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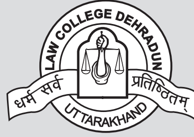

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EDITORIAL

Knowledge is like an infinitesimal galaxy and deciphering an aspect of knowledge is like unveiling cosmic realities in quantized forms through contemplative capabilities. Legal research, too, is not immune from this process. Dehradun Law Review incessantly endeavours to provide a viable platform to these philosophical contemplations in the sphere of legal knowledge by propelling the legal researchers, academicians and scholars towards the well-cherished, socio-economic, welfare centric and academic objectives.

This is to our great satisfaction that the journal, unlike a rudderless vessel, continues to sail successfully towards the accomplishment of its desired objectives. An intellectual endeavour has a centre but no periphery and hence always serves as an inducement for constructive academic activism. The editorial board of Dehradun Law Review has so far attempted its best to live upto the expectations of the legal fraternity and becoming a UGC-listed journal in this year is a testimony to this fact.

We feel immensely enthusiastic while bringing up Vol. 9, Issue - I, November 2017 of Law College Dehradun, faculty of Uttaranchal University. We feel honoured to receive contributions from eminent academicians of Indian and foreign universities in this current issue. Issues like 'Disclosure Requirement of the Trips Agreement: Implications for Developing Countries', 'The Structure of a Criminal Procedure Rule and its Test on English Criminal Procedure', 'Changing Dimension of Moral Rights under Digital Environment', 'Secularism & Democratic Governance: an Appraisal', 'A Legal Evaluation of Protection of Wildlife vis. a vis. Scientific and Technological Development', 'A Legal Discourse between Fair Trial and Media Trial: Indian Perspective', 'Policy Framework for Climate Change in India: Triumph or Fiasco' and 'E-Governance and Regulatory Measures in India with Special Reference to State of Uttarakhand' have been thoroughly discussed and analysed offering valuable insights in the different sub-spheres of legal knowledge.

Dr. B.N. Pandey and Dr. Prabhat Kumar Saha in their research paper titled "Disclosure Requirement of the Trips Agreement: Implications for Developing Countries" reviews disclosure requirement provision of the TRIPS to analyze flexibilities available in the provision from developing countries' perspective with the aim to portray its significant implications for developing countries.

Dr. Yin Bo in his paper titled "The Structure of a Criminal Procedure Rule and its Test on English Criminal Procedure" argues if the structural coupling of a criminal procedure rule of China is a universal jurisprudence, criminal procedure defect consequences in England as well as all other common law jurisdictions will be a mess instead of a system. His paper examines relationship between a procedural deficiency and its procedural consequence.

Dr. Ashish Kumar Srivastava in his paper titled "Secularism & Democratic Governance: an Appraisal" asserts Indian Judiciary has been a *qui vive* of the sentinel of democracy and it has always kept the faith unflinching which has been reposed by a plural democracy like India. In this paper the author examines the various aspects of secularism and democratic governance in a descriptive and analytical manner.

Dr. Anoop Kumar in his paper titled "Changing Dimension of Moral Rights under Digital Environment" argues the information era has generated new technologies for the creation of artworks, and the possibility of new kinds of works, leading to problems with the established understanding of authorship, creative work, and the relationship between the two. His paper makes an attempt to explaining challenges of moral rights in present digital environment.

Mr. Praveen Kumar Rathi in his paper titled "A Legal Evaluation of Protection of Wildlife viz a viz Scientific and Technological Development" analyses the impact of growing technology upon the decreasing wildlife in India, which was a hub of enormous species of wild animals including Tiger, Leopard including the Snow Leopard, Elephants, Bear, Birds etc., and the ensuing consequences.

Dr. Rama Sharma and Dr. Sushim Shukla in their research paper "A Legal Discourse between Fair Trial and Media Trial: Indian Perspective" relying on the 200th report of Law Commission of India and suggests that the prohibition of anything that is prejudicial towards the accused or suspect and this restriction should operate from the time of arrest. Their paper makes an attempt to draw the attention towards the media practices infringing the human rights of the accused as the criminal jurisprudence is based on thinking that a person is innocent in the eyes of law until proven guilty.

Mr. Sukhwinder Singh and Mr. Nakul Sharma in their research article "Policy Framework for Climate Change in India: Triumph or Fiasco" raises question whether Indian policy framework addressing all the issues has given a fruitful result or still there is a amending scope to improve its outcome. Their research paper is a bonafide attempt to analyse various policies dealing with the issue of climate control, their impact, outcome and scope of amendment.

Dr.Laxman Singh Rawat in his research paper titled "E-Governance and Regulatory Measures in India with Special Reference to State of Uttarakhand" examines e-governance regulatory mechanism in the India as well as in State of Uttarakhand to explore how far e-governance has contributed to achieve the objectives of good governance through law and policy intent.

No intellectual endeavour, however sincere and focused, is immune from ambiguities and inconsistencies. Admitting the same, we sincerely look forward to and welcome criticism and constructive as well as valuable suggestions from academic quarters and legal fraternity. We also extend our warm wishes to the contributors of articles and solicit their continuous academic inputs for the enhancement of the quality of the journal.

God Speed!

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

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DISCLOSURE REQUIREMENT OF THE TRIPS AGREEMENT: IMPLICATIONS FOR DEVELOPING COUNTRIES

B.N. Pandey* &
Prabhat Kumar Saha**

Abstract

Article 29.1 of the TRIPS Agreement requires member countries to disclose the invention 'in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art.' Member countries may also require the applicant 'to indicate the best mode for carrying out the invention known to the inventor.' Developed countries argue that because of the territorial nature of patent rights, patent applications in developing countries with 'best mode' disclosure requirement to a 'person skilled in the art' ensures access to technologies with sufficient and valuable information which facilitate innovators of developing countries to design around and improve upon the invention during the patent term and use the invention after the patent term resulting in transfer and dissemination of technology to developing countries. However, some legal scholars argue that, in practice, disclosures in patent applications are drafted in such a way that they never actually disclose anything useful for innovators thereby subvert patent laws and do not induce transfer and dissemination of technology to developing countries. How to implement 'best mode' disclosure requirement to a 'person skilled in the art' in developing countries is a key issue which needs serious consideration. The paper reviews disclosure requirement provision of the TRIPS to analyze flexibilities available in the provision from developing countries' perspective with the aim to portray its significant implications for developing countries.

Key words

Patent, Patent Application, Disclosure and TRIPS Agreement.

I. INTRODUCTION

A patent is a legal document that confers a set of exclusive rights for the use and exploitation of an invention in exchange for its public disclosure. Today, due to the evolution from the industrial age to the information age, the disclosed patent information is becoming an ever more crucial force behind the competitiveness of industrial organisations. The commercial value of patent information is increasing, global economic competition is perpetually growing, and it is more and more based on technological leadership. Patent disclosure indirectly stimulates others' future innovation by revealing to them the invention so that they can use it fruitfully when the patent term expires and so that they can design around, improve upon, or be inspired by the invention both during and after the patent term. Based on social-contract theory, best mode disclosure requirement helps to ensure that the public receives a full and

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honest disclosure in return for the grant of patent. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) includes specific obligations on the disclosure of the invention in Article 29.1. By the implementation of the TRIPS Agreement the requirement to indicate the best mode for carrying out the invention have been adopted by most members of WTO. If the flexibilities inherent in 'best mode' disclosure requirement to a 'person skilled in the art' is well enforced in developing countries, the most valuable information of invention will be included in the patent application, and innovators of developing countries can use such information to build newer technologies based on the imported technologies with sufficient and pivotal information. However, there has been surprisingly little investigation into whether the disclosure requirement serves its purported purpose of disclosing new inventions adequately to the public, and in particular, to the experts who can build on this information for further innovation resulting in transfer and dissemination of technology to developing countries.

II. DEFINING DISCLOSURE REQUIREMENT

As used in this paper, the phrase "disclosure requirement" refers to the basic idea that inventors must disclose information about their inventions-the technological advances that they have made in order to obtain a patent[1]. Disclosure has historically been one of the fundamental principles of patent law. It provided one of the early justifications for the granting of patents[2]. The justification of patent rights based on disclosure was in some cases put in the form of a social-contract theory: "society makes a contract with the inventor by which it agrees to grant him the exclusive use of the invention for a period and in return the inventor agrees to disclose technical information in order that it will later be to society."[3] Modern patent laws state that the invention must be described and disclosed. This is basic patent law, the *quid pro quo* for the grant of a patent. The disclosure of invention in patent application is mandatory.[4] The sanction for failing to disclose the invention in a sufficient manner is the rejection of the application, the

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[1]Jason Rantanen, "Patent Law's Disclosure Requirement" 45 Loy. U. Chi. L.J. 373 (2013).

[2]"In the absence of protection against imitation by others, an inventor will keep his invention secret. This secret will die with the inventor and society will lose the new art. Hence, a means must be devised to induce the inventor to disclose his secret for the use of future generations. This can best be done by granting him an exclusive patent which protects him against imitation" *cited in* Edith T. Penrose, *The economics of the international patent system* 32 (The Johns Hopkins, Baltimore, 1951).

[3]Lord Mansfield was the first jurist to formulate the social contract theory when, in a 1778 case, he pronounced that "the law relative to patents requires, as a price the individual should pay the people for his monopoly, that he should enrol, to the very best of his knowledge and judgment, the fullest and most sufficient description of all the particulars on which the effect depended, that he was at the time able to do". *Liardet v. Johnson, cited in* Edith T. Penrose, *The economics of the international patent system* 32 (The Johns Hopkins, Baltimore, 1951).

[4]A patent application includes the specification, the claims and the summary of the invention. The specification (or description) of the invention is generally written like a science or engineering report describing the problem the inventor faced, the prior art and the steps taken to solve the problem. The essential goals of the specification are to substantiate the evidence of completion of the act of invention, that is, whether the inventor has effectively made a patentable invention; and to make new technical information available to the public so others are able to recreate the invention and improve upon it. Thus, disclosure of patent, in theory, facilitates the transfer and dissemination of technology.

invalidation of the patent, or declaration of nullity according to different country's patent law. Sufficiency of disclosure is a crucial component of the patent's function of technology dissemination.[5]

Disclosure requirement is an internationally recognized condition for obtaining a patent. Disclosure is established as a core requirement under the TRIPS Agreement.[6] Article 29.1 states that "members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art." A robust disclosure requirement can produce many desirable results: (1) It ensures that the inventor teaches others-specifically, others who would be able to make use of the information-how to replicate the technological advance that the inventor has discovered; (2) It ensures that patents provide information about cutting-edge technological advances that others can use to improve on the new technology; (3) It creates higher quality prior art. Patent examiners will also have a much easier time finding and using the applicant's disclosure as prior art since it has taken the form of a patent; (4) It limits the maximum scope of patent claims. It ensures that the applicant is not claiming every novel and non-obvious variant of the invention regardless of the degree to which it is actually related to the thing invented. A robust disclosure helps limit the applicant to what she has actually invented and taught, even if she tries to claim something that is far broader; (5) It helps the drafter of the patent to express, and the reader of the patent to understand, what the claims are actually saying; and (6) It establishes the outer boundaries of what the applicant might claim, at least with respect to priority based on that effective filing date which helps potential infringers figure out whether or not new claims that might cover their product are even possible. The weaker the disclosure requirement, the easier it is to later stretch the scope of the patent to encompass competitors' products.[7]

III. TRIPS NEGOTIATING HISTORY OF DISCLOSURE REQUIREMENT

While the specific requirements of the obligation to disclose the invention and their practical enforcement (by patent offices and courts) vary among countries, such obligation was a well established element in patent law at the time of the negotiation of TRIPS.[8] The duties of the patent owner was one of the most controversial parts of the TRIPS Agreement negotiations, since developing countries tried to incorporate an obligation to work the patented invention locally.[9] Equally, developing countries sought to include a clause against abusive or anticompetitive licencing practices on the part of patent holders.[10]

According to the Anell Draft the patent owner should have the following obligations:

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[5]Lu Bing-bin, "The Disclosure Requirement for Patent Application: Article 29 of TRIPS Agreement and a Dimensional Exploration" 7 *US-China Law Review* 44 (2010).

[6]Jason Rantanen, "Patent Law's Disclosure Requirement" 45 *Loy. U. Chi. L.J.* 373 (2013).

[7]*Ibid*.

[8]UNCTAD-ICTSD, *Resource Book on TRIPS and Development* 449 (Cambridge, New York, 2005).

[9]Peter-Tobias Stoll, Jan Busche, *et al.* (eds.), *WTO - Trade-Related Aspects of Intellectual Property Rights* 522 (Martinus Nijhoff, Leiden, 2009).

[10]See *supra* note 8 at 450.

"to disclose prior to grant the invention in a clear and complete manner to permit a person versed in the technical field to put the invention into practice and in particular to indicate the best mode for carrying out the invention; to give information concerning corresponding foreign applications and grants; to work the patented invention in the territory of the Party granting it within the time limits fixed by national legislation; in respect of licence contracts and contracts assigning patents, to refrain from engaging in abusive or anticompetitive practices adversely affecting the transfer of technology, subject to the sanctions provided for in Sections 8 and 9 below."[11]

The first two draft paragraphs were essentially the same as under the current Article 29. In addition, the Brussels Draft still contained references to a local working obligation and abusive or anti-competitive licencing practices. By contrast to the Anell Draft, however, these obligations were optional.[12]

"Parties may provide that a patent owner shall have the following obligations: To ensure the working exploitation of the patented invention in order to satisfy the reasonable requirements of the public. For the purposes of this Agreement the term "working" may be deemed by parties normally to mean manufacture of a patented product or industrial application of a patented process and to exclude importation; in respect of licensing contracts and contracts assigning patents, to refrain from engaging in abusive or anti-competitive practices adversely affecting the transfer of technology; parties may adopt the measures referred to in Articles 31, 32 and 40 below to remedy the non-fulfillment of the obligations mentioned in paragraph 3 above."[13]

In the subsequent negotiations, the working obligation disappeared from the final text of Article 29 as a result of the compromise struck in December 1991, which was reflected in the wording of Article 27.1. Article 29, as adopted, was finally limited to matters relating to the disclosure of the invention for purposes of examination and of execution of the invention after the expiry of the patent term.[14] The clause on anti-competitive licensing practices was moved to the more general provision under Article 40 of TRIPS, thus disconnecting it from the patent application procedure.[15]

IV. INTERPRETATIONS OF DISCLOSURE REQUIREMENT

Article 29 contains one mandatory and two facultative elements. First, it requires members to disclose the invention "in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art". It, thus, unsurprisingly incorporates the "enablement" requirement, as usually established in national patent

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[11]GATT, Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit

[12]Goods, Chairman's Report to the GNG (23 July 1990). MTN.GNG/NG11/W/76; See supra note 8 at 450.

[13]GATT, *Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit; Goods,* Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (3 December 1990). Revision, MTN.TNC/W/35/Rev.1.

[14]GATT, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations,* Trade Negotiations Committee (20 December 1991). MTN.TNG/W/FA.

[15]See *supra* note 8 at 451.

laws.[16] Under Indian law, for instance, the doctrine is codified in *Section 10(4)(b)* of The Patents Act, 1970 to "disclose the best method of performing the invention which is known to the applicant and for which he is entitled to claim protection"[17]. Section 64 of the Act provides as a ground of revocation of patent in *sub-section (1) (h)* that: "the complete specification does not sufficiently and fairly describe the invention and the method by which it is to be performed, that is to say, that the description of the method or the instructions for the working of the invention, as contained in the complete specification are not by themselves sufficient to enable a person in India possessing average skill in, and average knowledge of, the art to which the invention relates, to work the invention, or that it does not disclose the best method of performing it which was known to the applicant for the patent and for which he was entitled to claim protection"[18]. Such requirement aims at ensuring that patents perform their informative function, by demanding that the patent specification enable those skilled in the art to make and use the full scope of the invention without undue experimentation.[19]

Second, Article 29.1 introduces, in a facultative manner, the best mode requirement. This requirement aims at preventing inventors from obtaining protection while concealing from the public the preferred embodiments of their inventions.[20] The best mode requirement is a subjective one: what constitutes the best mode of executing the invention depends upon what the inventor knew and considered to be the best way of executing his invention, at the time of the filing of the patent application or the priority date.[21] This information rarely includes the actual know-how for the execution of the invention, since at the time of filing there is seldom production experience.[22]

The Agreement leaves considerable room for the implementation of the standards provided for in Article 29.1. WTO members could for example strictly implement these standards with a view to facilitating competitive innovation, adapting protected inventions to local conditions, or merely practicing them once the term of protection expires.[23] Developing countries could strictly implement the standards mentioned in Article 29.1 ensuring the completeness and quality of patent disclosure, in a manner accessible to local researchers and industry in developing countries. Patent offices may,

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[16]*Ibid*.

[17]*Section 10(4)(b)* of The Patents Act, 1970.

[18]*Section 64* of the Patents Act, 1970.

[19]See *supra* note 8 at 451.

[20]See *supra* note 8 at 451.

[21]The priority date means the date on which the first application was made, in accordance with Article 4 of the Paris Convention. The purpose of this right is to enable someone who has filed a patent application in one country to file posterior applications for the same patent in the other countries of the Paris Union. In this scenario, it is possible that a third person in one of these other countries files an application for the same patent before the original applicant has a chance to deposit his application for that country. The priority date results in the recognition of the original filing in all the other Paris Union countries. Thus, any applications by third persons intervening between the original filing in one country and any subsequent filings by the original applicant in the other countries will be considered posterior to the original filing. The condition is, however, that the subsequent filings in the other countries be effectuated within 12 months from the date of filing of the first application. For details, see Article 4A, B, C of the Paris Convention.

[22]See *supra* note 8 at 451.

[23]UNCTAD, *The TRIPS Agreement and Developing Countries* 33 (UNCTAD, Geneva, 1997).

hence, adopt rules requiring the proper identification and description of inventions in a manner understandable to local people skilled in the art.

V. IMPLICATIONS FOR DEVELOPING COUNTRIES

TRIPS Agreement includes specific obligations on the disclosure of the invention in Article 29.1. By the implementation of the TRIPS Agreement the requirement to indicate the best method for carrying out the invention have been adopted by most members of WTO. Data shows that after introduction of product patent regime in India, number of patents granted to foreigners in India increased from 1147 (2004-05) to 6236 (2010-11).[24] Since patent requires disclosure, it has been argued by developed countries that the disclosure of inventions mandated by Article 29.1 constitutes a mode of technology transfer to developing countries, but there are several problems with this argument.[25]

First, although full disclosure of the invention is a basic principle of patent law and remains one of the traditional justifications for the granting of exclusivity to the inventor, patent specifications generally convey the minimum information required to get the patent granted. Skilled patent agents would normally avoid including information that may help competitors to invent around or rapidly implement the invention, once the patent has expired. In addition, when several embodiments of an invention are claimed, often the applicant omits information allowing the reproduction of all such embodiments by a third party. Second, until the patent expires, a party interested in using the protected technology in countries where the patent has been granted will always need a licence from the patent owner. In other words, disclosure makes the invention known but not immediately accessible for exploitation without permission. Third, in some cases, such as where inventions pertain to microorganisms, access to the relevant knowledge only becomes possible through access to the biological material itself. Such access may be made available to third parties with the publication of the patent application, but it is allowed for experimental purposes only, and not for commercial use. Fourth, patent specifications are difficult to implement for technicians in developing countries without experience in a particular technical field, especially because such specifications seldom include the actual know-how (which usually is not available at the time the application is filed) necessary for executing the invention. Finally, most patents are never industrially executed and, in many cases, developing a product or process based on a patented idea requires significant experimental and development work. Moreover, meeting the patentability requirements does not ensure the marketability and commercial success of any invention. Only 37 percent of U.S patents are renewed 11.5 years after they issue, while at any given time 95 percent of existing patents are unlicenced and over 97 per cent generate no royalties. In sum, the informative effects of patent grants cannot be deemed a substitute for transfer of technology mechanisms through which companies in developing countries actually gain access to proven and commercially viable technologies.[26]

[24] Annual Reports of the Controller General of Patents, Design and Trade Marks, a*vailable at:* http://www.nstmis-dst.org/PDF/TableNo34.pdf (visited on 13 August 2017).

[25] Keith E. Maskus and Jerome H. Reichman (eds.), *International Public Goods and Transfer of Technology under A Globalised Intellectual Property Regime* 239 (Cambridge, New York, 2005).

[26] *Ibid*.

Further, the disclosure of an invention is not in itself flexibility, but, on the contrary, is a requirement imposed upon the applicant as a condition for the grant of the patent. Nevertheless, related aspects left open by the TRIPS Agreement are able to be implemented in a flexible way, such as the 'best mode requirement' and 'a person skilled in the art'.[27] The scope of broad claims under 'best mode requirement' may be rarely justified because they discourage production and innovation, particularly when systematically allowed for merely incremental innovations. One modality of broad claims is that based on functional terms, i.e. claims that describe what an invention does, not what the invention structurally is. Legislation with strict approach to the 'best mode requirement' may require that each application shall relate to one invention only.[28] As a result, separate applications need to be filed for intermediates and the final product and eventually for processes of manufacture. For example, a provision may require the structural definition of chemical products and separate applications for an active ingredient and their derivatives and salts.[29]

Disclosure requirement aims to disclose technical knowledge to the 'person skilled in the art' to encourage transfer and dissemination of technology; however, it does not account for the type of knowledge that the 'person skilled in the art' really needs i.e. tacit knowledge.[30] Since disclosure requirement is one of the closest existing means to transfer knowledge from a source to a recipient, developing countries may require disclosing tacit knowledge associated with the invention in 'best mode' requirement for effective transfer and dissemination of technology.[31] It is important to note that the TRIPS Agreement does not prevent a member country from adopting a strict concept of 'a person skilled in the art' for assessing the patentability to consider the extent of disclosure of an invention. In fact, the disclosure requirement could be set in developing countries in accordance with the average knowledge of a skilled person in such countries.

VI. CONCLUDING OBSERVATION

In order to effectively leverage the flexibilities, developing countries must ensure that there is a complete and enabling disclosure of the patented invention. We argue that the provision ought to be wide enough to permit developing country entities to experiment on patented inventions with a view towards arriving at improvements or even inventing around such patents. Patent offices of developing countries may, hence, adopt rules requiring the proper identification and description of inventions in a manner understandable to the average knowledge of local people skilled in the art. It is suggested that, in order to maximise the beneficial effects of patent applications and

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[27]WIPO, Committee on Development and Intellectual Property, Document prepared by the Secretariat (18 March 2011). CDIP/7/3.

[28]Carlos M. Correa, *Multilateral Agreements and Policy Opportunities* 8 (Initiative for Policy Dialogue, New York, 2008).

[29]Mario Cimoli, Giovanni Dosi, et al., *Intellectual Property Rights: Legal and Economic Challenges for Development* 422 (Oxford, New York , 2014).

[30]Margaret McInerney , “Tacit Knowledge Transfer with Patent Law: Exploring Clean Technology Transfers” 21 *Fordham Intell. Prop. Media & Ent. L.J.* 493 (2011).

[31]*Ibid*.

patent databases, the WTO could develop ways in which developing countries may make full use of Article 29.1 of TRIPS Agreement which requires patent applicants, when disclosing their invention, to indicate the 'best mode' to a 'person skilled in the art' for carrying out the invention to enhance the practical value of a patent as a source of publicly available technological information. It is also suggested that, disclosure requirement for patent could be set in developing countries that each application should relate to one invention only as under section 7(1) of the Indian Patents Act, 1970, along with tacit knowledge in a manner understandable to the average knowledge of local people skilled in the art.

THE STRUCTURE OF A CRIMINAL PROCEDURE RULE AND ITS TEST ON ENGLISH CRIMINAL PROCEDURE

Yin Bo*

Abstract

According to the positivist legal theory in China, a criminal procedure rule is structurally composed of a procedural direction and the procedural result of its breach and that a procedural deficiency is the breach of a procedural direction. If this structural coupling of a criminal procedure rule is a universal jurisprudence, criminal procedure defect consequences in England as well as perhaps all other common law jurisdictions will be a mess instead of a system. If it is applied to English criminal procedure, its following characteristics will be found: avoidance of overarching theoretical design and integrated doctrines; unsystematic case-law evolution and event-driven legal reform; unprincipled procedural rules with scattered procedural consequences of the breaches; weak structural constraints in various procedural remedies. The structural coupling of a criminal procedure rule can provide certain illuminations to common law world. In the above backdrop, the paper examines relationship between a procedural deficiency and its procedural consequence.

Key words

Criminal Procedure Rule, English Criminal Procedure and Criminal Procedure Defect

I. INTRODUCTION

According to the positivist legal theory in China, it can be inferred that a criminal procedure rule is structurally composed of a procedural direction and the procedural result of its breach and that a procedural deficiency is the breach of a procedural direction.[1] For example, according to s 136a (2) (3) of the Code of Criminal Procedure (*Strafprozeßordnung*, hereafter StPO) in Germany, a confession which is procured from an accused whose memory is impaired shall not be allowed (the procedural direction); if

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[1] It is necessary to exclude purely technical provisions from legal rules, though sometimes they can be applied in conjunction with obligatory rules. For example, the last Article (Art. 552) of the Legal Explanations of the Supreme Court on Particular Issues of Implementing Criminal Procedure Law in China stipulates that if other regulations enacted by the Public Security Ministry prior to implementation of this provision conflict with it, this provision shall be applied. In addition, those rules for conferring rights or powers are also excluded because it is a matter of choice for the rights-holder or the power-holder. For example, according to Art. 43 of the Criminal Procedure Law (hereafter CPL) in China, the accused is entitled to change his defense counsel. There will not be any adverse legal consequence followed if the accused does not exercise his right to change his defense counsel. Herein, the rules are confined to a general type of obligatory regulations.

such a confession is obtained (the procedural deficiency), then it shall not be used, i.e. 'excluded' (the procedural consequence of the breach). The paper briefly outline the sources of law for criminal procedure and then scrutinise, according to this structure of a criminal procedure rule, the remedies for procedural deficiencies in English criminal procedure.

Four complementary aspects of procedural consequences are examined for English criminal procedure: (1) what rationale or doctrine, if any, underpins the procedural consequences of breaches of criminal procedure; (2) the law-making process concerning procedural consequences (how the rules concerning procedural consequences evolve, e.g., by case-law or by legislation); (3) the provision of procedural consequences (e.g., the types of procedural consequences); (4) the procedural mechanisms for ascribing procedural consequences (e.g., allocation of powers to institutions or persons to raise objections to defective procedure). These four aspects are complementary. Firstly, the rationale or doctrine underpins the provision of procedural consequences. It may also influence how the rules concerning procedural consequences evolve. Secondly, the law-making process concerning procedural consequences is related to the pattern of the existing procedural consequences. Thirdly, the specific procedural consequences for breaches of procedure are important for achieving procedural justice. Fourthly, procedural consequences are enforceable only if there are adequate procedural mechanisms (including institutional arrangements and structural constraints) for their enforcement.

If this structural coupling of a criminal procedure rule is a universal jurisprudence, the paper suggests that criminal procedure defect consequences in England as well as perhaps all other common law jurisdictions will be a mess instead of a system.

II. THE RELATIONSHIP BETWEEN A PROCEDURAL DEFICIENCY AND ITS PROCEDURAL CONSEQUENCE

What is the relationship between a procedural deficiency and its procedural consequence? The paper argues that a procedural deficiency inevitably result in a procedural consequence. This logical relationship is derived from the structural coupling of a criminal procedure rule. Before proposing the structure of a criminal procedure rule, it is necessary to understand the structure of a general legal rule.

The Structural Coupling of a Legal Rule

Prior to taking the hypothetical formula (a criminal procedure rule = a procedural direction + a procedural consequence of its breach) for granted, it is necessary to understand the structure of a legal rule. A legal rule is functionally composed of two parts: the prescribed requirement (or direction) and the legal consequence of its breach. If the specified direction is violated then the resulting legal consequence ought to be ascribed; for example, according to Art. 232 of the Chinese Criminal Law, a person shall not intentionally commit homicide (the direction); otherwise, he shall be sentenced to death, life imprisonment or fixed-term imprisonment of not less than ten years (the legal consequence of the breach).[2]

Basically, a complete legal rule 'ought to be' designed in this logical way. Alternatively,

[2] Chinese Criminal Law, Art. 232.

this logical statement can be derived from the specified legal rule. This stable program (...the direction..., otherwise... the legal consequence of its breach...) is the jurisprudential prerequisite for this legal discourse to be scientific. It enables us to employ an objective standard to assess each existing legal rule, as the structural closure of the formula insulates evaluations of the law from value judgments. The prescribed requirement or the direction indicates the inclination of the law-maker. It is an unquestionable part of a legal rule. For example, homicide is legally forbidden by criminal law in every jurisdiction. However, what is the legal consequence of its breach? Is a legal consequence of a breach necessary for a complete legal rule? What is the difference between a legal consequence of the breach and a legal sanction?

A legal consequence of the breach is the residual part of a structured legal rule. It is used to respond to the breach of a legal direction. A lack of legal consequence resulting from the legal direction is a flaw in the legal rule. This conclusion is neither political nor moral. Even though certain extra-legal consequences have the instrumental function of securing obedience to the legal directions, they are not legally stipulated. If the resulting consequence is only extra-legal, the law will be a general norm for human behaviors and cannot be justified as law, as it will not be legally enforceable and legal autonomy cannot be ensured.

The legal consequence of a procedural breach cannot be seen as a sanction. The sanction amounts to an adverse consequence, which indicates a certain element of coercion. However, the notion of a sanction cannot sufficiently embrace all patterns of legal consequences. For instance, some less severe breaches of the law may not inevitably lead to substantial sanctions, but are instead followed by overlooking of deficiency. In other words, even though there might be a technical breach, the law still confirms the anticipated legal result of act/conduct. Admittedly, the majority of legal consequences of the breaches in public law are sanctions. Without enough sanctions, there is more risk of people with an anti-social motive disobeying the law. As Weber argues, a relaxation of law might result in the immediate degeneration of legal order into chaos and disorder.[3] In a word, the inner motivation of the subjects for obedience to the legal rule must be guaranteed by a certain legal consequence of its breach, in particular those in relation to fear.

Admittedly, ascription of the legal consequence to the breach may constitute a new prescribed requirement, which purports to be followed by a new legal consequence. For example, if the legal direction A is breached, the consequence B is followed. However, if the consequence B is not properly carried out pursuant to the law, another consequence - C - might be necessary to deal with the breach of B. Again, if C is not followed due to various reasons then the cycle will continue. This open-ended circular is a problem for all legal rules, whereby more technical arrangements need to be employed. Given this fictitious case, it seems that law, as a body of language, cannot comprehensively deal with any situations encountered.

The Structural Coupling of a Criminal Procedure Rule

[3] M Weber, *Economy and Society: an Outline of Interpretative Sociology* (Bedminster Press, New York 1968) 880-95.

Following the above formula, sufficient legal consequences for procedural breaches are an institutional prerequisite for a complete criminal procedure system. A legal consequence of breach of procedure is necessary for deterring the potential rule-breakers and achieving fairness between violators and those affected, otherwise the rule-breakers may benefit from such a relaxation of criminal procedure. The above formula may provide a standard for legal diagnosis but has not gone far enough to elucidate the exact type of legal consequence of the breach that should be attached to criminal procedure rules. The paper argues that the procedural direction and the procedural consequence of its breach are two indispensable parts for structural integrity of a criminal procedure rule.

Criminal procedure has the unique function of processing criminal cases to finality. This function can hardly be found for substantive law. Criminal procedure should be understood as a continuous process to be gone through. It naturally embraces a dynamic factor that moves the seised case forward. The procedural direction needs to be secured by its functionally irreplaceable consequence, namely a criminal procedure defect consequence. This consequence is not expressed as sanctions in substantive law (e.g., compensation or criminal penalty). It is intended to cure the defect in some way or otherwise resolve the matter. For example, in the case of illegal search, the resulting evidence may be excluded.[4] The exclusion of evidence is not a criminal penalty, compensation or a disciplinary sanction. It is instead nullification of the defective procedural conduct, namely the search, and its resulting evidence.

Then, the question might be alternative consequences for breaking a procedural rule, such as criminal, civil, disciplinary sanctions or government compensation. The branches of law are only man-made divisions pragmatically incorporated into a general legal system. However, it is necessary to point out, compared with these consequences, a procedural consequence has some irreplaceable features: (1) it is a particular response to a procedural defect whilst most of the other consequences focus on the violation of substantive law with incidental reference to procedural propriety; (2) it is a direct response to the procedural misconduct and constitutes a part of the entire proceedings, substantive sanctions meanwhile are only imposed on the violator and functionally contribute nothing to the entire proceedings.

To put specifically, substantive sanctions, for instance, issuing a warning to a police officer, can only be used to cope with a small part of criminal procedural deficiencies because of their own particular subjects of regulation, for instance, the law of employment. Those consequences can only be resorted to when the breaches of procedure are also regulated by criminal law, civil law, disciplinary law or government compensation law. It is clear that most deficiencies cannot be up to the basic conditions to impose criminal sanctions. In addition, they can be hardly proved to the level of certainty - 'beyond a reasonable doubt' or 'inner conviction' (also called 'intime conviction' or 'innermost conviction')[5] or 'clarity of the fact and sufficiency of the

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[4]See, *e.g.*, StPO, s 136 (2) (3).

[5]It means that you must feel sure of the conviction.

evidence'.[6] Civil compensation normally arises from material loss and the breach of procedural rules is often difficult to measure in terms of economic interest.[7] The relationship between the agencies and the participants cannot be regarded simply as equal entities in a civil relationship. Disciplinary law can only guide certain agencies and lawyers. It can never be applicable to other lay participants, such as the accused. Government compensation is rather narrow in terms of applicable subjects - chiefly the innocent criminal suspects whose freedom has been wrongfully deprived. Hence, in most jurisdictions, the qualification for government compensation is rather rigorous, whereas the sum of compensation is significantly limited.

It is clear that criminal procedure is relatively autonomous in the whole legal system. A procedural consequence is a natural result of the breach of a procedural direction. It is therefore an intrinsic part of a complete criminal procedure rule. It is not necessary to prove a procedural issue or defect as certainly as a material fact in substantive law. For example, in continental legal theory, the liberal proof is particularly referred to for procedural issues as compared to the strict proof for the subject-matter of the criminal case.[8] Substantive law sanctions, such as a criminal penalty, are normally ascribed after the criminal proceeding is closed, otherwise, the whole proceeding would be unduly suspended. Even if a prosecution for assault of a suspect by the police is possible, a further criminal proceeding is inevitably involved. Conversely, a criminal procedure defect consequence is normally instituted inside the existing and self-contained criminal proceedings. Therefore, resort to procedural remedies is much more efficient than other remedies responding to the wrongdoing. For instance, in England, the courts have no authority to directly impose disciplinary sanctions against the police or the prosecution, but they can deny prosecutorial force by imputing their behaviour as an abuse of process and staying proceedings or excluding evidence.[9]

In addition, having outlined the abstract formula that 'a criminal procedure rule = a procedural direction + the procedural consequence of its breach', the test on criminal procedure defect consequences shall be taken in the context of criminal procedure rules in England.

III. A TEST ON ENGLISH CRIMINAL PROCEDURE

[6] It is mistaken to suggest the fundamental difference amongst three criteria in terms of the level of certainty. These expressions certainly have different origins. However, the three criteria depend upon the state of mind of those seised of the case. In the course of truth-ascertaining, the attitudes of the agents seised of the case harden into certainty. See JR Spencer, 'Evidence' in M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (CUP, Cambridge 2002) 601-2.

[7] The English courts tried to provide a principled solution to the assessment of pain and suffering that occurs in the breach of procedure. See *Thompson v Commissioner of Police* [1997] 2 All ER 762; John v MGN [1996] 2 All ER 35. Interestingly, a similar way of measuring rewards for the breaches of procedure is provided in ECHR jurisprudence. But all attempts to assess the damage caused by procedural breach failed. See R Carnwath, 'E.C.H.R. Remedies from a Common Law Perspective' (2000) 49 ICLQ 520-7.

[8] Y Lin, *Criminal Procedure Law I : General Part* (China Renmin University Press, Beijing 2005) (in Chinese) 352-3; Z Xu, 'The Principle of Speedy Adjudication' (2003) 12 Legal Monograph (in Chinese) 121.

[9] For examples, see ALT Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (OUP, Oxford, New York 1993).

The Sources of Law

In the absence of an all-embracing code of criminal procedure, English criminal procedure rules are scattered in the form of legislative text as well as an immeasurable volume of case law traced back to the thirteenth century. At present, Acts of Parliament are the major source of English criminal procedure, approximately 150 of which are concerned with procedural matters.[10] In a general sense, some procedural rules belong to Acts with constitutional status, notably Magna Carta 1215,[11] the Bill of Rights Act 1688, and the Human Rights Act 1998 into which the European Convention on Human Rights is incorporated.[12]

Many procedural rules are contained in high-profile legislative rag-bags, such as the Criminal Justice Act 2003. At present, the following important areas of criminal procedure are largely regulated by Acts of Parliament: the structure of the courts and seised proceedings;[13] the authorities and obligations of public prosecutors;[14] jurors and juries;[15] and the authorities of the police to investigate offences.[16]

In some areas, procedural matters are governed both by statutory provisions and case-law, such as the pre-trial process, the trial and criminal evidence.[17] Some rules, such as those regarding sentencing and appeals have been almost entirely consolidated into statute.[18]

The sources for many of the detailed rules are delegated legislation, particularly a myriad of court rules made by a variety of Rules Committees[19] and the Home Secretary.[20] These delegated legislations are supplemented by a range of other secondary documents, including various codes of practice,[21] Home Office circulars, guidelines

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[10]For details, see M Delmas-Marty and JR Spencer (eds), European Criminal Procedures (CUP, Cambridge 2002) 142-3.

[11]Some parts of Magna Carta have been repealed. For example, the clause prohibiting excessive fines was repealed by the Criminal Law Act 1967.

[12]However, Parliament is still entitled to repeal the rules in the Human Rights Act if it desires to do so.

[13]For example, Criminal Appeal Act 1968, Magistrates' Court Act 1980, and Supreme Court Act 1981.

[14]For example, Prosecution of Offences Act 1985 and Criminal Justice Act 1987.

[15]For example, Juries Act 1974.

[16]For example, Police and Criminal Evidence Act 1984, usually known as PACE.

[17]As regards the statutory provisions, the pre-trial stage is regulated by the Bail Act 1976, the Magistrates' Courts Act 1980, the Criminal Procedure and Investigations Act 1996, the Indictments Act 1915, etc.; the trial and evidence is regulated by the Criminal Evidence Act 1898, the Youth Justice and Criminal Evidence Act 1999, etc.

[18]The rules regulating sentencing was codified by the Powers of Criminal Courts (Sentencing) Act 2000. Appeals from magistrates' courts and from the Crown Court were respectively consolidated into the Magistrates' Courts Act 1980 and the Criminal Appeal Act 1968, which was later modified by the Criminal Appeal Act 1995.

[19]For example, the Magistrates' Court Rules, the Crown Court Rules and the Criminal Appeal Rules.

[20]For example, the Prosecution of Offences (Time Limits) Regulations, made under the Prosecution of Offences Act 1985, s 20.

[21]In particular, those codes of practices supplement considerable details to the provisions of PACE, explaining how certain powers and procedures are to be implemented: for example, Code C is concerned with the detention and questioning of suspects and Code D is bearing on identification procedures.

issued by the attorney-general, official advices given by the Judicial Studies Board and practice directions issued by the higher judiciary.

As the origin of English criminal procedure is embedded in a common law tradition, case law is unquestionably important. The major statutes are surrounded by innumerable cases that elaborate and interpret them. In addition, some areas of criminal procedure are so far only regulated by case law. The abuse of process, the paper discusses as a type of remedy is a prominent example that only exists in case law.[22]

Test of Criminal Procedure Defect Consequence

Avoidance of Overarching Theoretical Design and Integrated Doctrines

Anglo-American jurists have long rejected the idea of jurisprudence as a science. At the beginning of English legal system, the rules were a strategically contingent creation for reconciling political conflict between the Norman invader and the indigenous population. Thus, a managerial theory for overall rules in criminal procedure was difficult to be instituted whereas the rule of remedy is deemed to be natural. Though the aspiration of jurists for a comprehensive body of rules has been continuing for a century and a half, an overarching system was never really created.[23] The systematic methods of legal thinking and the law of reason have suffered by rejection from the 'traditionalistic conservatism of the English lawyers'.[24] Turning to English criminal procedure, proceduralists refer to the criminal process rather than to 'the criminal justice system'.[25] It might be caused by the fact that English justice agencies, in practice, are 'relatively autonomous' and 'enjoy considerable discretion'.[26]

Therefore, it is not strange that English common law seems to be wary of ambitious theory, especially considering some traditional socio-legal and political factors. Most of the English-originated criminal procedure theories have a characteristic of anti-

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[22]For details of English criminal procedure, see J Sprack, *Emmins on Criminal Procedure* (9th edn OUP, New York 2002); A Ashworth and M Redmayne, *The Criminal Process* (3rd edn OUP, New York 2005); JR Spencer, 'The English system' in M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (CUP, Cambridge University Press, 2002; ATH Smith, 'Chapter Three England and Wales' in CD Wyngaert (ed), *Criminal Procedure Systems in the European Community* (Butterworths, London, Brussels, Dublin, Edinburgh 1993); P Fennell, C Harding, N Jörg and B Swart (eds), *Criminal Justice in Europe: A Comparative Study, Clarendon Press* (OUP, Oxford, New York 1995); M Davies, H Croall and J Tyrer, *Criminal Jusitce: An Introduction to the Criminal Justice System in England and Wales* (Longman, London and New York 1995). J Hatchard, 'Chapter Four: Criminal Procedure in England and Wales' in J Hatchard, B Huber and R Vogler (eds), *Comparative Criminal Procedure* (B.I.I.C.L, London 1996). DJ Feldman, 'Chapter Four: England and Wales' in CM Bradley (ed), *Criminal Procedure A Worldwide Study* (Carolina Academic Press, Durham, North Carolina 1999) 91-142,

[23]For example, the Parliament was encouraged to enact a criminal code by prominent rationalist jurists such as Jeremy Bentham and Sir James Fitzjames Stephen; however, it has never been successful. See R Cross, 'The Making of English Law' [1978] Crim. LR 519, 652; ATH Smith, 'Codification of the Criminal Law (1) The Case for a Code' [1986] Crim. LR 285.

[24]T Weir (tr), K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn OUP, Oxford 1998) 136.

[25]A Ashworth and M Redmayne, The *Criminal Process* (3rd edn OUP, New York 2005) 17. Lord Justice Auld also suggests that the use of the word is 'misleading', because there is no 'system' worthy of the name. See Lord Justice Auld, A Review of the Criminal Courts of England and Wales (The Auld Report) (The Stationery Office, London 2001) <http://www.criminal-courts-review.org.uk/> Chapter Eight, para 1, accessed 15 September, 2015.

[26]A Ashworth and M Redmayne, *The Criminal Process* (3rd edn OUP, New York 2005) 17.

formalism with little enthusiasm for divisions.[27] Naturally, English law is not likely to construct an overarching theory of procedural consequence, which only constitutes one aspect of the criminal process. 'Due process', 'abuse of process', 'exclusion of evidence', etc. are only partial solutions for certain procedural deficiencies and cannot provide a complete framework as to how the breach of procedural rules ought to be remedied. Even the terminologies adopted for remedies were randomly coined and are not within a coherent semantic system. They are rather vague and uncertain, rendering their substance difficult to be apprehended and applied.[28] Some of them are neither in plain English nor in a scientific shape of design so it is difficult to unify them. For example, 'abuse of process' and 'judicial stay' are notoriously vague. They can be conceived of as expedient measures to cope with particular patterns of breaches of procedure. In the sequential criminal process, the breach of trial procedure vis-à-vis other procedure is much researched. However unfortunately, it is still far from being systemised into an integrated theory. For example, though the right to a fair trial has been institutionalised in Art. 6 of the ECHR, a consensus as to the reach and standard of fairness of trial has never been achieved.

Moreover, the status of criminal procedure has been suspect in the eyes of English jurists. They tend to observe criminal procedure empirically in practice rather than to focus upon the black-letter rules. In the field of criminal procedure, unethical conducts are particularly looked at and justified.[29] Formal rules are clearly circumvented instead of being enforced. In addition, codes of ethics are regarded as an indispensable part of criminal procedure. However, they definitely dilute the legitimacy of criminal procedure because they have no legal force. These attitudinal phenomena as to English criminal procedure are consistent with what Roberts and Zuckerman argue:[30]

Rules which appear clear and settled on their face, but which in practice are frequently circumvented without warning or explanation, produce only the illusion of certainty and predictability.

Empirically, rational theory and the structure of criminal procedure rules receive little attention from common lawyers. Their overly pragmatic view of criminal procedure can be exemplified again by what Roberts and Zuckerman claim,[31]

If we do not trust our judges to discharge the duties of their office, the answer is to appoint new judges, rather than to place inflated demands on procedural rules which, no matter how well-drafted, are bound to disappoint unreasonable expectations.

The method they prefer to ensure the judges' enforcement of procedural rules is not improving procedural rules but a rather contingent way - appointing new judges. Generally, most English criminal proceduralists favour a socio-legal study in dealing with procedural irregularities. However, this cannot preclude the value of structural

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[27] Andrew Ashworth divides the decisions into 'processual' and 'dispositive'. See ibid 8. However, in this monograph, this division is not used to construct a fundamental theory for evaluating criminal process.

[28] H.F. Stone, 'Some Aspects of the Problem of Law Simplification' (1923) 23 *Colum. L. Rev.* 327.

[29] A Ashworth and M Redmayne, *The Criminal Process* (3rd edn OUP, New York 2005) 71. See also P Roberts and A Zuckerman, Criminal Evidence (OUP, Oxford 2004) 56-7.

[30] *Roberts and Zuckerman, ibid*. 30.

[31] *Ibid* 27.

analysis of a procedural rule in positive law. Lack of research in this area might be owing to the lack of a civilian, academic tradition that claims that law needs to be planed prior to being made.

Unsystematic Case Law Evolution and Event-Driven Legal Reform

From a historical perspective, English solutions to procedural deficiencies are fragmented due to their unsystematic evolution. Generally, they are mainly based on case-law appeal systems and a series of judicial reforms recently.

In common law tradition, the most important aim of appeal system is clarification of the law and a reflexive development of the entire system.[32] It means that law has been evolving bit by bit through the mechanism of an appeal system, so the body of common law is not consciously planned.[33] In this course, common lawyers tend to proceed by analogy with concrete cases, and avoid large generalisations, thus eventually arriving at temporary formulations or principles.[34] For example, errors in the trial are the most common ground of appeal. They can be misdirections in the judge's summing-up, including, inter alia, 'failing to leave to the jury a defence for which a foundation has been laid by the evidence', and 'failing to give an adequate direction on the burden and/or standard of proof.'[35] There can also be other procedural errors in the course of trial, including, inter alia, 'allowing the prosecution to amend the indictment when that involved the risk of injustice,' 'allowing evidence to be admitted when it should have been excluded,' 'failing to deal properly with a note from the jury,' 'failing to comply with the statutory limitations on majority verdicts.'[36] However, potential errors are not defined clearly in a conceptualised structure but must resort to a vague test: 'was the conviction safe'.[37]

The appeal system can be seen as the engine of common law, in that it offers a process for detailed review of the law, including the remedies for procedural deficiencies. In performing the role though, appeals only allow the higher court to exert passive control over the lower courts. Specifically, the appeals offered to challenge procedural defects need to be initially requested by the defendant or the prosecutor, which normally means that the 'serious' legal issues rather than the 'less serious' are more possible to be analysed and clarified. This circumstance impedes blueprinting a complete picture for procedural consequences of the breaches. Moreover, case-law itself restricts the imagination of the related agencies on how the law should be designed.

In addition, the appellate process has not been researched enough. It is manifested by the fact that little is known about the appellate process in the Appeal Court. Criminal

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[32]Andrew Ashworth even argues that 'unless there is no appeal system, the common law system could hardly exist'. See A Ashworth and M Redmayne, *The Criminal Process* (3rd edn OUP, New York 2005) 338.

[33]M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (CUP, Cambridge 2002) 142.

[34]See Lord Goff of Chieveley, 'The Wilberforce Lecture 1997 The Future of the Common Law' (1997) 46 ICLQ 753.

[35]J Sprack, *Emmins on Criminal Procedure* (9th edn OUP, New York 2002) 427.

[36]*Ibid*.

[37]*Ibid*.

procedure only recently demonstrates its tendency to rationalisation[38] and codification.[39] This recent inclination purports to be caused by legal approximation with European continental law under the structure of the ECtHR and the European Union.

Apart from the slow pace of case-evolution, legislative reform occurs sometimes but is often 'event-driven'.[40] It means that reform is only performed when a random matter has been exposed to the general public and gained enormous societal influence. For example, the collapse of miscarriage of justice cases, particularly the Birmingham Six case led to the institution of a Royal Commission on Criminal Justice, promulgation of the Criminal Appeal Act of 1995 and the creation of the Criminal Cases Review Commission. The reform somehow only occurs haphazardly when a severe problem is noticed by the authority. Ashworth and Redmayne even observed,[41]

If the failed prosecution of the suspects in the Stephen Lawrence case had not received adequate media attention, it seems unlikely that the double jeopardy rule would have been the subject of provisions in the Criminal Justice Act 2003.

It is noteworthy that the fundamental cause for reform of criminal process is the political climate when the case happens. Taking advantage of this, the politicians attempt to attract enough support by announcing their particular attitude towards criminal justice.[42] This rarely requires systematic thinking or logical coherence with the rest of the law. Thus it is self-evident that so-called 'fundamental reform or change' is only a contingent weapon for democratic votes. In a word, English criminal procedure is not only unsystematic but also susceptible to inconsistency and politics.[43] Though criminal procedure in other jurisdictions may share a similar inclination, it occurs more frequently in the Anglo-American liberalist tradition.

Unprincipled Procedural Rules with Scattered Procedural Consequences of the Breaches

Clearly, there is neither a systematic code nor a uniform and hierarchical structure of legal sources in English criminal procedure. In contrast, there is only a collection of unprincipled laws detailing the directions for handling criminal cases. These procedural rules sometimes overlap with each other and much confusion arises as a result. In addition, many loopholes need to be clarified in English criminal procedure. Though greater endeavor has been tried to introduce guidance and accountabilities into chaotic English criminal procedure, there is still much unfettered discretion, some of which is deliberately left by the legislators. These conditions inevitably mean that criminal

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[38] In the Auld Report, Lord Justice Auld proposed a comprehensive inquiry into English criminal justice systems to the government. Rationalisation of the entire system is a main theme in this report.

[39] In both the Auld Report and the governmental White Paper codification is strongly supported. It is claimed that codes of criminal procedure, criminal evidence and sentencing should replace the existing sources of law; For the latest proposal of the White Papers, see the White Papers Criminal Justice: The Way Ahead, Cm 5074(February 2001) and Justice for All (Cm 5563)(July 2002).

[40] A Ashworth and M Redmayne, The Criminal Process (3rd edn OUP, New York 2005)16.

[41] *Ibid*.

[42] *Ibid, s* 17.

[43] Justice, Remedying Miscarriages of Justice (British Section of the International Commssion of Jurists United Kingdom, London 1994) 8.

procedure defect consequences are similarly scattered without being designed in an orderly way.

In fact, the appeal measures in a broad sense constitute the main body of procedural sanctions: (1) if a procedural error is found to result in an 'unsafe' conviction by the Court of Appeal, the appeal must be allowed and the appellant's conviction should be quashed.[44] If the interests of justice so require, a retrial may be followed[45]; (2) If the conviction, order, determination or other proceeding of a magistrate's court is wrong in law[46] or in excess of jurisdiction, the party can appeal to the Crown Court or by stating a case to the High Court. If the appeal is successful, the Crown Court or High Court can 'reverse or vary any part of the decision appealed against', 'remit the matter to the magistrates with its opinion thereon' or 'make such other order in the matter as it thinks just'[47]; (3) If the Crown Court's decision in matters not relating to trial on indictment is wrong in law or in excess of jurisdiction, the party can also appeal by case stated to the High Court. And the consequence in the second situation is also applicable; and (4) If a procedural irregularity occurred prior to or at the beginning of Crown Court proceedings, which causes a fundamental mistrial, with the consequence of the defendant being never put in danger of a valid conviction, a writ of venire de novo should be passed, and a retrial should follow.[48] Despite a myriad of appeal measures, the demarcations of applicable conditions of appeals are not clearly provided.

Many procedural rules are created to loosely guide practice rather than to regulate it. However, if the rule is effective, it must at least have some extent of density and rigidity. For example, the 'National Standards for Cautioning' is supported merely by a Home Office circular, and thus cannot be binding in law.[49] Some guidelines, such as the Codes of PACE, are too generally phrased to make the regulated persons accountable.[50] Even though the House of Lords tends to interpret the Codes of PACE strictly, in a lot of cases, such as *R. v. Forbes*,[51] there is no clear consequence for a breach of Code D.[52]

The common law tends to always fall into the trap of repeatedly clarifying definitions of certain procedural faults, such as 'abuse of process', 'technical error', and 'substantive error'. Use of these terminologies usually results in flexible ascription of criminal procedure defect consequences depending on which particular fault is deemed to have arisen. The remedies for irregularities are usually temporarily provided after a judicial

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[44]Criminal Appeal Act, s 2(2).

[45]*Ibid*, s 7.

[46]The conditions that are wrong in law include, *inter alia*, that 'the information was bad for duplicity', 'the magistrates had no power to try the case', 'the inadmissible evidence was received or admissible evidence excluded' etc. See J Sprack, *Emmins on Criminal Procedure* (9th edn OUP, New York 2002) 459.

[47]See *ibid* 458, 464.

[48]See *ibid* 429.

[49]However, the 1993 Royal Commission recommended that police cautioning should be governed by statute, under which national guidelines, drawn up in consultation with the CPS and the police service among others, should be laid down in regulations. See Royal Commission on Criminal Justice, *Report* (Cm 2263 HMSO, London 1993) para 5.57.

[50]A Ashworth and M Redmayne, *The Criminal Process* (3rd edn OUP, New York 2005)161.

[51](2001) UKHL 40.

[52]See Royal Commission on Criminal Justice, *Report* (Cm 2263 HMSO, London 1993) 32.

balancing of conflicting rules. Meanwhile, different judges may use different procedural consequences to deal with similar irregularities. Without clear definitions of terminologies and enough overarching rules, the remedy for breach of a procedural rule is largely unpredictable. In these circumstances it is difficult to decide whether certain procedural consequences will be applied when a defect occurs.[53]

Many other types of consequence are frequently employed instead of using a procedural consequence to deal with procedural defects. These legal consequences consist of administrative consequences, disciplinary consequences, civil consequences, criminal consequences, etc. For example, non-compliance with PACE, such as illegal arrest and trespass to premises, can result in civil actions and criminal proceedings as well as disciplinary proceedings.[54] Again, extracting a confession through violence might also have various similar consequences. It seems that the categorisation of legal consequences, especially according to legal branches, receives little attention. What is perhaps more concerning is whether the sanction is severe enough to deter procedural irregularities. The remedies for irregularities can be quashing the conviction with or without a retrial, a financial award, a reduction in sentence, or a simple declaration that there has been a breach of rights.[55] However, the relationship between different types of remedies is not clarified, which creates too much unfettered discretion for the choice of a solution to a procedural breach.

Weak Structural Constraints in Various Procedural Remedies

Criminal justice agencies in England have been relatively independent in terms of their mutual relationships. The authority is not only diffused between superior agency and inferior agency, but also isolated between two agencies at the same level. Clearly, this is partly owing to the long-term evolution of English law in a relatively close space resistant to the influence from outside jurisdictions. The loose structural constraints for the remedial measures leads to many cases of unaccountability, which further contributes to the inadequacy of criminal procedure defect consequences in the case-law context.

The relationship between prosecutor and police is relatively isolated so the necessary check between them is almost absent. Initially, the police, as private citizens, undertook the responsibility both of investigation and of prosecution. The Prosecution of Offences Act 1985 created the Crown Prosecution Service (CPS). It is operated under the orders of the Director of Public Prosecutions (DPP), who acts 'under the superintendence of the Attorney-General'.[56] The primary reason for introducing the CPS was to bring a professional prosecutorial review into the system, to prevent weak or inappropriate cases from going to courts,[57] and for this they were given a power of discontinuance.[58]

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[53]For example, in the case of illegally or improperly obtained evidence, it is difficult to predict in advance whether it shall be excluded or not.

[54]C Elliott and F Quinn, *English Legal System* (6th edn Pearson Longman, Essex 2005) 257.

[55]See I Dennis, 'Fair Trials and Safe Convictions' (2003) 56 CLP 211, 223; B Emmerson and A Ashworth, *Human Rights and Criminal Justice* (Sweet & Maxwell, London 2001) 17-33.

[56]See Prosecution of Offences Act 1985, s 3 (1).

[57]Royal Commission on Criminal Procedure, *Report* (Cmnd.8092 HMSO, London, 1981) para 7.6.

[58]Prosecution of Offences Act 1985, s 23.

When compared with counterparts in other countries, however, the Crown prosecutors play a less important role in the criminal justice system. They have few rights to control the activities of the police.[59] It is a well-known characteristic of the police that the supervision of constables is not great, and that they have much *de facto* discretion.[60]

The police are locally organised and largely independent of direct government control. Accountability for individual decisions depends largely on the internal structure of the agency. However, a hierarchy of the police within the broader criminal process is absent and they play rather confused roles. Generally, the police have two distinguishing features: firstly, when investigating crimes, they are left largely on their own. Although they must procure a warrant from a judge or a magistrate before they are allowed to take certain coercive measures, they do not carry out their investigations under the direction of a public prosecutor or a juge d'instruction. Secondly, having completed their investigations and identified a suspect, they may make the decision to launch a prosecution. This is odd when compared to most other jurisdictions, where the initial decision to prosecute is made by the public prosecutor.[61] Although, now the CPS has the authority to discontinue the prosecution, it is a rather difficult and ambiguous route, since the CPS does not usually challenge the police decision. The route for reform chosen was partially due to the police trying to avoid losing power to the newly created CPS.

English common law has arrived at a peculiar legal structure, which is somehow in contradiction to the standard structure of a legal rule clarified above. Historically, a law of remedies instead of a complete structure of legal rules had been shown in the clause 29 of Magna Carta 1215:

No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him nor condemn him, unless by the lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

The development of habeas corpus has been tremendously influenced by this clause. It indicates that any person detained under criminal procedure is entitled, as a right, to have the legality of his or her detention re-examined by the judge.[62] Hence, habeas corpus became an efficacious mechanism for political opponents to challenge an arbitrary order of imprisonment made by the king. In ordinary criminal cases, it was once regularly used for challenging a refusal by local justices to grant defendants bail and excessive pre-trial detention.[63] In modern English criminal procedure, habeas corpus is hardly mentioned, as such challenges gradually evolved into a slightly different legal machinery of remedies.[64]

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[59]Code for Crown Prosecutors 2010, s 3.1.

[60]M Maguire and C Norris, *The Conduct and Supervision of Criminal Investigations* (HMSO, London 1992).

[61]M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (CUP, Cambridge 2002) 151.

[62]RJ Sharpe, *The Law of Habeas Corpus* (2nd edn OUP, Oxford 1989).

[63]M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (CUP, Cambridge 2002) 146.

[64]*Ibid*.

Most issues of possible nullity of conduct should be settled by the court. The check of legality by the court has not inevitably led to clear guidance. In a sense, the court is the fundamental pillar for dealing with procedural impropriety. At present, the legitimacy of police decisions at the prosecution stage of the process can be challenged in the form of judicial review before the court but this is a civil procedure. An active restraint by the agency seised of the case to prevent procedural breaches is almost absent within the criminal procedure system. If there is no challenge from one party, especially the defence, there will be no nullification procedure.

An unaccountable body, the jury, might be one plausible reason for weak structural constraints in decision-making. In England, the jury was originally introduced as a substitute for the judgment of God pronounced through ordeal. The lay participation injects a certain degree of unpredictability into a criminal justice system. The division of responsibility between judge and jury in Crown Court trial indicates an additional relationship to be regulated. Subject to soft control from the judiciary, a jury may even set aside criminal law embodied in the judge's instructions and make their own decision.[65] It is clear that considerable trust is put in the jury during the criminal proceeding. As Ashworth and Redmayne observe,[66]

If the Court of Appeal interfered with jury verdicts too readily, it would put itself in the uncomfortable position of questioning the ability of the jury to reach correct verdicts: it might be thought to be undermining the very system which it oversees.

In addition, it is not required for the jury to give reasons for its decisions and its deliberations are secret. Thus the Court of Appeal cannot identify the precise reason(s) why the jury makes a certain decision.

Since 1964 the Court of Appeal has been entrusted with the power to order a retrial, whereby the court can 'combine a concern for the integrity of the original trial with respect for the jury as the final decision maker in the criminal process'.[67] Even so, it is still difficult to deal with adjudicative faults committed by the jury. Although the Criminal Appeal Act provides that the Court of Appeal 'shall allow an appeal against conviction if they think the conviction is unsafe' and shall 'dismiss such an appeal in any other case',[68] the Court is generally reluctant to interfere with a jury's decision as to conviction. Under these circumstances, many appeals from defendants have been dismissed unjustly.

In English criminal proceedings, there are large-scale buffer zones due to the existence of the jury. In many cases, clear-cut measures against non-compliance with legal rules as to decision-making are absent. For example, the House of Lords have held that the jury should be informed if Code D of PACE has been breached and requested to consider the significance of the breach. In some cases the breach may result in exclusion of identification evidence. If not excluded, the judges are obliged to warn juries about the

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[65]M Damaška, 'Structures of Authority and Comparative Criminal Procedure' (1975) 84 YLJ 491. See also J Feinberg, The Right to Disobey (1989) 87 Mich. L. Rev. 1702-4.

[66]A Ashworth and M Redmayne, *The Criminal Process* (3rd edn OUP, New York 2005) 345.

[67]*Ibid* 346.

[68]Criminal Appeal Act 1968, s 2(1). The amendments were introduced by the Criminal Appeal Act 1995.

dangers of mistaken identification.[69] This warning should be reasonably concrete to juries, at least including the information that convincing witnesses can be mistaken. If the identification evidence is of poor quality, for example, if it is procured from a fleeting glance or derived from a longer observation in a rather difficult condition, the judge should go further. If a case hinges 'wholly or substantially' on identification evidence, the judge should request the jury to be cautious when convicting the defendant based on such evidence. In most situations, the case should be withdrawn from the jury unless there is evidence to support the identification. If there is supporting evidence, then the judge should identify it for the jury. Clearly, the relationship through which the judge supervises/assists the jury is rather flexible and relaxed, which definitely results in quite vague rules. Therefore whether the evidence should be excluded or the case should be withdrawn depends on the politics of the game playing between them.

IV. CONCLUSION

The above description of the existing procedural consequences for defective criminal procedures in England shows how incomplete and unsatisfactory the links between criminal procedural consequences and defects are. From my studies, it becomes clear that weaknesses in remedies for procedural deficiencies exist in English criminal procedure. It is particularly demonstrated by the fact that many regulations only have directions, but they do not have procedural consequences for breaches. Lack of procedural consequences is rather detrimental to the efficacy of criminal procedure. It is here necessary to repeat the argument made at the start of this chapter: from the perspective of the integrity of a criminal procedure rule, the establishment of a procedural consequence for a procedural deficiency is necessary; otherwise, criminal procedure simply becomes a set of guidelines for handling the case. Maybe it reflects the essence of criminal procedure in common law jurisdiction. Even though common lawyers rejects my criticism from their inner mind, I wish that they may receive certain illuminations from a Chinese law or more widely, continental law perspective.

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[69] *R. v. Turnbull* (1977) QB 224.

• SECULARISM & DEMOCRATIC GOVERNANCE: AN APPRAISAL

Ashish Kumar Srivastava*

Abstract

Practicing a secular Constitution after independence, wherein the fanatic and radical forces have always been aggressive to attack the secularism in India was not a plaything. The great 'Ganga Jamuni Tehjib' and idea of religious tolerance and 'Sarva Dharm Sambhav' which was conceived on Gandhian Model has always been firmly established by State. Indian Judiciary has been a qui vive of the sentinel of democracy and it has always kept the faith unflinching which has been reposed by a plural democracy like India. Freedom of thought, expression and belief are important elements of liberty and fraternity of the trinity (liberty, equality and fraternity) maintains the Constitutional tandem and creates harmony in society. India is a country, the cultural ethos of which is a symbol of unity in diversity. Practice of religions has two basic parts: the basic one which connects one to his supreme power and the second which is about worldly affairs and is contained in rituals. The second part which is worldly in nature must be regulated for establishment of a secular and egalitarian State. In this paper the author attempts to examine the various aspects of secularism and democratic governance in a descriptive and analytical manner.

Key words

Religion, Secularism, Democarcy, Profess, Propagate and Restrictions.

I INTRODUCTION

India is a country which is very diversified in its religious orientation. India being a country has been a country of migrants as it openhandedly welcomed different religious and ethinic group from across the globe. The composite culture is an outcome of assimilation of different cultures which speaks very loudly about cultural heritage of India. Religion is a tool for the spiritual elevation of human being. The other fundamentalist aspect of religion has always been misused by pontiffs and demogouges of the civic society. The communal harmony is an asset for any country as it creates an amicable ambience of growth which is multifacted and optimum. The secular India is the need of the hour as it suits the best to cultural and religious disparity in India and it creates communal harmony by establishing an India which is religiously hamonized. In the initial years of working a democratic constitution India was firmly establsihing secularism. In the seventies the preamble was amended to include the term 'secular' to make it more indelible in the constitutional governance of India. The freedom of religion and secularism was adopted by India with full vigour and colour. In practicing India has

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shown up that how multi-cultural and multi-religious communities can peacefully co-exist.

II. COMPARATIVE OVERVIEW OF SECULARISM

United States of America

The first amendment to the Constitution says "Congress shall make no law respecting or establishment of religion or…and prohibiting the free exercise thereof"[1] .In Aversion v. Board of Education[2] the United States Supreme Court held that, "The prohibition against establishment of religion has been interpreted to mean "neither a state nor the federal Government can setup a church. Neither can pass laws which aid one religion, aid all religious or prefer one religion over other .Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion .No person can be punished for entertaining professing religious beliefs or disbeliefs for church attendance or attendance. No Tax in any amount, large or small can be levied to support any religious activity…Neither a state nor the federal Government can openly or secretly participate in the affairs of any religious organizations or groups of vice-versa."

In *Davies v. Beason*[3] the USA Supreme Court held that, "The guarantee of free exercise of religion means that there are no restrains upon the free exercise of religion according to dictates of conscience or upon the free expression of religious opinions, some those imposed under the police power against acts inimical to the peace, good order and morals of society." In *Mccollium v. Board of Education*,[4] the US Supreme Court held that, "No religious instruments can be imported in state aided school premises even by non governmental bodies and beyond the school hour." In *Cantwell v. Connecticut*[5] the US Supreme Court held that, "The freedom of religion, propaganda or solicitism may be regulated by the State in the interests of public safety, peace, comfort or convenience or prevention of fraud provided the restriction is not arbitrary or excessive."

Australia

Section 116 of Australian Constitution provides, "the commonwealth shall not make any law for establishing religion or for imposing any religious observance or for prohibiting the free exercise of any religion and no religious test shall be required as a qualification for any office or public trust under the common wealth".[6]

Eire

Article 44(2) of the Constitution of 1937 says that the freedom of conscience and free profession and practice of religion are subject to public order and morality, guaranteed to every citizen; the state guarantees not to endow any religion; and the state shall not impose any discrimination on the ground of religious profession, belief status. But the

[1]Harry E. Grooves, Religious Freedom, 4 *JILI* 191 (1962)

[2]330 US 1 (1947)

[3]133 US 333 (1890)

[4]333 U.S. 203 (1948)

[5]310 U.S. 296 (1940)

[6]See also *Adelaide co. v. Commonwealth* (1943) *C.L.R.*116

Constitution does in fact recognise the special position of a particular religion namely the Roman Catholic religion. This is evident from its preamble.

USSR

Article 124 of Soviet Constitution 1936 says "Freedom of religious worship and freedom of anti religious propaganda is recognised for all citizens".

France

The Constitution of France 1946 and 1958 says "None ought to be disturbed on account of his opinion, even religious ,provided their manifestation does not derange the public established by law".

Japan

Article 20 of the Constitution of 1946 says "Freedom of religion to all… No person shall be compelled to take part in any religious act, celebration rite or practice".

England

There is no separation of church and state in England. The church of England (i.e. protestant church) is a established church and the patron of all its clergy with in the United Kingdom. The protestant church has been by the Act of Supremacy and uniformity by law established i.e. its entire oraginsation is sanctioned by law which establishes it and recogniges its property and other rights to the exclusion of any other system. The Official Church is entitled to public financial support e.g. from a financial levy on land owners called title legaliged by statute Teith Act 1936. Only the bishop of the Church of England have seats in House of Lords. Ordinary law makes a distinction between Chiristian religion and other religion in the matter of blashmemy. Offence of blashphemy of Chiristian religion is punishable but an attack on other religion is not similarly punished. Anglican is official church and it is an established custom that king or queen must be a follower of catholic faith. Despite of this provisions Britain is considered a secular state because no absolute separation between religion and state church and state's both units are connected with human life.

III. INDIAN CONSTITUTIONAL FRAMEWORK

Concept of secularism has been borrowed Europe we have expanded the concept according to special experiences. Unlike the west the purpose of secularism in India is to develop the feelings of friendliness ans fraternity among the followers of different sects/religions.In India term secularism is not added in the Constitution. By 42nd amendment 1976 term secular was added in the preamble. In Hindu the equivelent term is 'Panthanirpantha' nor 'Dharmanirpheksha'. Panth and dharma are distinct. Panth means road while dharma denotes quality of certain thing as quality of fire is to burn.

A secular state has two aspects *i.e.* positive or negative. Negative aspects means that secular state conducts opposite to the state protecting special official religion as Pakistan protects only Islam religion. Positive aspect is that it provides all men(citizen or foreiner) an equal opportunity. In India the positive aspect of secularism has been emphasised. Before introducing the right to freedom of religion a committee was constituted and questions before committee were: Indian Constitution includes right to freedom religion?; should Indians be given freedom of conversion?; and will conversion destroy the democratic from of goverment?

After the debate of four month committee concluded that there is no danger by conversion in India. The prohibition of right to practice and prapogate will affect adversely the Christrian Community which will be ultimately violative right to equality. Purshotaam Das Tandon, K.T.Shah, Shayma Prasad Mukherjee, Sardar Vallabh Bhai Patel opposed the practice of conversion but their demand was denied as it was affecting the secular from of the Constitution. Articles 25 to 28 incrporate the right to freedom of religion.

Articles 25 to 28 guarantee fundamental right to freedom of religion to all the persons. Secularism is basic feature of the Indian Constitution. Secularism is derived from Latin term Secularism i.e. connected with religious matters. According to D.D.Basu secular state means "a state having no own religion and which treats with all religion equally". In this respect Mahatma Gandhi advocated for religious tolerance. It means that to give importance to own religion equally and simultaneously to give respect to other's religion. In India religious tolerance becomes of utmost importance/ pivotal because religion directs every affair of human life. There are so many religions in India in this contest religious tolerance also become important. But Pt. Nehru advocated for secularism in the from of political tendency. Indian Constitution adopts the concept of Pt. Nehru in respect of secular state. Secular state means that the state will remain in affairs of religion. It is neither pro God nor anti God. Before dealing secularism let us deal with freedom of religion guaranteed as fundamental right in Indian Constitution in Arts. 25 to 28.

What is Religion?

In *Commissioner H.R.E v. L.T.Swamiar*,[7] the Indian Supreme Court held that, "Religion is a matter of faith. A religion is undoubtedly has its basis in a system of believes and doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it is something more than merely doctrine or belief. A religion may not only lay down ethical rules for its followers to accept but may also prescribes rituals and observance, ceremonies and modes of worship which are regarded as integral part of that religion. These forms and observances might extend even to matters food and dress."

Right to freedom of religion as gauranteed under article has two parts: inner Part as Freedom of conscience, and outer Part as Right freely to profess, practice and propogate. Freedom of conscience connotes a persons right to entertain beliefs and doctrines concerning matters which are regarded by him to be conducive to his spiritual well being. In this connection, to profess means a religion means right to declare freely and openly one's faith. Whereas, practice should be treated as a part of religion, it is necessary that it be regarded by the said religion as its essential and integral part.

Certain practices even though regarded as religious may have sprung from superstitious beliefs and may in that sense be only extraneaous to a religion. It is upon the Court to decide which practice is essential and integral and which is not. In *E.R.J. Swami v. State of T.N.*[8] Supreme Court held that the mode of appointment of Acharya in Temple was a

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[7] AIR 1954 SC 282

[8] AIR1972 SC 1586

secular and not a religious practice. In *Mohd. Hanif Qurashi v. State of Bihar*[9] the Supreme Court held that "Slaughter of cows is not an integral part of Islam Religion. A second marriage by a Hindu in presence of his first wife does not include an integral part of Hindu religion." In *Jagdishwara v. Police Commissioner, Calcutta*[10] the Supreme Court after going in to religious books and practices of Anand margis held that tandav dance in public is not an essential part of Anand Marga.

A person may propogate freely his religious views for the edification of others. The term religion is not defined in the constitution and indeed it is a term which is hardly susceptible to any rigid definition. The Supreme Court has defined it broadly. Religion is a matter of faith with individuals of communities and it is not necessarily theistic. In *P.M.A.Metropolitian v. Mohan M. Marthoma*[11] Supreme Court Observed "Religion is a which binds spiritual nature of men to super natural being. It includes worship, belief, faith devotion etc. and extends to rituals.

A religion undoubtedly has its basis in a system become life and doctrine which are regarded by those who profess religion to be conducive to their spiritual well being. A religion is not merely an opinion, doctrine or belief. It has outward expression is acts as well. "Every religion must believe in a conscience and ethical and moral precepts. Therefore whatever binds a man to his own conscience and whatever moral and ethical principle regulate the lives of men believing in that theistic, conscience or religious beliefs that alone can constitute religion as understood in the constitution which fosters the feeling of brotherhood, amenity, fraternity and equality of all persons which find their foothold in secular aspect of the Constitution. Apex Court said that right to religion guaranteed under Article 25 &26 is not absolute and unfettered but subject to legislation by state limiting any activity-economic,financial,political and secular.

Science does not means scientific explanation of problems and scientific solutions. American, French and Russian revolutions have created new chapters in the human history. These revolutions have removed class discrimination and established liberty, equality, fraternity and freedom of religion. These ideas are not mere declarations. All countries adopted it and gave right to enforce it. These revolutions did not eliminate the religion. Court should encourage scientific thinking and supposes in scientific and traditional trend" Court will have to take initiative to protect religious liberty. Politics is based on religion. If a Law is undemocratic, inscientific and backward it should declared unconstitutional on the ground of reasonableness propounded in Maneka's Case.[12]

Concept of Secularism

The concept of secularism is implicit in the preamble of the Constitution which declares the resolution of people to secure to all its citizens liberty of thought, belief, faith and worship. The 42nd Amendment Act 1976 has inserted the word secular in the Preamble. There is no mysticism in the secular character of state. A secular state was never considered as an irreligious or atheist state.

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[9] AIR 1958 SC 731

[10] AIR 1984 SC 51

[11] AIR 1995 SC 2001

[12] M.Katju, Law, Religion, Politics in Society, 1994 AIRJ (133-137).

St.Xavier College v. State of Gujarat[13] it was held that there is mysticism in the secular character of the State. Secularism is neither Anti-god, nor Pro-god, it treats alike the devout the antagonistic the athiest. It eliminates God from the matters of the matters of the state and ensures that none shall be discriminated against on the ground of religion.

In *S.R.Bommai v. Union of India*[14] it was held that secularism is a basic feature of the constitution. The States treats equally all religious denominations. Religion is a matter of individual faith and cannot be secular activities. Secular activities can be regulated by the state by enacting a law. Ramaswami J. Observed that secularism is not anti-God.In the Indian context secularism has a positive content. The concept secularism separates spiritualism with individual faith. The State is neither anti-religion nor pro-religion. In the matter of religion, the State is neutral and treats every religion equally.

In *Santosh Kumar v. Secy. Ministry of Human Resources Development*[15] the Court said that state to ensure religion, does not make it either a religious or a theocratic State. Secularism represents faith born out of the rational faculties and it enables to see the imperative requirements for human progress in all aspects. Secularism neither anti-god nor pro-god, as it treats alike the devote, agnostic and the atheist.

In *Aruna Rai v. UOI*[16] it was held that secularism is susceptible to the meaning that is developing, understanding and respect towards different religions. Secularism can be practiced by adapting a complete neutral approach towards religions or positive approach by making one section of religions people to understand and respect religion and faith of another section of people. His Lordship quoted Gandhiji who said the real meaning of secularism is Sarva Dharma Sambhava meaning equal treatment and respect all religions. But we have misunderstood the meaning of secularism as Sarva Dharma Abhav meaning negation of all religions. In *State of Karnatka v. Praveen Bhai Thogadia*[17] it was held where speeches or actions are likely to trigger communal antigonism and hatred, prohibiting orders may be passed irrespective of position. Secularism means that state should have no religion of its own and each person whatever his religion must get on assurance from the state that he has the protection of law to freely profess, practice and propagate his religion and freedom of conscience.

Bal Patil and others v. UOI[18] it was held Hindu includes Jain. Our concept to put it in a nutshell is that the state will have no religion. The states will treat all religions and religious groups equally and equal respect without in any matter interfering with their individual rights of religion, faith worship. The constitutional goal is to develop citizenship in which everyone enjoys ful fundamental freedoms of religion, faith and worship and none is apprehensive of encroachment of his right by others in minority or majority.

Freedom Of Conscience And Free Profession, Practice And Propagation Of

[13] AIR 1974 SC 1389

[14] (1994) 3 SCC 1

[15] AIR 1995 SC 293

[16] AIR 2002 SC 3176

[17] (2004) 4 SCC 68

[18] (2005) 5 SCC 690

Religion under Article 25 (1)

Subject to public order morality and health and to other provisions of this part all persons are equally per entitled to freedom of conscience and the right freely to profess, practice and propagate religion. These constitutional provisions guarantee religious freedom not only to individuals but also to religious groups. Secularism in India does not mean being irreligious. It means respect for all faiths.

Restrictions under Article 25

It is noted that right to freedom of religion is not absolute. Art. 25 itself put restriction on this right. It can be explored as follows:

Public Order, Morality, Health of Public

In the name of religion no act can be done against public order, morality and health of public. Sec 34 of Police Act prohibits the slaughter of cattle or indecent exposure one's person in public place. Prohibition on devdasis system can not be justified on the name of practice of religious rites. Right to propagate one's religious does not give right to any one forcibly convert any person to one's own religion. Focibly conversion of any person to one's own religion right disturb the public order hence could be prohibited by law. In *Rev Stainislaus v. State of M.P.*[19] The Supreme Court held that Acts prohibiting forcible conversion were meant to avoid disturbances to the public order by prohibiting conversion from one's religion to another in a manner reprehensible to the conscience of community.[20] In *Gulam Abbas v. state of U.P.*[21] It has been held that the direction given by the SC for shifting a property connected with religion to avoid clashes between two religious communities or he sects does not affect religious rights being in the intersect of public order.

In *Acharaya Jagdisawara Nand Avadhuta v. Commr. of Police Calcutta*[22] held that Tandav Dance in Procession or at public places by Anand Margis carrying Lethal weapons Human skulls was not an essentials religious rites of followers of Anand Marga and hence the order under Sec. 144 Cr.PC. prohibiting such procession does not violate right freedom of religion are in the interest of public order and morality.

Health

Church of God in India v. K.K.R.M.C. welfare Association[23] the Supreme Court held that "Exercising the right to freedom of religion Under section 25 and 26 does not give anyone right to spread noise pollution and to disorder the public tranquility. In a civilised society no right is absolute. Right to freedom of religion is subject to public health, morality and public order."In *Javed v. State of Haryana*[24] the Supreme Court held that "Haryana Panchayti Raj Act does not violate Art. 25 and is constitutional. This Act disqualifies the persons, for Panchayat elections, who had more then two children."

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[19]AIR 1977 SC 906

[20]See also *Satya Ranjan Manjhis v St of Orissa* (2003) 7 SCC 439

[21](1984) 1 SCC 81

[22]AIR1984 SC512

[23]AIR 2000 SC 2773

[24]AIR 2003 SC 3057

National Anthem

In *Bijoe Emanual v. State of Kerala*[25] Supreme Court held that, "If saying National anthem is opposite to any religion then only standing in attention position will be enough."

Public Safety

In *Md.H.Qurashi v. State of Bihar*[26] it was held by the Supreme Court that Sacrifice of cow on Bakrid day was not an essential part of Muslim religion and hence could be prohibited.

Social Evils

In *State of Bombay v. Appa Mali*[27] Bombay High Court held an act prohibiting Bigamy was constitutional.

Regulation of Earthly Affairs of Religion

Art 25(2)- Nothing in this Article shall effect the operation of any existing law or prevent the state from making any law. (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practices. (b) providing for social welfare or reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

The question that matter is what is secular and what is religious because state is empowered under this article to secular activities. This again raises the question whether this activities. This again raises the question whether the activity sought to be regulated is regarded as an essential and integral part of the religion in question or not. Art 25(2)(a) contemplates state regulation of economical, commercial or political in character through these may be associated with religious practices.

Slaughtering of animals is connected with economic activity and law can regulate the same.[28] The mere fact that essential activities of religion involves expenditure or employment of priests and servants or use of marketable commodities would not make them secular activity.[29] In *Ismail farukhi v. Union of India*[30] it was held that "A mosque is not an essential part of the practice of religion Islam and Namaz by Muslim can be offered anywhere. State Goverment can acquire a Mosque in exercise of its sovereign power for public safety."

Explanation 1 says that working and carrying of Kripans shall be deemed to be included in the profession of sikh religion .

Explanation 2 In subclause (b) of clause (2) says that the reference of Hindus shall be construed as including a reference to persons professing the Sikh, jain or buddhist religion and the reference to Hindu religious Institutions shall be construed accordingly.

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[25] AIR 1987 SC 748

[26] AIR 1958 SC 731

[27] AIR 1952 Bom 84

[28] *Md.H.Quarashi v. State of Bihar* AIR 1958 SC 731.

[29] *Ratilal v. State of Bombay* AIR 1954 SC 388

[30] AIR 1995 SC 605

Venket challiah Commission[31] has recommended that in Article 25(2)(b) "providing for social welfare and reform are throwing open of Hindu, Sikh, Jain or Buddhist religious institutions of public character to all classes and sections of these religions" should be provided. This recommendation shows that these are not different sects of Hindu religion rather it has a distinct basis. Professor Tahir Mahmood. says this communities are minorities. But this view is not good and would lead to disintegration of the Country.

Article 25(2)(b) enables the state to take steps to remove the scourge of untouchability from amongst Hindu. The right is not unlimited. Thus no Hindu can claim that a temple must be kept open for worship at all hours of day and night or he should personally performs those religious services in a temple which the pujari alone is entitled to perform.

The Court by restricting the time of bursting the firecrackers has not in any way violated the religious rights of any person as enshrined under Article 25 of the Constitution. The festival of Diwali is mainly associated with pooja performed on the auspicious day and not with firecrackers. In no religious textbook is it written that Diwali has to be celebrated by bursting crackers. Diwali is considered as a festival of lights, not of noises.[32]

Freedom To Manage Religious Affairs under Article 26

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right- to establish and maintain institutions for religious and charitable purposes; to owe and acquire and immovable property; and to administer such property in accordance with law.

Religious Denominations

In Webster's Dictionary the word denomination has been defined as "collection of individuals classed together under the same name"Generally a religious sect or body having a common faith and organisation and designated by a distinctive value and name.

To form a religious denomination three conditions must be fullfilled: it is a collection of individuals who have a system of beliefs which they regard as conducive to their spiritual well being; they have a common organigation; and they have a common notice

Estabilsh and Maintain

Where an institution has been established by a religious denomination then it can claim the right to maintain the same as well. It includes the right to administer as well. In *Azeez Basha v. Union of India*[33] it was held that "A denomination has no right to maintain an institution which has not been established by it. Aligarh Muslim University has ben established by statute and not by muslims and they can not right to maintain."

Matters of Religion

The term matters of religion used in Art. 26(b) is synonymous with their term religion in

[31]The National Commission to Review the Working of the Constitution, 2000.

[32]*In re Noise Pollution* (V) (2005) 5 SCC 733.

[33]AIR 1968 SC 662

article 25(1).The religious institutions of public character in Art.25(2)(b) includes an institution belonging to a religious denomination and such an institutions can thus be thrown open to all sections of Hindus under Art.25(2)(b).On the other hand the term religions in the Art.26(b) embraces religious practices which signifies that such questions as who are the persons entitled to enter in to temple for worship are matters of religion coming with the Article 26(b).

Right to Acquire and Manage Property

Under Art.26(d) it can administer such property according to law. Reading Art.26(d) togeather it becomes obvious that a distinction has been drawn between the right to manage its religious denomination and right to manage its property. The former is a guaranteed right which can not be taken in accordance with law. State can not administration and manage of properties of such religious denominations but can not manage the affairs of religion. In *State of Rajasthan v. Sajjan Lal*[34] it was held that if however the right to administer the properties never vested in denominations concerned or had been validly surrendered by it then Article 26(d) could not be invoked by it. Article 26(c)(d) merely safeguard the continuance of the rights which the denomination already had. In *State of Orissa v. Chintamani Khuntia*[35] it was held that collecting fruits and flowers and money by worker of temple and distributing those among themselves is not a religious matter nor it is their religious right.

Adi SaivaSivachariyargal Nala Sangam v. The Government of Tamil Nadu[36] Supreme Court addressing the issue of appointment of Archakas discussed about validity of a law providing for appointment of Archakas held that, "That the freedom of religion under Articles 25 and 26 of the Constitution is not only confined to beliefs but extends to religious practices also would hardly require reiteration. Right of belief and practice is guaranteed by Article 25 subject to public order, morality and health and other provisions of Part-III of the Constitution. Sub-Article (2) is an exception and makes the right guaranteed by Sub-article(1) subject to any existing law or to such law as may be enacted to, inter alia, provide for social welfare and reforms or throwing or proposing to throw open Hindu religious institutions of a public character to all classes and sections of Hindus. Article 26(b) on the other hand guarantees to every religious denomination or section full freedom to manage its own affairs insofar as matters of religion are concerned, subject, once again, to public order, morality and health and as held by this Court subject to such laws as may be made under Article 25(2)(b). The rights guaranteed by Articles 25 and 26, therefore, are circumscribed and are to be enjoyed within constitutionally permissible parameters. Often occasions will arise when it may become necessary to determine whether a belief or a practice claimed and asserted is a fundamental part of the religious practice of a group or denomination making such a claim before embarking upon the required adjudication. A decision on such claims becomes the duty of the Constitutional Court. It is neither an easy nor an enviable task that the courts are called to perform. Performance of such tasks is not enjoined in the court by virtue of any ecclesiastical jurisdiction conferred on it but in view of its role as

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[34] AIR 1975 SC 706

[35] (1997) 8 SCC 22

[36] AIR 2016 SC 209; (2016) 2 SCC 725.

the Constitutional arbiter. Any apprehension that the determination by the court of an essential religious practice itself negatives the freedoms guaranteed by Articles 25 and 26 will have to be dispelled on the touchstone of constitutional necessity. Without such a determination there can be no effective adjudication whether the claimed right it is in conformity with public order, morality and health and in accord with the undisputable and unquestionable notions of social welfare and reforms. A just balance can always be made by holding that the exercise of judicial power to determine essential religious practices, though always available being an inherent power to protect the guarantees under Articles 25 and 26, the exercise thereof must always be restricted and restrained.

The Apex Court did not allow the burial of a Muslim Baba in School premise under right to religion.[37] Haj Pilgrimage was examined in *Union of India v Rafique Shaikh Bhikan*[38] and asked the Government to reduce the subsidy within ten years on Haj. The court held that conducting NEET exam for medical aspirants does not violate Articles 25 & 26.[39]

Taxation and Religion

Article 27 provides that, "No person shall be compelled to pay taxes, the proceeds of which are specifically appointed in payment of expenses for the promotion or maintenance of any particular religion or religious denomination." Article 27 does not prohibit to impose tax for public service though it is related to any religious denomination. In *Ramchandra v. State of West Bengal*[40] it was held that If any tax is imposed for promoting health, morality and public order, on piligrimages, it will be valid. In *Raja Bir Kishore v. State of Orissa*[41] to maintain water tanks of Lord Jaggannath Temple, tax was imposed by State goverment which was held valid on ground of public health, clean water for drinking. In *Surksh Chandra Chiman Lal Shah v. Union of India*[42] supporting a cultural function related to Lord Mahaveer was not held a violation of Article 27 and 28.Celebration of the 25000th anniversary of the attainment of salvation of the founder of Jain religion, Mahavira.

Freedom as to Attendance at Religious Instruction or Religious Worship in Certain Educational Institutions under Aricle 28

It reads as follows:

1. No religious instruction shall be provided in any educational institution wholly maintained out of State funds.
2. Nothing in clause (1) shall apply to an educational institution which is administered by the State but has ben established under any endowment or trust which requires that religious instruction shall be imparted in such institution
3. No person attending any educational institution recognised by the State or receiving aid out of state funds shall be take part in religious instruction that may be imparted in

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[37]Mohd Hamid v Badi Masjit Trust 2011 (8) SCALE 2

[38]AIR 2012 SC 2453

[39]*Christian MedicalCollege v. Union of India,* (2014)2 SCC 314

[40]AIR 1976 Cal 164

[41]AIR 1964 SC 1501

[42]ILR 1975 Delhi 32

such institution or any religious worship that may be conducted in such institution or in premises attached thereto unless such person or if such person is a minor his guardian has given consent thereto.

With regard to religious instructions Article 28 makes a distinction between educational institutions: wholly maintained out of State funds; established under any endowment or trust but administered by the state; and recognised by state or receiving aid out of state funds.

In respect of educational institutions wholly named by the state funds, clause(1) prohibits all together giving of religious instruction. As regards the institution in category (2)religious instruction can be imparted if the endowment or trust so requires. As to those institution which falls in category (3)there is no prohibition in giving instruction or conducting religious worship, but there can not be any compulsion on attendance.

In explaining the reasons for prohibiting religious instruction Dr. Ambedkar discussed three main reasons as Art.27 prohibits the utilisation of public funds raised by taxes for the benefit of any particular community; multiplicity of freedom of religion; all relegious so far as there mutual relations are concerned, they are anti social, one religion claiming that its teaching constitutes the only path for salvation, that all other religion are wrong.

In *D.A.V. College Jalendhar v. State of Panjab*[43] it was held that Sec.7 of Guru Nanak University Act which enjoyed the Sate to make the provision to study and research on the life and teachings of gurunakwas questioned on ground at the university was maintained wholly out of State funds. The Court did not accept his argument because what sec 4 enjoyed the university was to encourage an academic study of life and teachings of Gurunanak which need not necessarily amount to religious instructions or promotions of any particular religion. In *P.M. Bhargava and others v. UGC And others*[44] It was held that study of astrology in universities does not amount to religious instruction. For it a expert committee was constituted which did not give any report that this violates any Constitutional provision. This is not against doctrine of secularism.

In *Santosh Kumar v. Secretary Ministry of Human Resources Development*[45] held that introduction of Sanskrit language as a subject in CBSC is not against as it is mother of all Aryan languages. The Court directed the CBSC to make necessary amendments in the syllabus within three months to make Sanskrit an elective paper for nurturing our cultural heritage. Without learning Sanskrit language it is not possible to decipher Indian Philosophy, culture and heritage.

In *Aruna Rai v. Union of India*[46] the validity of new National Education Policy 2002 which provided for value based education to school children based on basis of all religions was challenged as violative to Article 28 anti secular. The Court held that study of religions in school education is not against secular philosophy. In *Bramh Samaj Education Society*

[43] AIR 1971 SC 1737

[44] AIR 2004 SC 3478

[45] AIR 1995 SC 293 SC

[46] AIR 2002 SC 3176

and others v. State of west Bengal and others[47] it was held that every religious institution has right to establish educational institution but the right is subject to public order, morality and health. Merely on the ground that petitioner do not receive funds from Goverment. This autonomy can be prohibited absolutely neither the institution can be regarded as goverment undertaking.

It was reiterated in *I. Nelson v. Kallayam*[48] Pastorate that rights under Arts. 25 and 26, are not absolute and unfettered. Right to manage does not carry with it a right to mismanage and therefore in cases of mis-management, courts can oversee its function.

Conversion

In M. Chandra v. M. Thangamuthu[49] the court held that to prove conversion from one religion to another, two elements must be satisfied: (i) there has to be a conversion and (ii) acceptance into the community to which the person had converted.

In *Lily Thomas v. UOI*[50] it was held that freedom guaranteed under Art. 25 of the Constitution is such freedom which does not encroach upon the similar freedom of other persons. What Article 25 grants is not right to convert another person to one's own religion by exposition of its. This Article postulates that there is no fundamental right to convert another person to own religion because a person purposely convert another person to his own religion it would be an attack on freedom of conscience guaranteed to all citizens of country alike.

IV. CONCLUSION

Practicing a secular Constituion in plural democracy like India was not easy however the organs of state has successfully curtailed the radical and fanatic forces in India and maintained the Constitutional tandem wherein 'we the people of India' have enjoyed the freedom of thought, expression and belief like no one on this planet could dare to enjoy. The right to religion has various tricky tentacles which has been dealt by organs of state like religion and extra-religious affairs, regulation of non-religious affairs, management of deities' wealth and properties, conversion, cultural unity, untouchability etc. The Constitution of India envisages an eagalitarian society which is religiously tolerant and sober. The secular character of India is well founded in the Constitution in its various provisions. The constitutional framework with the help of Apex Court has steered the country in the right direction which is laying the edifice of a shining and sumptous India. The communal harmony created with the help of constitution and Supreme Court is not only vital but sine quo non in the diversified ambience of India.

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[47]AIR 2004 SC 36

[48]2006 (9) SCALE 245

[49](2010) 9 SCC 712.

[50](2000) 6 SCC 224

• CHANGING DIMENSION OF MORAL RIGHTS UNDER DIGITAL ENVIRONMENT

Anoop Kumar*

Abstract

The social, economic and political development of a nation depends to a very great extent on the creativity of its people. The author special rights are aspect of copyright law that seeks to protect the non-commercial, personal or spiritual interest of an author in his work. The moral rights raise the status of author's beyond material gains. Even if the work of author is sold, some basic rights remain vested in author; these basic rights are known as moral rights of the author. These rights vest in authors independent of their economic rights. On the other hand, technologies of the digital age have profound implications for the creative arts, they challenge many of the fundamental concepts at the heart of artistic tradition. The same concepts provide the underlying framework for moral rights protection, so that current technologies challenge the validity of existing moral rights doctrine, law, and practice. Notably, the information era has generated new technologies for the creation of artworks, and the possibility of new kinds of works, themselves, leading to problems with the established understanding of authorship, creative work, and the relationship between the two. The paper makes an attempt to explaining challenges of moral rights in present digital environment.

Key words

Author's Special Rights, Copyright, Moral Rights and Digital Environment.

I. INTRODUCTION

The social, economic and political development of a nation depends to a very great extent on the creativity of its people. The encouragement of national creativity is a sine qua non for further progress. The enrichment of the national culture heritage depends directly on the level of protection afforded to the cultural creations. The copyright protection is an important means to promote, enrich and disseminate the national culture heritage. The higher level of protection the greater the encouragement for authors to create. The greater the number of a country's intellectual creations, the higher it's renown. It is because of this reason that every nation protects its creative genius by copyright law.

In the Copyright Act, 1957, section 57 provides for Author's Special Rights. These special rights are by and large based on the Berne Convention Art.6 bis. The Act provides for paternity and integrity right. The Moral Rights (Author's Special Rights is popularly

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known as Moral Rights[1], thus the present paper refers it as Moral Rights) are the aspect of copyright law which raises the status of authors' beyond material gains. Even if the work of author is sold, some basic rights remain vested in author; these basic and spiritual rights are known as Moral rights[2] of the author. These rights vent in authors independent of their economic rights. This notion of independence is basic to the moral rights. The concept of moral rights assumed importance on the international legal horizon, with the conclusion of Berne convention in 1886. The growth of law in relation to moral rights had to overcome various objections, primarily those raised by United States of America. The conclusion of Universal Copyright Convention and TRIPs Agreement and further growth by inclusion in WIPO internet treatise are some of the landmark in the growth of moral rights.

II. CONCEPT AND MEANING OF MORAL RIGHTS

The moral rights are aspect of copyright law that seeks to protect the non-commercial, personal or spiritual interest of an author in his work. The traditional theory of Moral Rights is that authors of copyrightable work have inalienable rights in their works that protect their moral and personal interest that supplement the set of economic rights which is traditionally granted to copyright holder in all jurisdictions.[3]

The Moral Rights doctrine is premised on the idea that creators have certain rights in the integrity of their work that transcend the protection of economic rights.[4] An artistic creation is not merely a product that can be bought and sold but rather it is direct reflection on the authors personality, identity, and even his or her 'creative soul'.[5] These rights are often conceived as a fundamental human rights or a personal rights, grounded

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[1]For literature on the moral rights, see generally, Sterling J.A.L. *World Copyright Law* (London: Sweet & Maxwell 1998) at 280 ; Kevin Garnett, *et.al.*(ed.) *Copinger and Skone James on Copyright*, (London: Sweet & Maxwell Ltd 200415th Edition) at 627; Lionel Bently and Brad Sherman, *Intellectual Property Law* (New Delhi: Oxford University Press 2003) ; Ahuja, V.K., *Law Relatingto Intellectual Property Rights*, (Nagpur: Lexis Nexis Butterworth Wadhawa, 2007) ; W.R. Cornish, *Intellectual Property: Patents*, *Copyright, Trade Marks and Allied Rights* (New Delhi : Universal Law Publishing Co. Pvt. Ltd. 2003 Third Edition); Cornish, W.R., Authors in Law (1995) 58(1) *The Modern of Review* pp.1-16 ; Beitz, R. Charles, The moral Rights of Creators of Artistic and Literary Works (2005) 13(3) *The Journal of Political Philosophy*: pp. 330-358; Louise Longdin and Eagles Ian, Technological Creativity and Moral Right: A Comparative Perspective (2004) 12(2) *International Journal of Law and Information Technology* pp. 209-235; Masiyakurima, Patrick, The Trouble With Moral Rights (2005) 68 (3) *Modern Law Review* pp. 411-434; Mira T. SundaraRajan, Moral Rights in Developing Countries: The Example of India (2003) 8 *Journal of Intellectual Property Rights* pp. 357-371; Mira T. SundaraRajan, Moral Right in Information Technology: A New King of 'Personal Right'(?) (2004)12 (1) *International Journal of Law and Information Technology* pp. 32-54; R. Eg. Sarraute, Current Theory of Moral Rights of Authors and Artists under French Law (1968) 16 *American Journal of Comparative Law* at 159; Satish Chandra, Moral Right: Moving from Rhetoric in India (2005) 34 *Banaras Law Journal* pp.187-195; Ruth Towse, Copyright and Artists : A View From Cultural Economics (2006) 20 (4) *Journal of Economy Survey* pp. 567-585; David Vanver, Moral Rights Yesterday, Today and Tomorrow (1999) 7(3) *International Journal of Law and Information Technology* pp. 270-288; Amy M. Adlert, Against Moral Rights (2009) 97 *California Law Review* pp.263-301.

[2]The term 'moral rights' derives from the French expression '*droit moral*'.

[3]Bently and Sarman, *Intellectual Property Law* (New york: Oxford 2003 1st Edition) at 234.

[4]Ilhyung Lee, Toward an American Moral Rights in Copyright, (2001)58 *Wash and Lee L. Rev.* 795, 801.

[5]Neil Netanel, Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evolution,(1993) 24 *Rutgers L.J.* 347, 402-03.

in the author's essentials personhood and the projection of that personhood on an artistic or creative work.[6]

Moral rights grant authors control over their creative projections in so for as subsequent performance or transmissions must identify the original creator and not distort the meaning and essence of the original creation. This right is independent from copyright protection. An author can convey away his copyrights in a creation, thus denying the ability to receive revenues from that work. The author however, will still retain moral rights and can at least in theory maintain the integrity of his creation as it is expressed through performance and transmission.[7]

III. MORAL RIGHTS IN NEW TECHNOLOGIES

Technological works that are now considered to be copyrightable works, creative works that utilize new technological methods of creation, new kinds of creative works, or some combination of all of these? In fact, international copyright instruments have made little progress in addressing the issue of moral rights in these new areas of human creativity. Rather, this area remains largely unexplored in international copyright law, a situation that is reflected in a corresponding lack of consideration in most national copyright statutes. As result, moral rights issues in information technology remain in an uncomfortable state of neglect that may ultimately have negative consequences at the practical, legal and conceptual levels.[8]

The technologies of the Digital Age have profound implications for the creative arts, they challenge many of the fundamental concepts at the heart of artistic tradition. The same concepts provide the underlying framework for moral rights protection, so that current technologies challenge the validity of existing moral rights doctrine, law, and practice. Notably, the Information era has generated new technologies for the creation of artworks, and the possibility of new kinds of works, themselves, leading to problems with the established understanding of authorship, creative work, and the relationship between the two.

New Technologies for Creation

Recent technological developments have generated a variety of technologies that may be applicable to the creation of artworks. In some cases, these technologies are new variants of means that have traditionally served to facilitate artistic expression - for example, the development of dictation software that allows text to be typed directly from dictation by a computer. In other cases, new technologies have a more direct impact on the nature of the final product, as in the case of new means of creating and reproducing sounds, colors, or images. It is interesting to note that the range of creative possibilities generated by the Digital Era has yet to be explored to its full potential by authors and artists.[9]

All of these new technologies intervene between the author and the creative work in its

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[6]Robert C. Bird, Moral Rights: Diagnosis and Rehabilitation. (2009) 46 issue 3 *Ame. B. L. J.* at 410.

[7]Susan P. Liemer, Understanding Artists' Moral Rights: A Primer, (1998)7 *B.U. Pub. Int. L.J.* 41,42.

[8]*Supra note* 8 at 49.

[9]RajanSundara T. Mira, Moral Rights in Information Technology: A New of 'Personal Right'? (2004) Vol. 12 No. 01 *International Journal of Law and Information Technology* at 49.

final form. However, depending on the nature and extent of the intervening technology, the manner in which the work is created may fundamentally alter the nature of the relationship between the author and the final product. Protection of moral rights is based on the presumption of a personal, intimate, and unbreakable connection between the author and the creative work. However, where the influence of technology is powerful, this relationship may become tenuous.

New Kind of Works

A related effect of new technology is the possibility of creating new kinds of artistic works. Works that incorporate digital technology, such as 'multimedia' creations also present problems in the satisfaction of the basic concepts underlying copyright law. If the multimedia work incorporates text, images, or sound from pre-existing sources, when does the new work cease to be 'original'? Are new kinds of work based on technology expressive of the personality of the creator in a way that is analogous to traditional works? Is the appropriation or alteration of these works likely to affect the author in the same way as a traditional author?

The Problems of Authorship

It is apparent that the most serious challenges to moral rights presented by digital technologies occur at the level of authorship. In particular, there is a confusion of identity among the individuals who are involved in artistic creation at every stage.

Programmer as Author

Where a computer programmer creates a work of art through the medium of programming technology, he arguably becomes an 'author' in the traditional sense of the expression. However, does the programmer fit the traditional model of an author as an independent and original being, whose work reflects a unique, creative genius? The work of a programmer seems intuitively different from that of an artist, all the more so if the work that is created is the product of electronic events that are, to some extent, self-propagating. Nevertheless, moral rights require an author. If we refuse to consider the programmer as the author, who will then fulfill this role? How can authorship be associated with a machine, or an impulse of software, without human involvement?

Performer as Author

If the performance of an electronic work of art requires the involvement of a human being for example, someone to manipulate the program or carry out certain steps at different stages of its realization what will the law consider to be the role of this person in the artistic creation? Is he a performer, a performer-cum-author, or a co-author of the program?

The merging of identities between performer and author is increasingly a feature of global culture. The reasons for this trend are both technological and cultural, having to do with the impact of technology on artistic creation, and with the increasing emphasis on performance as an artistic activity in its own rights in the Digital Age. Interestingly, this trend is reflected in the latest international regulation on copyright in performances, the WIPO Performances and Phonograms Treaty (WPPT) of 1996, which entered into

force in mid-2002.[10] Article 5 of the WPPT creates moral rights in performances, on identical terms to the moral rights enjoyed by original authors under Article 6bis of the Berne Convention. From the perspective of moral rights doctrine, this change is a radical one. However, it appears to reflect a determination at WIPO to ensure that moral rights protection is available to a broad range of creators a new legal approach to situations where the distinction between performer and original author is increasingly difficult to separate, in practice.

Audience as Author

The widespread ease and availability of technological means for intervening in ostensibly finished works of art potentially allows 'end-users' an unprecedented role in reshaping, modifying, criticizing, and disseminating them. This trend has widely been portrayed by copyright scholars as an indication of the 'unenforceability' of moral rights. However, digital technologies affect other aspects of copyright equally, for example, the maintenance of an exclusive right of reproduction, or communication to the public. The power of the public to deal with artworks directly through technology after a certain point, without the mediation of the author brings to light a number of important changes in the relationship between authors and their public. In particular, the supremacy of authorship is now challenged by the power of the public to intervene. The protection of moral rights therefore depends, to an increasing extent on the support of the public. By an appropriate irony, the future protection of the personal and cultural interests involved in moral rights depends upon the evolution of a cultured and educated attitude towards artistic creation among the public. In effect, through technology, in combination with cultural training and values, the audience, too, has become an 'author.' [11]

If the case against moral rights in information technology remains superficial, the spurious exclusion of moral rights from the artistic consequences of digital technology seems ill-informed. While some areas of digital creativity are greatly removed from the basis of moral rights doctrine, in other respects, digital creation has only enhanced the value and importance of these rights. In the first instance, a consideration of the nature of creation in computer-generated works shows that, in this area, the difficulty of identifying the author, analysing the nature of the work, and establishing the nature of the relationship between the two may make moral rights protection inappropriate. However, the growing participation of individuals at different stages of the creative process through technology suggests that the protection of the relationship between the author and the work through moral rights may actually enhance culture and creativity. An all-encompassing conclusion about the appropriateness of applying moral rights to the creative endeavors of the Digital Age cannot be drawn, particularly if that conclusion implies the complete exclusion of moral rights protection from technological creation altogether. Rather, moral rights appear to be necessary and desirable in some areas, but may be inappropriate in relation to others.

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[10]WIPO performance and Phonograms Treaty, adopted by the WIPO Diplomatic Conference on Certain Copyright and Neighboring rights Questions in Geneva; on December 20, 1996 [WPPT]. Available in the WIP Collection of Laws for Electronic Access, online: http://clea.wipo .int.

[11]*Ibid*.

Rights to Integrity

Infringement of an author's moral rights could occur by the simple fact of digitisation of his work. Translating a work into digital form necessarily provokes a loss in quality due to the compression into a format capable of being understood by a computer. The differences in loss of quality will vary with the nature of the work. For instance, the digital version of a painting where the original is very detailed and with nuances in its colours might not be a satisfying copy of the original. An author might consider such changes violate his moral right of integrity. In the UK, however, it is very unlikely that this digital version of the painter's work would be considered as derogatory treatment by the courts since objectively it is unlikely to be seen as sullying his honour or reputation, amounting instead only to a slight loss in quality. The other view could be taken in France where the test for the violation of the integrity of the work is much lower and more subjective.[12] The artist could successfully argue that the lower quality affects his work to such a degree that is not acceptable to him. Going further, arguments could be taken from the size of the digital copy. In the UK, a court has said that the reduction of size of a number of paintings of dinosaurs for inclusion in a catalogue was not derogatory treatment[13] and so a UK author would be unlikely to have a remedy as a result of the change of size of a work brought about by digitisation. In another French case, the court considered that 'the suppression of the lower part of the drawing which included the name of the represented person and the author's signature' infringed moral rights. As a consequence, in France an author could argue that the reproduction on the Internet of his work in a normal size infringes his moral rights of integrity either because that work has to be compressed to fit the screen, or because of the impossibility to have the entire the creation on the screen. The user has to scroll down to get the visual effect of the work.

The Right of Disclosure

The second instance in which the territorial approach of copyright laws in the domain of moral rights can lead to considerable problems is the right of disclosure. Extensive rights are granted in this category by the French Code. The right of disclosure (or non-disclosure) does not exist as such in UK legislation although it is fair to say that there is no compulsion on an author to disseminate a work once created. The author is perfectly at liberty to lock the work away and never make it available either in public or private. The French Code by contrast explicitly provides that "*only the author has the right to disclose his creation…and he defines the means and conditionsof this disclosure*".[14] This right of disclosure is considered as absolute and exclusive. The courts have clearly affirmed that the author has the right to "*remain the sole judge of the opportunity of thepublication*" of the work and that therefore no compulsory order for the disclosure of the work can be obtained before the courts. The author could prevent the dissemination of his work on a medium he considers inadequate as to the presentation and or quality of

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[12] In this sense, see French case on acts infringing the "spirit" of the creation : The moral rights of the author were infringed where a certain direction of actors was considered contrary to the spirit of a theatre creation : TGI Paris, 27 November 1985, Gaz. Pal. 1986. 2. Somm. 369.

[13] *Tidy v. The Trustees of the Natural History Museum* (1995) 37 IPR 501.

[14] French Intellectual Property Code Article L, 121-2: "*L'auteur a seul le droit de divulger son auvre. Sous reserve des disposition de l'article L. 132-24, il determine le procede de divulgation et les condition de celle-ci*".

his creation. This is of particular relevance in the case of dissemination in digital form over the Internet bearing in mind that such disclosure has to be agreed on by the author even after the transfer of the economic rights of exploitation to an assignee or licensee.

Compilation Problem

The Compilations of data and other material are required to be protected under TRIPS whatever their form (machine readable or other) if the selection or arrangements of their contents constitute intellectual creations.[15] While TRIPS stipulates that 'computer programs' are to be protected as literary works it does not require that compilations be allocated to any particular category of copyright subject matter only. Most, if not all, jurisdictions allow the authors of compilations to claim the full range of moral rights. If they then define 'compilation' in such a way that it can include copyrightable web pages, databases.[16] or suites of computer programs[17] then the creators of these products will have rights denied to the authors of their constituent or organizing programs. Once again it is hard to see the policy reasons for this distinction.

IV. INDIAN PERSPECTIVE

At present, in India, the management and protection of copyright in digital works is looked after by copyright societies formed by copyright owners. These societies registered under Section 33 of the Copyright Act, 1957 work on the concept of collective administration of copyright. These societies are entitled to issue licenses, collect fees and distribute such fees among the owners of the copyright. But it is not an effective means to protect and control piracy of a copyrighted work in modern digital environment. Therefore, comparable provisions to WIPO Treaties are proposed in Copyright Amendment Act, 2012 to The Copyright Act, 1957. It includes the definition of The RMI under Section 2(xa)[18] and the protection of The RMI under Sections 65A and 65 B.

Section 65A[19] of Copyright Act deals with protection of technological measures. Subsection (1) provides that any person who circumvents an effective technological

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[15]TRIPS, Art. 10 (2).

[16]Indeed TRIPS does not specify that they even be protected via copyright at all. At. 2(5) of the Berne Convention (Paris Revision 1971) which only refers to collections of literary or artistic words such as anthologies or encyclopedias.

[17]Authors of copyrightable databases are not denied paternity and integrity rights under the Copyright, Designs and Patents Act 198 (UK). Moral rights have no application , however, to the sui genres database right.

[18]Inserted by Act 27 of 2012, (The Copyright Amendment Act, 2012) S. 2 (w.e.f 21-06-2012)

(xa)- "Rights Management Information" means,

(a) the title or other information identifying the work or performance;

(b) the name of the author or performer;

(c) the name and address of the owner of rights;

(d) terms and conditions regarding the use of the rights; and

(e) any number or code that represents the information referred to

in sub-clauses (a) to (d),

but does not include any device or procedure intended to identify the user.

[19]Inserted by Act 27 of 2012, (The Copyright Amendment Act, 2012) S. 37 (w.e.f 21-06-2012).

measure applied for the purpose of protecting any of the rights conferred by the Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and fine. Sub-section (2) provides that nothing in sub-section (1) shall prevent any person from doing anything referred to therein for a purpose not expressly prohibited by the Act. It also provides that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated or doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy or conducting any lawful investigation or doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner or operator or doing anything necessary to 26 circumvent technological measures intended for identification or surveillance of a user or taking measures necessary in the interest of national security

Further section 65 B[20] runs as "Any person, who knowingly removes or alters any rights management information without authority, or distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine. It also provides that if the rights management information has been tampered with in any work, the owner of copyright in such work may also avail of civil remedies provided under Chapter XII of the Act against the persons indulging in such acts described above".

The Copyright Act neither defines the term 'effective technological measure' nor covers TPMs that restrict those actions which are not permitted by law. It protects only the 'act' of circumvention and not the trafficking circumvention devices or services. The exception of Section 65A (2) (a) appears to permit circumvention for any purpose that would not amount to infringement under the Act; it dilutes protection under Section 65A because proposed new section 52 already provides a very broad exception. For example - Section 52(b) (v) along with exceptions for copying of computer programs that permits copying for any 'noncommercial personal use' beyond the usual making of a back-up copy. Further Section 65(A) is silent on civil remedies.

V. CHALLENGES TO MORAL RIGHTS IN THE DIGITAL ENVIRONMENT

Conceptual Challenges

In the Digital Age, the fundamental concepts underlying moral rights doctrine are brought into question. Problems arise in relation to the identity of the author, who may be a human being, a machine, or most likely, a combination of the both. The nature of the work raises another series of issues: it may not be what is traditionally understood as a work of human creative expression, leading to the question of whether the mistreatment of this kind of work will affect the author in the same way as it would in the case of a work. The relationship between the author and the work may itself be somewhat

[20]Inserted by Act 27 of 2012, (The Copyright Amendment Act, 2012 S.65(B).

different in the environment of digital technology, where technological means of creation may intervene between the author and the work in such a way as to make the link between them somewhat tenuous, and therefore, difficult to protect.[21]

Relationships among the parties involved with the works may also be affected by technological change, whether between the author and the performer, or between the author and his audience. For example, performance of an author's original work may acquire a new importance in its own right.[22] The performer may be putting into action instructions of the author that would otherwise be incomprehensible to an audience, or incapable of being perceived by them, as in the situation where the 'performer' may be executing the instructions in a computer program.[23] At the same time, the ability of the public to intervene in a work which is presented in digital format and make seamless changes has the potential to transform the audience into a more active participant in the creative process. The active involvement in artistic creation means much more than physical manipulation, it is the re-creation and development of the mind-set of the artist within the person who receives the work. The idea of the audience as aesthetic participant may be somewhat unfashionable in Western 'high' culture; however, it is an ancient and well-established aesthetic doctrine in certain cultures of the East.[24] By enabling a physical rapprochement between author and audience through technological means, digital technology brings the possibility of a new and closer relationship between author and audience into the consciousness of society, and may ultimately lead to real, spiritual closeness between the two.

Enforcement Difficulties

The technological developments that make possible greater audience involvement in creativity also create great difficulties of the enforcement of moral rights, and copyright restrictions, in general. The nature of digital technology is such that, once a work appears in digitized form, it can be altered in such a way that someone who subsequently sees the work will be totally unaware of the changes that have been made. Information, such as the identity of the author, may easily be removed without anyone's knowledge. Reproduction of the work can also be made without any loss of quality, regardless of the number of copes make. Finally, the Internet may provide a means of worldwide distribution of the work at virtually no cost, and access to the work may be available on an individual basis.[25]

A number of technological measures have been development in an attempt to protect works from copyright infringement. These include encryption technology, which

[21]RajanSundara T. Mira, Moral Rights in Information Technology: A New of 'Personal Right'? (2004) Vol. 12 No. 01 *International Journal of Law and Information Technologyat* 42.

[22]*Ibid.*

[23]It is interesting to note the parallel that the situation of technological creation presents with the traditional situation of music performance: the average person is most often unable to read the musical score, itself a form of 'code' notation.

[24]For example, see the detailed study of Indian art and aesthetics in S Pandit, An Approach to the Indian Theory of Art and Aesthetics (Sterling New Delhi 1977) 88-89. The intersection of traditional culture with digital technology is explored by J Tunney, 'E.U., I.P., Indigenous People and the Digital Age: Intersecting Circles?' (1998) 20(9) EIPR 335, 335.

[25]*Supra* note 8, p. 43.

prevents someone from gaining unauthorized access to the work, and watermarking, which allows copying of the work to be traced, though not prevented. Measures aimed at circumventing these safeguards have become criminal offenses in some countries; nevertheless, these so-called 'anti-circumvention' measures quickly become technologically outmoded, and have achieved only limited effectiveness, to date.[26]

Given the ease with which digital technology allows moral rights to be circumvented, some commentators have raised the possibility that moral rights may be irrelevant to the creation and dissemination of artistic works in the Digital Age. However, this question should not be assessed on the basis that moral rights have become difficult to enforce, in practice. Rather, to what extent does the moral rights of authors continue to be relevant to their concerns in the environment of digital technology? The answer to this question should determine how moral rights are protected, and how to encourage a sufficient degree of compliance and enforcement. Above all, the viability of moral rights in digital environment will depend on the knowledge and willingness of the public to champion the rights of creators: the creative community must attempt to develop a more cooperative relationship with its public, and realize the potential contribution of the public to its creative interests.[27]

The unspoken assumption in international copyright law that moral rights are not and should not be applicable to computer programs is based on an insufficient consideration of the policy issues at stake. Programmers may well have moral interests in their technological creations. Rather than rejecting outright the possibility of moral rights in these works, the problem deserves to be considered comprehensively, in terms of legal doctrine, economic consequences, and the public policy of providing adequate access to new technology. Like India, many countries may conclude that software development will not be especially strengthened by the elimination of moral rights. Instead, the exclusion of these rights may bring inconsistency to copyright protection for software, while preventing the potential moral interests of programmers for being explored.

VI. SOLUTIONS WITH REGARD TO DIGITAL CHALLENGES

The practical challenges of exercise and administration of moral rights led to solutions being suggested around two related lines. First, technology could be used to solve problems created by technology and various options like Digital Rights management, Digital fences Encryption, Watermarking, Digital signatures along with Monitoring and tracking devices could be used to tackle infringement. Second, acknowledging that technology may not provide a full solution as such, additionally collecting societies

[26]The relevant United State provisions are SS 1201 (a) (1) and 1201 (a) (2) of the Digital Millennium copyright Act, 17 USC (1994 &Supp V 1999). The American approach to circumvention technologies is discussed by D Balaban, ' The Battle of the Music Industry: the Distribution of Audio and Video Works via\ the Internet, Music and More' (2201) 12 Fordham, IP, Media S Ent. LJ 235, 259-265. The; relevance of anti-circumvention technology to moral right of integrity considered briefly by TP Heide, The Moral Right of Integrity and the Global Information Infrastructure: Time for a New Approach?' (1996) 2 UC Davis J Intl L § Poly 211, 263-66.

[27]SundaraRajan the importance of the cooperative element in the development of copyright in the era of digital technology is emphasized by JAL Sterling 'Philosophical and Legal Challenges in the Context of Copyright and Digital Technology' (2000) 31(5) IIC 508, 525.

could play a role in administration of rights while implementation and enforcement of the rights would largely depend on the public. As to enforcement of rights, most commentators suggested the way forward was international moral right harmonization, but acknowledged that such result is unlikely. The conceptual challenges were harder to provide specific solutions to. The solutions around the right of identity did not create as divergent opinions as the right of integrity did. The thrust of the concerns around scope and definition of rights arose from two issues. First, digital environment had disturbed the existing balance between interests of producers, creators and users. Second, the nature of the different types of creative works present in the digital realm could have no one allen compassing solution as the strength of cases for moral rights differed with the particular type of creative work in question. Accordingly, most commentators agreed that the solution lied in retaining a flexible version of moral rights.[28]

Various guidelines were offered as to the shape of such relatives version of rights. These guidelines were based around tempering the scope of moral rights to account for perceived interests of users, industries, society and technology and judging the scope of protection according to the type of creative work in question. In principle, both criteria though fair, were to be applied on the basis of assumptions rather than evidence.

The post-modernist attack challenging the justification of giving protection to personality rights did present a sensitive assessment of some of the realities of present day world. It was suggested that if we have outgrown the romantic notion of authorship, then the rationale for moral rights needs to be associated with a broader understanding of creativity. It is submitted that in understanding such creativity, along with assessing other concerns, the authors' perspective will play an important role.

Further, according to the new realities of the digital environment, newer justifications were forwarded as reasons to retain moral rights in that they could serve other purposes apart from protecting authors. They could serve public interest in two ways, by ensuring authenticity of information and preserving our intellectual history and cultural heritage in an environment where original versions of works are hard to retain and trace.

The above solutions were of course, offered under the presumption that moral rights continue to be applicable in the digital environment. While there were calls for abolition of moral rights in this environment on grounds such as - practical challenges of moral rights being vulnerable to technology shows that such rights have become irrelevant or that moral rights were against public right to information and promotion of information society and new technologies these were also based on presumptions without any evidence to show that was the case. Overall, the authors fared slightly better in academic discussion than the policy debates as the general conclusion was that a balance of interest should be achieved by taking cognizance of interests of all concerned parties, being authors, publishers, users and wider public interest and without hindering the development of technology. However within the discussion of how such balance could be achieved, the authors went overlooked.[29]

The discussion in the academic literature being piecemeal in nature needs a clearer direction. The gravity of the conceptual and philosophical challenges to moral rights

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[28]Kheria Smita, Moral rights in the digital Environment "Authors" absence from Author's rights debate (2007) *BILETA, at* 6.

[29]*Ibid.*

legitimize the exploration of the topic from a bottom up approach by basing the queries at the broadest level. As opposed to atop down approach, such a position of informed ignorance will avoid being blind to the structures in this new environment. Such queries should be broadly as follows:

First, whether personality interests deserve to be recognised by law in the digital environment? The first question will involve assessing issues like the nature of creative authorship and social role of creative authorship to determine to what extent the philosophical basis behind personality interests still hold true. It will also involve assessing whether personality interests protection can be justified on any utilitarian grounds.

If the answer to the first question is in the affirmative then the second question is how should such interests be protected by law? This would require an assessment of all sides concerned with and affected from personality interests like users, intermediaries, original creators, subsequent creators and technology developers to judge the scope of protection that needs to be given to such interests. The fact that the digital environment threatens moral rights at all levels, should be used as an opportunity for a fundamental reassessment of moral rights as suggested above and within such reassessment the presence of two following components, amongst others, are necessary.

Inter-Disciplinary Approach

Most of the policy debates and the academic literature took a purely legal/doctrinal approach to the question of moral rights in the digital environment. As such issues like how technology creates challenges for law, and how can law respond to such challenges, to what extent should law not hinder the development of technology and to how can technology be used to retain the status quo in the law were explored whilst other broader social, cultural and philosophical issues were not explored in depth. Even though such discussions helped in identifying appropriate questions which if probed, analyzed and answered would take the debate further, it is submitted that such probing and analysis cannot be done on the basis of purely legal arguments.

Research on moral rights needs to be undertaken on what one commentator had predicted would be the third generation of issues concerning copyright in a digital environment, being role of author and the economic, social and political aspects of law in a digital environment. The case for interdisciplinary research is the strongest for moral rights because unlike other intellectual property rights arguably more economic in nature, moral rights are the most personal and have a strong cultural emphasis, where the creativity of individual artist is valued over all else. The reasonable way forward for the debate on moral rights in the digital environment is through inter-disciplinary research and whichever way moral rights go in this new environment, whether they continue to exist or get washed out, such consequences should not be allowed to happen without a hearing of all sides concerned, especially the author, the subject of protection of these rights.

VII. CONCLUSION

It is clear that eliminating moral rights protection from the sphere of information technology is a hasty and ill-advised solution to the problems that they present. Rather, scholars and policy-makers should attempt to investigate both the implications of digital technology for the doctrine of moral rights and its embodiment in law, as well as the potential impact of moral rights, in turn, on technological and cultural development. The moral rights that meets the needs of human creativity in the digital era will reflect the variety of human creative experience as never before. In doing so, it will not only accommodate the cultural developments accompanying the digital revolution, but it may also bring a new possibility of recognition and understanding to the existing diversity of human culture-until now, poorly reflected in international copyright law. The challenges brought to traditional concepts of creativity by digital technology have also opened copyright law to the models of creativity and culture that are typical of in-Western cultures, often fundamentally different from the established concepts of the west. Clearly there is much to be gained from a re-assessment of moral rights, their propose, scope, and content. The moral rights of the digital age can hope to attain a truer reflection of the complex dimensions of human creativity in an unprecedented era of global civilization.

A LEGAL EVALUATION OF PROTECTION OF WILDLIFE VIS. A VIS. SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENT

Praveen Kumar Rathi*

Abstract

Unbridled technological development in various sphere of life viz. industrial, domestic, municipal etc., has immensely contributed in surging the brunt of environmental deterioration, which bring the state of environment, particularly in the context of wildlife protection, at the verge of catastrophe. Celebrated provision under the Constitution of India mandates the State to take all possible and practical means and measures for the protection of flora and fauna which is the essential element of wholesome environment. State is directed to take every possible effort to achieve above mentioned tasks under Article 48-A of the Constitution of India, which was inserted by 42nd Constitutional Amendment Act, 1976. Besides this, there is a federal legislation titled as the Wildlife Protection Act, 1972 which specifically provides about the appointment of authorities for the protection of wild fauna, and also vested them with powers for achieving objectives of the Act. In this research paper, author has analyse the impact of growing technology upon the decreasing wildlife in India, which was a hub of enormous species of wild animals including Tiger, Leopard including the Snow Leopard, Elephants, Bear, Birds etc., and the ensuing consequences.

Key words

Wildlife Protection, Science and Technology, Socio-legal Effects and Environment.

I. INTRODUCTION

For centuries, India has been known as a country with abundance of natural resources with ample diverse flora and fauna in its vast geographical areas. Culture and tradition of this great nation are so high that inhabitants regard nature and its facades equivalent to divine powers, thus, worshipping the great forces existing in the form of rivers, lakes, trees, wildlife etc. The concept of environment found place in the Kautilaya's Arthashashtra. In other words Kautiliyan Jurisprudence dealt with the law relating to environmental protection. The .rulers were duty bound to maintain and protect forests and its produce,[1] and almost all kinds of wild animals. Mythological texts are filled with praise and aspect of preservation of flora and fauna, including wildlife, where they get the prominent place equivalent to Gods and Goddesses.

Even, each individual was under a duty to protect the nature. The animals, trees, water, air and land were treated as a divine power as they supervise and control the universe. For a variety of other reasons the trees, animals, air, water and land were worshipped by

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[1] S.C. Tripathi, *Environmental Law*, 4th Ed. CLP Allahabad, (2010), p.15

ancient men.[2] The world history reveals that almost all religious and philosophical writings express concern for protection and adequate use of natural resources and also need for preserving natural wealth for the sake of future generations. Forest and wildlife are natural assets of immense value and have been a vital source of human sustenance. They have been an integral part of human existence since time immemorial because of their role and ecological balance, environmental stability, and conservation of biodiversity, food security and sustainable development have been recognised ubiquitously.[3]

But, with the passing of time men forget his duties toward the nature and start exploiting it without using his wit, which ultimately brought the state of environment at the brink of extinction. Technological developments in the field of human luxury played a vital role, on one hand, in the progress of humans, but, on the other hand in the destruction and imbalance of nature. Technology simplifies the way we do things. The research and development for technological innovations has been growing at a fast pace. It becomes highly imperative in our competitive world to find out the impact of technology on all stakeholders. The sustainable aspect of development in any sector is the need of the hour and technological development also needs thorough impact assessment. In the view of this author, there is a need to balance development with environment as it becomes our responsibility towards the entire ecosystem, the resources of which are being exploited in lieu of technological development.

Although, India has sufficient Legal Framework in the form of Anti-poaching Laws[4] and Constitutional Mandate for wildlife protection and preservation, but so far they failed to be as effective as they were once contemplated to be because of destruction of Habitats of Wild Animals and unabated human population growth.

II. LAWS FOR THE PROTECTION AND PRESERVATION OF WILDLIFE IN INDIA

Legal protection of wild animals, in reality, starts from British Era. There were several important legislation viz. The Madras Elephant Preservation Act, 1873; The Elephant Preservation Act, 1879; Wild Birds Protection Act, 1887; Wild Birds and Animals Protection Act, 1912; Hailey National Park Act, 1936 etc. aimed towards the protection of wild animals like Tiger, Elephant, Birds etc. before Independence. However, in 1972, parliament of India has enacted the Wildlife (Protection) Act, which is applicable in whole of the territory of India, except the Jammu & Kashmir. Besides this, Constitution of India also contains some provisions for wildlife conservation.

The Constitution of India, 1950

To protect and improve the environment, including protection of wild animals, is a

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[2]*Ibid.*

[3]Prakash Chandra Shukla, "The Scheduled Tribes and Other Trditional Forest Dwellers (Recognition of Forest Rights) Act, 2006: A Step to Undo Historic Injustice" in the Book "An Introduction to Environmental Rights", Edited by Dr Rathin Bandopadhyay and Dr Rajendra Dhar Dubey, Central Law Publication, Allahabad, (2010), p. 100.

[4]The Wildlife (Protection) Act, 1972; Biodiversity Act, 2002; and there is also "Wildlife Conservation Strategy, 2002".

constitutional mandate under Article 48-A and Article 51A(g).[5] It is a commitment for a country wedded to the ideas of a welfare State. The Indian Constitution contains specific provisions for environment protection under the chapters of Directive Principles of State Policy and Fundamental Duties. The absence of a specific provision in the Constitution recognizing the fundamental right to clean and wholesome environment has been set off by judicial activism in the recent times.[6]

Initially, the Constitution of India had no direct provision for environmental and wildlife protection. Global consciousness for the protection of environment in the seventies, Stockholm Conference and increasing awareness of the environmental crisis, including hunting and eradication of wildlife, prompted the Indian Parliament to do 42nd Amendment to the Constitution in 1976. The Constitution was amended to introduce direct provisions for protection of environment, forest and wildlife. This 42nd Amendment added Article 48-A to the Directive Principles of State Policy.

The Wildlife (Protection) Act, 1972

The Wildlife (Protection) Act was enacted on 7th September 1972. It provides legal guidelines for the protection, conservation and management of wildlife in India. It covers all matters relating to India's wildlife,[7] including protected areas,[8] activities within protected areas, control of hunting and poaching, trade of wildlife,[9] enforcement and administrative functions of wildlife authorities.[10] The Act authorises the appointment of Directors and other officers, after the establishment of sanctuaries, national parks, as well as zoos.

It also empowers the Directors and other officers of the Ministry of Environment and Forests to be in charge of wildlife in India, and armed them with ample powers in order to ensure the protection of wild animals a from smuggling and poaching.[11] Under the Act, the Ministry of Environment and Forests and state forest departments manage sanctuaries and national parks through regulations that prohibit various activities within them. Regulations for specific national parks and sanctuaries are to be drawn up in consultation with local authorities, which differs from place to place. The Wildlife (Protection) Act, 1972 also provides almost complete or partial protection of wild species, listed under various Schedules.

However, despite of these laws, wildlife in India is rapidly decreasing because of improper implementation and corruption in officials responsible for wildlife protection. But, bigger factor for their destruction is our lifestyle in which science and technology play a greater role.

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[5] The Constitution of India, 1950; Articles 48-A and 51A(g).

[6] *Subhash Kumar v. State of Bihar*, AIR1991SC 420; *Sansarchand v. State of Rajasthan* (2010) 10 SCC 604.

[7] The Wildlife (Protection) Act, 1972; Sections 9-17

[8] *Ibid,* Sections 18-38.

[9] *Ibid*, Prohibition of Trade or Commerce Sections 49 A, 49B, and 49 C.

[10] *Ibid,* Sections 3-8 deal with Authorities in the Act.

[11] *Ibid,* Section 50.

III. GROWTH OF SCIENCE AND TECHNOLOGY: POSITIVE AND NEGATIVE IMPACTS ON WILDLIFE

"Scientific progress and technological development are major forces underlying improvements in productivity and living standards. New technologies offer considerable promise for decoupling economic growth from long-term environmental degradation. But there is no guarantee that innovations will appear when and where they are most needed, or at a price that reflects all environmental and social externalities associated with their deployment"[12]

It is humbly submitted that science and technology is sine qua non for human development and progress and no country can ignore it, otherwise it failed to pace with developed nations. The advancement in technology has been exceptionally fast in the 20th and 21st century. With electronic technology and machines being produced and improved all the time, it was very likely that along with the positive aspects of these new advancements, people would also consider the negative aspects and look to criticise new technology.

Developments in science and technology in the contemporary world are fundamentally altering the way people live, connect, communicate and transact, with profound effects on economic development. Through breakthroughs in health services and education, these technologies have the power to better the lives of poor people in developing countries. Eradicating malaria, a scourge of the African and Asian continents for centuries, is now possible. Cures for other diseases in man and animals, which are endemic in developing countries are also now become possible, allowing people with debilitating conditions to live healthy and productive lives.[13]

Our country has also stride significantly in the direction of science and technological advancement. India ranks third among the most attractive investment destinations for technology transactions in the world. Modern India has had a strong focus on science and technology, realising that it is a key element of economic growth. India is among the topmost countries in the world in the field of scientific research. India is aggressively working towards establishing itself as a leader in industrialisation and technological development. Significant developments in the nuclear energy sector are likely as India looks to expand its nuclear capacity.[14]

This has also been contributing a bit in the arena of wild animal protection in various National Parks and Sanctuaries in India as Wild Life Authorities installed CCTV Cameras in the jungle, by which vigil over the illegal movement and activities in the forest can be made more effectively. Moreover, modern animal tracking system has been a huge success in the preservation of rare species which are at the brink of extinction like one Horne rhinoceros, Ganges river dolphins, Purple frog, birds species such as

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[12] OECD "Technology Policy and The Environment", OECD Publication, Paris, France (2002), p.7.

[13] Lee Roy Chetty, "The Role of Science and Technology in the Developing World in 21st Century", available at: https://ieet.org/index.php/IEET2/more/chetty20121003 (visited on 30/10/2017).

[14] Science and Technology Development in India, available at: https://www.ibef.org/industry/science-and-technology.aspx (visited on 30/10/2017)

Himalayan Quail, Great Indian Bustard and Indian Horn-bill and many small mammals.[15]

On the other hand, however, this sort of development has also contained some cons, particularly its negative impacts upon the environment and this trend is still continuing. First, with the decline of mortality rate, population growth is on surge, particularly in India. Now it is the second largest country of the world after China and the rate of growth still continuous alarmingly. The earth is now overcrowded and consumption habit of the people is on the rise. While India has only 2.4 percent of the total area of the world i.e. 2.5 million square miles, it has 16 percent of the world population. While global population has increased three fold during the last century from 2 billion to 6 billion, the population of India has increased nearly five times from 238 million (23 corers) to 1 billion in the same period. As per the 2001 census, India's population stands at 1027 million and currently it is 1.25 billion, and it is increasing by about 17 million every year which is equivalent to the population of Australia, area wise Two and half times bigger than India.[16] One can easily understand that the pressure of such enormous population growth be ultimately affect the forest cover and deforestation would be inevitable, which in turn affect the wild animals.

Secondly, Unplanned Urbanization is also a sort of result of technological growth, because Industries are established in the vicinity of cities alluring the rural population for employment, thus, encouraging their exodus in the cities which are already overcrowded. From the earlier days we noticed that generally the civilization started near the water courses, and this trend is still going on, but instead of civilization, it is now resulting in growth of slums thus, putting huge pressure on aquatic flora and fauna and wildlife.

Thirdly, rapid industrialization, is another cause of worry as far as health of wildlife is concerned because it contributes tremendously in increase in pollution, which makes the wild environment unsuitable for wild animals. Immediately after the independence, major steps were taken in our country in its stride for development in order to give its economy a big boost. Industrialization was then considered the most important factor that can put the country in the path of progress, and indeed it do so. But to our utter surprise industrialization, which is one of the major facet of scientific and technological growth, along with wayward development brought with it the danger to the human civilization and wild flora and fauna as well, by contributing in surge of environment pollution.

It is to be noted that large number of plants and animal species are beneficial to humans in one way or the other. Many of the medicines such as aspirin, penicillin, quinine, morphine and vincristine have been derived from uncultivated plants, the pollination in which takes place due to humming Birds and Honey Bees. If we talk about the ancient medicinal system of Ayurveda, it has also been using extracts and juices from various plants and herbs to cure problems like blood pressure, diabetes and many other neurological problems since ages.

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[15]Unfortunately, many rare Indian species of wildlife has already vanished till now like Indian Cheetah, Indian Aurochs, Sivatherium, etc.

[16]Sukanta K. Nanda, *Environmental Law, CLP,* Allahabad (2009), p. 10.

It's not only the plants which are useful, many of the extracts from animal species are rich in nutrients and anti-oxidants which we extract from them either by force or killing, however, wild animals have become the object of experiments and observations for human benefits, an another form of cruelty upon them. For instance, the oil from lever of Cod fish is rich in Omega 3 and Omega 6 anti-oxidants that helps fight ageing, chemicals derived from shrimps and lobsters are used in treating fungal infections, venom of Cobra is used as a cure for leprosy and the list does not end here. Today, various species of animals are also being studied and researched upon to find cures to deadly diseases like cancers, Alzheimer's and Parkinson's.[17]

IV. Wild Animals bear the brunt of Development of Science and Technology

Conceding the fact that growth of science and technology in multiple aspects of human life make it more luxurious and comfortable, one must not forget the ill consequences of its rampant, arbitrary and mindless use just for the sake of human convenience. Followings are the major impacts of indiscriminate growth of science and technology upon the wild animals and creatures:

Firstly, with the availability of sophisticated weapons, poaching in the jungles in India, and particularly in the State of Uttarakhand, become much more easier for the poacher, who inclined to finish the carnivorous animals like tigers, leopards, snow leopards etc. It is honestly submitted by this author that as a result of this unchecked poaching, sharp decline in the population of carnivorous animals is noticed, which iis extremely harmful to the ecological balance.

Secondly, as the habitats of these predators are vanishing due to unplanned urbanization and deforestation, and also by poaching, their population has come down alarmingly. On the other hand, sharp increase in the population of herbivorous animals, particularly Indian Antelope (Boselaphus tragocamelus), is noticed, which are notorious to invade the growing crops.

Thirdly, particularly in the State of Uttarakhand, as a result of deforestation and poaching, increase in the unwarranted human interference in the habitat of wild animals, is resulting in frequent clashes between humans and wild animals. Often, wild elephants found venturing in human habitations in the State because of decrease in their habitat areas. Similarly, leopards, which are fortunately found in large numbers, invaded the human populace in search of easy prey. The victims are generally those poor, who are forced to live near the borders of jungles due to poverty or those, who have made their residence in the periphery of jungle. National Green Tribunal of India has also raised its concern against such human activities in the case of Salim Khan v. Union of India[18] that "As the exercise of relocation and rehabilitation of the villagers is going on (in Hoshangabad District of Madhya Pradesh), the families vacated from the core area of the Tiger Reserve have started moving into the newly allotted land and constructing their

[17]Pawan Kotiyal "Reasons Why We Need To Save Wildlife" 7th June, 2016 , available at: https://www.tourmyindia.com/blog/reasons-to-save-wildlife/ (visited on 30/10/2017).

[18]Decided on 4th April 2014 by National Green Tribunal.

houses as well as taking up agricultural activities ".[19]

Fourthly, other Human activities directed toward certain commercial interest also adversely affecting the state of affair of wildlife and working as fuel in the process of deterioration of wild animals. Use of wild animals for commercial and entertainment purposes is another curse. Matter was raised against such cruel behaviour in the Delhi High Court in the case of *People for Ethical Treatment of Animals v. Union Of India & Others*[20] where honourable court has dismissed the petition alleging maltreatment given to wild animals while making a commercial movie, due to the lack of adequate material, none the less also expressed its concern upon the topic.

The Kerala High Court upheld a notification by the Ministry of Environment and Forests stating that bears, monkeys, tigers, panthers and lions shall not be exhibited or trained as performing animals. When the notification was challenged in the Supreme Court, the court declared that animals suffer cruelty as they are abused and caged to make them perform, and therefore, this contravenes the mandate of constitution to treat the wild animals compassionately.[21] It also dismissed the argument that the petitioners' right to carry out any trade or business under article 19(g) of the Indian Constitution was violated as those activities that caused pain and suffering to the aforementioned animals would not be allowed.[22]

In *Sansar Chand v. State of Rajasthan*[23] the Apex Court of India has expressed its concern over unabated hunting of rare wild animals, particularly Tiger in the following words:

"Until recently habitat loss was thought to be the largest threat to the future of tigers, leopards etc. However, it has now been established that illegal trade and commerce in skins and other body parts of tigers, leopards etc. has done even much greater decimation. Poaching of tigers for traditional Chinese medicine industry has been going on in India for several decades. Tigers and leopards are poached for their skins, bones and other constituent parts as these fetch high prices in countries such as China, where they are valued as symbols of power (aphrodisiacs) and ingredients of dubious traditional medicines. This illegal trade is organized and widespread and is in the hands of ruthless sophisticated operators, some of whom have top level patronage. The actual poachers are paid only a pittance, while huge profits are made by the leaders of the organized gangs who have international connection in foreign countries. Poaching of wild life is an organized international illegal activity which generates massive amount of money for the criminals ".[24]

The Honourable Court, while pointing out the importance of preservation of wildlife, further observed that "Preservation of wild life is important for maintaining the ecological balance in the environment and sustaining the ecological chain. It must be

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[19] *Ibid*, at para 8.

[20] W.P(C) No. 23480/2005 Decided on 5th March, 2009.

[21] Constitution of India, 1950; Articles 48-A and 51-A(g).

[22] N.R. Nair And Ors., Etc. v. Union Of India And Ors. Decided on 6 June, 2000.

[23] (2010) 10 SCC 604.

[24] *Ibid,* para 14.

understood that there is inter-linking in nature. To give an example, snakes eat frogs, frogs eat insects and insects eat other insects and vegetation. If we kill all the snakes, the result will be that number of frogs will increase and this will result in the frogs eating more of the insects and when more insects are eaten, then the insects which are the prey of other insects will increase in number to a disproportionate extent, or the vegetation will increase to a disproportionate extent. This will upset the delicate ecological balance in nature. If we kill the frogs the insects will increase and this will require more insecticides. Use of much insecticide may create health problems. To give another example, destruction of dholes (wild dogs) in Bhutan was intended to protect livestock, but this led to greater number of wild boar and to resultant crop devastation causing several cases of abandonment by humans of agricultural fields. Destruction of carnivorous animals will result in increase of herbivorous animals, and this can result in serious loss of agricultural crops and other vegetation ".[25]

Thus, it is submitted that state of wildlife in India, in general, and State of Uttarakhand, in particular, has gravely affected by human activities.

V. SOCIO-LEGAL EFFECTS

Enormous use of science and technology in mindless manner specially the use of machines is affecting the state of wildlife in adverse manner, both directly and indirectly. Following are the resulting socio-legal effects impacting both humans as well as wild animals and also creating the legal implications:

Forced Violation of law due to Wild Animals Intrusion

As a result of enormous pollution and decreasing animals habitats due to the deforestation, it is noticed that these animals often after crossing the jungle roam in the areas where people live, thereby, posing a serious threat to life and security of property of the folk. Thus, in order to protect their life and property the local people, in a manner induce to take records of such measures and devices which are meant either to kill these animals or causing serious harms to the body and health of such animals. For example, when elephants start trodding the farm land and cause damage to the crops standing in such farm land, it is obvious, that villagers encase of receiving no help from the concerned wildlife authorities, inclined to kill these elephant either by use of guns, poisons or fire. Same is the case with Indian antelope, wild boars, monkeys etc.

In other cases concerned to carnivorous predators like tigers and leopards when they start venturing in human dwelling areas in search of domestic animals and in some cases of also of human being, as easy food, the administration and local folk left with no option but to kill them in order to save the life and property of the people.

This is invariably results in the violation of legal provisions by such people because they have to kill the wild beast and herbivores by violating the provisions of wildlife (Protection) Act 1972 and mandate of constitution of India for ensuring their survival.

Loss of Life, Property and Crops

Another consequence of attraction of wild animals towards the human populated areas due to the abovementioned reasons often cross the loss of human lives, properties

[25] *Ibid,* para 11.

movable and immovable and standing crops, hence, creating the huge financial crisis upon a common man along with the agony. This also violates one of the social security of peaceful life, to which every person is entitled to lead due to the inherent human dignity in him.

Smuggling

Abundant killing of wild animals by some greedy and anti social persons has economic reason, because they can make money by supplying the skin, bones, furs, feathers, ivory, tusk etc. to foreign countries by way of smuggling where these items are in high demand.

Damage to Ecology and Ecological Balance

Killing of wild animals either because use of poisonous pesticides and insecticide, modern agricultural practices, and resulting amount of pollution in the environment due to deteriorating water, air and soil quality...is causing irreparable damage to ecosystem. It is in a way disturbing the food web and food chain mechanism found in nature, once the ecological cycle gets disturbed, it become very difficult to bring back it ion track. This in turn generates more diseases, global warming, and erosion of natural resources vital for human consumption.

Deprivation the Natural Inherent Right to Wholesome Environment

In India, the honourable Apex Court has held in Subhash Kumar v. State of Bihar[26] that every person has right to enjoy the Wholesome Environment, which includes wild flora and fauna, besides pure air and water. Therefore, it may be submitted that elimination of wildlife, in a way, also depriving this aesthetic right of man to observe and enjoying the wild creatures.

VI. CONCLUSION

It is humbly submitted that wildlife, both carnivores and herbivores including micro organisms, is a precious gift of nature to this planet. The term 'wildlife' not only caters to wild animals but also takes into account all undomesticated life forms including birds, insects, plants, fungi and even microscopic organisms. For maintaining a healthy ecological balance on this earth, animals, plants and marine species are as important as humans. Each organism on this earth has a unique place in food chain that helps contribute to the ecosystem in its own special way.

With growing needs and aspirations, we tend to ignore the basic need to survive, which is supported by the environment we live in. Impact of technology on environment can be stated with day to day examples such as increasing pollution levels, reducing green cover, and global warming, and causing changes in weather patterns. We need a sustainable approach towards inclusive development.

But, sadly today, many of the animals and birds are getting endangered. The natural habitats of animals and plants are being destroyed for land development for urban purposes like human dwellings and establishing the industries and farming by humans. Poaching and hunting of animals for fur, jewellery, meat and leather are other great factors contributing to wildlife extinction. If soon, no stringent steps are taken to save

[26] AIR 1991 SC 420.

wildlife, it would not be long when they will find a place only on the list of extinct species. The extinction of wildlife species will certainly have a fatal impact on human race as well. So, for us as humans, it becomes a great responsibility to save the wildlife, our planet and most importantly, our own selves. Here are few more reasons that will provide you an in-depth understanding why wildlife plays such a significant role in maintaining an ecological equilibrium on earth.

It is further submitted that the eco-system of a region is all about relationships between different organisms connected through food webs and food chains. Even if a single wildlife species gets extinct from the eco-system, which has now become a regular phenomenon, it may disturb the whole food chain ultimately leading to disastrous results upon the planet and greatest victims shall non else but we humans. Consider a simple example of a bee that is vital for growth of certain crops due to their pollen carrying roles. If bees get reduced in numbers, the growth of food crops would definitely lower owing to lack of pollination.

Similarly, if a specie i.e. antelopes, deers etc. gets increased in number, again it can have an adverse effect on the ecological balance. Consider another simple case of carnivores which is getting reduced every day due to human poaching and hunting. The reduction of these carnivores is leading to increase in the number of herbivores who are dependent on forest vegetation for their survival. It would not be long, when the number of herbivores in forests would soar to such a great extent that they would move to agricultural lands and villages for their food needs. Thus, saving wildlife plays a great role in ensuring a check on the ecological balance thereby, maintaining a healthy eco-system.

Thus, author wish to submit that existence of wildlife is absolutely necessary for survival of human beings on this earth. For minimising the negative impacts of indiscriminate growing science and technology upon wild animal, here are some suggestions underneath, which may be beneficial in maintaining the balance between growth of Science and Technology and preservation and conservation of wildlife:

First of all, there is immediate need to discard those policies and programs, which are, though on one hand, for the benefit of mankind, but, on the other hand, very harmful to the wild species threatening their very existence. Of course, we have to compromise a bit with our comfort, but, ultimately, extremely useful for human existence.

Second, both at national and international level, we must adopt and emphasise on the well established principle of Sustainable Development, so that wild animals can survive.

Third, adoption of Effective and operational Wildlife policy directing towards the preservation of wild animals on priority basis, is the need of time.

Fourth, science and technology must be environment friendly, therefore, it is humbly submitted that our scientist should focus upon those inventions and innovations in the field of science and technology, which do not harm the environment including the wildlife.

Fifth, government must at all levels require to take steps on urgent basis to stop unplanned growth of cities and unplanned urbanization, particularly upon the forest land.

Sixth, though we have Wildlife (Protection) Act, 1972 for preserving the wild animals from poaching and hunting, nonetheless, there is need of another effective and practical

legislation in this field. Otherwise, steps must be taken by concerned authorities to ensure the accountability of those, whom are entrusted with the powers and duties to protect the wildlife.

Last but not the least, effective judicial support is most vital in environment justice, in general, and wild animals protection, in particular. It is further submitted that, though, Indian Judiciary, including the Supreme Court and High Court of Uttarakhand, are very vigilant and active to protect and preserve the cause of environment including wildlife, but just contrary is the approach of executive authorities and bodies including central government, State Government, Wildlife Wardens appointed under the Wildlife (Protection) Act, 1972 and other concerned authorities. To sum up, it has been suggested that this approach cannot prevent destruction of wild animals, thus, judiciary must come forward and issue guidelines and directions to these executive bodies binding them to play their role more effectively in the protection of wildlife.

A LEGAL DISCOURSE BETWEEN FAIR TRIAL AND MEDIA TRIAL: INDIAN PERSPECTIVE

Rama Sharma* &
Sushim Shukla**

Abstract

In present scenario number of instances have witnessed in which media has conducted the trial of an accused and has passed the verdict even before the court passes its judgement. Often the targets of media to portray them as they have really committed the offence and sometimes victimize the innocent person led to violation of their right of fair trial. It is so because the gap between an accused and a convict is minimized by portraying the image of accused as a real offender which has to be decided by the courts on the basis of the evidences. In addition, it builds up a public opinion against the accused based on the image portrayed in media and later if the judgement grants acquittal to accused person it puts a question mark on the fair justice delivery system. However, in this connection, the 200th Law Commission report has suggested the prohibition of anything that is prejudicial towards the accused or suspect and this restriction should operate from the time of arrest. The paper makes an attempt to draw the attention towards the media practices infringing the human rights of the accused as the criminal jurisprudence is based on thinking that a person is innocent in the eyes of law until proven guilty.

Key words

Media Trial, Fair Trial, Rights of Accused, Pre-Trial Publicity, and Presumption of Innocence.

I. INTRODUCTION

Trial is a word which is associated with the process of justice. It is important for media to recognise the fact that apart from the truth behind a case, both parties to litigation have a constitutional right to have a fair trial in court of law including free, fair, and uninfluenced by any pressure, fear or favour. This right of fair trial may be defeated if media while reporting a matter uses such a language which may have an effect to influence the mind of judges and control the judicial process. Therefore it is responsibility of media to take due care while reporting court proceedings. There must be an obligation to ensure fair and accurate reporting throughout the course of a legal proceeding, whether at the stage of investigation, during arguments in courtrooms and eventually when the judgement is delivered. This is a concern since it is very common place to come across reports in the media where statements made by investigations or even the courtroom proceedings inter se the judges and lawyers are either erroneously

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cited or quoted without an explanation of the context in which they were cited, acting as a misnomer.

In some specific cases, there is a compelling need to protect the identity and privacy of parties. Commonly, judicial proceedings should be open to public scrutiny, but there is a need to restrain the same in some exceptional circumstances. Therefore, law in extreme cases provides for in camera proceedings. For instance, the identity of victims of sexual offences should not be disclosed.[1] Our procedural laws empower judges to order in camera proceedings in family related disputes and rape trials, to protect the victims and witnesses from undue pressure and unwanted media attention. The Madrid Principles on The Relationship between the Media and the Judicial Independence (1994) expressly allow for the preservation by law of secrecy during investigations of crimes even when such investigations form a part of the judicial process.[2] The preference for the secrecy in such circumstances must be regarded as mainly for the benefit of persons who are suspected and to preserve the 'presumption of innocence'.[3]

The Supreme Court recognised the problem many years ago and observed in *Saibal Kumar v. B.K. Sen:*[4]

"No doubt it would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of investigation. This is because trial by newspapers, when a trial by one of regular tribunals of the country is going on, must be prevented. The basis for this view is that such action on the part of a newspaper tends to interfere with the course of justice, whether the investigation tends to prejudice the accused or the prosecution."

II. PRE-TRIAL PUBLICITY

In a democratic society people enjoy the right to know. Therefore, the media has a corresponding duty to inform the people about the criminals and the crime. It thus,

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[1] *R. Rajagopal & Ans. v. State of Tamil Naidu*, (1994) 6 SCC632.

[2] Law Commission of India 200th Report on "Trial by media free speech and fair trial" under Criminal Procedure Code, 1973, (August, 2006)..

[3] In respect of the interface between media freedom and criminal law, one of the Siracusa principles (1984) stipulates:

All trials shall be public unless the Court determines in accordance with law that:

(a) the press or the public should be excluded from all or part of a trial on the basis of specific findings announced in open Court showing that the interest of private lives of the parties or their families or of juveniles so requires; or

(b) the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial or endangering public morals, public order or national security in a democratic society.

[4] (1961) 3 SCR 460.

demands the right to carry on pre-trial publicity.[5] Yet, on the other hand, the judiciary is keenly aware of the fundamental rights of the accused to a fair trial and of due process of law. Since pre-trial publicity can derail a fair and a speedy trial, the judiciary has to balance the competing fundamental rights. While the freedom of speech and expression of the media, the right to know of the people need to be protected and promoted, the right to fair trial of the accused needs to be secured and guaranteed. Pre-trial publicity is injurious to the health of a fair trial. Even before the accused is arrested and tried, the cacophony of media proclaims the accused to be guilty. It may project irrelevant and inadmissible evidence as the gospel truth, thereby convincing the people about the guilt of the accused. Thus, it undermines the fundamental principle of common law that every man is presumed to be innocent till proven guilty. Once the accused is portrayed as a despicably depraved character, at times, the Bar may refuse to defend him. It, therefore robs the accused of his fundamental right to defend himself. Such publicity also convinces the witnesses to custom-tailor their testimony to the prosecution case. Most importantly, the appreciation of the evidence by the public and the judiciary may differ. While the people are convinced of the guilt of the accused, the court, after meticulous examination of the evidence may acquit him. Such differences in perception weaken the

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[5]First Amendment case law has encouraged a vigorous press in American public life. However, under the 6th Amendment, a fair trial in a criminal court requires that the judge and jury make their judgment solely on the basis of the evidence introduced in the courtroom. When vast publicity threatens the conduct of a fair trial, a fundamental conflict occurs between two constitutional rights i.e. a fair trials and a free press. Traditionally, the Supreme Court had been reluctant to attempt any control of pre-trial publicity. But *Irvin v. Dowd* (1961), *Rideau v. Louisiana* (1963), and *Sheppard v. Maxwell* (1966), where the Court reversed criminal convictions because of prejudicial publicity which contributed to a heightened judicial awareness of the potential dangers of pervasive publicity. This awareness in turn led many trial courts to impose certain controls on the press's reporting of criminal proceedings. The issuance of "gag orders" restricting the press from reporting certain facts regarding trials constituted one such control. In the wake of Sheppard, despite the Courts holding that press coverage serves a vital role as it "guards against the miscarriage of justice," some trial courts faced with criminal trials attracting much publicity resorted to gag orders against the press. Bid the mid?1970s, gag orders threatened the hard?won freedoms previously secured by the press. In *Nebraska Press Association v. Stuart* (1976), the Court invalidated a gag order on the grounds that it was an unconstitutional prior restraint on the press. The Court held that such a prior restraint could be sustained only if the prohibited publicity constituted a clear and present danger to the defendant's right to a fair trial. As a result of that decision, gag orders on the press must now be regarded as presumptively unconstitutional.

In *Oklahoma Publishing Co. v. District Court of Oklahoma County* (1977), the Court struck down a gag order restricting the press from publishing the name or picture of a juvenile involved in a delinquency proceeding. In *Landmark Communication v. Virginia* (1978), the Court struck down a state statute preventing the press from covering activities of the state Judicial Review Commission. In *Smith v. Daily Mail* (1979), the Court struck a similar law preventing the press from publishing the name of a minor charged in juvenile court. Despite the Nebraska Press ban, some judges try to do indirectly what they cannot do directly and have attempted to control prejudicial publicity by curtailing the flow of information to the press. One means of controlling the media is closure of trial proceedings to the public and press. However, in *Richmond Newspapers, Inc v. Virginia* (1980), the Court greatly narrowed a judge's ability to close trials and held that the paramount right of the public and press to attend criminal trials was guaranteed by the First and 14th Amendments. *Globe Newspaper Co. v. Superior Court* (1982), *Press-Enterprise Co. v. Riverside Superior Court I* (1984), and Press-Enterprise II (1986) made it clear that open trials were the rule, and excluding the public and press from even a portion of a trial was the rare exception. Another means of curtailment is the restriction of information divulged by trial participants to the press. In *Gentile v. State Bar of Nevada* (1991), although finding the state's guidelines too vague, the Court held that some restrictions on lawyers' speech, if carefully drawn, may be constitutional.

faith of the public in the criminal justice system. Ultimately, pre-trial publicity undermines the criminal justice system and overturns the rule of law. However, in a democracy, the right of free press and right of fair trial must peacefully co-exist. The United States of America, England and India are the torchbearers of democracy. We are progenies of the common law. We, thus, share a common political ideology, a common legal heritage. Our Constitutions, whether written or unwritten, proclaim, protect and promote the same set of fundamental rights: both the First Amendment of the American Constitution[6] and Article 19(1) (a) of the Indian Constitution guarantee the freedom of speech and expression. The Fifth Amendment of the American Constitution protects the right to life, liberty and property. Article 21 of our Constitution, likewise, protects life and personal liberty. While the former speaks of due process of law, the latter requires procedure established by law. Similarly, the Sixth Amendment of the American Constitution ensures the right to a speedy and public trial, by an impartial jury. Although we do not have trial by jury, but Article 21 of our Constitution also ensures the same right of fair trial.[7] Though England has an unwritten Constitution, but it, too, subscribes to the identical inalienable rights. Therefore, the three countries share a common denominator of this perpetual confrontation between the freedoms of speech versus fair trial.

III. IMPACT OF HIGH PUBLICITY TRIALS ON JUDICIAL SYSTEM

The system in which we live is full of rampant corruption everywhere. Media activities to expose corruption are welcome. Media is taking a proactive step to weed out the evils that have crept in our system. Media is creating pressure on the system in order to

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[6]The First Amendment to the U.S. Constitution prohibits the making of any law respecting an establishment of religion, impeding the free exercise of religion, abridging the freedom of speech, infringing on the freedom of press. It was adopted on December 15, 1791, as one of the ten amendments that constitute the Bill of Rights.

The Bill of Rights was originally proposed as a measure to assuage Anti- Federalist opposition to Constitutional ratification. Initially, the First Amendment applied only to laws enacted by the Congress, and many of its provisions were interpreted more narrowly than they are today. Beginning with *Gitlow v. New York* (1925), the Supreme Court applied the First Amendment to states, a process known as incorporations through the Due Process Clause of the 14th Amendment. In *Everson v. Board of Education* (1947), the Court drew on Founding Father Thomas Jefferson's correspondence to call for "a wall of separation between church and State", though the precise boundary of this separation remains in dispute. Speech rights were expanded significantly in a series of 20th and 21st-century court decisions which protected various forms of political speech, anonymous speech, campaign financing, pornography, and school speech; these rulings also defined a series of exceptions to First Amendment exceptions to the protections.

The Supreme Court overturned English Common Law precedent to increase the burden of proof for Defamation and liable suits, most notably in *New York Times v. Sullivan* (1964). Commercial speech, however, is less protected by the First Amendment than political speech, and is therefore subject to greater regulation.

The Free Press Clause protects publication of information and opinions, and applies to a wide variety of media. In *Near v. Minnesota* (1931) and *New York Times v. United States* (1971), the Supreme Court ruled that the First Amendment protected against prior restraint, pre-publication censorship in almost all cases. The Petition Clause protects the right to petition all branches and agencies of government for action. In addition to the right of assembly guaranteed by this clause, the Court has also ruled that the amendment implicitly protects freedom of association.

[7]There are various aspects of right of fair trial. These include the adversarial trial system, the presumption of innocence, independent judges, and the knowledge of the accusation, trial and evidence in the presence of the accused, adequate legal representation to respond the charges. The right to a fair trial has been interpreted to be one of the implicit rights contained within the Right to Life under Article 21 of the Constitution of India.

convert the system into more accountable and responsible one. It is keeping vigilance over our society, ensuring that the truth is out there in the open and making sure that the voice of the common man and the under privileged ensuring that the truth is out there in the open and making sure that the voice of the common man and the under privileged section is heard. If media scrutiny is forcing the system to be responsive to the common man then there should be no complaints.

However, as every coin has two sides, there is another side of this role of media also. In every attribute of a democratic society it is one that cannot but make us a little more than worried. Now it has become the tendency of news channels and print media to drift towards sensationalism, even towards a distortion of facts of the case. As an example look at Arushi murder case. In present some television channels put out reconstructions of the murders, which were not based on any solid evidence. That is the whole point. True, they had the word reconstruction in small print in one corner of the screen but that does not minimise the fact that as a news media they did not stick to the facts of the matter as was established. That is not however, the only filling of which some media units have been guilty, encouraged there are more widespread attempts to sensationalise a case. Media was following the case since Aarushi and Hemraj were found murdered. Media has provided the case too high publicity by giving every minute detail pertaining to every little breakthrough in the case. During the arrest of Dr. Talwar on 23 May, 2008, media had started to publish the stories of him being guilty. Whenever, the two families one of Talwars and another of the Durranis ventured out, groups of reporters continued to harass them. Gradually the case has become a matter of trial by media.

IV. TRIAL BY MEDIA AND ITS IMPACT

Now the days, practices are nurturing in media to act as a public court as media conducts the *independent investigations*[8] and publish the result of investigation which instigate people to develop a public opinion against the accused even before the verdict of the courts in sub-judice matters. It gives rise to unnecessary controversies and apparently has an effect of interfering in administration of justice. Display of Photographs of the suspect or accused in media creates problems during identification parade conducted under the Indian Evidence Act.[9] Consequently the accused that should be assumed innocent is presumed as a criminal characterising him as a person who had indeed committed the crime. It defeats the '*presumption of innocence*' which is the base of Criminal Jurisprudence.[10] This media practice in the name of trial by media overlooks the differences between the accused and a convict. Hon'ble Supreme Court

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[8] *Saibal Kumar v. B.K. Sen* (1961) 3 SCR 460.

[9] Section 9, 1872.

[10] The presumption of innocence, sometimes referred to by the Latin expression *Ei incumbit probatio qui dicit, non qui negat* (the burden of proof is on he who declares, not on he who denies), is the principle that one is considered innocent until proven guilty. In many nations, presumption of innocence is a legal right of the accused in acriminal trial. The burden of proof is thus on the prosecution, which has to collect and present enough compelling evidence to convince the fact, who is restrained and ordered by law to consider only actual evidence and testimony that is legally admissible, and in most cases lawfully obtained, that the accused is guilty beyond reasonable doubt. If reasonable doubt remains, the accused is to be acquitted.

has already cautioned all modes of media to extend their cooperation to ensure fair investigation, trial, and defence of the accused and non-interference with the administration of justice in matters sub-judice.

V. PRESUMPTION OF INNOCENCE

The presumption of innocence is the cornerstone of criminal justice administration and is recognised in all human rights instruments. In an excessively strict interpretation the presumption of innocence would only come into play during the actual trial. The presumption of innocence has implications for the overall treatment of the suspect or accused by the organs of criminal courts, detention personnel, and the media. For example, in their external communications towards the media, criminal courts have to take care that the suspect or accused is considered to be innocent until proven guilty in a fair trial. Furthermore, the refusal of a guilty plea cannot affect the presumption of innocence and consequently a plea of not guilty on behalf of the accused has to be entered. In addition, the presumption of innocence implies the right to remain silent.[11]

As a legal right of the accused in a criminal trial presumption of innocence, is recognized by the criminal jurisprudence of almost all the nations. The burden of proof is on the prosecution to prove the guilt of the accused beyond a reasonable doubt, and let the judge make the final determination. In other words, the burden is on the person who asserts, not the person who denies. The state must prove that: the crime was committed, and the defendant was the one who committed the crime.

According to ICCPR[12] everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. India is also a signatory to ICCPR. Media reporting in present scenario has witnessed the sensationalisation of self-manifested stories, half-baked truth resulting in the violation of right of individuals. Trial by media is a medium to treat an accused or suspect as a seasoned criminal or Television News items to boost the TRPs, keeping at stake the reputation of the accused. The media provides excessive publicity to the accused or suspect which provokes atmosphere of public hysteria resulting into the impossibility of free and fair trial. It also injures the reputations of the accused to such degraded level as even if they are acquitted by the court on the grounds of proof beyond reasonable doubt, they cannot rebuild their lost image in society.

In addition apart from suspects or accused even victim and witnesses suffer from excessive publicity as it invade their privacy rights. Disclosure of the identity of witnesses in the media leads towards the constant change in the statements of witnesses. There are various reasons responsible for it like pressure of opposite parties and police.

The perusal of above aspects of trial by media indicates the interference with the administration of justice tends to lower the authority of courts[13] and finally hampering the functioning of democracy because an independent judiciary is necessary to dispense justice free from fear or favour and achieving strength with maintaining the faith among public at large.

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[11]Article 19(1) (a).

[12]International Covenant on Civil and Political Rights, 1966.

[13]Contempt of Courts Act, 1971(Act 45 of 1976).

The grey area of the trial by media is the allegations prejudicing the judges presiding over a particular case. In *State of Maharastra v. Rajendra Jawanmal Gandhi*[14] the Court cautioned the judges to guard themselves against the pressure generated by means of a trial by press by way of public agitation. This was held to be very anti- thesis of rule of law and leading towards the miscarriage of justice. Cardozo one of the great Judges of the American Supreme Court observed that judges are subconsciously influenced by several forces.[15] Hon'ble Supreme Court of India has expressed the similar views in *Reliance Petro Chemicals Ltd. v. Proprietor Indian Express.*[16] Chairman of M.P. Human Rights Commission Hon'ble Justice D.M. Dharmadhikari has also asserted that there is always a chance that Judges get influenced by the flowing air of remarks made upon a particular controversy. Media represents the case in such a manner to the public that if a judge passes an order against the media verdict, he or she is deemed either as corrupt or biased. The same facts were recognised by Lord Dilhorne in *Attorney General v. BBC*[17] that Judges and Jurors could not claim to be super human and may be influenced subconsciously.

The Constitution of India under Article 22 provides every person who is accused of any offence the right to get himself represented by a lawyer of his choice to put up his points in favour of his innocence before the adjudicating court and no one has the right to debar him from doing so.[18] However apart from these constitutional guarantees media is indulge in creating pressure on the lawyers even not to take up the cases of the accused. The media assumption of guilt clearly encroaches upon the right to legal representation which is a critical component of fair trial. It may also intimidate lawyers into refusing to represent the accused persons. As we have seen when Mr. Ram Jethmalani one of the

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[14](1997) 8 SCC 386.

[15]Cardozo, "Lecture IV, Adherence to Precedent: The subconscious element in Judicial Process" Nature of Judicial Process, (Yale University Press, 1921).

[16](1988) 4 SCC 592.

[17]1981 AC 303 (HL).

[18]Rights of the Accused under Article 22:

1. No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
2. Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

1. Nothing in clauses (1) and (2) shall apply -

i. to any person who for the time being is an enemy alien; or

ii. to any person who is arrested or detained under any law providing for preventive detention.

2. No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless -

i. an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention: Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause of clause (7); or

ii. such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

3. When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the

best lawyers of the country decided to defend Manu Sharma accused of a murder case.[19] Television News Channels called the decision an attempt to defend indefensible. When Mr. Jethmalani took the case media posed him as a villain and the same was happened in the case of terrorist Amir Ajmal Kasab apart from a terrorist he was also a human being and had same right of fair trial and legal right to represent him in a court of law as per the provisions of Article 22 of the Indian Constitution. In addition Article 21 of the Indian Constitution also restricts the deprivation of personal life and liberty of a person except the procedure established by law. UN Declaration of Human Rights[20] also talks about the right of fair trial for the accused.

VI. JURIST'S OVERVIEW ON TRIAL BY MEDIA

Former Chief Justice ofIndia K.G. Balakrishnan said that the tendency of newspapers and news channels to carry unverified reports posed a danger to a free and fair constitutional judicial process. The manner, in which "the modern media and telecommunications" intruded into a person's life and caused embarrassing and damaging publicity, if left unchecked, would become "alarming." The media trial, conveying public opinion in favour of one side or the other, particularly in criminal matters, had become increasingly frequent in recent times. Even before the court trial began, the accused was being shown as guilty. This questioned the very premise on which the judicial system was based .The right of every party involved in a court proceeding to have his case adjudicated in a free, fair and unbiased manner.[21] Gujarat High Court Chief Justice K.S. Radhakrishnan said giving reference to Arushi murder case that 'Trial by media sometimes does not give the accused a fair trial'.[22]

Addressing a programme organized by Jain Seva Samiti and Shantaram Potdukhe College of Law Eminent lawyer Mr. Ram Jethmalani came down heavily on the role of media saying the fourth estate should immediately stop indulging in 'trial-by-media' acts. "Of late media acts as a court and passes judgment even before the court pronounces its verdict. This has to be stopped."Trial by media is nothing but breach of law. This media activity amounts to contempt of court.[23] Freedom of press is not absolute and it can be restricted, Soli J. Sorabjee said that there is a need to regulate the media in

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grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

4. Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.
5. Parliament may by law prescribe -

i. the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);
ii. the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
iii. the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

[19] *Manu Sharma v. State* (*NTC of Delhi*), (2010) 6 SCC 1.

[20] Article 10.

[21] The Hindu 'Media trial challenges judiciary', Sunday, Aug 10, 2008.

[22] PTI, New Delhi, May 16, 2012.

[23] *Id.*, Feb. 20, 2010.

country. Speaking at a panel discussion on Self-Regulation of the Media organised by Indian Women Press Corps (IWPC), he said the media has to be regulated and there cannot be a media trial of everything."It has been seen that when a certain case is in court, media starts a parallel trial, which is not good. Yes, the media has done a lot good in certain cases like Jessica Lal murder case but there can't be a media trial to everything. Let the court first decide on a matter, then the media can criticise. However, he said court can't frame guidelines as it is the job of the legislature.[24]

VII. MEDIA TRIAL AND LAW COMMISSION RESPONSE

The 17th Law Commission of India was setup under the chairmanship of Hon'ble Justice Mr. M. Jagandha Rao. The Commission has drafted 200th report on the various issues related with media reporting. It is the most reckoning research of Law Commission on the subject of trial by media issues which deals with the positive and negative shades of media trials.[25] The recommendations of the commission addressed the prejudicing impact of sensationalized news reports on the administration of justice. The report has suggested the prohibition of anything that is prejudicial towards the accused or suspect and this restriction should operate from the time of arrest. The law commission with the perception to stop the media from prejudging or prejudicing the case recommended that the starting point of a criminal case should be from the time of arrest of an accused rather than from the time of filing of charge sheet. A controversial recommendation of law commission is that the High Courts should be empowered to issue directions to print and electronic media to postpone such publications or telecasts pertaining to criminal cases or to postpone the publications in order to avoid the abuse of right of fair trial by way of excessive publicity. The commission has also recommended the central government to enact a law to abstain the media from publishing prejudicial materials against the rights the accused in criminal cases. The law commission has also suggested certain amendments in Contempt of Court Act to protect the administration of justice from excessive use of freedom of speech.

A committee was appointed in the Chairmanship of Justice Brian Leveson[26] to inquire the culture, practice and ethics for press including the relationship of media with politicians and police. The report has criticized the media for sensationalisation and recklessness. The report had submitted its recommendations to constitute a strong and independent regulator. India has borrowed several democratic setups based on the concept of UK. The report also focuses on the relationship between media and people in power. According to this report political parties in UK agreed to adopt and setup a mechanism under the royal charter. In India we have also seen that after the commission of an incident media outlets start blaming certain outfits dependent upon information based on certain source, this sets out an idea for investigation. It is a well-known fact that the cases of the innocent people are acquitted after years in prison. The committee

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[24]*Id.*, May 10, 2012.

[25]Law Commission of India 200th Report on 'Trial by media free speech and fair trial' under Criminal Procedure Code, 1973, (August, 2006).

[26]Leveson report on an Inquiry In to the Culture, Practices and Ethics of the Press: Executive Summary and Recommendations(2012).

in his report discussed the "interplay of different forces in the public domain, especially between the media and law-enforcement agencies".

VII. CONCLUSION

A trial primarily aimed at ascertaining truth has to be fair to all concerned which includes accused, victims and the society at large. Each person has a right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as it is to the victim and society.[27] Blackstone's formulation named after English jurist William Blackstone that there is hardly anything more undesirable in a legal system than the wrongful conviction of an innocent person. This is because the consequences of convicting an innocent person are so significantly serious that its reverberations are felt throughout a civilised society. This media practice in the name of trial by media overlooks the differences between the accused and a convict. The Supreme Court has already cautioned all modes of media to extend their cooperation to ensure fair investigation, trial, and defence of the accused and non-interference with the administration of justice in matters sub-judice.

[27]Maja daruwala (ed.), Fair *Trial Manual: a Handbook for Judges and Magistrates,* (commonwealth human rights initiative and the international human rights clinic, cornell law school ISBN: 81-88205-91-5, 2010).

• POLICY FRAMEWORK FOR CLIMATE CHANGE IN INDIA: TRIUMPH OR FIASCO

Sukhwinder Singh* &
Nakul Sharma**

Abstract

Global climate change has already had observable effects on our environment. Temperature is rising, glaciers are melting, seasons are shifting, and sea level is rising. India has emerged as a global player in number of fields. In a country like India climate change is directly posing a threat to the pace of development. So far as India's position with regard to combating climate change is concerned, India has been showing its commitment through number of policies backed by financial soundness. Broadly these policies are directly related to action plans relating to various aspects viz. agriculture, energy, eco-system, forest, fuel contributing as a major factor affecting our climate. Whether Indian policy framework addressing all the issues has given a fruitful result or still there is a amending scope to improve its outcome. It is high time to ponder upon our policies before it's too late. This research paper is a bonafide attempt to analyse various policies dealing with the issue of climate control, their impact, outcome and scope of amendment.

Key words

Climate Change, Action Plan, Solar Mission, Renewable Energy and Forest.

I. INTRODUCTION

India has grabbed the attention of world by showing consistent growth in its economy. India is leading on the path of development while maintaining the democratic structure. The development is observed in infrastructure, agricultural sector and industrial sector. It is to note that all these forgoing sectors represent majority of carbon emissions. Being the 7th largest country in world in terms of land and number 2nd in terms of population, the demand for energy in these sectors will grow and emissions are bound to be there. India has taken positive steps by adopting the climate change related policies for promoting clean energy and energy efficiency. It is to be noted that India's carbon emissions have been rising sharply since last three decades and increased demand for energy will also accelerate the emissions. India holds the prerogative of being in the couple of nations of the planet to accommodate the security and development of

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environment by protecting the forests and wild life of the country through constitution.[1]

While addressing climate change issue, India has shown its commitment by taking various measures that fulfills the objectives of the UNFCCC.[2] India has adopted several policies and measures that are relevant to climate change which manifests the voluntary commitment made by India towards the international community.

Almost 700 million rural population of India directly count upon the climate sensitive segments like agriculture, forests, fisheries and natural resources for their survival and livelihood.[3] It is worthy to note that developing countries are emitting around 2/3 share of global carbon[4] and India is leading country among developing countries, making it major player to initiate climate change policies and relevant framework.[5]

II. NATIONAL ACTION PLAN FOR CLIMATE CHANGE

The NAPCC is an ambitious initiative by India. India has given a push to sustainability approach by adopting the NAPCC. Although, India is under no obligation to reduce its per capita emission as it is far below the world average level. The NAPCC is divided into 8 sub-missions for maintaining the overall growth to key sector in a sustainable manner.[6]

National Mission for Sustainable Agriculture

Currently, the risk of climate change represents a test for sustainable agriculture expansion[7] for guaranteeing food security, equitable access to nourishment resources, improving sustenance options and providing fiscal stability at the national level.[8]

The issues to be looked under this Mission are dry land agriculture, access to qualified data, bio-technology and risk management.[9] It provides for: to devise key plans at the Agro Climatic Zone level so that full proof mechanisms are placed to territorial scales for Research and Development, Technology and Practices, Infrastructure and Capacity Building, and to improve agri-produce through planned methods, for example utilization of bio-technology to improve range of crops and livestock, advertising effective irrigation

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[1] The Constitution of India, Art. 48A-Protection and improvement of environment and safeguarding of forests and wild life. "State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country". (Inserted by the Constitution 42nd Amendment Act, 1976, sec. 10) (w.e.f. 3-1-1977). Art. 21, 51-A also guarantees the environment.

[2] India signed the UNFCCC on 10 June 1992 and ratified it on 1 November 1993. India acceded to the Kyoto Protocol on 26 August 2002.

[3] Jayant Sathaye, et. al., *Climate Change, Sustainable Development and India: Global and National Concerns,* 90 Current Science, No. 3, 314, 318 (February 10,2006)

[4] Center for global development "Developing Countries Are Responsible for 63 Percent of Current Carbon Emissions" 8/18/15, Available at https://www.cgdev.org/media/developing-countries-are-responsible-63-percent-current-carbon-emissions (Last accessed on 18-02-2017)

[5] *Id. at* 4

[6] Prime Minister's Council on Climate Change , Government of India " National Action Plan on Climate Change", available at: http://www.moef.nic.in/downloads/home/Pg01-52.pdf (Last accessed on 18-02-2017)

[7] National Mission For Sustainable Agriculture- Strategies for Meeting the Challenges of Climate Change, 15, Department Of Agriculture And Cooperation Ministry Of Agriculture New Delhi (August 2010), at 2.

[8] *Id* at II.

[9] National Action Plan on Climate Change, Prime Minister's Council on Climate Change,(2008), at 35.

frameworks, exhibition of proper technology, capacity building and skill advancement.[10]

NMSA also included Rashtriya Krishi Vikas Yojana (RKVY),[11] National Horticulture Mission (NHM),[12] National Food Security Mission (NFSM) and National Agricultural Insurance Scheme (NIAS).[13] In addition to above issues, one of the important aspects is to focus on "on-farm and off-farm" agricultural technologies to combat with climatic catastrophe.[14]

National Mission for Enhanced Energy Efficiency[15]

The Mission includes several new initiatives. Perform Achieve and Trade (PAT) is to enhance the cost effectiveness in improving the energy efficiency of energy Intensive industries through certification of energy saving which can be traded".[16]

It incorporates issuance of Energy Savings Certificates (ESCerts) to units for energy efficiency upgraded in addition to their targets, which will include processes that require more than 50 percent of the fossil fuel consumption in India, and help in limiting CO2 emission. About 700 large energy consuming units and electricity generation plants in India would be put under obligation to limit their energy consumption by a fixed percentage.[17]

For maintaining the finance viability of this mechanism, establishments which can limit emission more than what is specified under the mechanism, such establishments will be issued ESCerts for the amount of energy saved. These ESCerts could be utilized by different energy intensive entity for meeting the mechanism's mandate, assuming that they find it exorbitant to meet their own specified targets.[18] Energy efficiency ratings were made mandatory for 4 key appliances i.e. refrigerators, air conditioners, tubelights and transformers.[19] The results of PAT Cycle I are outstanding, it not only achieved the

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[10]See NMSA, *supra* note 6, at 11.

[11]Launched under XI five year plan. In the XI Five year Plan, Rs 27447 crores has been sanctioned under RKVY for taking up 5768 projects across various sectors, *available* at http://164.100.47.132 /paperlaidfiles/AGRICULTURE/State%20of%20Indian%20Agriculture%202012-13%20(English)%20with%20 cover.pdf

[12]*Id*.at. 86. The NFSM is currently under implementation in 482 districts of 19 States of the country.

[13]At present the scheme is being implemented by 24 states and two UTs. *See* Economy, available at: http://www.indiainbusiness.nic.in/economy/agriculture2.htm

[14]National Mission on Sustainable Agriculture, available at http://nmsa.dac.gov.in/

[15]India's cabinet approved the National Mission on Enhanced Energy Efficiency (NMEEE) on 24th June, 2010. India: Taking on Climate Change Post-Copenhagen Domestic Actions, 2, available at: http://moef.nic.in/downloads/public-information/India%20Taking%20on%20Climate%20Change.pdf

[16]S.P.Garnaik, *National Mission for Enhanced Energy Efficiency, Bureau of Energy Efficiency*, 3, (2010) *available* at http://www.moef.nic.in/downloads/others/Mission-*SAPCC-NMEEE*.pdf

[17]Sanjay Dube, et al., *Can the Learning's from International Examples Make the 'Perform Achieve and Trade (PAT) Scheme' Perform Better for India,* 11, (March, 2011), available at http://www.emergent-ventures.com/docs/A%20Discussion%20Paper%20on%20India-s%20Perform%20%20Achieve%20and %20Trade%20(PAT)%20Scheme.pdf

[18]*Id.*

[19]India's cabinet approved the National Mission on Enhanced Energy Efficiency (NMEEE) on 24th June, 2010. India: Taking on Climate Change Post-Copenhagen Domestic Actions, 2, available at : http://moef.nic.in/downloads/public-information/India%20Taking%20on%20Climate%20Change.pdf at 3.

target set for the years 2012- 2015, rather exceeded by more than 30 percent in terms of oil saving.[20]

The other initiatives of NMEE include *Market Transformation for Energy Efficiency, the Programme of Activities, Energy Efficiency Financing Platform, Framework for Energy Efficient Economic Development.* The NMEE has saved 700 Billion INR till March 2017[21] through "The Ujala Scheme"[22] and PAT both.[23]

National Mission for a Green India

The Green India Mission acknowledges the potentials and impacts that the "*forest and other natural ecosystems have on atmosphere adaptation/mitigation and food, water, environmental and employment security of tribal and forest dwellers, in particular, and the country at a greater level*" in the relation to climate change.[24] The objectives of the Mission are: to increase forest blanket on 5 m. ha. of forest/non-forest terrains and enhanced quality of forest cover on an additional 5 m. ha., and to increase yearly CO2 sequestration by 50 to 60 million tonnes in the year 2020.[25]

Under the budget of 2011-12, the central government has allotted Rs. 200 crores from National Clean Energy Fund for the initiation of GIM.[26] A sum of Rs. 4,500 crores for every year has been reserved for the GIM, and breaks in prerequisite, if any, will be met from outside financing.[27] In the year, 2014, government has allocated a sum of Rs. 460 Billion for GIM for next 10 year.[28] The financial commitment by government shows positive approach for combating climate change issues.

National Mission on Sustainable Habitat

The NMSH plans to make urban areas sustainable by enforcing changes in "*energy efficiency in buildings, management of solid waste and shift to public transport*".[29]

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[20]Press Information Bureau ,Government of India, Ministry of Power, Ministry of Power issued more than 38 lakhs Energy Savings Certificates to Industries , issued on 22-March-2017, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=159670

[21]M. Ramesh, Energy efficiency 2.0', available at http://www.thehindubusinessline.com/specials/energy-efficiency-20/article9631198.ece

[22]In this scheme, the replacement of incandescent bulbs are done with LED bulbs

[23]M RAMESH, Energy efficiency 2.0', available at: http://www.thehindubusinessline.com/specials/energy-efficiency-20/article9631198.ece,

[24]National Mission for Green India, at 1.

[25]*Id.* at 6.

[26]Pranab Mukherjee, Ministry of Finance, Budget of 2011-2012, (Feb 28, 2011), *available* at: http://indiabudget.nic.in/budget2011-2012/ub2011-12/bs/bs.pdf, at 19.

[27]Sujatha Byravan & Sudhir Chella Rajan, *An Evaluation Of India's National Action Plan On Climate Change*, 21, (July 2012), available at: http://www.indiaclimatemissions.org/download/NAPCC%20 Evaluation.pdf

[28]Neha Sethi, CCEA approves Rs.46,000 crore Green India Mission, available at: http://www.livemint.com/Politics/vmQa48zjStIKQiLx5m6wWN/CCEA-approves-46000-crore-Green-India-Mission.html

[29]*PM Approves Mission On Sustainable Habitat,* The Economic Times, Jun 20, 2010 available at: http://economictimes.indiatimes.com/features/dateline-india/pm-approves-mission-on-sustainable-habitat/ articleshow/6069320.cms

Sustainable habitat underlines the idea that "*achieving a balance between the economic and social development of human habitats together with the protection of the environment, equity in employment, shelter, basic services, social infrastructure and transportation*".[30] The NMSH covers following aspects: extension of the Energy Conservation Building Code which provides for design of new and bigger commercial buildings to manage energy consumption in best possible way;[31] better Urban Planning and Model Shift to Public Transport providing long run transport plans to promote the development of medium and small urban areas in best possible manner that affirms competent and suitable public transport;[32] recycling of Material and Urban Waste Management, the target would be the improvement of technology for generating electricity from waste. This also includes a major R&D programme, concentrating on "*bio-chemical conversion, waste water use, sewage utilization and recycling options, plasma conversion of waste of biological origin to liquid fuels*" that can be used as an alternate for conventional fuels wherever possible.[33]

Provision of Rs. 260 billion has been made for urban local bodies under the 13th Finance Commission.[34]

National Mission for Sustaining the Himalayan Ecosystem

The Himalayan ecology is important for the livelihood of near about 1.3 billion people in Asian region. Natural geological wealth such as "*forestry, wild life, flora, fauna and biodiversity, snow, water bodies, traditional knowledge and mountain agriculture*", portrays the peculiarity of region.[35] The NMSHE would endeavor to develop measures for maintaining and protecting the Himalayan glaciers and mountain ecological system by: increasing supervision of Himalayan ecological system with a focus on melting of Himalayan glaciers and its effect on downward water channels and other downstream socio-ecological activities;[36] and Facilitating community-based administration for safeguarding and developing the forest cover in the region.[37] In year 2014, government approved Rs. 4.5 billion for the same.[38]

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[30] National Mission on Sustainable Habitat, at 6.

[31] *Id.* at 13-14

[32] *Id.*

[33] *Id.*

[34] Section 2, Summary record of discussions at the meeting chaired by the Principal Secretary to PM on 22.3.2010 to discuss the draft Mission Document for the National Mission on Sustainable Habitat.

[35] National Mission for Sustaining the Himalayan Eco-System-Mission Document, at 7.

[36] *Id.* at 12.

[37] *Id.*

[38] Press Information Bureau, Government of India, Ministry of Science & Technology, "Approval for the National Mission for Sustaining Himalayan Ecosystem launched under the National Action Plan on Climate Change" 28-2-2014, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=104353

National Mission on Strategic Knowledge for Climate Change

Science plays a central role in addressing the issues related to environment and it is expected that technology should provide best possible and feasible remedy at the same time legal measure should observe the national response.[39] The fundamental objective of this mission is to firm the base and facilitate research capacity and giving strategic knowledge for climate change.[40]

The scientific programme under the mission includes "*National Carbonaceous Aerosols Programme; setting up of Long Term Ecological Observatories for Climate Change Studies; Coordinated Studies on Climate Change for North Eastern Region; and setting up of Centre for Climate Change Studies*".[41]

Jawaharlal Nehru National Solar Mission

The Government of India formally started the JNNSM in November 2009 with certain aims to achieve 20,000 megawatts of on-and off-gird solar energy based on PV and CSP technologies by 2022 and increasing numeric count of solar oriented applications for example solar lighting, heater, and water pumps.[42]

The JNSSM plans to deal with the inadequacies of former plans through updated and more alluring feed-in-tariffs, a single window application process, and RPOs providing solar purchase mandate. Under the JNNSM, the NVVN is under an obligation to buy the costly solar power from developers and club it with low price coal based power before distributing the integrated power to the different enterprises at an attractive cost.[43] The cost of solar based electricity has been an important concern for the stakeholders but with the passage of time and technological development the tariff rates per unit have fallen up to 2.62 per unit and this is a positive sign for JNNSM.[44] JNNSM is divided into 3 phases, viz:

Phase 1: (2010-2013) sets target of500 MW of grid-connected and 200 MW of off-grid solar PV will be installed.[45]

Phase 2: (2013-2017) sets target of additional installations of 3,000-10,000 MW of combined PV and CSP capacity. For Phase 2, it will be mandatory to use cells and modules manufactured in India.[46]

Phase 3: (2017-2022) sets target of the off-grid solar capacity installations will reach 2,000 MW, on-grid capacity will reach 20,000 MW, 20 million m2 of solar thermal

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[39]National Mission on Strategic Knowledge For Climate Change-Mission Document, at 8.

[40]Rs. 1050 Crore on Strategic Knowledge for Climate Change, available at: http://hexagreen.com/environment/rs-1050-crore-on-strategic-knowledge-for-climate-change

[41]*Id*.

[42]Jawaharlal Nehru National Solar Mission-Towards Building Solar India, at 3.

[43]D S. Arora et al., Indian Renewable Energy Status Report-Background Report for DIREC . 78. 2010, Oct. 2010, *available* at: http://www.nrel.gov/docs/fy11osti/48948.pdf

[44]Srikanta Tripathy, Solar tariff plunges to new low at Rs 2.62 per unit', May 10, 2017 Available at http://timesofindia.indiatimes.com/city/jaipur/solar-tariff-plunges-to-new-low-at-rs-2-62-per-unit/articleshow /58608089.cms

[45]*Supra* note 44.

[46] *Id*.

collector area will be installed, and 20 million solar lighting systems will be deployed in rural households.[47] Progress under JNNSM[48] is as follows:

Solar PV Pump	Street Lighting System	Home Lighting System	Solar Lantern Lantern	Power Plants
7,373 Unit	2,04,523 Units	7,48,676 Units	7, 31,202 Units	9,142.60 KWP

National Water Mission

The objective of National Water Mission is "*conservation of water, minimizing wastage and ensuring its equitable distribution both across and within States through integrated water resources development and management*".[49] Five objectives have been recognized by the NWM are: detailed water data base in public sphere and evaluation of the impact of climate change on available water resources, advancement of citizen and state efforts for "*water conservation, augmentation and preservation*";[50] proper care to susceptible region incorporating the over exploited territories; expanding water use efficiency by 20 percent; and advancement of basin level joint water resources management.[51]

A two-tier framework has been advised, one at the Central level and the other at the State level for making the regulation and road map for execution of the NWM.[52]

III. FOREST POLICIES

National Forest Policy, 1988

It acknowledges that "*forests in the country have suffered serious depletion. This is attributable to relentless pressures arising from ever-increasing demand for fuel-wood, fodder and timber; inadequacy of protection measures*".[53] The basic objective of the policy is to "*increase the forest/tree cover in the country through massive afforestation and social forestry programmes, especially on all denuded, degraded and unproductive lands*".[54] The NFP has set the goal of at least "*one-third of the total landscape of the nation should be under forest or tree cover, while in the hills and in mountainous regions, it should be two-third of the area under such cover in order to prevent erosion and land degradation and to ensure the stability of the fragile eco-system*".[55]

In order to tackle the fuel, wood and fodder demand, a time bound plan of afforestation

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[47] *See* Jawaharlal Nehru National Solar Mission-Towards Building Solar India

[48] Central Statistics Office Ministry of Statistics and Programme Implementation, Government of India, Energy Statistics 2012 (Nineteenth Issue), at 29, available at: http://mospi.nic.in/mospi_new/upload/Energy_Statistics_2012_28mar.pdf

[49] Comprehensive Mission Document of National Water Mission-Volume II, at iii-v.

[50] *Id*.

[51] Ministry of Water Resources, available at: http://www.pib.nic.in/newsite/erelease.aspx?relid=71513

[52] *Id*.

[53] *See* Preamble to the National Forest Policy 1988.

[54] *See* Basic Objective of the National Forest Policy 1988.

[55] National Forest Policy1988, para 4.1.

and tree planting is need of the hour in national interest.[56] The Indian forests reported to have 6,662 mt carbons sink, enlisting a yearly augmentation of 38 mt of carbon since 1995 to 2005.[57]

The National Afforestation and Eco-Development Board

The NAEB[58] is accountable for "*promoting afforestation, tree planting, ecological restoration and eco-development activities in the country, with special attention to the degraded forest areas and lands adjoining the forest areas, national parks, sanctuaries and other protected areas as well as the ecologically fragile areas*".[59]

National Environmental Policy, 2006

The NEP sets out climate change as a major challenge.[60] The substantial amount of resources would basically be needed for adaptation of measures for climate change impact, if human miserableness is to be hedged.[61] The NEP charts out certain measures to address climate change: relying on various approaches which are beneficial in nature; supremacy to right to development; equitable claim over planet's environmental resources to all; to trace out the important areas which poses threat to India pertaining climate change, specially the likely effect on "*water resources, forests, coastal areas, agriculture, and health*"[62] and promote domestic industry to engage in clean development mechanism.[63]

The Compensatory Afforestation Fund Management and Planning Authority

The Hon'ble Supreme Court has directed for the creation of a body for Management of Compensatory Afforestation Fund and collection of Net Present Value of forest lands[64] and in pursuance of the above direction, Indian government constituted an authority called CAMPA.[65] The apex court also ordered the Adhoc-CAMPA in absence of CAMPA.[66] The Indian government has constituted National CAMPA council to chart out guidelines for the performance of state CAMPA.[67] The CAMPA is "*a funding mechanism for enhancing forest and tree cover and conservation and management of wildlife*".[68]

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[56]*Id.* at para 4.2.1.

[57]India's Forest and Tree Cover Contribution as a Carbon Sink, *available* at: http://envfor. nic.in/ modules/ about-the-ministry/CCD/Contri_carbon_sink.pdf

[58]It came into existence in October, 1992.

[59]Ministry of Environment & Forests, Annual Report 2004-2005-Regeneration And Eco-Development, at 75, available at: http://envfor.nic.in/report/0405/Chap-06.pdf

[60]The National Environment Policy, 2006 at.7.

[61]*Id.* at 42.

[62]*Id.* at 43

[63]*Id.* at 43.

[64]In the case of T.N. Godavarman Thirumulpad vs. Union of India, AIR2005SC4256, Supreme Court issued direction for the creation of CAMPA.

[65]*See* Vide Extraordinary, Notification dated 23.04.2004, Ministry of Environment and Forest.

[66]*See* Guidelines for Investment Policy and Procedure for Investment of funds lying with Ad-Hoc CAMPA.

[67]*See* Ministry of Environment and Forest, F.No.13-1/2009-CAMPA, *available* at: http://envfor.nic.in/ downloads/public-information/CAMPA-order-dated-13.8.pdf

[68]See Guidelines on State Compensatory Afforestation Fund Management and Planning Authority (State CAMPA).

III. EMISSION REDUCTION POLICY

National Policy on Biofuel, 2009

India shares the privilege of being in the fastest thriving economies on the globe, where it requires the adequate supply of energy to maintain the same. The major chunk of energy demands are met by the fossil fuels, which in term accelerate the carbon emission. In order to become independent in term of fossil fuels the NPB promotes the Bio-fuels (biodiesel and bio-ethanol) as an attractive renewable alternative to conventional fossil fuels.[69] The NPB provides that by the year 2017, a target of 20 percent combination of biofuels, both for the bio-diesel and bio-ethanol should be achieved.[70]

IV. ENERGY POLICIES

There have been major shifts in the way governments deal with energy related climate issues in recent years. Inclusion of sustainable development and tackling climate change have become the inherent part of energy planning, analysis and policy making in number of countries.[71] On a factual note, commercial energy demand in India has increased by 70 percent in the recent four decades.[72] So, it has become imperative to adopt detailed energies policies in India, the energy related policies and programmes are as follows:

National Electricity Policy, 2005

The aim of National Electricity Policy is to speed up the growth of the energy, giving supply of energy to all regions and ensuring the stake of consumers and different stakeholders at the same time acknowledging the accessibility of energy sources and technology to use natural resources.[73] The policy stresses upon harnessing the energy from renewable sources of power as its one of the goal.[74]

The policy outlines following measures for the promotion and generation of renewable energy: non-conventional sources of energy being the most environment friendly there is an urgent need to promote generation of electricity based on such sources of energy";[75] efforts need to be made to reduce the capital cost of projects based on nonconventional and renewable sources of energy";[76] the strict application of Renewable Energy Purchase Obligations.;[77] the SERC is empowered to fix relevant tariffs for renewable energy based

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[69]Policy Brief- National Policy on Biofuels, available at: http://www.indiaclimateportal.org/component /option,com_policybrief/view,policybriefdetail/id

[70]National Policy on Biofuels 2009, Ministry of New & Renewable Energy, Government of India.

[71]See IEA, *supra note* 42, at 3.

[72]Clean Technology Fund Investment Plan For India, 21, *available* at http://moef.gov.in/downloads/public-information/IP-CTF-2011.pdf

[73]National Electricity Policy -03-Feb-2005,*available* at:
http://pib.nic.in/archieve/others/2005/nep20050209.pdf

[74]*Id*.

[75]National Electricity Policy-2005, para, 5.12.2, at 16.

[76]*Id*.

[77]*Id*.

power generations and purchase of electricity by DISCOMs, keeping in mind the competitive bidding process.[78]

National Energy Labeling Programme, 2006

Energy efficiency labeling on consumer appliances is an enlightening instrument that is extensively promoted and used over the European Union to increase awareness of environmental concerns, for example global warming.[79] The programme provides that "*the potential benefit of the scheme is substantial, as it could spur consumers to select more energy efficient products, which in turn would reduce the national electricity*".[80] This programme addresses measures to promote the manufacturers to manufacture the energy efficient products and on the other hand this will also provide consumer to go for informed choice before finalising the energy appliances.[81]

Energy Conservation Building Code

The ECBC sets minimum energy standards for building, "*which is having a connected load of 100 kw or contract demand of 120 kw and above and is used or intended to be used for commercial purposes*".[82] Three categories of buildings i.e. a) Day use office buildings, b) BPOs, c) Shopping malls have been put in public sphere for labeling programme.[83] Currently 136 buildings have been earmarked for eligibility for issuance of label, while ESCO model[84] is being implemented for promoting energy efficiency measures in existing buildings through performance contracting.[85]

V. OTHER POLICIES FOR ENERGY SAVINGS

Bachat Lamp Yojana, 2008

The BLY is an ambitious programme which endeavours to encourage the use of CFLs as a substitute for normal bulbs used in homes and otherwise. The CFL is to cost rupees 15 (the present rate for per CFLs varies from Rs. 80 to Rs. 100) which in turn likely to boost the use of these energy efficient product for every household.[86] A target of replacing 400 million normal bulbs has been set out which in turn likely to reduce around 4000 MW of

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[78] *Id*.

[79] National energy labelling programme launched for electrical appliances, Jul 15, 2006, available at: http://www.downtoearth.org.in/node/8086

[80] Shri Sushilkumar Shinde, Union Minister of Power, Launch Of National Energy Labeling Programme, New Delhi, 2-3, (May 18, 2006) *available* at: http://powermin.nic.in/whats_new/pdf/Minister_speech_on_National_Energy.pdf

[81] *Id*.

[82] The Energy Conservation Act, § 2 (c) (amended 2010).

[83] Energy Conservation, available at: http://powermin.nic.in/acts_notification/energy_conservation_act/introduction.htm.

[84] An ESCO, or Energy Service Company, is a business that develops, installs, and arranges financing for projects designed to improve the energy efficiency and maintenance costs for facilities over a seven to twenty year time period. ESCOs generally act as project developers for a wide range of tasks and assume the technical and performance risk associated with the project, available at: http://www.naesco.org/resources/esco.htm

[85] See Energy, *supra* note 79.

[86] *Id*.

energy demand and a total reduction of 24 mt of CO2 per year.[87] The BEE has taken major promising step by developing a wide framework "BLY-PoA" for "*key CDM requirements, including the project baseline, additionality, methodology, monitoring protocols*" by which the assessment of reduced CO2 emissions would be carried out.[88] The major benefit for employing PoA methodology is that it minimizes the time and processing costs for registered projects.[89]

Clean Energy Cess on Coal

A clean energy cess has been levied on coal at the price of 1 USD per ton, applicable to domestic coals as well as imported coal. The fund generated will be accounted to the NCEF for carrying out research of new projects in clean energy technologies and environmental remedial programmes.[90]

Clean Development Mechanism

In pursuant to decision take at COP-7, the Central Government has constituted the National Clean Development Mechanism (CDM) Authority for the purpose of safeguarding and improving the environment.[91] Around 959 projects have been approved by the NCDMA.[92]

REDD

The REDD is an international endeavour to generate encouragement for developing nation to save and manage their available forest resources, in order to combat climate change and to contribute in global movement. The REDD just not only provide for examining the deforestation and forest degradation but it also "*includes incentives for positive elements of conservation, sustainable management of forests and enhancement of forest carbon stocks*".[93] India is has no specific policy in this regards, but it is looking forward to implement it with the help of UNEP.

VI. CONCLUSION

India's geographical position and going on social changes makes it highly susceptible to climate change, this compelled it to take serious interest for reducing the threat of climate change by making various legal and social initiatives. Indian position on emission cut is not synced with its energy, security, and economic growth law and policy. India has its genuine apprehensions about the impacts of climate change. Majority of Indian population are still do the cultivation and this is most sensitive sector with regard to impact of climate change. Decline in glacier levels, reduction in precipitation and frequent flooding in fertile lands results in shortage of usable water and that is directly related to crop production and livestock growth. Apart from this various national growth

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[87]*Id*.

[88]*Id*.

[89]See India, *supra* note 10 at 7.

[90]See India, *supra* note 10.

[91]National CDM Authority, available at: http://www.cdmindia.gov.in/constitution.php

[92]No. of Approved Reports, available at: http://www.cdmindia.gov.in/approved_projects.php

[93]Jaimini Sarkar, REDD, *REDD+ and India*, 101 Current Science, No. 3, 265, 266 (Aug. 10 2011)

indicators such as health, energy demand, infrastructure development etc., will also not remain unaffected.

Indian growth tempo is strong today, but still many social and socio-economic problems are till date unaddressed. In Indian society there is a critical gap between rich and poor. The problems of poverty, unemployment and lack of education are the pest on human development tree for the healthy growth, for this we need promising efforts and this can be achieved by harmonizing the industrial growth with climate. Increasing levels of GHG emission has direct relation with industrialization. But lack of harmony between the later and human growth often results in conflict. Thus, India has to find a fine balance between economic growth and reduction in emissions.

E-GOVERNANCE AND REGULATORY MEASURES IN INDIA WITH SPECIAL REFERENCE TO STATE OF UTTARAKHAND

Laxman Singh Rawat*

Abstract

E-governance has been a buzz word in India for last one decade or so. In tune with Central Government e-initiatives, the Uttarakhand State Government has shown its interest and intent in ICT enabled governance to make all Government services accessible to the common man. Along with several e-initiatives, from National e-Governance Plan to Digital India programme of Central Government, the Uttarakhand Government has also reiterated the same vision by the Information and Communication Technology Policy, 2006 which promise to provide services to common man of State of Uttarakhand. To give legal impetus to these e-initiatives, Information Technology Act has been enacted in the year 2000 as amended in 2008 which provides legal mechanism for e-governance. The Central Government has exercised its rule making power to facilitate the e-governance in India. Its several rules assist e-governance, especially Electronic Delivery of Services Rules, 2011 which specify the form and manner of electronic services delivery. Further, Uttarakhand Right to Services Act, 2011 was another step forward. However, there is a gap between technological advancement and the law and policy response. Thus, the present paper examines e-governance regulatory mechanism in the India as well as in State of Uttarakhand to explore how far e-governance has contributed to achieve the objectives of good governance through law and policy intent.

Key words

E-governance, Good Governance, Information Technology, Information and Communication Technology and Digital India Programme.

I. INTRODUCTION

'It must be considered that there is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle, than to initiate a new order of things.'[1]-Niccolo Machiavelli, The Prince (1532)

The information and communication technologies (ICTs) permeate almost every aspects of our life. The information technology coupled with rapid advances in

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[1]Government of India, *Transforming Governance: A Decade of e-Governance and the Next Wave*, Department of Administrative Reforms and Public Grievances, Ministry of Personnel, Public Grievances & Pensions and Department of Electronics and Information Technology, Ministry of Communications & Information Technology, January 2016, at 12, available at: *http://www.nasscom.in/download/summary_file/fid/*124184

communication has proved to be a powerful tool for good governance initiatives. The term governance refers to the way government carries out its work. It is the way government uses its authority to provide services, make policies and implement them. Good governance embodies qualities such as accountability, responsiveness, transparency and efficiency. Moreover, e-governance is the application of information communication technology to government functioning in order to create 'Simple, Moral, Accountable, Responsive and Transparent' (SMART) governance. Therefore, the objectives of e-governance are similar to the objectives of good governance. It is the application of information communication technology for delivering government services, exchange of information and communication transactions, integration of various stand-alone systems and services between and among various phases and interactions within the entire government framework. However, many of information communication technology experiments aiming at enhancing citizen participation and engagement have not fulfilled the potential offered by new technologies, and many of them have manifested a regression towards improved information provision models of e-governance. This is mainly due to the lack of institutional and legal mechanism, as well as the lack of political will to fully explore the potential offered by information communication technology.

II. E-GOVERNANCE: CONCEPT AND DEFINITIONS

The revolution in information and communication technology (ICT) provides basis to the core concept of E-governance. The concept of e-governance is the use of ICT with the aim of improving information and service delivery, encouraging citizen's participation in the decision-making process and making government more accountable, transparent and effective. Thus, e-governance embodies qualities like good governance such as accountability, responsiveness, transparency and efficiency. It is generally understood as a use of ICTs for some fields of service areas, such as e-health, e-social service, e-education, e-enabled public utility services, e-courts, etc. These electronic public services may include information, communication, interaction and transaction services which provide different branches of public service, such as health care, social welfare, and education.[2]

The United Nations Educational, Scientific and Cultural Organization (UNESCO) defined e-governance as the performance via the electronic medium in order to facilitate an efficient, speedy and transparent process of disseminating information to the public, and other agencies, and for performing Government administration activities.[3] Further, the Council of Europe has defined it as the use of electronic technologies in three areas of public action: relations between the public authorities and civil society; functioning of the public authorities at all stages of the democratic process (electronic democracy); the provision of public services (electronic public services).[4] These definitions visualize the use of the electronic medium in the exercise of authority in the management of a

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[2]Ari-Veikko Annttiroiko, 'Introductory Chapter A Brief Introduction to the Field of E-Government', in Ari-Veikko Annttiroiko (ed.), *Electronic Government: Concepts, Methodologies, Tools, and Applications*, Volume I, Information Science Reference, New York, 2008, pp. xliii- xliv.

[3]Available at: *http://portal.unesco.org/ci/en/ev.php-RL_ID=4404&URL_ DO=DO_TOPIC&URL_ SECT ION =201. html*

[4]Available at: *http://www.coe.int/T/E/Com/Files/Themes/e-voting/definition.asp*

country's affairs along with articulation of citizens' interests leading to greater transparency and efficiency.

The World Bank Report, Digital Dividends Overview, 2016 found that at global level, China has the largest number of internet users, followed by the United States, with India, Japan, and Brazil filling out the top five.[5] By 2014, all 193 member States of the United Nations had national websites. For the most common core government administrative systems, 190 member States had automated financial management, 179 used such systems for customs processing, 159 for tax management, 148 of them had some form of digital identification, and 20 had multipurpose digital identification platforms.[6] On average, 8 in 10 individuals in the developing world own a mobile phone, and the number is steadily rising. The number of internet users has more than tripled across the globe in a decade from 1 billion in 2005 to an estimated 3.2 billion at the end of 2015. This means that businesses, people, and governments are more connected than ever before.[7] Thus, in a growing connected virtual world of knowledge with rise of Internet and web-based information systems, service delivery is now possible on anytime, anywhere basis. The use of internet, mobile phones, and the other communication devices spread, collect, store, analyze, and share information quickly.[8] In India, the total number of Internet subscribers has reached to 331.66 million at the end of December, 2015. Out of 331.66 million, Wired Internet subscribers are 19.98 million and Wireless Internet subscribers are 311.69 million. The Internet subscriber base of 331.66 million at the end of December, 2015 is comprised of Broadband Internet subscriber base of 136.53 million and Narrowband Internet subscriber base of 195.13 million.[9]

III. E-GOVERNANCE AND REGULATORY MEASURES IN INDIA

At policy level, first time the Central Government approved a comprehensive programme i.e. National e-Governance Plan (NeGP) on May 18, 2006 with the vision that make all government services accessible to the common man in his locality, through common service delivery outlets and ensure efficiency, transparency and reliability of such services at affordable costs to realize the basic needs of the common man.[10] Further, the Government of India has approved the 'Digital India' programme on July 02, 2015. The programme itself promises to transform India into a digitally empowered society by focusing on digital literacy, collaborative digital platforms and availability of digital resources or services in Indian languages. Besides this, the e-Courts project was

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[5]World Development Report, *Digital Dividends Overview,* International Bank for Reconstruction and Development/The World Bank, Washington DC, 2016, at 5, available at: *http://www-wds.worldbank.org/externaldefault/WDSContentServer/WDSP/IB/2016/01/13/090224b08405b9fa/1_0/Rendered/PDF/World0developm0l0dividends0overview.pdf*

[6]*Ibid*.

[7]*Id*. at 2.

[8]*Ibid*.

[9]Government of India, *The Indian Telecom Services Performance Indicators, October-December, 2015,* Telecom Regulatory Authority of India, New Delhi, India, May 2016, at v, available at:

http://www.trai.gov.in/WriteReadData/PIRReport/Documents/QPIR_Oct_to_Dec-15.pdf

[10]Government of India, *National e-Governance Plan*, available at: *http://www.*negp.gov.in/

conceptualized on the basis of the 'National Policy and Action Plan for Implementation of Information and Communication Technology in Indian Judiciary' which was prepared by the e-Committee of Supreme Court of India in 2005.[11] Under NeGP, e-Courts Project as a Mission Mode Project was proposed to implement ICT in Indian judiciary in three phases over a period of five years.[12] Now, 'e-Courts' project is one of the plans as 'Technology for Justice' of e-Kranti (NeGP 2.0) under 'Digital India' programme.

The Central Government's Digital India Programme provides an opportunity to renew focus to the future of e-governance. One can say that path breaking IT development platform, Analytics, Cloud Computing coupled with key initiatives of the Government such as Unique ID, Jan Dhan Accounts and Digital Locker provide us an opportunity to break from the past to achieve good governance through e-governance which are truly citizen centric in letter and spirit. It is noteworthy that the 'Digital India' programme and especially fourth and fifth pillars i.e. 'e-Governance: Reforming Government through Technology' and 'e-Kranti- Electronic Delivery of Services' respectively are directly related with e-governance and critical for the success of e-governance, easy governance and good governance in the country. The Digital India programme has been devised to support all Central Ministries/Departments as well as all States/UTs in leveraging the emerging technologies, making use of newer business models and revamping of existing projects so as to deliver the services electronically to citizens in an efficient, transparent and affordable manner.

The system of governance is changing and the preferred policy of the government ensuring transparency and accountability has been made legally feasible with the statutory recognition of e-governance. Chapter III of the Information Technology Act, 2000 containing section 4 to 10 A provide the legal mechanism for e-governance. Section 6[13] of Information Technology Act, 2000 provides the foundation of e-governance.[14] Whereas section 6A of the Act, 2000 provides for appointment of Service Providers by appropriate Government for e-governance services. By virtue of this Section, the appropriate Government may authorize any service provider to set up, maintain and upgrade the computerised facilities and perform such other services as it may specify, by notification in the Official Gazette. The service provider may be an individual, private agency, private company, partnership firm, sole proprietor firm or any

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[11]Available at: *http://ecourts.gov.in/*

[12]e-Court Project, *Project Monitoring Website for E-Courts Mission Mode Project, available at: http://ecourts.gov.in/*

[13]Section 6 of Information Technology Act, 2000 provides as: (1) Where any law provides for (a) the filing of any form, application or any other document with any office, authority, body or agency owned or controlled by the appropriate Government in a particular manner; (b) the issue or grant of any license, permit, sanction or approval by whatever name called in a particular manner; (c) the receipt or payment of money in a particular manner, then, notwithstanding anything contained in any other law for the time being in force, such requirement shall be deemed to have been satisfied if such filing, issue, grant, receipt or payment, as the case may be, is effected by means of such electronic form as may be prescribed by the appropriate Government. (2) The appropriate Government may, for the purposes of sub-section (1), by rules, prescribe- (a) the manner and format in which such electronic records shall be filed, created or issued; (b) the manner or method of payment of any fee or charges for filing, creation or issue any electronic record under clause (a).

[14]K. Mani, *A Practical Approach to Cyber Laws*, Kamal Publishers, New Delhi, 2008, at 13.

such other body or agency. The appropriate Government may also authorize any service provider to collect, retain and appropriate service charges from the person availing such service.[15] In this connection, the Central Government has power to make rules to provide the manner in which the authorised service provider may collect, retain and appropriate service charges under Section 6A (2) of the Act.[16] Moreover, the Central Government framed Information Technology (Electronic Services Delivery) Rules, 2011 in the exercise of powers conferred by Section 87 (2) (ca) of the Act read with Section 6A (2) of the Information Technology Act, 2000. Further, the Information Technology Act, 2008 (Amendment Act) amended relevant provisions of the Indian Penal code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 to facilitate e-governance. However, one can find that there is no legislation that makes electronic delivery mandatory for priority public services or any mandatory timeline for transforming public services. Key institutional aspects of the introduction of e-service delivery have not been set out in formal legislation such as the role, functions and responsibilities of different Government organizations, the mechanism for coordination across Government, the definition of an oversight mechanism, and the relevant financial arrangements.

One can find that if any law mandates that documents, records or information are required to be retained for any specific period, then, that requirement shall be deemed to have been satisfied if the same is retained in electronic form.[17] It also makes audit of electronic documents mandatory wherever physical documents, records required audit.[18] Publication of official gazette in electronic form is permitted by Section 8 of the Act, 2000. Therefore, where any law requires publication of rule, regulation, order, bylaw, notification or other matter in the gazette, publication thereof in electronic form is permitted. Likewise, Section 4(1) of the Right to Information Act, 2005 obligates public authorities in India to maintain all its records duly catalogued and indexed in a manner and form which facilitates the right to information and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated. Thus, one can say that e-governance and Right to Information are interrelated and two sides of the same coin.

With the initiation of national programmes like Unique Identification number and increased collection of citizen information by the government, concerns have emerged on their impact on the privacy of persons. In order to understand these concerns and identify interventions issues, Justice A.P.Shah, former Chief Justice of Delhi High Court,[19] suggested a comprehensive legislation to safeguard privacy and also the office of a central privacy commissioner to develop and apply it. Even when suggesting the establishment of a privacy commissioner, who could impose penalties for violations, it

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[15]Section 6A(2) of Information of Technology Act, 2000.

[16]*Id*. at Section 87(2)(ca).

[17]*Id*. at Section 7.

[18]*Id*. at Section 7A.

[19]Government of India, Report of the Group of Experts on Privacy (Chaired by Justice A P Shah, Former Chief Justice, Delhi High Court), 2012, at 3, available at:
http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf

recognised the central role of existing judicial forums by retaining the jurisdiction of civil courts. While many may see privacy as the core issue in the Aadhaar programme, privacy itself transcends it. As our everyday lives become connected, comprehensive privacy legislation is an essential safeguard.[20]

To give legal impetus to Unique Identification number, the Aadhaar Act, 2016 was passed to provide efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Fund of India, to individuals residing in India through assigning of unique identity numbers to such individuals. It can be used for all benefit that will linked to consolidated fund of India. The UID Authority shall take special measures to issue Aadhaar number to women, children, senior citizens, persons with disability, unskilled and unorganised workers, nomadic tribes or to such other persons who do not have any permanent dwelling house and such other categories of individuals as may be specified by regulations.[21]

It is to be noted that the UIDAI must use its regulatory powers under Section 23 to set up a robust grievance redressal mechanism, including an ombudsman, to adequately bolster its accountability quotient. Doing so is necessary not just to protect privacy but also to underline the seriousness of the state in delivering services to vast sections of the population that are identity-less and excluded. Aadhaar represents a prototype of a new welfare State- smarter, responsive and oriented towards improving material lives while being respectful of rights. Its failure, either owing to civil society activism or wanton future subversion for surveillance purposes, might be the final straw for a State machinery on the brink of irredeemable discredit.[22]

IV. E-GOVERNANCE AND REGULATORY MEASURES IN STATE OF UTTARAKHAND

It may be noted that the Uttarakhand is selected as a case study for the present paper to explore how far e-governance has contributed to achieve the objectives of good governance. The State was carved out of the State of Uttar Pradesh on November 9, 2000. The Government of Uttarakhand promises to leverage benefits of information technology for the growth of the State. However, there is a geographical inequality in Uttarakhand, the hill region districts are less developed than plain region in terms of infrastructure i.e. electricity, roads, irrigation etc. It leads to economic disparity in the State which faces the challenge of promoting livelihoods to retain citizen through local employment and income generation and to enhance their quality of life.

The formation of the new State created high expectations related to development and better living standards of people of State of Uttarakhand. The Government of

[20]Apar Gupta, The Basis Of Privacy, March 29, 2016, available at: http://indianexpress.com/article/opinion/columns/aadhaar-bill-the-basis-of-privacy/

[21]Government Notifies Aadhaar Act, March 28 2016, available at: http://www.newindianexpress.com/nation/Government-Notifies-Aadhaar-Act/2016/03/28/article3350746.ece

[22]Arghya Sengupta, Aadhaar project: Last chance for a welfare state, April 8, 2016.

Uttarakhand had registered a society named 'Uttaranchal E-Governance Initiative Project Management Unit'.[23] This society functions as State's nodal agency named as Information Technology Development Agency (ITDA). The ITDA is an independent and autonomous body to guide and monitor various projects and provide expert inputs, monitor, evaluate and execute State's information technology initiatives and projects.

The Information and Communication Technology Policy was approved by the Cabinet on 27th June 2006. This policy document is an extended document of the New Industrial Policy 2003 of the Government of Uttarakhand. The vision and goal of the Uttarakhand Information & Communication Technology Policy, 2006 is to make the State of Uttarakhand fully digitalized i.e. a networked society where information flow and access across all sections of the society, enabled through effective information and communication technology infrastructure which would propel the economic growth of the State, leading to a very high quality of life of its citizens.[24] The vision aspires to reduce various divisions such as the digital divide, economic divide, literacy divide and the social divide. With knowledge playing the leveller, information and communication technology infusion could gradually remove these divides.

Coming to the existing regulatory framework of e-governance in State of Uttarakhand, the Uttarakhand ICT Policy, 2006 aspires vision to reduce various divisions such as the digital divide, economic divide, literacy divide and the social divide. With knowledge playing the leveller, information and communication technology infusion could gradually remove these divides. The dynamic nature of IT requires periodic revisiting of the on-going policies and strategies. In particular, a need has been felt to unite the State e-governance model with the 'Digital India' Programme - an initiative of the government of India with a vision 'to transform India into a digitally empowered society and knowledge economy'. The ICT Policy, 2006 is an outdated policy to meet today's fast growing and changing circumstances in relation between society and technology. It is noteworthy that Uttarakhand has not yet amended its policy. This policy documents prescribe ineffective objectives and these objectives have been shown in the form of ideal or goal to be achieved. The objectives should be clear, precise and specific. Since usage of ICT is increasing, the government first and foremost duty is to provide quick and cheap mechanism to access the services promised by the government. In order to achieve this, the Government of Uttarakhand has to revisit its policy document to keep pace with the changing time.

It is important to note that in pursuance of the provisions of Clause (3) of Article 348 of the Constitution of India, the Uttarakhand Legislative Assembly passed the 'Uttarakhand Right to Service Act, 2011'[25] (20 of 2011). The objective of this Act is to provide delivery of services to the people of the State of Uttarakhand within the given

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[23]Government of Uttarakhand, Home Page, Information Technology Development Agency (ITDA), available at *http://www.itda.uk.gov.in/*

[24]Government of Uttarakhand, *Vision & Goals (Part II)*, *Uttarakhand Information & Communication Technology Policy,* 2006, Information Technology Development Agency (ITDA), available at: *itda.uk.gov.in/files/Acts-Rules/IT_Policy.pdf*

[25]As Passed by the Uttarakhand Legislative Assembly and assented to by the Governor on October 04, 2011.

time limits.[26] The 'services' under the Act means any service noti?ed under Section 3. Section 3 of Uttarakhand Right to Service Act, states that the State Government may by noti?cation from time to time, notifies the services. Thus, if e-services is notified by the State Government, it will provide services to State's people in time bound manner.

The available opportunities gaps between 'haves' and 'haves not' will divide the societies of Uttarakhand and will create various types of social unrest in the nearest future. The first step in handling the widening digital gap is, understanding the breadth and depth of any cultural, racial, education, knowledge or literary divide that exists in any given jurisdiction. It is incumbent on governments to bridge these divides and ensure that there are no inequities between those who have the capacity to engage in online transactions with governments and those who do not have access or do not wish to participate in the online world. This is a big challenge in ensuring successful e-governance and the delivery of e-services.[27] It is to be noted that there are many citizens who currently cannot participate in the information society, and they will be left behind. Only by understanding and addressing the digital divide and the needs of the citizens will make local governments to realize the vision of true e-governance.[28] Due to hilly area, lack of infrastructure and low per capita income, mobile governance is a present day need of State of Uttarakhand. Mobile enabled development or leveraging the mobile revolution to enable development impact is part of a broader phenomenon. It takes electronic services and makes them available via mobile technologies using devices such as mobile phones. It has the potential to help make public information and governance services available 'anytime, anywhere' to citizens and officials. Thus, suited for the rural and especially hilly areas where Internet access rates are low, mobile phone usage is growing rapidly.

V. E-GOVERNANCE AND REGULATORY MEASURES: ISSUES AND CHALLENGES

Privacy and security have emerged as critical practical issues for e-governance advocates seeking to deliver services to citizens while complying with existing and emerging legislation and public expectations. A familiar range of straightforward legal questions may emerge regarding the substantive adequacy of legal norms intended to protect citizens' physical and informational privacy, often conceived as a dimension of their personal security.[29] A breach of privacy, for example, may occur when an individual's information is shared with unintended parties. In contrast, we use security to mean the steps that are taken to ensure that information is not shared. It may consist of a password, encryption, or firewalls, for example. A breach of security, for example,

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[26] Available at: *http://www.cm.uk.gov.in/files/English_1.pdf*

[27] Tan Yigitcanlar, 'E-Government and the Digital Divide'in Ari-Veikko Annttiroiko (ed.), *Electronic Government: Concepts, Methodologies, Tools, and Applications,* Volume I, Information Science Reference, New York, 2008, at 1723.

[28] *Ibid*.

[29] Keith Culver, 'E-Government as a New Frontier for Legal Theory', in Ari-Veikko Annttiroiko (ed.), *Electronic Government: Concepts, Methodologies, Tools, and Applications,* Volume I, Information Science Reference, New York, 2008, at 3741.

would occur if a password is compromised and credit card information is stolen. As we conceptualize privacy and security. They may be visualized as overlapping circles, distinct, but affecting each other.[30]

Privacy, as a dimension of personal security, is typically taken to refer to our interest in controlling what others know about us in order to secure freedom of thought and conduct against others' interference with exercise of those freedoms. The exercise of privacy involves withholding of personal information to some desired extent, often involving highly context-dependent choices regarding the personal interests satisfied by relinquishing privacy.[31] The kind of public trace or persona created by selective disclosure of personal information has long been important in various ways. Consider, for example, many persons' interest not just in the fact of having a credit record, but in having an accurate credit record maintained and made consistently available across a network of users to enable him or her to secure credit as desired.[32]

Consumer transactions on the Internet are growing rapidly. However, to reach its full potential, e-commerce must earn the confidence of consumers that reasonable mechanisms exist to ensure fair dealing, and, in the event of a consumer complaint, that accessible and effective methods of dispute resolution are available. Though the industry self regulation is an important component of consumer protection, but there is a need of comprehensive statutory protections at the Central and State levels. Finally, consumers will make the judgment as to which of these approaches is the most effective in protecting their rights in cyberspace.[33]

One of the biggest challenges has been the approach for e-initiatives policy integration. Projects have been designed in a siloed manner for one department, not considering citizens needs or integration requirements with other departments. Second, only a handful of e-governance projects have prepared detailed action plans as part of their initial scoping. This compounds the problem of lack of continuity of leadership and dedicated team by adding another layer of uncertainty for successful implementation of the project.[34] Third, there is inadequate focus on capacity building and leadership development to manage e-governance projects. The problem of capacity within the government to design e-initiatives that deliver outcomes continues to be a challenge.[35] Fourth, in today's scenario it can be seen that many large IT companies are losing interest in participating in e-governance projects because even if PPP projects are designed with user charges to cover investments and returns, the payment model assumes the Government ownership- wherein government still collects money and then

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[30]Internet Law & Policy, Janine S. Hitler, J.D., Ronnie Cohen, J.D. Prentice Hall, Uppar Saddle river, New Jersey, 2002, at 76.

[31]*Supra note* 29 at 3741.

[32]*Ibid.*

[33]*Supra note* 30 at 221.

[34]Government of India, *Transforming Governance: A Decade of e-Governance and the Next Wave,* Department of Administrative Reforms and Public Grievances, Ministry of Personnel, Public Grievances & Pensions and Department of Electronics and Information Technology, Ministry of Communications & Information Technology, January 2016, at 24.

[35]*Ibid*.

decides payment. This means projects are seeking private sector funding for government expenditure with an expectation that all risks will be borne by the private sector. This approach is demotivating and discourages the private sector to participate in e-governance projects. It may also be noted that in many e-governance projects designed and implemented, there has been a complete absence of incentive or disincentives for effective implementation. IT projects were low on the priority of policy makers.[36] Finally, in a rapidly changing world of technology, there is a need for continuous technology skills up gradation to manage large transformation projects. But with less talent infusion or professional training opportunities, the e-governance nodal agencies are not up-to-date in meeting the expectations of various stakeholders and government leadership.

VI. CONCLUSION

E-governance can become pill of all ills of governance. Technology is a boon for good governance and good governance can be achieved through e-governance. However, technology is not enough for e-governance. It must be democratized. Simultaneously, attitude of stakeholders to use technology for governance is of prime importance. With changed in attitude of people, technology based e-governance will be a great help in achieving the goal of good governance. One can say that e-governance is the vehicle of good governance. The strong political will, the policy and regulatory frameworks as well as dedicated institutions are necessary elements for successful e-governance initiatives strategies. A clear road map with a set of milestones should be outlined by Government of India with the ultimate objective of transforming the citizen-government interaction at all levels to the e-governance mode by 2020. This may be enshrined in a legal framework keeping in view the gigantic dimension of the task, the levels of required coordination between the Union and State Governments and the diverse field situations in which it would be implemented. To sum up in the words of A. P. J. Abdul Kalam:

"Technologies in computers and communications have led to the death of time and distance. Computers and networks work extremely fast and technologies can improve anything and everything. Challenges have inspired some very creative responses in our country. Let every forum of Information Technology professionals discuss and bring out a comprehensive set of recommendations continuously for the effective implementation of anytime-anywhere citizen-centric e-governance systems across State and Central governments in our country."

[36] *Ibid*.

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