet technology in combination with globalization poses more formidable challenge to territorial sovereignty than even before. In the world of the cyberspace it is difficult even for the communicators let alone the authorities of the concerned from which and to which the communication is directed, to know that their messages are actually crossing territorial borders. Cyber torts, Cyber racism and Cybercrimes not only undermine our understanding of territorial state as the ultimate final authority within its borders but raise a number of issues relating to prevention, investigation and trial of the offenders. Therefore, in these circumstances there is necessity of reformulation in legal education as well in India.

The position of legal education in India before independence was dismal and even degeneration continued after independence. But because of continuous and concerted efforts of government and academicians, changes took place. Debates on teaching methods, introduction of clinical legal education and focus on continuing

education along with infrastructural developments became tools of quality legal education. But one thing which actually helped in ensuring high pedestal to legal education in India is removal of sense of complacency from the thinking process of society regarding law as a career not as a last resort. Similarity, the opening of avenues to legal professionals in various areas also enhanced the craze of subject. Globalization and the changing dimensions of the Indian economy and polity have thrown up new challenges of governance.

SUGGESTIONS TO MAKE LEGAL EDUCATION MORE EFFECTIVE

The appropriate step needs to be taken in the matter so the law graduate acquires sufficient experience before they become entitled to practice in the Courts. The legal education must reflect participation of representative of the Judiciary, bar council and UGC. The Bar Council should regulate and supervise the affiliation of colleges. There must be an entrance examination to Law Colleges. It is advocated the Five year law course after 10+12 level. Professional ethics should be made a compulsory course. The case methods and problem methods should be made compulsory and must carry more marks than theory. Necessary amendments should be made to supplements lecture method with problem method and other modern technique of importing legal education. Parting in mood courts, mock trails and debaters must be made compulsory and marks awarded. Practical training in drafting pleadings, contracts can be developed in the last year of the study. Students' visits to the courts are made compulsory so as to provide greater exposures. The legal education committee should lay down norms for the conduct of theses examination. It may be noticed that the main focus of this committee was on regulating admission to low colleges and admission to the Bar and not on community responsive legal education. However, introduction of compulsory practical training and clinical methods as per the directions of the Bar Council of India, have brought to focus the potently of legal education to became more respective to community needs in additional to becoming professional.

Practical skills of a lawyer are taught/leant thought one of the three ways: first classroom teaching classroom teaching coupled with court visits; second through placement with lawyers: and third' live-client cases handled in a legal aid clinic or *Lok Adalats*. Following topics are covered in the course of clinical Legal Education: Client Interviewing and Counselling Legal Research, Getting Familiar with Courts in Delhi (Structure, Jurisdiction and Colloquial Words Used) Stages in Criminal/Civil Case, Case Analysis, Planning and strategy, Negotiation, Mediation, Trial advocacy, framing of Issues/Charges, Bail/Bond, examination-in-chief, cross examination, adducing evidence, arguments, appellate advocacy; moot court; professional ethics, legal aid, *lok adalats* and public interest Litigation, teaching methods. The course is taught classroom teaching coupled with placement with lawyer for the weeks useful for dealing with different aspects of the course. The choice of methods is dependent on the skill/s to be learnt. I prefer to use the following teaching a methods while teaching different topics. Brain Storming introduction to practical skills course, experiential client interviewing/client confidentiality, simulation moot courts, negotiation role plays client interviewing, group discussions, legal aid, games, examination-in-chief, pyramid fact gathering and recollection, active listening, sub-groups peer observation and feedback, hypothetical problems, ethics case methods, lecture court structure/information, handouts course material/points to remember. It is necessary to mention, however, that that the most difficult task while using three

alternate methods of teaching is to maintain the time limits of the classes for various activities. Usually a small lecture on the subject followed by instructions on the activities precedes the exercise. The lecture is the easiest to contain within the time limit. Initially the instructions in the beginning take more time for students to comprehend. They are not used to be actively involved in classes in other courses and in take them some time before they start getting familiar with the different methods of learning employed in these classes. Once they get into the activity, they get so involved in it that they cannot keep track of the time and usually are not able to conclude their task within the time prescribed. Many a times, it becomes necessary to postpone the analysis and feedback of the exercise for a subsequent class and that affects the schedule of the next class.

For making legal education more effective and legal profession more competitive and value oriented certain suggestions may be taken into consideration. Firstly, the global or transnational curriculum should be developed keeping in view the challenges of globalization; high technology crimes and changing concept of sovereignty. Secondly, the teaching methodology should be upgraded and the combination of lecture method, case study method and Socrates method along with tutorials and other modern techniques of imparting legal educations such as power-point presentations, audio-visual demonstrations, video conferencing etc. The Socratic Method refers to the teaching style used by most law professors. Instruction by lecturing is quite limited and more often takes the form of directed questioning. These methods help to sharpen critical thinking skills and the ability to distinguish between subtle underlying principles of a certain area. Thirdly, there is need for original and path breaking legal research to create new legal knowledge. Fourthly, lawyers must be trained to specialize in international trade practices, comparative law, conflict of laws, international human rights law, environmental law, gender justice, space law, bio-medical law, bio-ethics, international advocacy etc., They must also acquire a requisite knowledge of foreign laws like the American, French, German, Chinese and Japanese law. For instance, in South Korea, in the last 10 years, the curriculum has been expanded to include not only the above subjects, but also International Business, International Contracts, International Civil Procedure and laws of England, America, France and Germany.

Fifthly, the law schools must improve their library facilities to include use of computers and internet so that the students and faculty are able to draw regularly from the internet sources. Sixthly, the law students need to enhance their ability to argue, explain and convince points of law. Good command over spoken and written language, effective oral skills, diction and extensive reading are pre-requisites that go without saying. Knowledge of a foreign language is important to be a lawyer in the global economy. Law students should be provided with the opportunity to learn a foreign language of their choice. Lawyers, solicitors, legal executives all need good intellectual ability, the ability to assimilate and analyze facts quickly. Law students hence need to develop their ability to distinguish the relevant from the irrelevant, screen evidence, and apply to the law to the situation under scrutiny. Moreover, in order to retain good teachers in the law school who are the backbone of legal education facilities and incentives should be given. This may include, career development opportunities within the law schools; development of research infrastructure including the resources to organize and participate in national and international conferences, and undertake serious research; a harmonious environment that fosters mutual respect; governance of the law schools in a transparent fashion; and, above all, faith in the leadership of the institution that excellence will not only be promoted as a general policy, but affirmative efforts will be

taken to encourage and support excellence. Further, the task of a teacher is not only to fill in the students with contents of his narration but to bring out the hidden talent in the students. The students and teachers have unlimited potential for collaboration in exploring any aspect of a subject. Thus, there is need of continuing education for the law teachers and to infuse in them the desire to do research work. Appropriate means must be devised so that the law teacher can go to the law courts to gain the practical experience and his experience, knowledge and proficiency may be used in proper manner and this avenue will attract many good students towards legal profession.

Lastly, legal education must be socially relevant and justice oriented. This concept of justice education in the field of legal education means that the law school curriculum should entail certain programs like *Lok Adalats*, Legal Aid & Legal Literacy and Para legal training. The end-semester examination should be problem-oriented, combining theoretical and problem oriented approaches rather than merely test memory. Clinical legal education should be given more emphasis, so that students can learn the law through experience and experience the role of law and legal in society along with acquiring professional skills. Autonomy, flexibility and freedom should be given to law schools, particularly departments in Universities.

There is need to actively seek and encourage philanthropic initiatives in the field of legal education. The system of creating endowments both individual and corporate has to be significantly promoted. Financial supports should be provided by Governments to law colleges etc. Internship and externship facilities should be arranged at law schools. Thus, the aim of legal education in India should be to produce legal professionals of such calibre as Bradley says in order to be an accomplished lawyer, it is necessary, besides having a knowledge of the law, to an accomplished man graced with at least a general knowledge of history, of science, of philosophy, of the useful arts, of the modes of business and of everything that concerns the well-being and intercourse of men in society. Trained in such profession, and having these acquirements, and two things more, incorruptible integrity and a high sense of honour. In the law schools, students are, by and large, evaluated on the basis of exams that take place at the end of the term together with some activities like project making and class participation.

Various methods and techniques of teaching are currently being used in law schools which range from lecture method to Socratic Method to problem based method. These methods have their own merits but at best they give the student knowledge about law and sound analytical capability. However, if students participate in the process of legal aid under the aegis of Legal Aid Clinic of their law school they get hands on experience in the practice of law. So, usual methods of teaching when combined with legal aid can produce wonderful results whereby the students who steps out of the law school are already trained as a lawyer. Organizing legal aid camps and distribution of legal aid literature are effective tools of spreading awareness about law which ultimately contributes towards legal enforcement. Internships are other opportunities where law students go to an organization to work where they can contribute their legal knowledge and in the process gain valuable experience of working in the field.

Teaching in the modern world is a well-developed profession marked by ranks of teachers which characterize the hierarchy in the teaching community. Progress, for a teacher, would naturally mean moving up this ladder of hierarchy. Various ways and means have been devised by the University Grants Commission in this regard. One of the major factors to be taken into consideration in this exercise is the number and

quality of publications that a teacher has been able to generate. This emphasis on research is placed keeping in mind the larger perspective of promoting research amongst academicians. On the same lines, the number and quality of cases argued by a teacher concerning legal aid should become a criterion for evaluating a teacher for the purposes of his promotion. In this manner, we shall be improving the quality of law teaching in the country together with building capacity for legal aid.

ROLE OF JUDICIARY IN ENVIRONMENTAL CONSERVATION IN INDIA

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Abstract

The task of environmental conservation is an important task for humanity. To deal this task all states requires to frame policy and law. The development of policies and laws towards an effective environmental management and conservation in most of the countries received momentum from the international development. India has implemented most of the international instruments either in the form of policy or in the form of law. However, India has always had its limitations in the implementation of all the policies and laws due to its socio-economic structure. The present paper examines the role of Indian judiciary in developing environment conservation mechanism in the form of effective pronouncements and guidelines to the State.

Key words

Environment, Conservation, Health, Sustainable Development and Judicial Activism.

INTRODUCTION

Policy developments towards an effective environmental management and conservation in most countries received momentum from the international developments. The Stockholm Conference is regarded as a major development of the time which guided most of the polities to legislate for environmental conservation. India is no exception to this observation. However, India has always had its own limitations in the implementation of all the laws with socio-economic consequences. Environmental laws also have the effect of curtailing the developmental and economic activities and so it also faced the difficulties all throughout. This was further impeded by the slow pace of development of such laws. Environmental consciousness in India underwent a series of developments after the Bhopal gas leak disaster. In the wake of this incident, the Environment Protection Act, 1986 was passed and a number of laws developed further.

Despite all the legislative developments the state of conservation in India was not prosperous. This onerous task was then taken over by the activist judiciary in the country which interpreted the constitutional provisions to be inclusive of the right to clean and healthy environment. Apart from Part Third of the Constitution, so many laws were positively interpreted and several doctrines were propounded afresh by the Indian judiciary. Apart from an accommodative stretch in the law, the implementation aspect was also contributed by such activism. Several industries were ordered to be shut down and many more had to relocate. Even the

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environmental clearance regime was led further by the judiciary in setting right several executive actions in granting clearance to unsustainable projects.

The present paper aims at evaluating the role of Indian judiciary in developing the environmental conservation laws and their implementation. Through this paper the author establishes that the judiciary has contributed more than the other limbs of governance. The author also concludes that judicial activism has played a very positive role in this regard. For this the author looks into the relevant statutory provisions and analyzes important judicial pronouncements related to environmental protection. It is not necessary that every smile be reason of happiness, perhaps, it may work as a hiding factor for tears. One has to understand by applying this philosophy in the case of nature and its exploitation. What we have received from our ancestors is available with us but what we are going to give to our decedents is a big question mark.

Legal interventions towards conservation of the environment gained momentum after the Stockholm Conference of 1972. By this time it had become undeniable that ignoring the environment and overexploitation of resources is not affordable. This would not be incorrect to state that environmental legislations in most countries have received inspiration from the international fora. This applies for India more significantly. India enacted several environmental laws in the seventh decade of the twentieth century. However, the need of umbrella legislation in this regard, was unfulfilled till 1986 when the Environment Protection Act was passed. This appears to have been a lesson learnt from the Bhopal Gas disaster and the legislative vacuum was attempted to be filled in urgently. Despite all these efforts the legislative lethargy and incompleteness were nonetheless existent; and the rich body of environmental laws in India would not have evolved unless contributed by the active judiciary of the country. Supreme Court of India has developed a rich body of law that guarantees a fundamental right to live in a clean and healthy environment.[1] Through the development of Public Interest Litigation, the Supreme Court of India has greatly broadened the procedural right of Indian citizens to present environment-related challenges against the government and its agencies.[2] Beyond the letter of the law, the judiciary has addressed an array of environment related issues related to its accelerated economic growth; for example, the right to live in a clean and healthy environment, interpreted within Article 21.

When India became independent, the socio-economic situation was dominated by a small class of large land owners, and a vast mass of impoverished cultivators. In subsequent years, land reforms were enacted; surplus private land was acquired by the state.[3] Public policy was founded on the thesis that farming would lift people out of poverty. This tended to give a certain degree of legitimacy to encroachment on public as well as community land, even though this often favoured the relatively rich, over the relatively poor.

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[1] *Subhash Kumar* v. *State of Bihar* AIR 1991 SC 420; *M.C. Mehta* v. *Kamal Nath* AIR 2000 SC 1997; *Rural Litigation Entitlement Kendra* v. *State of U.P.* AIR 1987 SC 1037; *Ratlam Municipality* v. *Vardhi Chand and Others* AIR 1980 SC 1622

[2] Rosencranz Armin and Jackson Michael, "The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power", 23 *Columbia Journal of Environmental Law*, 2003, pp.23-30 quoting in *Bandhua Mukti Morcha* v. *Union of India* AIR 1984 SC 802

[3] "Empowering People for Sustainable Development", 2001, Approach Paper to the Tenth Five Year Plan (2002-07), Ministry of Environment and Forests 2002.

LEGISLATIVE EFFORTS TOWARDS CONSERVATION

Since independence the Indian Parliament enacted a series of environmental regulations. In 1974, the government passed the Water (Prevention and Control of Pollution) Act (hereinafter called Water Act)[4]; its purpose is to provide for the prevention and control of water pollution and the maintaining and restoring of wholesomeness of water.[5] The Water Act established Central and State Pollution Control Boards to oversee the prevention, abatement, and control of water pollution.[6] The Boards are responsible for conducting site inspections and acquiring information regarding non-compliance with any aspect of the Water Act.[7] Similarly, in 1981 the Central Government enacted the Air (Prevention and Control of Pollution) Act (hereinafter called Air Act) to provide for the prevention, control, and abatement of air pollution.[8] Like the Water Act, the Air Act provides for Central and State Control Boards to handle all matters associated with the improvement of air quality.[9]

Subsequent to the Water and Air Acts, the President of Indian promulgated the Environment (Protection) Act (hereinafter called Environment Act) in 1986 to cure deficiencies left in India's core body of environmental law.[10] The Environment Act provides the central government with the broad power to take all measures necessary for the purpose of protecting and improving the quality of the environment and preventing, controlling, and abating environmental pollution.[11] Together, these pieces of environmental legislation provide a framework for the Indian people, as well as the judiciary, to enforce environmental protections. Finally, according to the Energy Information Administration, emissions resulting from India's fossil fuel consumption account for fourteen percent of total global carbon dioxide emissions, and is projected to increase to eighteen percent by 2025.[12] Thus, as India continues to demand access to energy and relevant technologies, it must address the environmental consequences of such rapid economic growth.

ENVIRONMENTAL PROTECTION AND THE CONSTITUTION OF INDIA

India's most significant legislative effort towards conservation of the environment is a Constitutional Amendment. It was the forty second Amendment to add Article 48-A, which includes a provision for environmental protection and states that a clean and

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4 The Water (Prevention and Control of Pollution) Act, 1974; the Environment (Protection) Act, 1986; and a series of environmental legislations have been enacted in India.

5 *Id*., Purpose of the Water Act

6 *Ibid*.

7 *Id*., Chapter 4 Defining Powers and Functions of Environmental Control Boards under the Water Act

8 *Id*., Responsibilities of Boards under the Water Act

9 The Air (Prevention and Control of Pollution) Act, 1981, Purpose

10 *Id*., Regarding the role of Environmental Pollution Control Boards

11 The Environment (Protection) Act, 1986, providing examples of possible measures to expand environmental protection.

12 Rosencranz Armin and Jackson Michael, "The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power", 23 *Columbia Journal of Environmental Law*, 2003, pp.23-30 quoting in B*andhua Mukti Morcha* v. *Union of India* AIR 1984 SC 802, Statement of David Pumphrey, Deputy Assistant Secretary for International Energy Cooperation, Department of Energy, explaining India's current and projected levels of energy consumption. If India's current civilian nuclear energy program stays on target, it is expected to reach 20,000 megawatts electric by 2020, up from a current capacity of 3,850 megawatts.

healthy environment is now a directive to the state policy. Article 48-A states that the State shall endeavour to protect and improve the environment. The key fundamental rights provision of the Indian Constitution, Article 21 guarantees that no person shall be deprived of his life or personal liberty except according to procedure established by law. Under this provision, the Court has expanded the right to life to include protection from harmful environmental elements. In a seminal decision, *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*[13], the Supreme Court of India resolved issues related to environmental and ecological balance as a result of a quarrying operation that mined limestone. In its ruling, the Supreme Court ordered the permanent closure of the quarries. The Court recognized that its judgment would have great financial consequences for the business, but noted that it is a price that has to be paid for protecting and safe-guarding the right of the people to live in a healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affectation of air, water and environment. While the Supreme Court did not explicitly refer to Article 48-A nor Article 21 of the Indian Constitution, its judgment was in accordance with these fundamental environmental rights.

In a separate decision by the High Court of Andhra Pradesh, T. Ramakrishna Rao v. Hyderabad Urban Development[14], the court expressly invoked Article 21 and noted that the right to a clean environment is a fundamental right when it stated, "the slow poisoning of the atmosphere caused by the environmental pollution and spoliation should be regarded as amounting to a violation of Article 21 of the Constitution." Thus, the Supreme Court of India and other lower courts have expanded fundamental rights within the penumbra of the Indian Constitution to include environmental protections and have judiciously supported a right to a clean and healthy environment. The Indian Constitution is one of the earliest constitutions in the world that contain specific provisions on the environment. The Directive Principles of State Policy and the Fundamental Duties chapters explicitly enunciate the national commitment to protect and improve the environment. Apart from these, the fundamental duties enumerated in the part IV-A of the Constitution, also cover duty to protect the environment. Article 51-A establishes that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers, and wild life and to have compassion for living creatures.

JUDICIAL ACTIVISM TOWARDS ENVIRONMENTAL PROTECTION

The Supreme Court of India has reacted to perceived bureaucratic failures by taking an activist stance toward the enforcement of environmental regulations. The Court, however, hands down decisions and recommendations that are often too difficult to implement, thus leading to greater confusion in the area of environmental enforcement. Furthermore, the Court ignores the logistical difficulties associated with implementation of their ideas of environment protection. Most striking is the Court's failure to establish a standard for acceptable pollution; therefore, any level of pollution may constitute a violation.[15] Moreover, the Court continues to turn a blind eye to current environmental laws, instead creating its own committees and reporting systems. Rather than this activist position, the Court should take steps to

[13] AIR 1987 SC 1142
[14] AIR 1990 AP 998
[15] *Supra* note 12

support both current environmental regulations and government actors in their enforcement. The results of such activist actions are clear: if the Court begins to create legislation, it bypasses the democratic means. By creating its own committees, the Court is signaling to the public that legislatively created committees are inefficient and lack credibility. Furthermore, the Court's criticism of the government and its agencies' actions undermines confidence in administrative proceedings. Despite some criticism of the Supreme Court's activist approach, it is undoubted that the Court's dedication to environmental issues has increased public and governmental awareness.

Public interest lawyering is another significant milestone towards constructive judicial activism in India. It has served as a major contributor towards environmental protection advancement through the Indian court system. Through Public Interest Litigation, the Supreme Court has taken steps to recognize that good health is a fundamental right, and so are conditions that promote good health, such as clean air and water. Ultimately, through a series of cases, the Court determined that there is an obligation to protect the environment that is derived from the protection of fundamental rights. Judiciary has shown its contribution by dealing the cases with regard to the legality of Environmental clearance granted to the developmental projects and hence supported in resolving environmental controversies. Judiciary is the Forum, where fairness of the Authority in granting Environmental clearance to a project and its impact on Public Interest can be adjudged. It is also to balance the sustainable development. Indian Judiciary has taken up the task of filling up the gaps existent in the overall legal system. This covers an activist role of the judiciary in protecting the environment also. Some of the cases to this effect and discussed and analyzed as follow:

M.C. Mehta v. Union of India[16]

In the aftermath of the Bhopal Gas leak disaster a lot of consciousness grew towards environmental conservation and health safety measures. It was the Oleum Gas leak case, wherein the Supreme Court considered the importance of safety measures in the hazardous industries. In this case the Court propounded the absolute liability principle. In another case filed by M.C. Mehta[17], the Supreme Court took the opportunity to evolve and invoke the doctrine of public trust. This doctrine binds the state as being trustee of all the natural resources for public at large as the beneficiary. In another action brought by Mehta[18], the apex court looked into the issue of decreasing ground water level in the national capital region, due to uncontrolled illegal mining. The Court issued stern orders on this and once again judicial activism was visible to the protection of environment. The same petitioner also filed a petition for preventing the continuous pollution of the holy river the Ganges. In this case[19] the Supreme Court dealt with the pollution of the Ganges due to the negligence of the leather tanneries in Kanpur. In *M.C. Mehta* v. *Union of India*[20], the Supreme Court empowered the municipalities and the state boards to take immediate steps for prevention of the continuing wrongs. In *M.C. Mehta* v. *State of Orissa*[21], the Orissa High Court dealt with the same question of providing sewage system when a medical

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[16] *M.C. Mehta* v. *Union of India* AIR 1987 SC 1086
[17] *M.C. Mehta* v. *Kamal Nath* (1997) 1 SCC 388
[18] *M.C. Mehta* v. *Union of India* AIR 2004 SC 4016
[19] *M.C. Mehta* v. *Union of India* AIR 1988 SC 1037
[20] *M.C. Mehta* v. *Union of India* AIR 1988 SC 1115
[21] *M.C. Mehta* v. *State of Orissa* AIR 1992 Ori 225

college complex was being set up. The M. C. Mehta cases have contributed immensely to the development of environmental laws in India. This attracts and warrants a salute to the spirit and efforts of the petitioner but these judgments are essentially examples of judicial activism and the constructive role played by the judiciary in this regard, cannot be undermined.

Municipal Council Ratlam v. Vardhichand[22]

In this case against the Ratlam municipality, the judicial activism of the eighties made its impact felt more in the area of environmental conservation than in other fields. In this case the Supreme Court identified the responsibilities of the local bodies towards protection of environment and developed the law of public nuisance in the criminal procedure as a potent instrument for enforcement of municipal duties. The residents within Ratlam municipal corporation area were suffering for a long time from a pungent smell emanating from the open drains. The odour caused by public excretion in slums and the liquids flowing on the street from the distilleries forced the people to approach the magistrate for a remedy. Instead of complying the order of the magistrate to clean the waste and so to remove the nuisance, the municipality opted to challenge it. When the case came to the Supreme Court, the Court observed that a statutory body like the municipality is duty bound to discharge the claimed responsibility. This case is important not only because of being one of the earliest decisions of its kind but also due to the nature of remedy made available by the Court, under the law of public nuisance.

Tehri Bandh Virodhi Sangharsh Samiti v. State of UP and Others[23]

The writ petition was filed praying directions restraining the Union of India, State of UP and the Tehri Hydro Development Corporation from constructing and implementing the Tehri Hydro Power project. The main contention against the construction of the dam was on the basis that the plan for the Tehri project had not considered the safety aspect of the dam and serious threat existed due to this construction, as north India is prone to earthquakes. The design of the dam was on a site which was prone to seismic activity hence posing grave danger to the people residing in that area. Based on the fact and circumstances of the case, the Court came to the conclusion that the Union of India had considered the question of safety of the project in various details more than once and that it had taken into account the reports of experts on various aspects. In the circumstances, the court held that it was not possible to hold that the Union of India had not applied its mind or had not considered the relevant aspects of safety of the dam. The Court lacked expertise in deciding such technical and scientific details, but would always judge to the fact whether or not the Government had taken all relevant consideration, while clearing the project or not.

Narmada Bachao Andolan v. Union of India & Others[24]

In 1987 ministry of Environment and Forest accorded environmental clearance to build dam subject to certain conditions. A PIL was filed against the decision of making the Dam. The issue was whether environment clearance granted in 1987 without proper application of mind and whether forcible displacement of tribals from their land violative of their fundamental rights under constitution of India Art. 21. The petitioner was an anti-dam organization in existence since 1986 but had chosen to

[22] AIR 1980 SC 1622
[23] 1990 (2) SCALE 1003
[24] AIR 1994 SC 319

challenge the clearance given in 1987 by filling a writ petition in 1994. While issuing directions and disposing of this case,

Two conditions have to be kept in mind:-

(i) The completion of project at the earliest.

(ii) Ensuring compliance with conditions on which clearance of the project was given including completion of relief and rehabilitation work and taking of ameliorative and compensatory measures for environmental protection in compliance with the scheme framed by the Government thereby protecting the rights under Article 21 of the Constitution. Keeping these principles in view.

The court issued the following directions.

i. Construction of the dam will continue as per the award of the tribunal

ii. As the relief and rehabilitation sub-group has cleared the construction up to 90 meters, the same can be undertaken immediately. Further increasing of the height will be only *pari passu* with the implementation of the relief and rehabilitation and on the clearance by the Relief and Rehabilitation Sub-group after consulting the three Grievances redressal Authorities.

iii. The Environment Sub-group will consider and give, at each stage of the construction of the dam, environmental clearance before further construction beyond 90 meters can be undertaken.

iv. The permission to raise the dam height beyond 90 meters will be given by the Narmada Control Authority, from time to time, after it obtains the above-mentioned clearances from the Relief and Rehabilitation Sub-group and the Environment Sub-group.

v. The States of Madhya Pradesh, Maharashtra and Gujarat are directed to implement the award and give relief and rehabilitation to the oustees in terms of the packages and these States shall comply with any direction in this regard which is given either by the Narmada Construction Authority (NCA) or the Review Committee or the Grievances Redressal Authorities.

vi. Even though there has been substantial compliance with the conditions imposed under the environmental clearance the NCA and the Environment Sub-group will continue to monitor and ensure that all steps are taken not only to protect but to restore and improve the environment.

vii. The NCA will within four weeks draw up an action plan in relation to further construction and the relief and rehabilitation work to be undertaken. Such an action plan will fix a time frame so as to ensure relief and rehabilitation pari pasu with the increase in the height of the dam.

viii. The Review Committee shall meet whenever required to do so in the event of there being any un-resolved dispute on an issue which is before the NCA. In any event the Review Committee shall meet at least once in three months so as to oversee the progress of construction of the dam and implementation of the Relief and Rehabilitation programs. In case any serious differences in implementation of the award arise and the same cannot be resolved in the Review Committee, the Committee may refer the same to the Prime Minister whose decision, in respect thereof, shall be final and binding on all concerned.

ix. The Grievances Redressal Authorities will be at liberty, in case the needs arises, to issue appropriate directions to the respective states for due implementation of

the redressal and rehabilitation programs and in case of non-implementation of its directions, the GRAs will be at liberty to approach the Review Committee for appropriate orders.

x. Every endeavour shall be made to see that the project is completed as expeditiously as possible.

The court held, when such projects are undertaken and hundreds of crores of public money is spent, individual or organizations in the garb of PIL cannot be permitted to challenge the policy decision taken after a lapse of time. It is against national interest and contrary to the established principles of law that decisions to undertake development projects are permitted to be challenged after a number of years during which period public money has been spent in the execution of the project.

Vellore Citizens Welfare Forum v. Union of India and Ors[25]

The Supreme Court, in *Vellore Citizens Welfare Forum* v. *Union of India and Others,* has observed that the development and environment protection must go together. There should be balance between development and environment protection. It is, therefore, necessary that before the proposed Complex of the DDA is brought into execution, it should have environment clearance from the authorities concerned. The whole of the area has to be surveyed from the point of view of environment protection. In other words, the environmental impact assessment of the area has to be done by the experts. The court was of the view that the authority contemplated by Section 3(3) of the Environment (Protection) Act, 1986 can be the only appropriate Authority to look into the environment protection side of the present project or any other project which the DDA or any other Authority may initiate in future. Needless to say that the City of Delhi is already highly congested and has been rated by the World Health Organization as the 4th most polluted city so far as the air pollution is concerned. It is, therefore, necessary that the development in the city should have environmental clearance.

T.N. Godavarman Thirumulpad v. Union of India and Ors[26]

In *T.N. Godavarman Thirumulpad* v. *Union of India and Others,* the Delhi Development Authority (DDA) proposed the development of International Hotel Complex on 315 hectares of land situated in the Vasant Kunj area after the same area was identified in the Master Plan for Delhi 2001 for urban use area under the earlier Master Plan 1962 was identified as green area but there was a change of user to urban area under the latter Master Plan. Supreme Court by an order dated 19.8.1997 held that 92 hectares of land out of 315 hectares was a constraint area and only in respect of the balance 223 hectares of land, the constructions have to abide by the conditions of clearance. The applicant contended that 92 hectares of land were a part of the ridge and that report of Environmental Pollution (Prevention and Control) Authority stated that environmental factors were not in favour of urban development use of land and the entire parcel of land should be developed as green and not for industrial use. Respondent contended that 92 hectares was constraint area and was not an integral part of Delhi Ridge, and that only 19 hectares were sought to be utilized for the purpose of construction. A bare reading of the order dated 19.8.1997 apparently made a proposition that the Court had treated the land as constraint area and Environmental Pollution Control Authority (EPCA)'s report nowhere indicated that the land was a part of the ridge. It would be inappropriate to reopen the whole

[25] (1996) 5 SCC 647
[26] (2006)10 SCC 490

issue as to whether the land in question was a constraint area or ridge land. Even if the land is held to be constraint area the constructions thereon were to be made only after having the requisite clearance.

Academy for Mountain Environics v. State of Orissa and Others[27]

Vedanta Alumina Limited, a subsidiary of M/s Strerlite Industries (India) Ltd had proposed a one million ton per annum capacity alumina refinery project together with a 75 MW coal based captive power plant. Interestingly, the Alumina refinery was granted environmental clearance without linking the project with the Mining of Bauxite. M/s Sterlite (the parent company of M/s Vedanta) applied for environmental clearance on 19.03.2003 to the Ministry of Environment and Forest. In the application, Vedanta stated that no forestland is involved and that within the radius of 10 kms there is no reserve forest. M/s Vedanta thereafter on 16.08.2004 applied for use of 58.943 ha forest land consisting of 28.943 ha village forest and 30 ha reserve forest. However, the application for environmental clearance was not modified and the same was processed on the premise that no forestland is involved.

Further, though mining at Lanjigarh was integral part of the Alumina refinery project, Vedanta could not have started the work on the Alumina refinery without getting the clearance for mining also. As per the guidelines for projects requiring clearance from forest as well as environment angles, separate communications of sanction will be issued, and the project would be deemed to be cleared only after clearance from both angles. M/s Vedanta requested the ministry to grant environmental clearance for the Alumina Refinery Plant stating that it would take three years to construct the refinery plant whereas mines can be opened up in one year. In its application for seeking environmental clearance for the project dated 19.3.2003 it is stated that no forestland was required for the alumina refinery and that within a radius of 10 km of the project site there is no reserve forest, which was contrary to the facts on record. Subsequently, on 16.8.2004 a proposal for allowing the use of 58.943 ha forestland, consisting of 28.943 acre of "Gramya Jungle Jogya" land and 30 ha of reserve forest, was moved under the Forest Conservation Act through the State Government to the Ministry of Environment and Forest. Out of the above, 26.123 ha forestland was required for the refinery, 25.82 ha for the mine access road and the balance 7.0 ha was required for the construction of the conveyor belt for the transportation of the mineral from the mine site to the plant.

The union ministry gave environmental clearance for Alumina Refinery Project by delinking it with mining project. In the environmental clearance it is stated that no forestland is involved, even though the application under the Forest Conservation Act was still pending. As per Para 4.4 of the guidelines laid down by the Ministry of Environment and Forest "Some projects involve use of forest land as well as non-forest land. State Governments or Project Authorities sometimes start work on non-forest lands in anticipation of the approval of the Central Government for release of the forest lands required for the projects. Though the provisions of the Act might not have technically been violated by starting of work on non-forestlands, expenditure incurred on works on non-forest lands may prove to be in fructuous if diversion of forest land involved is not approved. It was, therefore, decided that if a project involved forest as well as non-forest land, work should not be started on non-forest land till approval of the Central Government for release of forestland under the Act has been given" But Vedanta had started the work on Alumina Refinery in blatant violation of this provision.

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[27] (2006) 10 SCC 1475

Accordingly the applicant had filed an Application before the Central Empowered Committee on the 21st of September 2005 and the Central Empowered Committee (CEC) gave its recommendations to the Hon'ble Supreme Court of India. Accordingly the CEC was of the opinion that the Court should consider revoking the environmental clearance dated 29/09/04 granted by the Ministry of Environment and Forest for setting up of the Alumina Refinery Plant by M/s Vedanta and directing them to stop further work on the project.

CONCLUSION

To the uninformed observer, India's current emphasis on economic development seems to eclipse its environmental protection efforts. But the combination of strong legislative mandates, an activist judiciary, aggressive public interest litigators, and a proliferation of highly committed environmental NGOs means that India is no longer the heaven it once was for industries indifferent to environmental values. However there is no denying the fact that a lot is yet to be done. Furthermore serious impedance to the conservationists' agenda lies in the lack of awareness of the population. Certain state initiatives which may help improve the situation may be promotion of research in the relevant field and making available the environment friendly technology wherever applicable. To conclude, the role of judiciary in India has undoubtedly been tireless and highly constructive towards protection of the environment.

A SOCIO-LEGAL PERSPECTIVES ON CRIMES AGAINST CHILDREN IN INDIA

Vinod Kumar*

Abstract

Children are the foundation of human society. The shape of future human society shall be determined by their mental and physical well-being. Just as the personality of an adult is built in his or her primitive years, the development of a nation is determined by the priority given to his child. The children are the supreme assets of the nation; hence in national policy child's care should occupy the most prominent place. Specific care needs to be taken that children grow up to become agile citizens, physically fit, mentally sound and alert and socially and morally healthy. But unfortunately, in spite of there being a number of resolutions and laws both at national and global level, the condition of children is far from satisfactory. History is the witness that this innocent and helpless creature has been subject to variety of exploitation. There is no separate classification of crimes against children. Generally, the offences committed against children or the crimes in which children are the victims are considered as crimes against children. Such offences are construed as crimes against children. The Indian Penal Code and the various protective and preventive 'Special and Local Laws' specifically mention the offences wherein children are victims. Crimes against children should be taken as crimes against humanity and protection of children from crimes is collective responsibility of the state, family and society. It requires a concerted effort on the part of every member of society and it should start from family which is the basic unit of the society and has the primary responsibility to provide care and protection of children. So, let us make a peaceful world for a child that is free from fear, hate, neglect, violence, abuse and crime. As rightly said by the great Tamil Saint Thiruvalluvar: "The touch of children is the delight of the body; the delight of the ear is the hearing of their speech."

Key words

Children, Protection, Law, Crime and Society.

INTRODUCTION

Children are the foundation of human society. The shape of future human society shall be determined by their mental and physical well-being. Just as the personality of an adult is built in his or her primitive years, the development of a nation is determined by the priority given to his child. The children are the supreme assets of the nation; hence in national policy child's care should occupy the most prominent place. Specific care needs to be taken that children grow up to become agile citizens, physically fit, mentally sound and alert and socially and morally healthy. But unfortunately, in spite of there being a number of resolutions and laws both at

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national and global level, the condition of children is far from satisfactory. History is the witness that this innocent and helpless creature has been subject to variety of exploitation.[1]

CRIMINAL ISSUES RELATED WITH CHILDREN

There is no separate classification of crimes against children. Generally, the offences committed against children or the crimes in which children are the victims are considered as crimes against children. Such offences are construed as crimes against children. The Indian Penal Code and the various protective and preventive 'Special and Local Laws' specifically mention the offences wherein children are victims. The issues in which children are victimized and abused can be categorized as follows:

a) Child Soldiers

According to Human Rights Watch thousands of children are serving as soldiers in armed conflicts around the world. These include boys and girls serving in government forces and in armed opposition groups. These child soldiers may fight on the front lines, participate in suicide missions and act as spies, messengers, or lookouts. Girls may be forced into sexual slavery. Many child soldiers are abducted or recruited by use of force while others join out of desperation in belief that armed groups would offer them best chance for survival. As an estimate thousands of children below the age of 18 are currently fighting in wars in at least 14 countries worldwide such as Afghanistan, Burma, Central African Republic, Chad, Colombia, Democratic Republic of Congo, Iraq, Somalia, Philippines, South Sudan, Sudan, Thailand, Yemen, including India where Maoist "Naxalite" rebels in the Chhattisgarh region use children as soldiers. They induct children as young as 6 into children's associations and use children as young as 12 in the armed squads where they receive weapons training and participate in the armed encounters with government's security forces.[2]

Children are more vulnerable to military recruitment due to their emotional and physical immaturity. They can be easily manipulated and drawn into violence because they are too young to resist or understand the nature and consequences of their acts. Further, technological advances in weaponry and the proliferation of small arms have contributed to the increased use of child soldiers because lightweight automatic weapons are simple to operate, easily accessible and can be used by children as easily as adults. Sometimes children join armed groups out of economic or social pressure, or because they believe that the group will offer food or security. Both girls and boys are used as child soldiers. In some conflicts, girls may be raped or given to military commanders as "wives." In some countries, former child soldiers are getting assistance from the States to locate their families, getting back into school, receiving vocational training and are entering into civilian life. Sometimes children are forced to commit atrocities against their own family members or neighbours. Such practices stigmatized the children and it becomes impossible for them to return to his home or community.[3]

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1 M.B. Jameel, "Menace of Child Labour", paper published in *Souvenir* of National Seminar on Child Rights in the Background of the U.N. Convention on the Rights of Child, 1989, organised by the Department of Law, Dr. Ambedkar College, Nagpur on 15th & 16th February, 2004, at 73

2 Available at: *http://www.hrw.org/topic/childrens-rights/child-soldiers* [visited on 29th August, 2014]

3 Available at: *http://www.hrw.org/sites/default/files/Resource%20Pack%202012_updated_0.pdf.* [visited on 29th August, 2014]

b) Child Pornography

Internet has proved to be one of the greatest technological inventions of the 20th century. Unfortunately the same advances in computer and telecommunication technology that allow our children to reach out to new sources of knowledge and cultural experiences are also leaving them vulnerable to exploitation and harm by computer-sex offenders. While on-line computer exploration opens a world of possibilities for children, expanding their horizons and exposing them to different cultures and ways of life, they can be exposed to dangers as they hit the road exploring the information highway.[4] Statistics reveal that '*Paedophiles*'[5] have easy access to children through the means of Internet. Child molesters are using the electronic superhighway to look for victims. The Internet is the paedophiles playground, because it affords them anonymity, and they can use newsgroups, chat rooms, and e-mail to exchange information about child pornography and interact with children. There are computer bulletin boards set up specifically for the seduction of children. They lure kids in with games and establish relationships with them on-line. Then they arrange to meet face-to-face. Chat rooms and instant/private messages are two main tools which paedophiles use to contact children on-line. Paedophiles use the Internet to share "trade secrets," *i.e.* how to change identities, forge passports, and smuggle children. Paedophiles use the Internet for "virtual validation" of their activities within their circles of fellow paedophiles, so they feel accepted and consider their sexual interest in children normal. There are individuals who attempt to sexually exploit children through the use of on-line services and the Internet.[6]

One of the most common forms of cyber crimes against children is "child cyber pornography." Child cyber pornography has become the most controversial topic arising from the use of Internet in recent years. It is a form of commercial sexual exploitation of children by the use of Internet and is in great demand. Sexually explicit material exists on the Internet. Child pornography has developed into a multi-billion dollar industry, which can be run from within the exploiter's home. Every photograph or videotape of child pornography is evidence of that child's abuse.[7] In child pornography, the service provider misrepresents his identity and dispatches a mail to a child user of computer for sending photographs for a carrier of fashion or modelling, with an offer incentive or money and sometimes they assure their victims that such pictures are for personal or confidential use. When they receive such pictures they interpolate the same through graphic programme and convert them to pornographic pictures such as putting their face of the victim on the nude body of the person or convert them into intimate postures and releases through Modem by users without the knowledge of the victim.[8]

c) Child Beggars

Beggary is an accepted way of life for a large section of orphan, destitute and

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4 Available at: *http://www.fbi.gov/cgi-bin/outside.cgi?http://www.missingkids.com* [visited on 30th September, 2014).

5 *Adults engaged in Sexual Crimes against Children.*

6 Available at: *http://www.fbi.gov/filelink.html?file=/publications/pguide/parentsguide.pdf* [visited on 24th August, 2014]

7 Asha Bajpai, *Child Rights in India: Law, Policy and Practice,* Oxford University Press, New Delhi, 2004, pp. 251-252

8 Raghunath Patnaik, "Vulnerability of Children through Cyber Crimes", XXX(2&3) *Indian Bar Review*, 2003, pp.406-407

neglected children in our society. In urban areas we often come across children operating alone or in groups, soliciting money or food for privately run orphanages or homes. Apart from these a large number of children fend for their survival alone or in informal groups of two or three. These children can be seen making appeals for private charity in various ways in the railway stations, bus stands, religious places, busy markets and picnic spots. Such children are usually from poor families where the parents are unable to provide care, support or guidance for them. Sometimes child beggars may adopt the way of life of their parents. Such children often become part of organized gangs of beggars and are often the victims of the beggary evil. In India child beggars are handled in different manner and treated as a neglected child in terms of the children Act. Some children leave home and resort to begging due to disorganization in the family or death of parents, or loss of mother or father, maltreatment or neglect by parents. Sometimes even beggars kidnap children and mutilate them in order to use them as their pawns in beggary.[9]

In India, hundreds of thousands of children are being forced to beg. Many of the children are trafficked into gangs, some are kidnapped, others may have been handed over by their family out of desperation or because they have been duped. As per an estimate every year some 44,000 children fall into the clutches of these gangs. Children are trained to approach certain kinds of people and use certain mannerisms to extract even more money. The earnings of the children are handed over to the gang masters and if a child does not make their target that day they are beaten and tortured by them. Many child beggars are addicted to solvents, alcohol and *charas*.[10] This helps the children to forget where they are, but it also helps the gang masters to keep them under control. Often children are maimed by the criminal gangs because disabled children get more money as compared to healthy ones and it increases the profit of criminal gangs. Often these maimed child beggars are terrified of speaking out and they say their limbs just disappeared or were damaged in an accident.[11]

d) Child Sex Tourism

Child Sex Tourism (CST) is the sexual exploitation of children by a person or persons who travel from their home district, region or country in order to have sexual contact with children. Child sex tourists can be domestic travellers or they can be international tourists. Child sex tourism often involves the use of accommodation, transportation and other tourism-related services which facilitate the contact with children and enable the perpetrator to remain fairly inconspicuous in the surrounding population and environment.[12] Commercial Sexual Exploitation of Children (CSEC) is a term that describes the sexual abuse of children in exchange for cash or compensation, given either directly to the child or to a third party. There are various forms of commercial sexual exploitation of children and one of the forms of commercial sexual exploitation of children is child sex tourism which is related to the travel and tourism industry. The term 'child sex tourism' refers to acts perpetrated by travellers or by those

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9 Rubina Iqbal, "Begging: A Growing Menace in India," 2(8) *IJARMSS,* 2013, at 3, available at: *http://www.academia.edu/5450637/BEGGING_A_GROWING_MENACE_IN_INDIA* [visited on 28th August, 2014]

10 Powerful Afghan hashish often laced with opium.

11 Available at: *http://www.dfn.org.uk/info/slavery/42-information/slavery/93-beggary* [visited on 29th August, 2014]

12 Available at: *http://www.ecpat.net/sites/default/files/cst_faq_eng.pdf* [visited on 5th October, 2014]

who use their status as a tourist in order to sexually exploit children. Child sex tourism can said to be a sub-type of child prostitution having links with tourism industry where child victims are treated as sexual and commercial objects to facilitate the generation of profit.[13]

There is one popular belief that poverty is the main cause of commercial sexual exploitation of children but this is not so. One factor which is responsible for sexual crimes against children is the demand for sexual contact with children. Opportunistic individuals and organized criminals take advantage of the demand for child sex by generating a constant supply of vulnerable children. They identify potential victims and bring the supply to the demand, creating a veritable child sex market. As a result, vulnerable and victimized children become a means of massive profit generation for these opportunists. Child sex tourists basically are of three types *i.e.* 'paedophiles,' 'preferential child sex tourist' and 'situational child sex tourists.' One misconception about child sex tourism is that all child sex tourists are paedophiles but in reality the majority of child sex tourists are "situational child sex tourists" who abuse children as a means of experimentation. On the other hand the preferential child sex tourist displays an active sexual preference for children and he will generally search for pubescent or adolescent children.[14]

e) Child Marriage

Child marriage is a marriage of individuals before they attain the age of adulthood. The Indian law recognises 18 years for girls and 21 years for boys as the age of adulthood for the purpose of marriage. Child marriage is a violation of the rights of the child as child marriage below a certain age is blatant child abuse. Any marriage before this minimum age is termed as child marriage. Here, adults take the decision and children are forced into marriage without proper understanding or knowledge. Once married she is expected to carry out different obligations arising out of marriage, including responsibilities towards the spouse, the family and society.[15] In Rajasthan on *Akshay Tritiya* which is popularly known as *Akha Teej* hundreds of child marriages are openly performed. *Akha Teej* is regarded as the most auspicious day for celebrating marriages. On this day even infants, who have just been born or are only a few years old and cannot even sit or walk, are married. The child brides or the bridegroom do not understand the solemnity of these ceremonies, but for elders it is the safest and most tested way of keeping property and money within the family and of preserving the chastity of their daughters. These types of marriages are greatly prevalent in Rajasthan, but in other States also there are several incidents of child marriages.[16] There is no single cause of child marriage. The reasons behind this continuing practice are manifold. Child marriages are deeply entrenched in the socio-economic context of backwardness, poverty, illiteracy, patriarchy and feudalism, falling sex-ratio, backward status of women in general characterised by social malpractices like dowry, female feticide and infanticide and also certain traditional/religious/cultural practices in each region. Researcher is of the view that apart from these causes political patronage

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13 Available at: *http://www.thecode.org/csec/background* [visited on 14th October, 2014]

14 *Ibid.*

15 Aparna Bhatt, Aatreyee Sen & Uma Pradhan (eds.), *Child Marriages and the Law in India,* Human Rights Law Network, New Delhi, 2005, at 11

16 Asha Bajpai, *Child Rights in India: Law, Policy and Practice,* Oxford University Press, New Delhi, 2004, pp.212-214

and poor implementation of laws are also major factors of child marriages in India.

Child marriage leaves an impact on the health and general well being of the children. It takes a toll on further development of the child with physical, intellectual, psychological and emotional detriments. Young brides also run the risk of catching diseases from their respective spouses, as older husbands often engage in sexual relations with other women outside the marriage. Young married girls do not have bargaining power in the marriage and therefore cannot negotiate safe sex and are deemed vulnerable.[17] Child marriage is thus child abuse and a violation of the human rights of the child. It has an extremely deleterious effect on the health and well being of the child. It is a denial of childhood and adolescence; it is a curtailment of personal freedom and opportunity to develop to a full sense of selfhood as well as a denial of psycho-social and emotional well being and it is a denial of reproductive health and educational opportunities. The girl child is the most affected and suffers irreparable damage to her physical, mental, psychological and emotional development.[18]

f) Child Foeticide

Crimes against children are not committed only after he/she comes in this world but it can be even before he/she takes birth in this world of crimes. Female feticide or the selective abortion of a female feotus is becoming increasingly common nowadays. Female infanticide has a long history in India and chillingly each region has had its own established, traditional way of killing infant girls, methods that include drowning the baby in a bucket of milk, or feeding her salt, or burying her alive in an earthen pot. Female feticide is the selective abortion/elimination of the girl child in the womb itself, done deliberately after the detection of the child's gender through medical means. This is usually done under family pressure from the husband or the in-laws or even the woman's parents. However, female feticide is a far more heinous sin than the age old practice of killing an unwanted child. The root cause for female feticide lies within the cultural norms as well as the socio-economic policies of the country where this practice prevails. Preference for the male child; age old custom of dowry system; deteriorated status of women in society; legalization of abortion in India; illegal sex determination are reasons for this heinous practice. Further, industrialization of the health sector has further strengthened the selective sex abortion because with the advent of CVS, amniocentesis and Ultrasound, sex determination of the feotus has become much easier than it was earlier. Results of female feticide are steep decline in sex ratio, increase in female trafficking, rape and sexual assault on women/girls and population decline.[19] The sex-selective abortion has become another technique to murder girls by use of pre-natal sex determination. Pre-natal diagnostic techniques involve two main technologies, *i.e.* amniocentesis and ultra-sonography. In India, pre-natal sex determination test relies mostly on the ultra-sonography which is easier and

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17 Heman Barua, Pradeep Kumar Apte, "Care and Support of Unmarried Adolescent Girls in Rajasthan," XLII(44) *Economic and Political Weekly*, November 3-9, 2007, at 26

18 Jyotsna Chatterji, "Child Marriage," paper presented at India Social Forum, November 2006, New Delhi, quoted in Law Commission of India, 205th Report on the *Proposal to Amend the Prohibition of Child Marriage Act, 2006 and other Allied Laws,* February, 2008, at 24

19 Female Feticide: Causes, Effects and Solutions, available at: *http://silverstararrow.hubpages.com/hub/Female-Feticide-Causes-Effects-and-Solutions* [visited on 2nd October, 2014]

cheaper to conduct than amniocentesis. Most physicians are largely conscious of the ethical implications of this technology and are opposed to sex selection. However, a small number of unscrupulous practitioners have become rich by performing illegal sex diagnoses or sex-selective abortions.

g) Child Labour

The term 'Child Labour' is used as a synonym for 'employed child' or 'working child'. However, child labour can be defined as that segment of the child population which participate in work either paid or unpaid.[20] Today the incidence of child exploitation has posted a serious threat to the world and particularly India. It has been a perennial social evil of our country and no suitable remedy has been traced out so far to curb the menace. No doubt the child exploitation is legally prohibited but in reality it is rare to see an occupation where children are not exploited.[21]

The economic practice of child labour in India dated back to industrial revolution in the country. Since then, the demand of industry for cheap labour grew up so rapidly and the poverty of the masses became so acute that the tendency to exploit child labour among the employer increased in unprecedented manner and consequently children begun to be employed in organised factories and other establishments in large numbers.[22] Poverty makes the parents send their children to seek employment at an early age, as their earnings are essential for the survival of the family. Parents do not have the means to support and educate them; they want them to start earning as soon as possible. Similarly, low wages have a direct bearing on the prevalence of child labour in India.[23] The lower socio-economic groups of population are illiterate. They only think about the present time, which is their sole concern and worry. They never think of future. They are fully satisfied with what they gain by the earnings of children. It is ignore by them that their children may participate even in educational opportunities.[24] Child labour is preferred not only due to low wages but also because children are obedient, submissive, trouble free and are prepared to do all types of work without demanding over time, medical benefits and holidays etc. they are more needy and more active; they have less developed egos and status consciousness. Moreover, children can be easily punished for minor mistakes. Socio-cultural disparities may also contribute to child labour. Many societies display historical injustices and traditional taboos. The phenomenon has racial and social origin, interwoven issues of class and caste and the remnants of slavery. It is obvious that children used for labour exploitation are lured from particular racial or social groups, rather than from the well-endowed group in power.[25] Another direct cause of child employment is the situation at home. There may be tension and uncertainty, provoked or increased by poverty; the father may have left home; the mother may be alone; the father or mother, or

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20 Suresh Chander, *Child Labour in Informal Sector: A Sociological Study,* Sun Rise Publications, New Delhi, 2004, at 63

21 Paras Diwan, *Child and Law,* Panjab University Publication, Chandigarh, 1985, at 441

22 T.N. Bhagoliwal, *Economics and Labour and Social Welfare,* Agra, Sahitya Bhawan, 1976, at 651

23 Arbind N. Pandey, "Child Labour" *Competition Refresher,* May 2003, at 33

24 Narendra Prasad, *Population Growth and Child Labour: The Indian Dilemma*, New Delhi, Kanishka Publishers, 2001 at, 122

25 Dolly Singh (ed.), *Child Rights and Social Wrongs: An Analysis of Contemporary Realities*, Kanishka Publishers, 2001, at 187

both, may fall ill, or become physically unfit or die.[26] Migration is another cause of child labour, when family had to move from one area to another due to agricultural cycle; his wife and young children either move with him or stay back to look after the family in his absence. In the urban areas, when the whole family moves from their village to the cities, they face problem of lack of shelter, hunger, joblessness etc., and it forces the children to join the revolution is becoming a stabilized reality and wages of agricultural labourers has substantially gone up, labour families have pressed into service their child population, tempted by relatively good earnings.

Although extent and nature of child labour vary among countries and regions, child labour remains a widespread phenomenon. The Magnitude of the problem, especially in developing countries, is great and task of attacking it is urgent. What gives cause for concern is work that places too heavy burden on the child; work that endangers his safety, health or welfare; work that takes advantage of defenseless of the child; work that exploits the child as a cheap substitute for adult worker; work that uses the child's effort but does nothing for his development; work that impedes the children's education and training and prejudice his future. Child labour of this kind must be target of national or international action.[27]

h) Child Prostitution

Child prostitution designates the use of children for sexual activities in exchange for remuneration or another form of retribution such as gifts, food, clothes, etc. This activity is included under the umbrella term of sexual exploitation. These children work on the streets or in establishments such as brothels, clubs, massage parlours, bars, hotels, or restaurants. Both boys as well as girls are driven to prostitution. It is easier to abuse a child than an adult. Sexual exploiters utilise the docility of children because they are less able to defend themselves. This deviant attitude is often caused by the feeling of sexual and economic power, by the desire for new experiences, or by the feeling of impunity related to anonymity. Moreover, in certain cultures, myths and prejudices often justify the search for sexual relations with children. In Asia for example, some men are persuaded that the fact of having sexual relations with very young virgin girls prevents them from contracting HIV/AIDS, as well as curing this illness. Most men believe also that having sexual relations with a virgin increases their virility, as well as bringing longevity and success in business.[28]

Sexual abuse degrades the very soul of the victim particularly children who are vulnerable to sexual abuse and exploitation by unfamiliar persons both for commercial and non-commercial purposes. The commercial sexual exploitation of girls is a global, the multi-million dollar industry and pouring money into the hands of private citizens, government and police. Child prostitution and involvement of large number of children for flesh trade is the most serious manifestation of child abuse. Young innocent girls are kidnapped and sold either to men who are not able to get spouses in life, or to the owner of a brothel who purchases these girls and brings them up till they are grown up, whereupon they are treated as objects in the market of women flesh. There has always been a

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[26] Elias Mendelievich (ed.), *Children at Work,* International Labour Office Publication, Geneva, 1980 at 8

[27] Child Labour: *Report of the Director- General to the International Labour Conference,* 69th Session, International Labour Office, Geneva, 1985, at 37

[28] Available at: *http://www.humanium.org/en/child-prostitution* [visited on 15th September, 2014]

demand of children for sexual purposes. In India, sometimes sexual abuse starts during infanthood. Quite often child's own relatives are responsible for such abuse. A majority of girls in prostitution are forced into this practice either by unscrupulous adults or by poor parents and guardians. In India, approximately 20% of the prostitution constitutes 11 to 13 years old girls. Poverty alone is not root cause of child prostitution; it is coupled with the existing socio-religious status of women and prevailing national structure. The victims of this profession age very rapidly, due to lack sleep, malnutrition, having to satisfy abnormally large number of customers, multiple abortions and venereal diseases.[29] One of the forms of child prostitution in India is in the form of devadasi system. In some parts of India a few centuries ago a practice developed under which a few women were made wives of god and named as *Devadasis, Jogins, Basavis, Kalawants, Paravatis* or *Mathammas.* These wives of God lived in or around the temples. They performed some duties at the temples and participated in the religious functions. They were an integral part of many large Hindu temples. In addition to their religious duties, the Devadasis were a community of artists. They presented dance and music performances at the temple as well as at private functions. It was customary for the elite to invite devadasis at marriages and family functions.[30]

i) Child Trafficking

Trafficking in children is a growing problem in our country. Generally, it is felt that trafficking of children takes place for sexual exploitation but trafficking for forced labour, slavery, servitude, marriages and for the removal of organs is also very common. The trafficked children are most commonly used for labour in brick kilns, factories, construction work, sweatshops, as domestic servants and for the prostitution and pornography. Children become victims of trafficking due to various diverse factors. Poverty is the most identifiable factor driving the children into trafficking. People are forced to leave their natural habitat and are migrated to places where jobs are available. In search of job, male members leave behind their wives and children. These women and children becomes prey to evil intention of traffickers who lure them away with temptation of jobs and push them in prostitution or domestic work. Some other factors which lead to child trafficking include, natural calamities and poor rehabilitation of victims of disaster, Indian tribal *(Nats, Kanjar, Bedia)* where girl children traditionally earns through prostitution, male unemployment, weal law enforcement in border areas due to insufficient or corrupt policing, clandestine nature of this crime, lack of political will in setting up necessary infrastructure for protection of women and children. Child trafficking is not a new phenomenon. Women and children are bought and sold ever since human civilization came into existence but in the recent past there is an increased reporting of it, making it more visible than ever before. Children are trafficked because there is demand for them. The supply comes easy as children are the most vulnerable section and therefore can be manipulated, coerced, bought and sold.[31]

j) Child Delinquents

From the inception of civilization people have appreciated that proper child

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29 Nuzhat Parveen Khan, *Child Rights and the Law,* Universal Law Publishers, New Delhi, 2012, at 152-53

30 Anil Chawla, "Devadasis-Sinners or Sinned Against," available at: *http://www.samarthbharat.com/files /devadasihistory.pdf* [visited on 30th September, 2014]

31 *Ibid.*

development is the key to its perpetuation. Children are the most vulnerable group in any population and in need of greatest social care and protection. Due to their vulnerability and dependence, there is always a chance of them being exploited, ill treated and directed into undesirable channel by anti-social elements in the community. It is a fact that despite the utmost care and protection, children have from time immemorial indulged in deviant or anti-social behaviour. Such behaviour of children which is otherwise termed as 'juvenile delinquency' has been regarded as problem in every age.[32]

Since a nation's future depends upon young generation, children deserve compassion and bestowal of the best care to protect this burgeoning human resource. A child is born innocent and if nourished with tender care and attention, he or she will blossom with faculties physical, mental, moral and spiritual, into a person of stature and excellence. On the other hand, noxious surroundings, neglect of basic needs, bad company and other abuses and temptations would spoil the child and likely to turn him a delinquent. Our children being an important asset, every effort should be made to provide them equal opportunities for development so that they become robust citizens physically fit, mentally alert and morally healthy endowed with the skills and motivations needed by society.[33]

CRIMES AGAINST CHILDREN: SUGGESTED SOCIO-LEGAL REMEDIES

Following are the suggestions forwarded by the author which may be suitable for preventing the crime against children:

i. There is no uniform definition of 'child' under the Indian laws. So, author here suggests that there should be uniformity regarding age of children whether we are defining him/her as 'child' or 'minor.' Legal age to define a person as 'child' should be 18 years for all purposes in all legislations including labour legislations.

ii. Child marriage is also one of the forms of crimes against children and especially in case of girls' children. So, author here suggests that one of the ways to stop child marriages is increasing the age mentioned in the Marital Rape *i.e.* Exception to Sec. 375 of IPC. The age should be enhanced from 15 to 18 years.

iii. Most of the people are aware of Police Helpline number 100 to contact the police in case of emergency but most of them are ignorant about CHIDLINE 1098 service for protection of child in case of emergency. This is India's first 24-hour toll free, emergency phone service for children in need of aid and assistance run by NGO Childline India in selected cities/districts of India. This emergency helpline number should be displayed at all public places like railway stations, bus stations, airports, public parks, amusements places, banks, shopping malls, hotels and restaurants, police stations/posts, schools and other institutions, all government and private or semi-government buses, autos and other modes of public conveyance used by public at large with a view that general public

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[32] S.K. Chatterjee, *Offences against Children and Juvenile Offence,* Central Law Publications, Allahabad, 2013, at 257

[33] Justice V.R. Krishna Iyer, "Jurisprudence of Juvenile Justice: A Preambular Perspective," Souvenir of the International Conference on Shaping the Future of Law, organised by the Indian Law Institute, New Delhi on 21-25 March, 1994

including children should be aware of this helpline number in case any emergency arises.

iv. Child labour is also one of the forms of crimes against children which is directly associated with poverty. One of the failures of most of the labour legislations dealing with children is lack of its implementation and meager punishments and penalties. There are very few prosecutions in case of child labour and violators go scot-free just by paying the fine. Therefore, author suggests that first of all age limit for children to work should be increased from 14 to 18 years as India is also signatory to Convention on the Rights of Child, 1989[34] which defines that child is a human being below the age of 18 years. Secondly, there should be stricter punishments and heavier penalties in case a person employs child labour which is lacking in almost all labour legislations of India and at the same time there should be proper implementation of the laws by the labour officers and police officials.

v. Police officials should be given specialised training in matters connected with crimes against children so that they should deal in effective manner in a situation when offences are committed against children. There should be having a separate children cell in police stations in-charge of a woman police officer specially trained in criminal issues related with children to deal exclusively with the crimes committed against children. Further, there is need to have a special task force in the police which should exclusively deal with cases of crimes committed against children.

vi. All Central and State legislations containing provisions for protection of the children against crimes should be repealed and there should be a separate Children Code in India known as "The Children Code of India (CCI)" to deal exclusively with violation of child rights and crimes committed against children. This Code should contain severe punishments and heavier penalties in case of crimes against children or violation of child rights.

vii. Proper implementation of the laws relating to protection and welfare of children is possible only when there is proper vigilance by the society over the laws, policies and programmes relating to welfare and protection of children.

viii. One of the methods to protect children from crimes is to educate them about their rights. Children must be given awareness of their rights. There should be provisions in the school curriculum regarding awareness about child rights and the law relating to any type of child abuse so that children should know that there are laws under which they are given protection from any type of abuse.

ix. Training about child rights and protection of children from crimes should be essential pre-requisite of the pre-service and in-service training programmes for police officials, executive officers, judicial officers, law officers, public prosecutors, health workers, teachers and institutional heads managing the children institutions.

x. Children are abused because abuser thinks that due to fear, shame or shyness child will not disclose this to anyone. Children do not disclose because they might think that their parents will take it otherwise or will not trust upon them. Researcher is of the view that this is very complex issue which cannot be sorted by law and therefore suggests that for this family ties should be strengthened. Parents will have to treat their children as friends so that they should be

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[34] India accessed this Convention on 11th December, 1992

encouraged to express their views without any fear or shame. Parents have to teach their children that if something inappropriate happens with them in family, school, neighbourhood, or at any other place they must immediately report to them. For parents children should be their first priority than society. They must report to the police or approach before appropriate authorities if something bad happens with their children only then they will be able to justify as parents in front of their children. Last but not the least there should be change in the mindset of the society and this is possible only through education and awareness. Old age prejudices against girl children must be eliminated.

xi. Though Internet can be used as medium to generate public opinion to raise voice against rising incidences of crimes against children but it can also be used a means of committing crimes against children. Child pornography and abuse of children by the use of Internet is also one of the complex issues which need to be addressed on urgent basis. Porn websites containing sexually explicit material are also one of the reasons for growing sexual violence against children. Government must evolve some technology to filter these sites with a view to block this. People must come forward and make complaint to the Department of Telecommunication, Government of India, if they come across any porn website containing material of child abuse. Parents must use software which filters these websites when their children access Internet and they should also educate their children about the pros and cons of Internet. Police officials must be Police officials must be given proper training to deal with these cyber crime issues related to children.

xii. There should be online national data (including their photo graphs and finger prints) of all persons accused/convicted of committing crimes against children so that general public be aware of these persons. Identity of the persons accused or convicted of committing offences against children should be disclosed publically.

xiii. Last but not least, a strong political will is necessary to combat crimes against children. State must play its positive role towards children and State functions through elected representatives of people and if they are not serious against children then who will come forward for their rescue and protect them from crimes?

CRIMES AGAINST CHILDREN: AN OVERVIEW

Noble laureate Dr. Rabinder Nath Tagore once said: A nation's children are its supremely important asset and nation's future lies in their proper development. An investment in children is indeed an investment in future. A healthy and educated child of today is the active and intelligent citizen of tomorrow.[35] Crimes against children should be taken as crimes against humanity and protection of children from crimes is collective responsibility of the state, family and society. It requires a concerted effort on the part of every member of society and it should start from family which is the basic unit of the society and has the primary responsibility to provide care and protection of children. Being an important member of civilized society we must fulfill our duty towards children by providing them a conducive environment to develop his/her physical, mental, moral and spiritual personality. It is our duty to give them a world free from hate, neglect, violence and abuse. In India, much work has been done by the government regarding welfare of children and protecting them from

[35] "Juvenile Deviations and Protection in the Context of the Juvenile Justice Act, 1986", 25(1-3) *Indian Journal of Criminology and Criminalistics*, 2004, at 12

crimes, but still lot more has to be done in practice for proper enforcement of the rights of children and effective implementation of laws, policies and programmes relating to protection, survival and welfare of children. So, let us make a peaceful world for a child that is free from fear, hate, neglect, violence, abuse and crime. As rightly said by the great Tamil Saint Thiruvalluvar: "The touch of children is the delight of the body; the delight of the ear is the hearing of their speech." [36]

[36] Quoted in *D. Rajeswari* v. *State of Tamil Nadu and Others* 1996 Cr LJ 3795

TASK OF BIOLOGICAL DIVERSITY CONSERVATION AND ROLE OF INSTITUTIONAL MECHANISM IN INDIA

Digvijay Singh*

Abstract

Strong and effective institutional mechanism is sine qua non to achieve objectives of any legislation and State Parties to the Convention on Biological Diversity, 1992 require such mechanisms to fulfill their obligation to provide for conservation of biological diversity under the Convention. The Biological Diversity Act, 2002 of India provides for strong institutional mechanism in order to implement its obligation under Convention and has established a three tier institutional mechanism. This paper examines the working of institutional mechanism established at national, state and local level in India under the Act. It particularly focuses on the role of local institutions in conserving biological resources and associated knowledge and examines it's working. It also argues for justification of establishment of Biodiversity Management Committees in every local body by panchayats and municipalities.

Key words

Biological Diversity, Conservation, Institutional Framework/Mechanism, Local Institutions and Biodiversity Management Committee.

INTRODUCTION

At the international level an idea for conservation of biological diversity was conceived in the Convention on Biological Diversity, 1992 and with the conclusion of this Convention member states were under obligation to provide for conservation and sustainable use of biological diversity. India, being member of the Convention, was also under such obligation. Besides such obligation another fact was that India is one of the world's 12 mega-biodiversity countries and with only 2.5 per cent of the total land area, it accounts for 7-8 per cent of recorded species, so it was realized in the last decade of twentieth century that biological diversity of this country should be protected for present as well as for future generation.[1] This international as well as national task of biodiversity conservation also facilitates sustainable development, which is a must today. This effort of conservation of biological diversity requires strong institutional mechanisms to implement the obligations for conservation and management of biological resources and associated traditional knowledge of the country. In this context the Biological Diversity Act, 2002 was passed by the Indian Government to provide for strong institutional framework in order to implement the objectives of Convention which are conservation, sustainable use, and equitable sharing of benefits arising out of the use of biological resources and related knowledge.

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1 "Biodiversity Bill: A First Step", *Economic and Political Weekly,* 2002, at 5149

This legislation is an important step in direction to incorporate the Convention on Biological Diversity's policy framework at the national level and was considered long overdue by various academicians and non-governmental organizations (NGOs) working in the field of intellectual property rights (IPRs) and biodiversity conservation.[2] Since biological resources are largely undocumented and with knowledge systems being collective effort of rural local communities, who have protected and nurtured them the valuable role of local bodies was also recognized. It is in this context present paper is an attempt to examine the international legal framework of conservation of biological diversity. Further, this paper examines the working of institutional mechanism established in India, particularly three tier institutional mechanism of India. The main focus of this paper is on role of local institutions in conservation of biological diversity and working of biodiversity management committees at local level.

INTERNATIONAL TASK OF BIOLOGICAL DIVERSITY CONSERVATION

In the past, 'biological resources'[3] were considered as common heritage of mankind. But, in the wake of the advances in biotechnology, both developed and developing countries realized the importance of biological resources and then began exploitation of these resources. To regulate undue exploitation of these resources, the Convention on Biological Diversity was adopted in 1992, aiming to achieve conservation of biological diversity; sustainable use of its components; and fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[4] The Convention recognizes that conservation of biological diversity is a common concern and is integral part of the socio and economic development of humanity. It covers all ecosystems, species, and genetic resources. It links traditional conservation efforts to the economic goal of using biological resources sustainably. It sets principles for the fair and equitable sharing of benefits arising from the use of genetic resources, especially those intended for commercial use.[5]

The Convention expressly recognizes the sovereign right of states over their biological resources and acknowledges the dependence of indigenous and local communities over their biological resources and the need to share equitably the benefits arising from the use of traditional knowledge. Articles 3 and 15 of the Convention recognize the sovereign rights of nation states over their biological resources and their authority to determine access to genetic resources through national legislation. The Convention also stresses on sustainable use of biological resources. It also covers the rapidly expanding field of biotechnology through its Cartagena Protocol on Bio-safety, addressing technology development and transfer, benefit-sharing and bio-safety issues. Countries that join the convention are obliged to implement its provisions and it reminds decision-makers that biological resources are finite and sets out a philosophy of sustainable use.[6]

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2 Rajesh Sagar, "*Intellectual Property, Benefit-Sharing and Traditional Knowledge: How Effective is the Indian Biological Diversity Act, 2002?",* 8 *Journal of World Intellectual Property,* 2005, pp.383-388, at 383

3 The Convention on Biological Diversity, 1992, Article 2 reads as: "biological resources" includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.

4 The Convention on Biological Diversity, 1992, Preamble

5 Milind Wani and Persis Taraporevala, "CoP-11 on Biodiversity: An Opportunity to Go beyond Business as Usual", XLVII (38) *Economic & Political Weekly,* 2012, at 10

6 *Ibid.*

The issues dealt with under the Convention include measures and incentives for the conservation and sustainable use of biological diversity; regulation of access to genetic resources; access to and transfer of technology, including biotechnology; technical and scientific cooperation; impact assessment; education and public awareness; provision of financial resources; and national reporting on efforts to implement treaty commitments.[7] Above mentioned issues may only be short out with the help of strong and effective institutional mechanism. However, the major obstacle before such mechanism is a shift in focus from the ecological and scientific value of biological diversity to its commercial value. The highest decision making body of the Convention is the Conference of the Parties (CoP) which convenes after every two years and in October 2012, India hosted the 11th Conference of the Parties (CoP-11) in Hyderabad. In October, 2010, the Conference of the Parties (CoP-10) to the Convention adopted the Nagoya Protocol on Access and Benefit Sharing. The Nagoya Protocol is a significant achievement for developing countries in asserting sovereign right over their biological diversity and associated traditional knowledge.[8]

BIODIVERSITY CONSERVATION AND INSTITUTIONAL MECHANISMS IN INDIA

India is rich in biological resources but had no clear legislative framework to regulate access, use and rights over such resources until the Biological Diversity Act, 2002 was enacted. After its enactment such framework is evident to some extent. The Act provides for strong institutional framework in order to implement the objectives of CBD.[9] The Act reaffirms the sovereign rights of states over their biological resources and makes provision for conservation, sustainable utilization and equitable sharing of benefits arising out of the utilization of biological resources and knowledge.[10] It establishes different institutions responsible for permit, guideline and the supervision for the implementation of the Act. These are the National Biodiversity Authority (NBA) at national level, State Biodiversity Boards (SBBs) at state level, and Biodiversity Management Committees (BMCs) at the local level constituted by *panchayats* and municipalities. The following part discusses these institutions in detail.

National Biodiversity Authority (NBA)

The Central Government was preoccupied with establishing the institutional mechanisms, particularly at the national level from the beginning. After enactment of the Act, in 2003, the National Biodiversity Authority (NBA) was set up by the Ministry of Environment and Forest (MoEF) at Chennai as body corporate.[11] The NBA consists of a Chairperson, who shall be an eminent person having adequate knowledge and experience in the conservation and sustainable use of biological diversity and in matters relating to equitable sharing of benefits, to be appointed by the Central Government.[12] Besides chairperson three *ex officio* members to be appointed by the

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7 Rahul Goel, "Protection and Conservation- TRIPs and CBD: A Way Forward", 3(5) *Journal of Intellectual Property Law & Practice,* 2008, at 334

8 Harry Jonas, Kabir Bavikatte and Holly Shrumm, "Community Protocols and Access and Benefit Sharing", 12(3) *Asian Biotechnology and Development Review, 2010,* pp.49-76, at 50

9 Shalini Bhutani, Kanchi Kohli, "Ten Years of the Biological Diversity Act", XLVII(39) *Economic & Political Weekly,* 2012, pp.15-18, at 15

10 The Biological Diversity Act, 2002, Preamble

11 The National Biodiversity Authority has been established *w.e.f.* 01/10/2003, *vide* S.O. 1147(E), dated 1st October 2003.

12 The Biological Diversity Act, 2002, *supra* note 10, Section 8(4)

Central Government, one representing the Ministry dealing with Tribal Affairs and two representing the Ministry dealing with Environment and Forests of whom one shall be the Additional Director General of Forests or the Director General of Forests; seven *ex officio* members to be appointed by the Central Government to represent respectively the Ministries dealing with Agricultural Research and Education, Biotechnology, Ocean Development, Agriculture and Cooperation, Indian Systems of Medicine and Homoeopathy, Science and Technology, Scientific and Industrial Research; and five non-official members to be appointed from amongst specialists and scientists having special knowledge of, or experience in, matters relating to conservation of biological diversity, sustainable use of biological resources and equitable sharing of benefits arising out of the use of biological resources, representatives of industry, conservers, creators and knowledge-holders of biological resources.[13]

The NBA is an autonomous body that performs facilitative, regulatory and advisory function for Government of India on issue of conservation, sustainable use of biological resource and fair equitable sharing of benefits of use. The Act mandates implementation of the act through decentralized system with the NBA focusing on advice the Central Government on matters relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of benefits arising out of the utilization of biological resources; advice the State Government in the selection of areas of biodiversity importance to be notified under sub-section (1) of section 37 as heritage sites and measures for the management of such heritage sites. The NBA delivers its mandate through a structure that comprises of the Authority, secretariat, SBBs, BMCs and Expert Committees.[14] It is argued that the NBA is largely an inter-ministerial committee with a number of non-official members to be appointed from the scientific community, industry representatives, conservers, creators and knowledge holders.[15]

The Act also provides for the establishment of Committees by the NBA to deal with agro-biodiversity[16]. [17]It has an advisory role to Central and State Governments and an important role in opposing the granting of intellectual property rights on Indian biological resources or associated knowledge outside of India. The responsibilities of the NBA are important in the context to regulate the approval of activities dealing with access to biological resources and associated knowledge; transfer of research results; and acquisition of intellectual property rights. The NBA shall regulate those matters by regulations and issuance of guidelines.[18] However, it is argued that the structure of NBA is skewed in favour of government and bureaucracy and civil society has not been given adequate representation in the NBA. Moreover, by packing NBA with government representatives there is danger that NBA may virtually become a puppet in the hands of the government.[19]

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13 *Ibid.*

14 *Id.,* Section 8(3)

15 Christoph Antons, "*Sui Generis* Protection for Plant Varieties and Traditional Knowledge in Biodiversity and Agriculture: The International Framework and National Approaches in the Philippines and India", 6 *The Indian Journal of Law and Technology,* 2010, pp.91-139 at 127

16 The Biological Diversity Act, 2002, *supra* note 10, Explanation of section 13(1) defines agro-biodiversity, which means biological diversity of agriculture related species and their wild relatives.

17 *Id.,* Section 13

18 *Id.,* Section 18

19 K. Ravi Srinivas, "Biodiversity Bill Nice Words, No Vision", *Economic and Political Weekly,* 2000, at 3917

State Biodiversity Boards (SBB)

The next Authority established under the Act is State Biodiversity Boards at State levels. The Act establishes State Biodiversity Boards for the purposes of this Act as body corporate.[20] This board is established by State Governments at state level. The Board shall consists of a Chairperson who shall be an eminent person having adequate knowledge and experience in the conservation and sustainable use of biological diversity and in matters relating to equitable sharing of benefits, to be appointed by the State Government; and other 10 members.[21] Amongst 10 members five *ex officio* members to be appointed by the State Government to represent the concerned Departments of the State Government; and five members to be appointed from amongst experts in matters relating to conservation of biological diversity, sustainable use of biological resources and equitable sharing of benefits arising out of the use of biological resources.[22] State Biodiversity Boards are also inter-departmental committees with additional members drawn from experts on biodiversity and sustainability.[23]

So far all the states have established the SBBs except the newly constituted state of Telangana. The State Biodiversity Boards advises the State Governments, subject to guidelines issued by the Central Government, on matters relating to conservation of biodiversity, sustainable use of its components and equitable sharing of benefits arising out of utilization of biological resources; regulates commercial utilization by granting approvals or otherwise request for or bio-survey and bio-utilization of any biological resource by Indians; and performs such other functions as necessary to carry out the provisions of this Act or as prescribed by the State Governments.[24] There is no provision for the establishment of such mechanism in Union Territories, however, NBA shall exercise the powers and perform the functions of a State Biodiversity Board in Union Territories.[25] In relation to any Union territory, the National Biodiversity Authority may delegate all or any of its powers or functions to such person or group of persons as the Central Government specify.[26]

There is requirement of prior intimation to State Biodiversity Board for obtaining biological resource for commercial utilization, or bio-survey and bio-utilization for commercial utilization by the person, who is a citizen of India or a body corporate, association or organization which is registered in India. But, the provisions of this section shall not apply to the local people and communities of the area, including growers and cultivators of biodiversity, and *vaids* and *hakims,* who have been practicing indigenous medicine.[27] The prior intimation to the SBBs shall be given in the manner prescribed by the State Government and on receipt of an intimation the State Biodiversity Board may, in consultation with the concerned local bodies and after making enquires as to its conservation may by order prohibit or restrict any such activity if it is of opinion that such activity is detrimental or contrary to the objectives of conservation and sustainable use of biodiversity or equitable sharing of benefits arising out of such activity. Any information given for prior intimation shall be kept confidential and shall not be disclosed, either intentionally or unintentionally to any

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20 The Biological Diversity Act, 2002 *supra* note 10, Section 22(1)
21 *Id.,* Section 22(4)
22 *Ibid*.
23 Christoph Antons, *supra* note 15, at 128
24 The Biological Diversity Act, 2002, *supra* note 10, Section 23
25 *Id*., Section 22(2)
26 *Ibid*.
27 *Id*., Section 7

person.[28] The Act further gives power to the SBBs to establish Committees to deal with agro-biodiversity.[29]

Biodiversity Management Committee (BMC)

The next Authority established under the Act is Biodiversity Management Committees (BMCs), which are established at the local level.[30] The Act makes mandatory for every local body to constitute a Biodiversity Management Committee within its jurisdiction.[31] The BMCs consists of a Chairperson elected from amongst the members of the committee in a meeting to be chaired by the Chairperson of the local body and not more than six persons nominated by the local body, of whom not less than one third should be women and not less than 18 per cent should belong to the Scheduled Castes/Scheduled Tribes. The local Member of Legislative Assembly/Member of Legislative Council and Member of Parliament would be special invitees to the meetings of the Committee.[32]

These committees are constituted to promote conservation, sustainable use and documentation of biological diversity including preservation of habitats, conservation of land races[33], folk varieties[34] and cultivars[35], domesticated stock and breeds of animals and micro-organisms, and chronicling of knowledge relating to biological diversity.[36] These bodies will be consulted by the other bodies in their decision making processes *i.e.* NBA and SBBs, although they may levy fees and charges for biological resources collected within their areas. As we know this Act establishes three tier institutional mechanisms in India and at the local level it is BMCs. It is mandatory for local institutions to establish biodiversity management committee in its local jurisdiction. This obligation has been fulfilled to a large extent by all most of all the states and the numbers of Biodiversity Management Committees established in different states are as:

States	NO. of BMCs	States	NO. of BMCs
Andhra Pradesh	439	Manipur	49
Arunachal Pradesh	20	Meghalaya	84
Assam	131	Mizoram	221
Chatttisgarh	27	Nagaland	10
Goa	11	Orissa	---
Gujarat	2124	Punjab	55
Haryana	---	Rajasthan	26
Himachal Pradesh	106	Sikkim	7
Jharkhand	36	Tamil Nadu	13
Karnataka	4,384	Tripura	179
Kerala	1043	Uttar Pradesh	9
Madhya Pradesh	23,743	Uttarkhand	734
Maharashtra	603	West Bengal	81
		Total	**34,135**

As on August 14, 2014, available at: *http://nbaindia.org/content/20/35/1/bmc.html*

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[28] *Id*., Section 24

[29] *Id*., Section 25 reads as: the provisions of sections 9 to 17 shall apply to a State Biodiversity Board. Section 13 provides for establishment of Committees by the NBA to deal with agro-biodiversity. This section is applicable

[30] *Id*., Section 41

[31] The Biological Diversity Rule, 2004, Rule 22(1)

[32] *Id.,* Rule 22

At local level BMCs are responsible for promoting conservation, sustainable use and documentation of biological diversity including preservation of habitats, conservation of land races, folk varieties and cultivators, domesticated stocks and breeds of animals and microorganisms and chronicling of knowledge relating to biological diversity. The main function of the BMC is to prepare People's Biodiversity Register in consultation with local people. The National Biodiversity Authority and the State Biodiversity Boards shall provide guidance and technical support to the Biodiversity Management Committees for preparing People's Biodiversity Registers (PBRs). The People's Biodiversity Registers shall be maintained and validated by the Biodiversity Management Committee. The Register shall contain comprehensive information on availability and knowledge of local biological resources, their medicinal or any other use or any other traditional knowledge associated with them.

The Committee shall also maintain a register giving information about the details of the access to biological resources and traditional knowledge granted details of the collection fee imposed, and details of the benefits derived and the mode of their sharing. The other functions of the BMC are to advice on any matter referred to it by the State Biodiversity Board or Authority for granting approval, to maintain data about the local *vaids* and practitioners using the biological resources.[37] It is mandatory for the NBA and the SBB to take consultation of the Biodiversity Management Committees while taking any decision relating to the use of biological resources and associated knowledge occurring within the territorial jurisdiction of the Biodiversity Management Committee.[38] The Biodiversity Management Committees may also levy charges by way of collection fees from any person for accessing or collecting any biological resource for commercial purposes from areas falling within its territorial jurisdiction.[39]

Biodiversity Funds

The Act establishes biodiversity funds at national, states and local levels for administration of benefits to claimants and community benefits, conservation purposes and management of heritage site. Some of the funds, however, may also be used for purposes of socio-economic development and to meet expenses incurred. The Act, for above purposes, constitutes a National Biodiversity Fund (NBF) which shall be credited any grants and loans made to the NBA; all charges and royalties received by the NBA under this Act; and all sums received by the NBA from such other sources.[40] This Fund is applied for channeling benefits to the benefit claimers; conservation and promotion of biological resources and development of areas from where such biological resources or associated knowledge has been accessed; and socio-economic development of areas in consultation with the local bodies concerned.[41]

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33 The Biological Diversity Act, 2002, *supra* note 10, Explanation (c) of Section 41(1) defines "land race" which means primitive cultivar that was grown by ancient farmers and their successors.

34 *Id*., Explanation (b) of Section 41(1) defines "folk variety" which means a cultivated variety of plant that was developed, grown and exchanged informally among farmers.

35 *Id*., Explanation (a) of Section 41(1) defines "cultivar" which means a variety of plant that has originated and persisted under cultivation or was specifically bred for the purpose of cultivation.

36 *Id*., Section 41(1)

37 The Biological Diversity Rule, 2004, *supra* note 31, Rule 22

38 The Biological Diversity Act, 2002, supra note 10, Section 41(2)

39 *Id*., Section 41(3)

40 *Id*., Section 27(1)

41 *Id*., Section 27(2)

The Act constitutes State Biodiversity Funds (SBFs) which shall be credited any grants and loans made to the State Biodiversity Board under section 31; any grants or loans made by the National Biodiversity Authority; and all sums received by the State Biodiversity Board from other sources.[42] This fund is applied for the management and conservation of heritage sites; compensating or rehabilitating any section of the people economically affected by notification under sub-section (1) of section 37; conservation and promotion of biological resources; socio-economic development of areas from where such biological resources or associated knowledge has been accessed; and meeting the expenses incurred for the purposes authorized by this Act.[43]

The Act constitutes a Local Biodiversity Fund at every area notified by the State Government where any institution of self-government is functioning and there shall be credited any grants and loans made under section 42; any grants or loans made by the National Biodiversity Authority; any grants or loans made by the State Biodiversity Boards; fees received by the Biodiversity Management Committees; and all sums received by the Local Biodiversity Fund from such other sources as may be decided upon by the State Government.[44] In cases where specific individuals or group of individuals are identified, the monetary benefits will be paid directly to the Local Biodiversity Fund to be used by the Biodiversity Management Committee (BMC). The State Government may prescribe for the management and the custody of the Local Biodiversity Fund (LBF) and the purposes for which such fund shall be applied. The Fund shall be used for conservation and promotion of biodiversity in the areas falling within the jurisdiction of the concerned local body and for the benefit of the community in so far such use is consistent with conservation of biodiversity.[45]

WORKING OF INSTITUTIONAL MECHANISMS UNDER BD ACT, 2002

The NBA, SBBs and BDCs are seen as the key institutions to achieve far reaching objectives of Biological Diversity Act of India. One of the important function of the National Biodiversity Authority is to advise the Central Government on matters relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of benefits arising out of the utilization of biological resources; and the State Governments in the selection of areas of biodiversity importance to be notified under sub-section (1) of section 37 as heritage sites[46] and measures for the management of such heritage sites.[47] The Authority may take any measures necessary to oppose the grant of intellectual property rights in any country outside India on any biological resource obtained from India or knowledge associated with such biological resource which is derived from India.[48] As on August 26, 2014, 877 applications have been received by the Authority out of which 481 applications have cleared and 310 applications are under process at various stages and 101 applications have been closed including 15 cleared applications.[49] The NBA has supported in

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42 *Id*., Section 32(1)

43 *Id*., Section 32(2)

44 *Id*., Section 43

45 *Id*., Section 44

46 The State Government may, from time to time in consultation with the local bodies, notify in the Official Gazette, areas of biodiversity importance as biodiversity heritage sites under this Act.

47 The Biological Diversity Act, 2002, *supra* note 10, Section 18(3)

48 *Id*., Section 18(4)

49 Available at: *http://nbaindia.org/content/333/25/1/approval.html* [Accessed on September 11, 2014]

creation of SBBs in 26 States and has facilitated in establishment of around 34,135 BMCs, since its establishment.[50]

The NBA has approved thirty six access applications, transfer of fifteen research results applications; three hundred and ninety one intellectual property rights applications, thirty eight third party transfers and forty collaborative research projects under section 5. The agreement between NBA and the applicants has been signed for nineteen access applications, transfer of twelve research results applications, seventy five intellectual property rights applications and twenty five third party transfer applications.[51] The Government of India has also undertaken efforts to establish biodiversity registries and digital libraries to prevent patenting of Indian traditional knowledge abroad. These include the People's Biodiversity Registers, which are an important task for the Biodiversity Management Committees, and the Traditional Knowledge Digital Library (TKDL), which is currently focused on traditional medicine and medicinal plants.[52] As on August 14, 2014, 1863 Peoples' Biodiversity Registers have been maintained across the country.[53]

The primary task of NBA and SBBs has been setting targets for the number of BMCs to be formed in a stipulated time period, and for the number of Plant Breeders' Registers (PBRs) to be compiled.[54] The success story of SBBs may be seen in the context of the number of BMCs formed in the state. The State of Kerala is the first state to have BMCs in all its 978 village *panchayats,* 60 municipalities, and five corporations. However, incentives for encouraging innovative practices are prescribed as addendums to the process of BMC formation, rather than necessary attributes of it.[55] The idea of establishment of BMCs at local level recognizes the important role of local bodies in conservation of biological diversity and its associated knowledge. BMCs are envisaged as the third stair of decision making on who will access, use, and/or conserve biological diversity in the local area under their jurisdiction. The law required that every local government body in the country shall set up BMC. Supporters of the law saw immense potential for decentralized governance by local communities who could exercise control over bio-diverse ecosystems, both cultivated and wild, and their constituent parts. Critics saw it as over-regulation, and a severe undermining of the real custodians of biodiversity at the least, and a sell out to bio-based trade at its worst.[56]

In implementing the provision of the Act, BMCs come to the last in the line of authority after the NBA and SBBs but, law does not necessitate this hierarchy. The focus of command needs to be established locally with BMCs, which the NBA and SBBs are legally required to consult before taking any decisions on local biological resources and associated knowledge.[57] In some cases, the consultation may become

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50 Available at: *http://nbaindia.org/content/20/35/1/bmc.html* [Accessed on September 13, 2014]

51 Available at: *http://nbaindia.org/text/19/AgreementsignedbytheApplicantwithNBAMAT.html* [Accessed on September 11, 2014]

52 P. Pushpangadan and K. Narayanan Nair, "Value Addition and Commercialization of Biodiversity and Associated Traditional Knowledge in the Context of the Intellectual Property Regime", 10 *Journal of Intellectual Property Rights,* 2005, pp.441-453, at 447

53 Available at: *http://nbaindia.org/content/105/30/1/pbr.html* [Accessed on September 13, 2014]

54 Kanchi Kohli and Shalini Bhutani, "Biodiversity Management Committees: Lost in Numbers", XLIX(16) *Economic & Political Weekly,* 2014, pp.18-20, at 18

55 *Ibid*.

56 *Ibid*.

57 The Biological Diversity Act, 2002 *supra* note 10, Section 41(2)

prior informed consent; in others, the consent may be merely on paper.[58] In other instances of well intended capacity building, the emphasis may be on training to either create better PBRs or look out for potential contracts.[59] This is how numbers of BMCs are taken as marks of the BD Act's success story. Yet, not all people in a certain geographical space share a common vision of either conservation or use of biological heritage. In the current design of BMCs governance, states are predisposed to organize communities into institutional structures that can be identified and legally contracted with.[60]

It is said that the Act has further been supplemented with the Rules of 2004.[61] Much to the disappointment of local activists and NGOs favouring decentralized decision making and administration, the Rules confirmed the central role of the Authority in decisions about access, knowledge transfer and intellectual property rights.[62] According to Rule 14, which provides for procedure for access to biological resources and associated traditional knowledge, it is the Authority that enters into an agreement regarding access with an applicant "after consultation with the concerned local bodies" and it is in the Authority's discretion to impose conditions, including the quantum of monetary and other incidental benefits, restrictions or to revoke an approval under certain conditions.[63] Benefits will be given directly to the individuals or group of individuals or organization only in cases where biological resources or knowledge are accessed directly from them. In all other cases monetary benefits will be deposited in the Biodiversity Funds which in turn is used for the conservation and development of biological resources and socio-economic development of areas from where resources have been accessed.[64]

The Act had received mixed responses as it contains some progressive provisions towards ensuring community control over biological resources and associated traditional knowledge. But, the enactment of the Biological Diversity Rule, 2004 has reduced the role of BMCs and now these Committees may be considered mere data providers. This received severe response and criticism from different sections of civil society and community representatives as they felt that such Rules would simply place a vast mass of people all over the country, mainly tribals, farming communities, indigenous people at the compassion of a central or state level system of the management.[65]

Social Activists demanded for stronger Biodiversity Management Committees at local level and argued that there is limited role of local body and these bodies remains confined in it limits to the collection of data for the People's Biodiversity Registers and to the giving of advice to the Authority and State Biodiversity Boards during the granting of approvals.[66] In 2007, *panchayats* and community representatives from the

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58 Kanchi Kohli and Shalini Bhutani, *supra* note 54, at 19

59 *Ibid*.

60 *Ibid*.

61 In exercise of the powers conferred by Section 62 of the Biological Diversity Act, 2002 for carrying out the purposes of this Act; and in super session of the National Biodiversity Authority (Salary, Allowances and Conditions of Service of Chairperson and other Members) Rules, 2003, except as respect to things done or omitted to be done before super session, the Central Government has enacted the Biological Diversity Rule, 2004, G.S.R. 261(E)

62 Christoph Antons *supra* note 15, at 128

63 The Biological Diversity Rule, 2004, supra note 31, Rules 15 and 16

64 Aditi Choudhary, "The Biological Diversity Act, 2002: Is it the Right Solution?", XXVI *Delhi Law Review,* 2004, pp.126-142, at 135

65 The Biological Diversity Rule, 2004, *supra* note 31, Rules 15 and 16

66 *Id*., Rule 22

states of Tamil Nadu, Andhra Pradesh, Uttar Pradesh, Orissa and Meghalaya submitted over 3,000 resolutions to Prime Minister of India expressing their serious concerns over implementation of bio-diversity legislation, and in particular the Biological Diversity Rules, 2004 by State Governments.[67] They argued that though the Act itself describes the communities as "conserver and preservers" of biodiversity, the Rules delineating the provisions of the Act limit the power and function of the very same communities to only documentation of their resources and knowledge, with no legal provision to exercise control over what is documented.[68]

The working of the Act is criticized in number of ways.[69] The fact is that about 40 per cent of the world wide accessions for food crops are in the collections of the Consultative Group for International Agricultural Research (CGIAR) and India is itself highly dependent on access to these resources and to resources from other regions but, the Act is silent over this issue.[70] It is said that due to lack of extraterritorial authority, the NBA cannot effectively monitor applications outside India and it would neither have the time nor the resources to challenge patents in many foreign jurisdictions.[71] The relationship between the discretionary decisions of the NBA on benefit sharing and the agreements reached between applicants and knowledge holders remains unclear.

The local communities do not have automatic right to the benefits, but depend on the directions about the funds by the authorities. The determination of benefit sharing and the formula for it, needs fine tuning and the possibility of joint IP ownership as stipulated in section 21 of the Act may hardly be acceptable to multinational companies. In spite of attempts to avoid overlaps with the plant varieties legislation, there clearly is such an overlap with regard to agro-biodiversity and related benefit-sharing decision making. Therefore, it is concluded that the Act in practice does not provide effective measures for protection of biological resources and is heavily biased against the interests of tribal and local communities who are the guardians of associated knowledge. The lenient provisions for Indian nationals and especially for Indian industry even seem to encourage commercial exploitation of resources rather than giving impetus to the conservation of biodiversity or to benefit-sharing with the local communities.

CONCLUSION

The issue of biological diversity conservation had become a global issue in 1992; however, this global issue requires national efforts to deal with. Today there are 193 Members State to the Convention and they have provided for conservation of biological diversity in different manners including institutional mechanisms, which suited to their requirements. The forgoing discussion on the institutional mechanism and working of the Indian legal framework suggests that an important deal has been accomplished but, much still remains to be done. The biggest challenge in this context appears to be the slow pace at which the provisions are being applied. The institutional framework conceived in the Indian law include local bodies, but it is important to note here that there are all the probability that in reality the progress

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67 "The bio-diversity Act is progressive, but not fool-proof", *The Financial Express,* New Delhi, April 29, 2007, available at: *http://www.financialexpress.com/news/story/106130* [accessed on July 14, 2014]

68 *Ibid*.

69 Rajesh Sagar, *supra* note 2, at 387

70 *Ibid*.

71 *Ibid*.

may get buried in bureaucratic claptrap. The plurality of funds for achieving similar objectives may also lead to confusion at the stage of implementation. The BMCs may be strengthen through involvement of local people; their engagement in documentation exercises resulting in the intergenerational transfer of peoples' knowledge; and conservation activities. The ground reality is that often local bodies are unable to meet basic needs of the people in terms of infrastructure and services. Does one expect a *panchayat* unable to provide clean drinking water or education to give much importance to biodiversity? Creation of bodies and structures *per se* will not bring in any change unless there is an action plan and it is always better to try some structures and mechanisms in some places and then to extend them to many places rather than just creating structures.


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