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EDITORIAL

Our academic sojourn in the form of *Dehradun Law Review* is synchronous with the ever expanding contours of legal paradigms. It has been our consistent endeavour to facilitate analysis of wide range of socio-legal issues confronting the civil society. The current issue of the journal is a consequent outcome of legal inquisitiveness which constitutes the keystone of a philosophical architecture in the field of intellectual inquiry. The contributors of articles to this journal with their platonic efforts have attempted with all their tilt and potentials to accomplish the herculean tasks of quenching the thirst of legal and intellectual fraternities. Stereotype analyses leads to intellectual stagnation and innovative analysis leads to the exploration of new horizons of analyses in the sphere of law. In response to this goal, we have transformed *Dehradun Law Review* into a peer revieed journal which appears to be another mile-stone in our intellectual cum-academic expedition.

The editorial board of *Dehradun Law Review*, an intellectual procreation of Law College Dehradun, Uttaranchal University feels exalted to bring up Vol. 7, Issue 1, November, 2015. The present issue contains articles contributed by eminent academicians from various universities of the country. Issues concerning accountability in legal profession, status of euthanasia in India, prosecution of civil servants, displaced persons and development, witness protection in India, right to information act as a weapon to strengthen good governance and fighting against corruption, subsidy under the WTO Agreement, implementation of PCR Act, 1955 and SC and ST Act, 1989, currency manipulations and international trade, and doctrine of legitimate expectation have been intensively discussed, analyzed and evaluated in this issue providing valuable insights in the respective sub-spheres of law.

Professor Ravi Karan Singh and Mr. Avnish Kr. Singh in their article titled “Accountability in Legal Profession and Crises in Existing Mechanisms” examine the role of legal professionals and raise issue of independence of judiciary from other organs of state. They also argue for urgent requirement of a sound mechanism analyse the present procedure of appointment of judges under the National Judicial Appointment Commission (NJAC) Act, 2014

Dr. Pankaj Sharma and Dr. Shahabuddin Ansari in their paper “Euthanasia in India: A Historical Perspective” argue that euthanasia involves some significant issues like death with dignity, right to die, freedom of choice between life and ending the life, right to be killed and raise the question whether medical ethics permit doctors to assist suicide of a patient suffering from terminal diseases?

Dr. Ashutosh Mohanty and Professor Gautam Budha Sitaram in their research article titled “Limitations on Judicial Analysis in Prosecution of Civil Servants in India” draw out the practical implication of the judicial decisions explaining the extent and scope of judicial control in Government's relation to civil service matters.

Dr. Shaikh Sahanwaz Islam and Mr. Kumar Ashutosh in their research paper "Rights of Displaced Persons and Issue of Development" argue that development is inevitable but it should not be at the cost of right to life and livelihood of people and also examine the role of judiciary in maintaining a harmonious balance between the individual interests and interests of community interest in India.

Mr. Zubair Ahmed Khan in his paper titled "Need for Witness Protection in India: a Legal Analysis" argue that witness is an indispensable aid in the justice dispensation system in any civilized society. He discusses how the law relating to the protection of witnesses is insufficient and also emphasize on the need for a witness protection programme.

Mr. Mohit Sharma in his paper titled "Right to Information Act: a Weapon to Strengthen good governance and fighting against corruption" argues that Right to Information Act is a weapon to strengthen the good governance and also examines its role in fighting against corruption in India.

Mr. Anoop Kumar in his paper titled "Definition of Subsidy under the WTO Agreement" examines the legal definition of subsidy provided in SCM Agreement. He also examines the law of WTO appellate body to understand whether the concept is defined too broadly.

Besides these issues other issues like implementation of PCR Act, 1955 and SC and ST Act, 1989 by Professor Harbansh Dixit, currency manipulations and international trade by Mr. Ajit Kaushal and Professor Tabrez Ahmad, and doctrine of legitimate expectation by Mr. Vijay Kumar have also been discussed, analyzed and evaluated in brief in this current issue of journal.

Offering concrete, positive and in-depth analysis is our responsibility and critical comments of readers are the rewards. Hence, critical comments from across the academic spectrum are indispensable for any intellectual effort. As such, we solicit the comments and suggestions of the academic fraternity for further up-gradation of this journal. I extend my compliments and warm wishes to the contributors of articles and solicit their constant support in this scholastic expedition.

God Speed !

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

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ACCOUNTABILITY IN LEGAL PROFESSION AND CRISES IN EXISTING MECHANISMS

Ravi Karan Singh* & Avnish Kumar Singh**

Abstract

The Constitution of India accords to the judiciary an important role of constitutional umpire as well as legal mentor of nation. In administration of justice the role of legal professionals is also very important. The members of this noble and honorable profession are expected to maintain the high traditions, ideals and standards. From the judiciary's point of view independence from other organs of state is considered necessary and to maintain this independence there is urgent requirement of a sound mechanism. In major democracies of the World, judges are appointed by the Executive. The countries like South Africa and UK have set up Judicial Commission for the appointment of judges which consists of wide range category of members for appointment of the judges. In India, controversy has arisen between the different organs of the state. Both Legislative and Executive are trying their level best to get supremacy in the matter. Perhaps the solution exists in a practice where neither side enjoys supremacy. The present paper examines the present procedure of appointment of judges and analyses the National Judicial Appointment Commission (NJAC) Bill, 2014.

Key words

Legal Profession, Independence of Judiciary, Appointment of Judges and NJAC.

I. Introduction

The Constitution of India accords to the judiciary an important role of constitutional umpire as well as legal mentor of nation, in which the role of legal profession is very important in the administration of justice[1]. It is one of the professions in our country which has found a place of pride in the Constitution of India and it is indispensable to society. No doubt, the member of noble and honorable legal profession has expected to maintain the high traditions, ideals and standards[2]. Legal profession, which consists of lawyers, judges, legal bureaucrats and jurists, play a vital role in maintaining the rule of law. They mediate between modernistic values held out by the constitution and the traditional values accepted by the society which helps in creating proper legal culture[3]. The judicial process is collaboration between the practicing lawyers' and the judges. It is

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[1] *I. T. Commr. Madras v. RMC Pillai* AIR 1977 SC at 497

[2] Ravi Karan Singh, *Dispensation of Justice Role and Accountability of Judges and Advocates,* Deep & Deep Publication 2004

[3] Peter Rowe, "Indian Lawyers and Political Modernization", 3 Law and Society Review, 1968, at 219

therefore, the present study on legal profession has called to expose the prevalent professional misconduct in Bar and deviant behaviour of Bench. Further in this article instances has been mentioned to examine the prevalent unethical practices and to scrutinize ambiguities among the errant legal professionals.

Keeping the past attitude of the lawyers towards social change including awareness of their societal role as social engineers was necessarily realised by the Apex Court in *S.P. Gupta v. President of India*[4] that lawyers had locus standi to challenge governmental action which was likely to interfere with independence of the judiciary. Justice Bhagwati observed that 'the profession of lawyers' is an essential and integral part of the judicial system and lawyers may figuratively be described as priests in the temple of justice. They assist the court in dispensing justice and it can hardly be disputed that without their help, it would be well nigh impossible for the court to administer justice[5]. It appears that legal profession has not only high depth of learning but also a sense of social responsibilities which call for the high and noble conduct, by virtue of the position he occupies, a lawyer is required and expected to maintain high professional ethics.

The word 'Ethics' means a science of morals or that branch of philosophy which is only concerned with human character and conduct.It is the body of rules and practices which determine the professional conduct of the members of the Bar and the Bench. The character of a lawyer should be beyond suspicion. It is therefore, necessary for a lawyer from the commencement of his career to cultivate truth, honesty, and moral excellence while practicing his profession. The fundamental aim of 'legal ethics' in the words of Marshal C.J., of the United States, is to maintain honor and dignity of the legal profession; to secure a spirit of friendly co-operation between the Bench and the Bar in promotion of highest standards of justice; to establish honorable and fair dealing of counsel with his client, opponent and witnesses; to established spirit of brother-hood with Bar itself; and to secure that lawyers discharge their responsibilities to the community generally[6]. To regulate the conduct of lawyers, adequate safeguard have been provided under sections 35 and 36 of the Advocate's Act 1961 and Chapter II of Part VI of the afore said rules deals with, Standards of Professional conduct and Etiquette. Bar Council of India by framing certain rules and State Bar Councils by establishing disciplinary committees has become custodian of the profession.

The Judges of High Courts and the Supreme Court are constitutional functionaries. Hence no statutory conduct rules are applicable to them. Judges are governed by the oath that they will act faithfully and without fear, favor, affection or ill will. However, in order to maintain probity in judicial life, higher judiciary has to formulate code of ethics for themselves, wherein morality and virtue of judges has to be re-stated. However, all the states in India have formulated separate rules governing conduct of judicial officers of the subordinate courts[7].

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[4]AIR 1982 SC 149

[5]Id., at 195

[6]Krishana Swami Aiyer, *Professional Conduct and Advocacy* (New Delhi: Oxford University Press, Third Ed., 1960) at 92

[7]The U.P. Judicial Services Rules, 2001; the Punjab Superior Judicial Services Rules, 2007; the Haryana Superior Judicial Services Rules, 2007; and the West Bengal Judicial Services Rules, 2004 etc.

II. PROFESSIONAL MISCONDUCTS BY ADVOCATES

The expression 'professional misconduct' has been explained long time back by the Privy Council in the case of *George Frier Grahame v. Attorney General Fize*[8], that any attempt 'by any means' to practice a fraud or betraying the confidence of a client; empower on or deceive the court or the adverse party or his counsel and any conduct which tends to bring reproach on the legal profession or alienates the favorable opinion in which the public should entertain concerning it. In *P.D. Khandelkar v. Bar Council of India*[9], the Supreme Court laying down test to be applied in case of 'professional misconduct' of advocates, said that 'the proved misconduct of an advocate is such that he must be regarded as unworthy to remain a member of honorable profession to which he has been admitted, and unfit to be entrusted with the responsible duties that an advocate is called upon to perform".

Further, Supreme Court[10] classified that the word 'misconduct' though not capable of a precise definition, however, may involve moral turpitude, improper or wrong behavior, unlawful behavior, willful in character, forbidden act, a transgression of established and definite rule of action or code of conduct; but not a mere error of judgment, carelessness or negligence in performance of the duty; the act complained of must bear forbidden quality or character. Its ambit has to be construed with reference to the subject-matter and the context wherein term occurs.

It makes clear that misconduct has myriad forms, which are rampant in advocacy and entail the instances of lawyers accepting money in the name of a Judge or on the pretext of influencing him; or tampering with the court's record; or actively taking part in forged court orders; browbeating and abusing Judges and getting the case transferred from an inconvenient court; or sending unfounded and unsubstantiated allegation petitions against judicial officers and judges to the superior courts, are universally known. Unfortunately these examples are not from imagination. These things are happening frequently than we care to acknowledge[11].

In this regard few landmark instances has been given below which provide for curbing menace of malpractices which lawyers have made an integral part of their legal practice.

Lawyer's Strike

Prior the passing of Advocates Act 1961, an important question of law was raised in *Emperor v. Rajni Kanta Bose & ors*[12], that whether strike and boycott of court by the pleaders would amount to professional misconduct under the Legal Practitioners Act? The court held that such an attempt by the Pleader's was to impede the administration of justice and amounted to deliberate failure in duty towards clients and courts. The court observed that strike and boycott of the court by pleaders has been included in professional misconduct within the meaning of s.13(b)(7) of Legal Practitioner's Act and

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[8] AIR 1936 PC 224

[9] *AIR 1984 SC 110*

[10] *Noratanmal Chourisa v. M.R. Murli, AIR 2004 SC 2440*

[11] *R.K. Anand v. Registrar Delhi HC, 2009(10) SCALE 164*

[12] *AIR 1922 Cal. 515; See also, In re Taravi Mohan Barari AIR Cal. (FB) 21-23; and In re Pleaders Case AIR 1924 Rang 320*

court was opened that it was a ground for debar or suspension of the Pleader. Again the question of right to go on strike or give call for boycott of courts by professionals was considered in *Ex-Capt Harish Uppal v. Union of India*[13] but this question has not been decided by the court. However, the court realized that the phenomenon of going on strike at the slightest provocation has been increasing, although strikes and call of boycott

paralyzed functioning of the courts. Further, Supreme Court in *Indian Council of Legal Aid and Advice v. Bar Council of India*[14].

Observed that "members of the legal profession have certain social obligations and since their duty is to assist the court in the administration of justice. They must strictly and scrupulously abide by the code of conduct and must not indulge in any activity which may tend to lower the image of legal profession in the society. The legal profession is a solemn and serious occupation. The honor as a professional has to be maintained by its members by their exemplary conduct both in and outside the court.

Legal and judicial system in this country is playing an important tireless role. Stalwarts of the profession has always taken their profession seriously and practiced it with dignity, deference and devotion, seeing the seriousness of the profession Supreme Court in *re Sanjeev Dutta*[15] observed that lawyers has no right to go on strike and that they shall be answerable for the consequences suffered by the party. Court further established that 'No service will be too small in making the system efficient, effective and credible'. Senior members of Bar are also of firm opinion that strike of advocates amount to professional misconduct. It is a threat to the administration of justice and undermines rule of law[16]. Study on lawyer's strike in the States of Delhi, Punjab and Haryana and some other part of India reveals that time spent by lawyers in court is lesser then protesting outside the court. Therefore, to nip this evil of advocate's strike, the legislature must come forward with express provisions in the Advocates' Act, 1961[17].

Misappropriation of Client's Property

In *Vikas Despande v. Bar Council of India*[18], an advocate has obtained signature of his client on some blank papers and later on converted into forged documents of client property while, he was facing death penalty. There after he sold their land on the basis of forged power of attorney executed in his favor and adjusted the money in remittance of his fees. The court expressing distress and owing of such misconduct observed that the preservation of mutual trust between an advocate and his client is must otherwise the prevalent judicial system in the country would fail and collapse. Such acts apart from affecting the lawyers erode the confidence of the general public in the judicial system. Supreme Court, further, also comments on the nobility of the profession in the following words:

"Today hundred percent recruitment to the bench is from the bar starting from the

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[13] *(2003)2SCC 45*

[14] AIR 1995 SC 691

[15] 1995 3SCC 619

[16] H.M. Seervai, F.S. Nariman, P.P. Rao and Rajiv Dhawan (All are senior Advocates); See supra note 2, at 84 and 85

[17] Supra note 2, pp. 12-87

[18] AIR 2003 SC 308

subordinate judiciary to the higher judiciary. We cannot find honest and hard working Judges unless we find honest and hard working lawyers. Time has come when the society in general, respective Bar Council of states and the Judges should take note of warning bells and take remedial steps and nip the evil or the curse, if we may say so, in the bud."[19]

The court further realized that no judicial system in a democratic society can work satisfactorily unless it is supported by the bar that not only enjoys the unqualified trust and confidence of the people but also shares the aspiration, hope and ideals of the people whose members are monetarily accessible and affordable to the people.

Collusion of Legal Services

In *R.K. Anand* v. *Registrar, Delhi High Court*[20] (known as BMW Hit and Run case) on May 30, 2007 through a programme by a news channel, New Delhi Television (NDTV), it was revealed that eye witness was being influenced by the defence lawyer in collusion with public prosecutor to shield the main accused. The Supreme Court admitted the facts of case to be a manifestation of the general erosion of the professional values among lawyers at all levels. Living aside many kinds of unethical practices indulged in by a section of lawyers, Court find that even some highly successful lawyers seem to live by their own rules of conduct. It was asserted that unless the trend was immediately arrested and reversed, it shall have very deleterious consequences for the administration of justice in the country. The Supreme Court also criticized the quantum of punishment[21] awarded by Delhi High Court as wholly inadequate, and issued a show cause notice to Mr. Anand (Sr. Advocate) seeking an explanation as to why his punishment should not be enhanced under the Contempt of Courts Act? Further Court opined that the right of the advocates to appear in courts is within the control and jurisdiction of courts[22].

These are few illustrative judgments of the Supreme Court that provides stark reminders and stern warning to the deviant behavior of Advocates. The judiciary while acting reasonably against the errant Advocates has given some commendable judgments, of punishing errant lawyers, along with requisite directions to entire lawyer's fraternity and has attempt to bring back dignity of the legal profession and efficient administration of Justice.

For assessing role and functions of the Bar Council through its Disciplinary Committees in disposing of complaint cases in various capacities has been examined in depth and concluded by the study 'that the indulgence of the advocate in various serious professional misconduct may damage to the client heavily. Sometimes client may lose his livelihood while the advocate is let scot-free by their peer's group adjudication system. Study further showed that an attempt has always been made to save erring

[19] *Id.*, at 309

[20] *Supra note* 11 at 199

[21] The High Court debarred R.K. Anand and IU Khan both Sr. Advocates from appearing in any court in Delhi for four months along with a fine of Rs 2000/- each.

[22] The Supreme Court Practice and Procedure Rule, and High Court Practice and Procedure Rule

advocates and put complainant into distress[23]. After considering the pros and cons of the problem it is submitted that peer group of adjudication system in the legal profession failed miserably to grant any effective relief to sufferers.

III. MISCONDUCTS BY JUDGES

At present judges of the Supreme Court and of the High Court's shall be appointed by the President of India after consultation of chief Justice of India. He has to act or upon the advice of the Council of Ministers, which should be given in consultation with Chief Justice of India as required by Article 124(2) and 217(1). In this way President is appointing authority. In *Supreme Court Advocate on Record Association v. Union of India*[24] the Court has elaborated the expression 'consultation with chief justice of India' requires consultation with plurality of judges of the Supreme Court and held that the opinion of the Chief Justice of India has primacy in matter of recommendation for appointment to the Supreme Court and High Court Judges and to formed in consultation with a collegiums of Supreme Court judges.

On the other hand the existing machinery for removal of a judge of the Supreme Court or a judge of High Court's under Article 124(4) & (5) of the constitution is by way of impeachment. The President shall not pass such an order of impeachment unless an address by each House of Parliament has been presented to him for such removal on the ground of proved misbehavior or in capacity. Such an address must be supported by the two third majority of the House. Thus the existing process under the constitution for the removal of a Judge is sufficiently proved by the fact that hardly in any case, in which impeachment has been invoked since the commencement of the constitution and ended up in removal of judge in spite of support for the removal of a judge from the Bar, Media and the Parliamentarians.

The independence of the judiciary from the executive and the legislature as well as independence of each and every judge within the judiciary is considered as a necessary condition for a free society and constitutional democracy. The Supreme Court held more than once that the independence of judiciary is a basic feature of the Indian Constitution[25]. P.P. Rao, Senior Advocate in his article[26] rightly quoted Socrates to describe the quality of a judge. According to him, 'Four things belong to a judge; to hear courteously; to answer wisely; to consider soberly; and to decide impartially'. A dishonest judge cannot decide impartially. When a Lord Chancellor was asked as to what he would look in a candidate for judge-ship, he said 'honesty' and added if he knows some law, still better. Over the years there has been a growing concern about the deteriorating quality of judges. There was a time when corruption in the judiciary was unknown, but not any longer. In 1990, Nani A. Palkivalla spoke about public disenchantment with judicial administration. He rightly observed that 'if you lose faith in

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[23]Ravi Karan Singh, "Legal Practitioners (Regulation and Maintenance of Standards in Profession) Bill 2010: A Critique", Pbi. U. LJ, 2011, at 81

[24]*(1993) 4 SCC 441*.

[25]*SP Gupta v. Union of India AIR 1982 SC 149; Indira Nehru Gandhi v. Raj Narain AIR 1975 SC 2299; Minerva Mills Ltd. v. Union of India AIR 1980 SC 1789 and Kihoto Hollohan v. Zachillhu AIR 1993 SC 412*

[26]*P.P. Rao, "Working the Constitution- Delivered Lala Amar Chand Sood Inaugural Memorial Lecture", Pbi. ULJ, 2010, at 7*

politicians, you can change them. If you lose faith in judges, you still have to live with them... corruption in the upper reaches of the judiciary is illustrative of the incredible debasement of our national character[27]. Chief Justice S.P. Bharucha, estimated that 20% of the judiciary has become corrupt, but mostly in the subordinate judiciary. Ram Jeth Malani, as Union Law Minister, said that the fatal combination of incompetence and corruption among police, prosecutors, witness and judges frustrated Justice'[28]. Similarly senior lawyer Mr. Prasant Bhushan who was also member of the Committee on Judicial Accountability in an interview given to 'Tehelka magazine' in the year 2009 made a statement that 'half of the last 16 chief Justices were corrupt'. Not even this he also quote 'Transparency International Report' 2006 which states that judiciary in India is the second most corrupt institution after the police[29]. The allegation raised by Mr. Bhushan seems to have raised a heuristic challenge. How courts close its eyes and pretend to be asleep? Below mentioned are few instances which showed deviant behaviour of judges and malfunctioning of the constitutional courts. There are following instances of misconduct by Judges:

Justice K. Veeraswami Case

The former Justice of the Madaras High Court was found guilty of 'criminal misconduct' under S. 5(1)(e) of the then Prevention of Corruption Act 1947[30]. The matter reached before the constitution bench of Supreme Court. Court held that definition of 'public servant' is wide enough to include judges of higher judiciary. However, it created an embargo that a sanction from the Chief Justice of India shall be obligatory for registering a criminal case against a judge. The court held that, this restraint is necessary to protect the judges from harassment by the executive, who controlled the investigating agencies. Since the judgment has rather increased the impunity of judges who have now used to the feeling that they can get away with any kind of misbehavior.

Justice Soumitra Sen Case

A letter dated Aug. 4, 2008 to the Prime Minister, the then Chief Justice of India asked for the impeachment of the Judge Soumitra Sen. The process had been started to impeach of Mr. Sen by the Parliament. Rajya Sabha passed the resolution for his removal but before the Lok Sabha could take up the matter, he resigned and his resignation was accepted by the President of India.[31]

Justice Y.K. Sabharwal Case

The Central Vigilance Commission in Jan 2008, charged that Mr. Sabharwal misused his official position to promote the business interests of his son, by ordering for the demolition of commercial outlets in Delhi. This was criticized by media. It is interesting

[27] *Ibid.*

[28] Ibid.

[29] *Tehalka Magazine*, Vol. 6 issue 35 dated Sept. 05, 2009, available at: *www.tehelka.com* [Visited 20 June 2014]

[30] 'If any person on his behalf is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactory account, of pecuniary resources or property disproportionate to his known sources of income'.

[31] G.S. Pande, *Constitutional Law of India* (Pub. Uni. Book House Pvt. Ltd, 2012) at 468

to note that the Delhi High Court suo moto issued contempt proceeding against the press and others, despite their offering to prove the truth of all their allegations. The High Court declared that the truth of the allegation was irrelevant since they had brought the entire judiciary into disrepute and also tarnishes the image of Judiciary.[32]

Ghaziabad Provident Fund Scam

This scam came into notice when an ex judge (vigilance) of Ghaziabad District Court reported to the Allahabad High Court that more than seven crores has been siphoned out of the Ghaziabad treasury by the District and Session Judges with the help of anadministrative officer of the court, in the guise of Provident Fund advances to class III and IV employees. The High Court found the report, prima facie, having merit and directive to, the vigilance Judge to file FIR against the administrative officer of the court.Since the Ghaziabad police found it difficult to investigate the matter and it was transferred to CBI.[33]

Justice Nirmal Yadav Case

Also known as 'Judge's door scandal' arose when a packet containing of Rupees Fifteen lakh allegedly meant for Justice Nirmal Yadav, but it was mistakenly delivered to other Justice Nirmal Kaur, of Punjab and Haryana High Court. The CBI was called upon to investigate and an in-house Inquiry Committee of three judges was also constituted by the CJI. The committee found that there is substance in the allegations and misconducts disclosed are serious enough for initiating the proceedings for removal of Justice Nirmal Yadav.[34] However, in November 2009, a clean chit was given to Justice N.Yadav and CBI filed a closure report before special court. But the Bar Association opposed CBI's request to close the case and filed a petition in High Court against the same. However, petition was rejected on 26 March 2010. Once again, permission was granted to CBI to prove upon allegations against Justice Nirmal Yadav.[35] It seems, such controversies are diminishing the image of the whole judiciary and depicted the noncredibility of the collegiums system, for investigating complaints against the judges,but also brought forth the focus on judicial appointments and transparency in thejudiciary.

Justice V. Ramaswamy Case

This was the first judge in Indian legal history which faced impeachment for immense financial irregularities committed during his term as a Punjab and Harayana High Court judge. However, impeachment could be successfully completed as the same was not supported by 205 congress MPs. An inadequacy of the existing mechanism was witnessed in K. Veeraswami case and the infrutuous impeachment proceedings in the

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[32] Available at: *http://www.judicialreforms.org* [Visited on 15 July 2014]

[33] Restriction imposed in the K. Veeraswamy Judgment restrained the police from investigating criminal offences by judge without permission the prior written permission of CJI. As per directions given by the then CJI, the police were not allowed to directly interrogate the High Court judges and could only send written question to them.

[34] Available at: *http://.thehindu.com* [Visited on 15 July 2014]

[35] Ibid.

case of V. Ramasawami even after the adverse finding of the judge's committee under the Judges Inquiry Act, 1968, affirmed that impression.[36]

Justice P D Dinakaran Case

A criminal misconduct' came into light when District Collector report was submitted to the Supreme Court and confirmed that Karnataka High Court Chief Justice Mr. Dinakaran had encroached upon public land illegally. The forum comprising of senior Advocates of Chennai wrote to the Supreme Court collegiums and also to the Committee on Judicial Accountability, conveying serious misgivings about the integrity of Justice Dinakaran. The process of impeachment against Mr. Dinakaran was started by the Rajya Sabha by constituting a committee to investigate corruption charges against him. He challenged the constitution of the committee and procedure thereto adopted by the committee. Dismissing the petition Supreme Court urged the chairman to nominate another jurist in his place. Due to this delaying tactics, he resigned from his post and Rajya Sabha wound up the committee.[37]

Recently, former Supreme Court Judge Markanday Katju, Chairman of Press Council of India[38] stirred a controversy by alleging that three ex Chief Justices of India had made improper compromised' in given extension to an additional judge of Madras High Court against whom there were several allegations of corruption, to continue in office.[39] These three former CJI's made improper compromises. Further Mr. Katju said the reason for all this was that at that time the UPA-I, Government was dependent on allies and one of them was a Tamil Nadu (DMK) party, whose leader was given bail by the additional Judge concerned. Hence, it is argued that the corruption cases against the judges has rather increased the impurity of judges in higher court, who have now got used to the feeling that they can get away with any kind of misbehavior, without fear of any criminal action or action for removal. Armed additionally with the power of contempt they also have little fear of public exposure.[40] Nevertheless, this requisite must be given a second thought in beginning pertaining to the prevailing circumstances as since the K. Veeraswamy Judgment etc. A Chief Justice of India has rarely given permission to investigate a sitting Judge of High Court or Supreme Court, obviously not because there has been no corruption in the Judiciary.[41] In retrospect, it would appear that the trust reposed by the framers of the constitution in Parliament in the matter of impeachment of a judge is misplaced. Member of Parliament is most ill-suited to judge the misbehavior of judges. It therefore need better method of easing out erring judge. Otherwise, corruption in the judiciary cannot be checked.

However, politicians are eventually accountable to the people. They have to go the public after five years and more often than not even sooner than five years. The bureaucrats are accountable to their Ministers, the Legislature, the Courts and the

[36]Justice J.S. Verma, "Mechanism for Judicial Accountability", Available at: *http://wwwjudicialreforms* [Visited on 15 June 2014] [37]*Justice P.D. Dinakaran v. Judges Inquiry Committee*, AIR 2011 SC 3711 at 3748

[38]The Hindu, "Corruption and Bribery" New Delhi 21 July 2014.

[39]By supporting this controversy, the former SC Judge Ruma Pal had put her objection in writing on getting to know that a tainted Madras HC Judge Mr. Ashok Kumar was given extension in 2005 over looking the reservation of the collegiums. Then CJI Justice Lohati ignored my note on tainted Judge. *The Hindustan Times*, July 24, 2014, at 1

[40]Prashant Bhushan, The lack of Judicial Accountability in India, *Available* at http://www.judicialreforms.org visited 15 July 2014.

[41] *Ibid.*

watchdog bodies like the Central Vigilance Commission and the Central Bureau of Investigation. On the other only impeachment can be used against judges. It is acknowledged to the world that impeachment is a blunt and impractical weapon. They have not only depicted the non-credibility of the collegiums system, for investigating complaints against the judges, but also brought forth the focus on judicial appointments and transparency in the judiciary.[42] Manner of functioning of collegiums of the Supreme Court of India has drawn flak from all sections of the society and it is a matter of utmost concern and even a matter of shame for the members of the judiciary that the collegiums of the Supreme Court is blissfully remaining insensitive to public reaction.[43]

IV. CONCLUSION

The above said discussion reveals that the factors behind sabotaged credibility of the mechanism formulated to discipline errant lawyers and judges leading to strong voices demanding for a far more effective mechanism. However judiciary has already given some commendable judgment to punish errant lawyers and has also given directions to entire lawyer fraternity, in its attempt to bring back the dignity of the profession and efficient administration of justice. The Advocates Act, 1961, brought immunity from the High Courts in matters of professional misconduct and assigned this responsibility to the concerned Bar Councils through its Disciplinary Committees. The Disciplinary Committee consist of two members who are elected from bar and one member is co-opted from the local bar.[44] It is pertinent to note here that all members of the committee are regular practicing advocates. Elected members of the bar council have their political ambition to occupy high positions in public offices and to be retain in the near future. Hence one can easily say that the environment in which they function, society in which they live and their own inclinations lead compromise with impartiality and cast shadow on their judgments. It would be difficult to keep abuses out of it. By and large political alignment must be avoided because of the justice must not only be done but it must be done.[45] It is, therefore, submitted that the present composition of the disciplinary committee under the Advocates Act should be amended with a view to prohibit elected members of the bar therein. The functioning of the peer's group adjudication machinery under the Act must be made to an independent statutory authority.

In major democracies of the World, judges are appointed by the Executive. The countries like South Africa and UK have set up Judicial Commission for the appointment of judges which consists of wide range category of members for appointment of the judges[46]. In India controversy has arisen between the Executive and the Judiciary. Both Legislative and Executive were trying their level best to get supremacy in the matter. Perhaps the solution lying in a practice where neither side enjoys supremacy. To resolve this

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[42]Satya Prakash, "Collegiums System to be Scrapped?", Available at http://www.hindustonnet.com [Visited on 21 July 2014]

[43]Sujata V. Manohar, (Revised) *T.K. Tope's Constitutional Law of India* (Third Edition,E B C, Lucknow, 2010) at VIII

[44]S.9, Advocates Act 1961.

[45]Supra note 2; also see Ravi Karan Singh, Book review, selected judgments on Professions Ethics Pub. Bar council of Trust, MDU Law Journal Vol. 9, 357 (2004).

[46]Justice D.V. Shylendra Kumar, "Errant Judges and Secretive Collegiums of the Supreme Court", Available at: http://judicialremorms.org [Visited on 23 June 2014]

controversy recently, the Parliament by way of 121st Constitutional Amendment has passed National Judicial Appointment Commission (NJAC) Bill, 2014 which required ratification by more than half of the States, which is in process. The NJAC provides for an independent and impartial body, which is accountable to the public. Bill also provides manner of selection, promotion and transferring of Judge's from one High Court to another and elevation of Judges to the Supreme Court. This bill intends for creation for a Constitutional Authority reflecting the aspirations of all organs of the government. This is done in order to bring in harmony between the two conflicting wings of the Government.

EUTHANASIA IN INDIA: A HISTORICAL PERSPECTIVE

Pankaj Sharma* & Shahabuddin Ansari**

Abstract

Life is the precious gift donated by Divinity to mankind. One has to protect and preserve this with kindness and dignity. Ethics and morals impose an obligation on the medical practitioners to assist the maintenance of life free from sufferings and pains. In case of absence of medically qualitative life pacing into vegetative state the soul is liberated from slow and horrible sufferings. In such situation the patient is bestowed with the right to choose quick and easy death. This is popularly known as good-death, that is to say Euthanasia. Euthanasia involves some significant issues like death with dignity, right to die, freedom of choice between life and ending the life, right to be killed. Is the choice of death when it becomes imminent and unavoidable fall within the category of human right as right to die? Is cessation of treatment of a patient in vegetative state a way to protect human right to die? Does medical ethics permits doctors to assist suicide of a patient suffering from terminal diseases? These are some questions to be answered through this study relating to Euthanasia and historical development of legal frame work pertaining to it.

Key words

Euthanasia, Right to Die, Right to Life, Mercy Killing and Medical Ethics.

I. INTRODUCTION

Life is the precious gift donated by Divinity to mankind. One has to protect and preserve this with kindness and dignity. Though life and death is companion of each other yet death destroys the life and bereft humankind of the choicest blessings of providence. Therefore theistic people's majority do not want to die in unnatural way. It is, therefore, incumbent upon caretakers and Medical Practitioners to take oath to save the life of every person and not to kill him. Ethics and morals impose an obligation on the medical practitioners to assist the maintenance of life free from sufferings and pains. They have to perform the duty to conform to the right to live. No one should forget the value of life i.e. dignified life. But ultimate end and final decay of human body is equally a truth which cannot be ignored. As dignified life is a core aspect of civil society, similarly dignified death is also an ingrained ingredient of it. Regular decay with minimum sufferings and without intolerably painful prolonged illness is desirable by all animates. In case of absence of medically qualitative life pacing into vegetative state the soul is liberated from slow and horrible sufferings. In such situation the patient is bestowed with the right to choose quick and easy death. This is popularly known as good-death,

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that is to say Euthanasia. The conundrum is that how can the end of life be good? In this paper authors propose to explore needs and situations where a "good-death" or "dying well" might become necessary. There may be difference between good death and easy death. "In suicide the person ends his own life by himself [easily or painfully], mostly in secrecy. But sometimes he may find himself helpless in a pitiable condition arising out of infirmity caused by physical or mental illness, disease, old age or such other condition; that, even for committing suicide, the person requires help of others. He or she may be disabled, in terminal illness, bed ridden or paralyzed or in coma or otherwise to commit suicide himself. And here exactly the ethical and legal debate for euthanasia begins".[1]

Euthanasia involves some significant issues like death with dignity, right to die, freedom of choice between life and ending the life, right to be killed. Most of us may agree that circumstance may arise where one is allowed to cause death of other. Foregoing narration of some insights of euthanasia make it necessary to probe the impact of it on "socio-legal and/or moral texture of the society".[2] As such it may be within the ambit of this discussion to investigate as to whether the slow and horrible death with unbearable sufferings and pains is violation of the right of dignified life or not? Is the choice of death when it becomes imminent and unavoidable fall within the category of human right as right to die? Can a human right of the ailing person be transferred to other human beings like doctors, nurse or close relatives? Is cessation of treatment of a patient in vegetative state a way to protect human right to die? Does law permit mercy killing? Does a medical ethics permit doctors to assist suicide of a "patient suffering from terminal diseases? These and some other questions are to be probed through this study relating to Euthanasia and historical development of legal frame work pertaining to it.

II. CONCEPTUAL CONNOTATION AND HISTORY

Jurisprudence of euthanasia caters relevant basics like right to life, right to die, right to kill and right to be killed. Legally speaking it is suicide, homicide and consensual killing. It is popularly known that euthanasia is a Greek concept which literally means good death, that is to say, easy death. "It is the practice of killing a person or animal, in painless or minimally painful way for merciful reasons, usually to end their sufferings. The Euthanasia in the strict sense involves actively causing death, but in a wider sense it includes assisting someone to commit suicide, in a particular circumstance".[3]Some of the jurists transpose it "into Latin expression *benemortasia* meaning the benevolent or mercy killing".[4] It is general perception that euthanasia is a process used to cause death. On occasions it speaks about the act of inflicting death being good or right in it, therefore, no criminal liability arises from the death of a terminally ill patient. These connotations leave impression that euthanasia is an act of abetment or instigation to commit suicide or to assist suicide by giving advice for ending the life of a terminally ill patient.[5]

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[1]*Sujata Pawar, "Euthanasia for Death with Dignity: Is it Necessary", XXXVII (3-4) Indian Bar Review, 2010, at 4*

[2]*G. Saqlain Masoodi and Lalita Dhar, "Euthanasia at Western and Islamic Legal Systems: Trends and Developments", XV-XVI Islamic and Comparative Law Review, 1995, at 1*

[3]*Praveen Singh, "Euthanasia: Graceful Death", 1 Delhi Law Review (Students), 2004, at 83*

[4]*Senford H. Kadish, Encyclopaedia of Crime & Justice, (New York, 1983), at 709, quoted by G. Saqlain Masoodi, supra note 2, at 3*

[5]*Ibid.*

The psyche of human being and as such of animals too, is that one does not like the thought or idea of dying whether it is premature or not. Human society always entertains with joy the birth and mourns the death. Most of the people long for prolong life, but situations may arise when he or she desires death to free himself from the travails of prolong painful illness. We are acquainted with the notions of *Daya maran*, *Swachchhand Mrityu* and *Ichchha maran* in Indian culture, ethos and history. These *upaye* are provided to liberate the soul from physical sufferings of a patient. These might have been prescribed for obtaining *mukti* from slow and horrible prolonged illness.

In order to clear the clouds shrouding the concept of the euthanasia historians and jurists have made efforts to analyze forms and patterns of it. In the classification of concept of euthanasia intention of the patient plays a central role. On the basis of intention and act the euthanasia is categorized into active and passive euthanasia. Active euthanasia involved injective a potent drug to advance the death of such patients whom doctors have lost hope of reviving even with the most advanced medical aid.[6] In an attempt of active euthanasia "the doctor is actively involved in the termination of the life of the patient no matter for whatsoever reasons".[7] In other words it is doctor's intervention which causes death otherwise death might have not occurred.[8]Another way, that is, passive euthanasia involves "withdrawal of life sustaining drugs and/or life support system for patients"[9] who is in irreversible vegetative state. The active Euthanasia is declared crime whereas passive euthanasia is allowed by the Supreme Court in *Aruna Shanbaug* case.

The euthanasia can also be divided as voluntary euthanasia, non voluntary euthanasia and involuntary euthanasia. In the voluntary euthanasia, a wish to die is expressed by a terminally ill patient. He no more wants to live alive and declares his intention to that effect. If such patient seeks help for dying, refuses medical treatment, asks to remove life support mechanism, refuses to eat and/or decides to die to avoid painful future, he is supposed to beg voluntary euthanasia. Under non-voluntary euthanasia the patient cannot make a decision for ending his own life. This does not depend on the wish of the patient but is based on the wish of a close relation or guardian of the terminally ill person. This includes the cases where such patient is in coma or very young child or is under mental illness which makes his life miserable and not worth living. Amid these circumstances a third person like a close relation gives consent or asks for removing life support treatment. This third person must be the guardian or next friend of the patient. In the voluntary euthanasia, the consent of the patient is essential. Moreover, it must be an informed consent.

It is doubtful whether consent emanated from a patient who does not possess sound mind and body is free consent. In this arena next is involuntary euthanasia which is conducted without consent of the patient or his close relation but is done on the basis of the consent of the individual who has neither authority nor capacity to do it. In a

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[6]Dhananjay Mahapatra, "Commenting on the Judgment of Supreme Court in *Aruna Shanbaug Case*", Times of India, New Delhi, March 8, 2011

[7]Supra note 2, at 5

[8]Ibid.

[9]Supra note 6

situation where a stranger finds a person who has met with a fatal accident having no caretaker of his own and takes him to the hospital for the treatment where doctors declare him to be in vegetative state due to severe injuries in brain and spine. If such stranger gives consent for peaceful end of the life of this terminally ill person, it comes under the category of mercy killing and falls in the category of involuntary euthanasia.

It will be academically worthwhile to find out the traces of euthanasia in the history of human civilization. In ancient belief system it was a cardinal and ethical view that life is created by almighty and no one has right, capacity or authority to put it to an end. It had been reported that during 400 B.C. the life of human being, had been believed, to be so sacred that its protection and preservation had been deemed as primary duty of the medical practitioners. They had to take oath and solemnly declare, "I will give no deadly medicine to anyone if asked, nor suggest any such counsel".[10] However, in ancient Greece and Rome helping others die or putting them to death was considered permissible in some situations. In Greek City of sporta new-born with severe but defects were put to death.[11] And, also traditional Indian Law recognized a person's right to die. The Law Commission of India, in its 42nd report, relating to Indian penal code referred the tradition where it is narrated that a Brahamana who committed suicide to get rid of his body from sufferings, he was put in high place in the world of Brahamanas.

But the U.S. society did not permit any form of ending human life. It was in 1828 a statute was enacted in the U.S. This statute of New York had contained provisions to outlaw the assisted suicide. During 1857 to 1865, New York Commission had been constituted under the leadership of Dudley Field. This commission drafted a criminal code. The provisions of this code had prohibited "aiding" a suicide. With the passage of time, in early 20th Century public opinion was made in the U.S. relating to the easy end of life. Public concern had been focused on protecting dignity and independence at end of life.[12] During this time Law were legislated permitting living wills and surrogate health care decision making.[13] In Europe, England was the country, where public came forward to create atmosphere for dignified end of life.In 1935, Euthanasia society was formed in England. Nazi Germany under the leadership of an under-democratic, racial and fascist ruler adopted the notion of Euthanasia. In 1939, Hitler ordered mercy killing of sick and disabled persons. This programme was first kept focus on new born and later covered older disabled. After World War II, International Military Tribunal at Nuremberg found inhuman killing of the people declared by Nazi regime as "useless eaters"[14]

It was in 1994, U.S. State of Oregon legalized assisted suicide through 'the Oregon Death with Dignity Act'. This legislation was struck down by federal district judge and held the measure as unconstitutional. In the year, 1995, Australia's Northern Territory had approved euthanasia bill, which came into effect in 1996. But it was over turned by the Parliament of Australia in 1997.[15] Albania was the first country to partially legalize mercy

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[10] *Report published by Times of India, New Delhi, March 8, 2011*

[11] *Supra note 3*

[12] *Ibid.*

[13] *Ibid.*

[14] *The International Military Tribunal, 1946, Nurembarg, 1 AJL , 1947, pp.182-243*

[15] *Times of India, New Delhi March 8, 2011, at 14*

killing in 1995. Since 2002, Netherland and Belgium permit both euthanasia and assisted suicide.[16]In Luxembourg euthanasia has been declared legal in 2009.

There might have been debates on the need and form of euthanasia in India, also. In 1860 when Indian Penal Code was prepared, a provision was inserted in it where attempt to suicide has been declared a crime and this act is made punishable. This provision has been challenged in 1994 in P. Rathnam case. The Supreme Court upheld the decision of Bombay High Court and struck down Section 309 as unconstitutional. But in Giyan Kaur case, 1996 the Supreme Court over ruled the P. Rathnam verdict and opined that "right to life does not include right to die". In 2005 in a Seminar on "End of life issue" was held in New Delhi, then law minister agreed that a framework was needed for protection of withdrawal of life support provided to dying patients. The Law Commission was interested to suggest ways to deal with the problem of euthanasia. On 28th April, 2006, Law Commission suggested a draft bill on passive euthanasia. The Law Commission recommended that pleas must be made to high court which should decide it after expert opinion.[17] On March 7, 2011, the apex court allowed passive euthanasia in Aruna Shanbag case and recommended decriminalization of attempt to suicide.[18] But India still needs an appropriate legislation on the practice of euthanasia to give cover to mercy killing.

III. EUTHANASIA, RELIGION AND ETHICS

Indian society is predominantly religious society. Hinduism is a religion embraced and followed by immense majority of Indians. A tradition of *Pray-upavasa* or fasting to death reveals that it is an "acceptable way for Hindus to end their life only in certain circumstances. "It is condition precedent for adopting *Pray-upavasa* that it should be non-violent and resorted to only when the body has served its purpose and becomes a burden". There were other traditions showing the farces of euthanasia like *Sati Pratha*, where woman chose death. It had religious and social sanction in ancient India.[19] There had been some other ways where *saints, sages, seers and sadhu* had taken Samadhi and *Jal Samaadhi*. This tradition is still prevalent among religious and divinely oriented persons. The doctrines of *Ichchha maran, Daya maran and Swachchhand Mrityu*, are related with the upaye i.e. procedure to end one's life by his own volition. These notions seem to be nearer to the doctrine of euthanasia provided under Hindu way of life. These are the off- springs of "freedom to leave".

There is another stream of Hindu religio-philosophic system, wherein different view has been adopted. In Hindu religious order, it is believed that a person can only attain salvation or mukti and moksh from the cycle of rebirth if he/she dies in natural way. Shraad is also performed of and Tarpan is given to the soul of the deceased who dies in usual way and in the ordinary course of events. The soul of any person who is doomed to death by accident, commits suicide or has been killed by someone, is not entitled for tarpan and shraad. The soul of such type of dead person roamed in the universe

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[16]*Supra note 1, at 9*

[17]Supra note 14

[18]*Aruna Ramchandra Shanbaug v. Union of India*,(2011) 4 SCC 454

[19]Supra note 1, at 1

aimlessly having no destination. According to religious traditions and customs, a Hindu cannot opt for an inflicted death as the result of suicide, assisted suicide, involuntary end, or mercy killing. Thus, an inference can be drawn that euthanasia is alien to the Hindu culture and ethos.

Jain religion, an old Indian theocratic order, recognizes euthanasia in the form of Santhara. Under this Jain belief system one is "presumed to voluntarily shunning all of life's temptations--food, water, emotions, bonds-after instinctively knowing death was imminent.[20] Santhara has different notions and connotations like 'Pandit maran', 'Sallekhana, and 'Sakham-maran'. It is believed to have been practiced since the foundation of Jainism. It is held by the followers that "when all purposes of life have been served, or when the body is unable to serve any more purpose, a person can opt for it".[21] Sallekhana is focal point of Jainism without which Sadhna is not successful. "Santhara is only a matter of dying with dignity and could be undertaken in case of terminal illness or imminent death, famine or non-availability of food, and old age with loss of faculties".[22]

Sikh religion is totally opposed to the euthanasia and rejected suicide holding it as interference in God's plan.[23] The religion of Christians is also against taking life of any innocent person, even if that person wants to die. It is the part of belief system of Christians that "Birth and death are part of the life processes which God has created, so we should respect them.[24]

The Islamic socio-legal system is entirely against euthanasia. Islamic sharia declares, in no uncertain terms, that human life is sacred and inviolable. It is ordained, "Do not take life which Allah made sacred, other than in the course of Justice".[25] In another verse of Quran it is laid down that killing any person, except for murder or spreading mischief in the land, is the killing of whole mankind.[26] It is further prescribed that only Allah decides how long one will live[27] and as such taking life in any way is forbidden.[28] Sharia held that God alone, and not the human being, is the giver and the taker of human life.[29] The crux of the above explanation is that Islam is opposed to the idea of euthanasia in unambiguous terms.

IV. LEGAL AND NORMATIVE STRUCTURES

Constitutional Status

Legal status of Euthanasia, in India, seems to be that it is still illegal, particularly, active

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[20]Manasi Phadke and Tarunshree Venkatraman, "The Right of Death", *The Sunday Express (Indian Express)New Delhi*, September 6, 2015

[21]Ibid.

[22]Ibid.

[23]Shobha Ram Sharma, "Euthanasia and Assisted Suicide", *Nyaye Deep*, at 41

[24]Ibid.

[25]Quran, XVII: 33

[26]Quran, V: 32

[27]Quran, XVI: 61

[28]Quran, IV: 29

[29]Quran, V: 33

euthanasia. The constitution of India is the grundnorm, and as such every legal norm must be made and operate in accordance with the constitution. The constitution has placed the sanctity of human life at zenith. Article 21 of the constitution enshrines the right to life, especially right to life with dignity.[30] It is the basic right and all other "rights are subordinate" to and geared around it. It is an inherent right without which no civilization may be deemed to flourish. As this right is alienable, nonnegotiable and inviolable, any unfair and unjust interference with it shall be deemed violative to the article 21. Consequently, the right to die is not recognized as fundamental right under Indian Constitution. The right to life has been derived from the very fact of a human being's existence. The right to die is not an absolute right because it is not open to all irrespective of their state of health. Some jurists and philosophers are of the view that the spirit behind euthanasia has been to permit patients to die with dignity and to protect the patient's status as human being.[31] It is further held by the jurists that "from jurisprudential pointy of view the right to life may be in complete unless a person enjoys complete control to his person which includes right to die. The logic advanced by jurists that right to die is a case of freedom of choice. Under the constitution positive right includes the negative right.

Legislative Status

Legislative enactment, particularly, Indian Penal Code, 1860, embodies the provisions relating to the protection and preservation of life. Sections 299 and 300 contain rules relating to homicide and murder. Sometimes killing of human beings is held as homicide and at another time it is treated as murder. It depends upon the mode of ending human life. "Since in the cases of euthanasia or mercy killing there is an intention on the part of the doctor to kill the patient, such cases would clearly fall under clause first of section 300 of the Indian Penal Code, 1860".[32] During the treatment a patient may give valid consent and thereafter died due to the doctor's act, and then Exception 5 of the section 300 would be attracted. In such cases the mercy killer (including doctor) shall be liable under section 304 for culpable homicide not amounting to murder. The cases of voluntary euthanasia fall in this category while cases of non-voluntary euthanasia and involuntary euthanasia would governed by the proviso attached to section 92 of the I.P.C. Inference drawn from this discussion is that euthanasia is illegal under the Indian Penal Code. Attempt to suicide is also declared crime under section 309 of this code while assisted suicide is treated as abetment of suicide which is an offence punishable under sections 305 and 306 of the Indian Penal Code.

Apart from criminal law, the euthanasia is also declared as an unethical act under Regulation 6.7 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002. This contains rules relating to unethical acts of doctors and opines that "a physician shall not aid or abet or commit any of the following acts which shall be construed as unethical" and euthanasia is held as one of such act.

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[30]*Frances Coralie v. Union Territory of Delhi*, AIR1981 S.C. 764

[31]Supra note 3, at 15

[32]*Supra note* 2,

V. JUDICIAL RESPONSE

Till recent past, judiciary seems to be against the practice of Euthanasia in any form. Its practice had been declared against law because of legal provisions contained in the Indian Penal Code, 1860. General observation of the judiciary has been that physician-assisted death is not legalized nor has crystallized into medico-legal traditions of India. The judiciary has toed the line of thought of ethico-religious doctrines holding that "euthanasia devalued human dignity and sanctity of life". Some of the jurists supported the argument that Article 21, also enumerates the right to die. This controversy had been resolved by the Bombay High Court.[33] The question countenanced by the high court was as to whether the right to die is included in Article 21 of the constitution? The court further had to consider whether section 309 of the I.P.C. was in violation of Article 21? The Bombay High Court observed that the right to life includes the right to die. It was why the high court declared section 309 IPC is in contravention of Article 21, which provides punishment for the attempt to suicide. The high court held it as unconstitutional. The Supreme Court had been requested to settle the moot point relating to right to die. In *P. Rathinam v. Union of India*,[34] the Supreme Court upheld the Bombay High Court findings. The apex court observed that "to punish a person who attempted but failed to destroy his life might tantamount to an insult to his wound". But the apex court kept itself aloof from laying down the rule on the issue like mercy killing or euthanasia. However, after some time the constitutional bench of the Supreme Court[35] overruled P. Rathinam's judgment. The apex court asserted that right to life under Article 21 of the Indian Constitution does not enumerate the right to die or the right to be killed. The apex court expressed the view that suicide is an unnatural termination of life while right to life is natural right. Therefore right to die and right to life are incompatible and inconsistent with each other. The Supreme Court was requested again to deliberate on the right to die and mercy killing. In the land mark judgment, popularly known as *Aruna Shanbaug case*, the Supreme Court handed down the verdict rejecting the plea of a Mumbai nurse for mercy killing.[36] The apex court made distinction between active euthanasia and passive euthanasia. The court allowed passive euthanasia-involving withdrawal of life sustaining drugs and/or life support system.[37] In case of active euthanasia involving injecting a potent drug to advance the death of patients who are in permanent vegetative state, the apex court opined that it is crime under law.[38] The court devised an elaborate plan for the permission of passive euthanasia and held that only high court of at least two judges can give permission for passive euthanasia after *bonafide* consent from the patient's relatives and the opinion of an expert panel of reputed doctors comprising neurologist and physician.[39] The apex court asserted that the above mentioned procedure shall be held good till parliament enacts a law on the

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[33]The State of Maharashtra, v. *M.S. Dubal*, AIR 1977 S.C.411. This case went to the Supreme Court after the judgment of High Court.

[34]AIR 1994, SC 1918

[35]Gian Kaur v. State of Punjab,(1996) 2 SCC 648

[36]*Times of India*, New Delhi, March 8, 2011

[37]Dhananjay Mahapatra, *Times of India*, New Delhi, March 8, 2011

[38]Ibid.

[39]Ibid.

issue. This is the pragmatic initiative taken by the judiciary on a sensitive issue while executive and legislature kept the people waiting.

VI. CONCLUSION

Foregoing explanation and observation make it clear that death is sure and shall come to all of us one day. And it is a fact that each of us desire death to be peaceful and dignified. The purpose of medical treatment is to cure the patient, in case of failure, it aims at the promotion of comforts for the patient and relief from pain. It needs to provide better quality of dying to the terminally ill patients. This line of thought asks people not to attach to "fanatical adherence to the principle of preserving life regardless of circumstances.[40] Philosophers and jurists subscribing to this school justified the doctrine and practice of Euthanasia so that a person can leave this world in ecstatic way. The crux of the problem is that close relation of the patient also wish to provide comforts whether by healing or unavoidable merciful killing. This has been partially allowed by the apex court, tacitly adopted by medical practitioners and silently consented by close relation of the patient. It always culminates in the phrase *Dawa Ki nahi Dua ki Zarurat hey* prevalent in the society as last resort willing peaceful passing away of the patient. However, the collective wisdom of the society attaches significance to palliative care, and that too, merciful, as popular saying goes *Jahan saans hey wahan Aas hey.*

[40] R.K. Mani, "Just what the patient ordered", *Times of India*, New Delhi, August 4, 2014

LIMITATIONS ON JUDICIAL ANALYSIS IN PROSECUTION OF CIVIL SERVANTS IN INDIA

Ashutosh Mohanty* & Gautam Budha Sitaram**

Abstract

The general rule is that where there is a right there is a remedy. But, the problem of this rule is that it requires besides an examination of the rights and obligations of the Government and the civil servant a study of the remedies available to each party if the other violates the obligations imposed on him. The enforcement of the formal rule on civil servant is comparatively easy because the Government being the pay-master and the holder of the power termination of employment. In India there exists no specific judicial remedy available exclusively to civil servants. Whenever an aggrieved civil servant wants redress he has to seek the general remedies available to all others and there exist no privileges or status in this regard. The present paper is an attempt to draw out the practical implication of the judicial decisions explaining the extent and scope of judicial control in Government's relation to civil service matters.

Key words

Civil Servant, Privilege, Remedy, Judicial control, and Limitation.

I. INTRODUCTION

The primary concern of the citizens in a good civil society is that their government must be fair and good. For a Government to be good it is essential that their systems and sub-systems of Governance are efficient, economic, ethical and equitable. In addition the governing process must also be just reasonable fair and citizen-friendly. The administrative system must also be accountable and responsive besides promoting transparency and people's participation. The test of good governance lies in the effective implementation of it's policies and programmes for the attainment of set goals. Good governance implies accountability to the citizens of a democratic polity and their involvement in decision making, implementation and evaluation of projects programmes and public policies[1]. In this perspective transparency and accountability become invaluable components of good governance as well as of good administration. Transparency makes sure that people know exactly what is going on and what is the rationale of the decisions taken by the Government or its functionaries at different levels. According to George Washington, "The administration

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[1]The Latin maxim for this general rule is *ubi jus ibi remedium*

of justice is the first pillar of good governance". For good governance people's faith in judiciary based upon its functioning is essential. Lord Denning once said "Justice is rooted in confidence and confidence is destroyed when the right minded go away thinking that the judge is biased. The judges should not be diverted from their duties by any extraneous influences nor by any hope or rewards, nor by any fear of penalties nor by flattering praise, nor by indignant reproach. It is the sure knowledge of this that gives the people confidence in judges. The only real source of power that the judge can tap is the respect and confidence of the people. The result of this would result in good governance. The welfare of citizens greatly depends upon speedy timely and impartial justice. James Bryce has rightly remarked that there is no better test of the excellence of a Government than the efficiency of its judicial system. The judiciary is the guardian of the rights of the people and it protects these rights from all possibilities of individual and public encroachments. "If the law be dishonestly administered, says Bryce "the salt has lost its flavour, if it be weakly and fitfully enforced the guarantees or order fail for it is more by the certainly than by the severity of punishment that offenders are repressed. If the lamp of justice goes out in darkness how great is that darkness. Thus judiciary if functions faithfully is sure to promote good governance. In India, it is becoming the practice under Articles 32 and 226 to pray "for such appropriate writ, order, or direction as this Honourable Court may be pleased to issue" or expressions of a similar nature. A petition need not be dismissed on the ground that the petitioner has not prayed for the proper remedy. Further, more than one writ could be prayed for in one petition. In Somanath Sahu *v*. State of Orissa the appellant whose services were terminated had preferred an appeal before the Government. In the writ petition he had challenged only the original order and not the appellate order and it was held that no writ could be issued to quash the original order which had merged in the appellate order. In Raghavan Nair *v*. State of Kerala the petitioner was refused the remedy as he had omitted to challenge subsequent promotions. Mathew J., who dissented held that as the petitioner had challenged the basis of the promotion itself viz. the seniority list, the remedy could not be refused. It is submitted that the Courts need not take a too narrow view on these technical aspects. In service writs, where seniority lists are challenged, all persons affected by such challenges ought to be made parties. Such a procedure would be difficult where parties are numerous and reside in different parts of the country. In such cases, the procedure under Order 1, Rule 8 of the Code of Civil Procedure, may be made use of.

II. SERVICE WRITS IN THE SUPREME COURT

The power of the Supreme Court under Article 32 of the Constitution is similar to that conferred on the High Courts under Article 226 except that a person is allowed to take his case direct to the Supreme Court only where his fundamental right is violated. As such civil servant's case under Article 32 have arisen mainly under Articles 14, 16 and 19 of the Constitution. In one case the petitioner challenged the validity of the service rule providing for compulsory retirement from service, under Article 32 of the Constitution. Because the State Government also wanted an opinion of the Supreme Court it did not oppose the petition. Regarding violation of fundamental rights the jurisdiction of the Supreme Court and the High Courts is concurrent. When the complaint is about the denial of a legal right the High Courts

have exclusive jurisdiction. Experience shows that the remedy under Article 32 is not always preferred to that under Article 226 where a fundamental right of a civil servant is alleged to be infringed . Whenever any statutory rule is challenged under Part III of the Constitution or under Article 311 and when the allegation is proved to the satisfaction of the Court, the particular legislation is declared ultra vires and a writ of mandamus or a direction in the nature of mandamus is issued directing the State to forbear from enforcing the invalid law against the petitioner. Alternatively the Court can take out the alleged activity of the petitioner from the scope of the service rule as one not intended to be punished under the relevant rule as when the Court holds the petitioner's activity was not of "subversive character" to merit punishment. An administrative order may be challenged for mala fides.

Civil Suits

Civil suits in the nature of declaration, injunction or damages are available to a civil servant to vindictive his right. He is at liberty to select either the extraordinary remedies or the ordinary ones and the one does not supplant the other. But prior to 1950 these writs were available only in Presidency towns and a civil servant in other parts of the country had to rely entirely on civil suits. Thus he may file an ordinary civil suit against an order of punishment for a declaration that the punishment was wrongful or illegal and that he continues in service claiming inter alia damages in the nature of arrears of salary on the basis of the period for which he was out of service. Such a declaration that he still continues in service is available to a civil servant by virtue of Article 311 of the Constitution of India. He may ask for declaration that a certain service rule pre-judicial to him is ultra vires and hence invalid and also for an injunction against enforcing an invalid service rule or order. The jurisdiction of the Court in India to issue declaratory judgement and injunction is derived from the Specific Relief Act, 1963

III. PROSECUTION OF CIVIL SERVANTS BY JUDICIAL PROCESS

A civil servant is answerable for his misconduct, which constitute an offence against the state of which he is a servant and also liable to be prosecuted for violating the law of the land. Apart from various offences dealt with in the Indian Penal Code, Section 161 to 165 thereof, a civil servant is also liable to be prosecuted under Section 5 of the Prevention of Corruption Act, 1947 (which is promulgated specially to deal with the acts of corruption by public servants). A government servant is not only liable to a departmental enquiry but also to prosecution. If prosecuted in a criminal court, he is liable to be punished by way of imprisonment or fine or with both. But in a departmental enquiry the highest penalty that could be imposed is dismissal. Therefore, when a civil servant is guilty of misconduct which also amounts to an offence under the penal law of the land the competent authority may either prosecute him in a court of law or subject him to a departmental enquiry or subject him to both simultaneously or successively. A civil servant has no right to say that because his conduct constitute an offence, he should be prosecuted nor to say that he should be dealt with in a departmental enquiry alone.

Safeguards regarding prosecution of civil servants

a) Sanction mandatory

While it is permissible to prosecute a civil servant, in respect of his conduct in relation to his duties as a civil servant, which amounts to an offence punishable under the provisions of the Indian Penal Code or under Section 5 of the Prevention of Corruption Act, (hereafter referred to as the Act) no court is authorized to take cognizance of such an offence without the previous sanction of the authority competent to remove him from service. Civil servants are expected to discharge their duties and responsibilities without fear or favour. Therefore, in the public interest, they should also be given sufficient protection. With this object in view a specific provision has been made under Section 6 of the Act for the sanction of the authority competent to remove a civil servant before he is prosecuted. Therefore, when a civil servant is prosecuted and convicted, in the absence of the previous sanction of a competent authority as prescribed under section 6 (1) of the Act, the entire proceedings are invalid and the conviction is liable to be set aside. The policy underlying section 6 is that a public servant is not be exposed to harassment of a speculative prosecution. The object of section 6 (1) (c.) of the Act or for that matter section 197 of the Criminal Procedure Code is to save the public servant from harassment, which may be caused to him if each and every aggrieved or disgruntled person is allowed to institute a criminal complaint against him. The protection is against prosecution even by a state agency but the protection is not absolute or unqualified. If the authority competent to remove such public servant accords previous sanction, such prosecution can be instituted and proceeded with.

b) Sanction by state government when refused by disciplinary authority

Though in the case of members of the subordinate service, disciplinary authority, having power to remove a civil servant is the appointing authority, the state government is also being a higher authority the authority competent to remove a civil servant. Hence, in such a case it is competent for the State Government to give sanction for prosecution after it has been refused by the disciplinary authority.

c) Sanction for prosecution being an administrative act no opportunity of hearing is necessary

The grant of sanction for prosecution of a civil servant is only an administrative act. Therefore, the need to provide an opportunity of hearing to the accused before according sanction does not arise. The sanctioning authority is required to consider the facts placed before it and has to reach the satisfaction that the relevant facts would constitute the offence and then either grant or refuse to grant sanction.

d) Requirement of an order giving sanction of prosecution

The order giving sanction for prosecution should be based on the application of the mind to the facts of the case. If it sets out the facts constituting the offence and shows that a prima facie case is made out, the order fulfils the requirement of section 6 of the Act. But an order giving sanction only specifies the name of the person to be prosecuted and specifies the provisions which he has violated it is invalid.

e) Sanction not necessary for prosecution under section 409 IPC

Section 405 of the Indian Penal Code and Section 5 (1) (c.) of the Act are not identical. The offence under section 405 IPC is separate and distinct from the one under section 5 (1) (c.) of the Act and the later does not repeal section 405 IPC. Offence under Section 409 IPC is an aggravated form of offence by a public servant when committing a criminal breach of trust and therefore no sanction is necessary to prosecute a public servant for offences under section 405 and 409.

f) No sanction is necessary for prosecution after a person ceases to be a government servant

Under section 6 of the Act, sanction is not necessary if a person has ceased to be a government servant. The apex court observed thus : "when an offence is alleged to have been committed the accused was a public servant but by the time the Court is called upon to take cognizance of the offence committed by him as public servant he has ceased to be a public servant no sanction would be necessary for taking cognizance of the offence against him. This approach is in accord with the policy underlying section 6 in that a public servant is not to be exposed to harassment of a frivolous or speculative prosecution. If he has ceased to be a public servant in the mean time this vital consideration ceased to exist. As a necessary corollary, if the accused has ceased to be a public servant at the time when the court is called upon to take cognizance of the offence alleged to have been committed by him as public servant section 6 is not attracted. This applies even to a retired as well as a reinstated civil servant.

g) First prosecution if invalid does not bar second prosecution

The basis of section 403 of the Criminal Procedure Code is that when the first trial against a person has taken place before a competent court and it records conviction or acquittal then there would be a bar for a second prosecution for the same offence. But if the first trial was not competent then the whole trial is null and void and therefore it does not bar a second prosecution. Therefore, when a trial against a civil servant under the provision of the Act has taken place there being no sanction by the authority competent to remove him as required under section 6 of the Act, the entire trial starting from its inception is null and void. Therefore, it is competent to prosecute such a civil servant for the same offence after obtaining necessary sanction under section 6 of the Act.

e) Section 5 A does not contemplate two sanctions

Section 5-A of the Prevention of Corruption Act does not contemplate two sanctions, namely, one for laying the trap and another for further investigation. The order under this provision enables the officer to do the entire investigation.

f) Safeguards regarding investigation

Even in respect of starting investigation against a government servant relating to an offence punishable under the provisions of the Act protection is afforded under Section 5-A of the Act. Except with the previous permission of a magistrate no investigation can be started against the government servant by an officer below the rank of a deputy superintendent of police. It is a statutory safeguard to a civil servant

and must be strictly complied with as it is conceived in the public interest and constitutes a guarantee against frivolous and vexatious prosecution. When a magistrate is approached for permission for investigation in respect of an alleged offence of corruption by a civil servant by an officer below the rank of a deputy superintendent of police as required under Section 5-A of the Act, the magistrate is expected to satisfy himself that there are good and sufficient reasons for authorizing an officer of a lower rank to conduct investigation. It should not be treated as a routine matter. Section -5 A of the Act provides a safeguard against investigation of offence committed by public servant by petty or lower rank police officer. It has nothing to do directly or indirectly with the mode or method of taking cognizance of offences by the court of special judge.

IV. LIMITATION OF JUDICIAL ANALYSIS

The only possible exception could be under Article 136 by which a special leave appeal could be taken direct to the Supreme Court. Even here whether the Supreme Court would go into the merits unless outstanding reasons are shown is doubtful. The existence of such outstanding reasons could itself be termed as one of ultra vires or one based on extraneous consideration under Article 226 itself. Even where the proceedings have been set aside by the Court not on merits the State can start fresh proceedings against the civil servant. In a proceedings to set aside an order of punishment the High Court could not appreciate the evidence to see whether the civil servant merits the proposed punishment Regarding the imposition of punishment the selection of appropriate punishment under the relevant civil service rules is a discretionary matter left to the authorities.203 The only proceedings where a petitioner can reach the merit of the case seems to be one challenging the vires of the rule itself. For example, in such a case the civil servant can show that the conduct for which punishment was imposed was one protected by the fundamental rights of the Constitution. There is a point of view that Article 311 of the Constitution of India gives only a procedural protection and where such procedural rules are followed meticulously the Courts power of review is ousted. This view is substantiated by cases where the authorities have started fresh proceedings after the Courts have quashed an order of punishment or where the punishment has been increased on appeal to a superior authority. But the above view is not wholly true. It is to be admitted that administration would suffer if the authorities are unable to deal with corrupt, inefficient insubordinate or anti-national elements inside the departments. But at the same time it is the bounden duty of the Court to see also that such a power is not abused or exercised to attain an ulterior purpose or on any extraneous consideration. Apart from the doctrine of abuse of power the Courts have entered into the matter in some instances and where the Courts have interfered on the merits of the case no fresh proceedings could be started on the same facts. The same result follows where a criminal Court acquits the civil servant on the merits of the case. The Court can intervene where the order is proved to be mala fide or where the order is based on no evidence The punishing authority cannot close its mind before the representation made at the second show cause notice stage and if this fact appears from the record the Court would intervene. The power to impose penalties is for "good and sufficient reasons" So the punishing authority has to specify reasons or grounds for which the punishment is

given. In order to take the order out of the protection under Article 311 of the Constitution the debarring provision was cancelled the Court held that the Governor possessed no such power. A complete order found ultra vires Article 311 cannot be subsequently validated by omitting the invalid part and construing the valid part only. The reliance on the principle that an order is not invalid simply because it is assailable on some findings only but not on others. clearly shows that the Court looks at the matter as one of substance and not of procedure only. The central problem of judicial review in civil service matters seems to be that even though the review goes only to legality and not to merit from the point of view of the Government it unduly interferes with the maintenance of efficient service while from the point of view of the employees there are not enough principles developed and procedures prescribed to render them substantial justice. This dilemma can be resolved by constituting an appeal tribunal with power to hear appeals from all civil service matters as suggested earlier. Being an independent body consisting of senior civil servants and persons eligible to be appointed as High Court judges such a tribunal can administer substantial justice to civil servants taking into consideration the efficiency of the service. Article 311 has created an environment of excessive security and made civil servants largely immune from imposition of penalties due to the complicated procedure and process that has grown out of the constitutional guarantee against arbitrary action rather tend to protect the civil servants non-performance and arbitrary risk- avenge. Suitable legislation to provide for all necessary term and conditions of services should be provided under Article 309 to protect bonafide action of public servants taken in public interest, this should be made applicable to the states, necessary protection to public servants against arbitrary action should be provided through such legislation under Article 309.

V. CONCLUSION

Judiciary has played a great role in providing good governance to the people. Law and order is the biggest challenge for good governance as we witness daily the problems of rape thefts dacoity murders extortion etc. The police system was governed by outdated Police Act, 1861. Hindustan Times editorial (Sept. 28, 2006) Give them teeth not fungs rightly states a draft to a new Police Act which is being finalized by a committee set up in September 2005. After much nudging from the Supreme Court which has ordered the implementation of police reforms on or before December 31, 2006 to promote good governance the draft is to be converted into a Bill While reforms are likely to include the creation of separate institution for investigation and for law and order upgrading inter state links to tackle inter state crimes and incorporating modern methods to crack down on trafficking cyber crimes and economic crimes there is a fundamental flaw that desperately needs correction. Although there may be some civil servants who have streaks of martyrdom and who do not hesitate to record what their conscience tells them it is plain that the treatment meted out to them because of this approach causes frustration not only to them but also acts as a warning to others to desist from following such a course. This apart, the nation gets deprived of the proper benefit of services of capable civil servants because of their being put on unimportant jobs where they can hardly show their worth and make any contributions. It is time of appreciation that judiciary is playing an important role in providing good governance where legislature and administration

are feeling hopelessness and are entrenched in poor politics of vote bank. They must understand that Government is not the monopoly of any party therefore all parties should come together to remove the irritants to citizens and make good governance a reality. In addition judiciary must also put its house in order as we find that people are being fleeced and cheated by advocates under the very nose of judiciary. Therefore judicial reforms is also essential which can ensure good governance in judiciary. In this way judiciary must set an example by implementing good governance within its own sphere. Charity begins at home. This would lead to appreciation of judiciary vis-à-vis executive and Legislature the two organs of Government would welcome the steps of the judiciary to promote good Governance. People would be benefited in a big way and would start feeling the atmosphere of good governance emanating from all organs of Government. Emphasizing the importance of service matters which affect the functioning of Civil Servants who are an integral part of a sound governmental system the High Court held that service matters which involve testing the constitutionality of provisions or rules being matters of grave import could not be left to be decided by statutorily created adjudicatory bodies which would be susceptible to executive influences and pressures. It was emphasized that in respect of Constitutional Courts the framers of the constitution had incorporated special prescriptions to ensure that they would be immune from precisely such pressures. The High Court also provided reasons for holding that the sole remedy provided under the statute that an appeal under Article 32 of the Constitution would not help to improve matters was worth to note. It was therefore, concluded that although judicial power can be vested in a Court or a Tribunal the power of judicial review of the High Court under Article 226 could not be excluded even by a constitutional Amendment.

The Malimath Committee specifically recommended that the theory of alternative institutional mechanisms be abandoned instead it recommended that institutional changes be carried out within the High Courts dividing them into separate divisions for different branches of law as is being done in England. It stated that appointing more judges to man the separate divisions while using the existing infrastructure would be a better way of remedying the problem of pendency in the High Courts. Right to public service legislation which comprises statutory laws which guarantee time bound delivery services for various public services rendered by the Government to citizen and provides mechanism for punishing the errant pubic servant who is deficient in providing the service stipulated under the statute. Right to service legislation are meant to reduce corruption among the Government officers and to increase transparency and public accountability. New civil services accountability bill may prescribe demotion as punishment. According to a report by times of India quotng cabinet secretary K.M. Chandrasekhar, The piece of legislation is mainly to make the civil services more accountable. The department of personnel and training piloted bill will codify existing rules and provide for clearer and more inform penalties for mis conducted, report added. The bill will infact give statury for to services rules. And provide for for penal causes to punish wrong doors. The dart of the bill list out stoppage of increment among others of punishment for charges like insubodntiona lack of devotion to duty or falure to maintain integrity. Also major penalty included demotion and dismissed form services.

RIGHTS OF DISPLACED PERSONS AND ISSUE OF DEVELOPMENT

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Abstract

Development is inevitable but should not at the cost of right to life and livelihood. The displacement caused by developmental programmes due to economic and other factors is now attracting greater attention. All the developmental projects like Dams, mines, express ways or declaration of protected areas disrupts lives of the people who live in that area and often requires relocating them to an alternative site. Displaced people mostly loose their lands, homes, jobs and property which often lead to social isolation and increased morbidity and mortality. The social and cultural activities and the kingship systems of tribal people vanish with their displacement in particular. Sometime they loose their identity and loose their intimate link with the environment. The present study is an analysis of the issues relating to displacement and the role of judiciary in maintaining a harmonious balance between the individual interests and interests of community interest in India.

Key words

Development, Displacement, Individual Interests, Interests of Community and Judiciary.

I. INTRODUCTION

The World Bank estimates that every year roughly more than 10 million people world wide have been displaced by developmental projects for a variety of reasons. During last 50 years development projects have displaced more 30 millions people in India and 40 million in China. Uprooting people is a serious issue. It reduces its ability to subsist on their traditional and natural resource base. People, whose lives are closely woven around their own natural resources, find it hard to adopt a new way of life in a new place. According to the United Nations, internally displaced persons (IDPs) are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.[1] Principle 6, 2(c), of the Guiding Principles states that "the prohibition of arbitrary displacement includes displacement in cases of large-scale development projects, which are not justified by compelling and overriding public interests." Hundreds of millions of people worldwide have been forcibly evicted from their homes and livelihoods to make way for dam construction, urban renewal, highways, power plants, mining, and

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[1] "Guiding Principles on Internal Displacement", 1998, Introduction, para 2

other development projects. The World Bank and other regional development institutions have adopted operational policies on involuntary resettlement that call for avoiding or minimizing population displacement whenever possible, and requiring compensation and assistance for anyone that is displaced. In practice, however, resettled populations tend to become impoverished over time as a result of losing their land, jobs, and homes, among other factors.

Despite their numbers and their dire situations, this population of IDPs tends to be overlooked in part because no international agency is mandated to provide assistance and protection to them. For more information about involuntary resettlement and where it occurs, discussions of the relevant legal framework for addressing development-induced displacement, including the role of the Guiding Principles, and proposals for enhancing the international response to forced evictions.[2] The Victims of National development is a new concept of 21st century. The displaced persons are the victims and they have to pay the price for the developmental projects of the nation.

The term "Displaced Person" also includes the project affected persons but sometime the statistical data ignores such persons who are also directly affected due to displacement. The minimisation of displacement is crucial in the context of liberalisation and the number increases day by day. The acquisition of land in India in last five decades has been doubled in last one decade. The rational for many developmental projects is questionable. Displacement due to construction of dams mostly affected the tribal peoples and forest dwellers.

II. DISPLACEMENT AND ISSUE OF DEVELOPMENT IN INDIA

The public sector mostly acquires forest land, unused lands, whereas the private sector acquires land for their profit, ignoring the fertility and quality of land. Which land is suitable for what type of developmental project is a subjective satisfaction, it varies person to person under different consideration. For example in West Bengal in 200 acre and 96 acre of land are acquired for Tata Metalics and Birla farm near South Kharagpur in 1992 even if alternative land was available near North Medinapur Railway station which

Dams and the Displacement of Tribal People*

Name of Project	State	Population facing displacement	Percentage of displaced Tribal People
Karjan	Gujarat	11,600	100.00%
Sardar Sarovar	Gujarat	200,000	57.60%
Maheswar	Madhya Pradesh	20,000	60.00%
Bodhghat	Madhya Pradesh	12,700	73.91%
Icha	Bihar	30,800	80.00%
Chandli	Bihar	37,600	87.92%
Koel Karo	Bihar	66,000	88.00%
Mahi Bajaj Sagar	Rajasthan	38,400	76.28%
Polavaram	Andhra Pradesh	150,000	52.90%
Maithon &			

[2] Elisa Mason, "Internally Displaced Persons: Guide to Legal Information Resources on the Web", 2009, available at: *http://www.llrx.com/features/internaldisplacment.htm Visited on 12-10-2015*

Name of Project	State	Population facing displacement	Percentage of displaced Tribal People
Panchet	Bihar	93,874	56.46%
Upper Indravati	Orissa	18,500	89.20%
Pong	Himachal Pradesh	80,000	56.25%
Inchampalli	Andhra Pradesh and Maharashtra	38,100	76.28%
Tultuli	Maharashtra	13,600	51.61%
Daman Ganga	Gujurat	8,700	48.70%
Bhakra	Himachal Pradesh	36,000	34.76%
Masan Reservoir	Bihar	3,700	31.00%
Ukai Reservoir	Gujurat	52,000	18.92%

* Report of Ministry of Water Resources, GoI,New Delhi (2011).

was less fertile and rocky in comparison to the land acquired. Both the farm never even took off but it displaced hundreds of Lodha Tribal family. A national data is provided below for detailed reference.

III. LEGAL ASPECTS OF DISPLACEMENT

International Aspect

As the Guiding Principles on Internal Displacement, 1998 underline, it is not the international community but national authorities that have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction (Principle 3(1)). The manual aspires to recognize the efforts made by national authorities in many countries to assist and protect IDPs, to highlight laws and policies that have been most compatible with international law norms, and to encourage and assist those in positions of responsibility in other countries affected by internal displacement to undertake the difficult but crucial task of drawing up protective laws and policies of their own.To prevent internal displacement, protect the displaced during displacement, and find durable solutions for them once the cause of displacement no longer exists requires no more and no less than respect for human rights and, in armed conflict situations, the protective rules of international humanitarian law. As a result, in some situations the protection of IDPs' rights demands the same measures as are necessary to protect the rights of all citizens, regardless of whether or not they are displaced. For instance, a central means of implementing the right to liberty and security of person is the passage of legislation setting out protections against arbitrary arrest or detention that are applicable to all citizens, whether or not they are displaced.

Indian Aspect of Displacement

All the developmental projects like Dams, mines, express ways or declaration of protected areas disrupts lives of the people who live in that area and often requires relocating them to an alternative site. Displaced people mostly loose their lands, homes, jobs and property which often lead to social isolation and increased morbidity and mortality. The social and cultural activities and the kingship systems of tribal people vanish with their displacement in particular. Sometime they loose their identity and loose their intimate link with the environment. In India, the first draft of the National

Policy on Resettlement and Rehabilitation for Project Affected Family was brought out in 1993 and it was subsequently revised a number of times.

The Indian Constitution dictates that the resettlement and rehabilitation of the person displaced is the responsibility of individual union states. Till date some states have enacted separate law for rehabilitation. The Public Sector companies like NTPC and Coal India ltd have separately formulated policies on resettlement and rehabilitation. The only existing relevant law has been the Land Acquisition Act, 1894, which prescribed only how land could be acquired with payment of compensation, but contains nothing about people's entitlement to being resettled and rehabilitated for the land on which they do not have any legal rights. In absence of specific policy and law relating to displacement, judiciary has intervened under the general principles of human right and fundamental rights in order to give justice to the persons displaced.

There are several causes behind Displacement in India. The main cause of displacement is the acquisition of land for public purpose. Some examples are as follows:

- Two third of the land acquired for HAL MIG plant at Sunabeda, Odisha in 1996 lay vacant for three decades and was later sold at high profit. Where 3000 tribal families were displaced.
- Land acquired on both sides of RORO irrigation canal in Jharkhand for public purpose later on given to the relatives to the officials to build housing co-operatives.
- Burla township, Odisha has come up as an excess land acquired for Hirakund Dam.
- The Bangalore Link Road needed 200 hectares but 1200 hectors of land was acquired and the excess land was later on handed over to the companies for building colonies for profit.

a) Right of the State to Displace

- The state may acquire land for public purpose under the draconian law i.e. The Land Acquisition Act, 1894 without considering the peoples consent.
- In the name socio-economic justice under DPSP of the constitution, the state can make law for acquisition of land for public interest.
- Under section 2 of Forest (Conservation) Act, 1980, the central govt. may allow the use forest land for non forest purpose.
- The principle of Public Trust Doctrine that state is the trusty of natures gift, which may be applied negatively to displace forest dwellers in the name of preservation of ecology.

b) Rights of the Person Displaced

1) Constitutional Rights

- Article 14: Right to equality- any arbitrary displacement violates right to equality.
- Article 19 (1)(e): the right to reside and settle in any part of the territory of India. It includes rights not to be displaced without reasonable cause.
- Article 21: Right to life and personal liberty which includes the right to livelihood. Displacement is no doubt deprival of right to livelihood

All these rights are justifiable rights under article 32 and 226 of the Constitution

2) *The Scheduled Tribe and Other Traditional forest dwellers (Recognition of Forest right) Act 2006:*

Section 3 and 4 confers the forest dwellers nistar rights to hold and live in the forest. Their displacement is subject to adequate compensation and rehabilitation.

3) *Environmental Impact Assessment Notification, 1992 of Environment (Protection) Act, 1986:*

The Central Government is empowered to assess whether the developmental project are in harmony with the environment. Schedule-1 of the EIA notification includes almost all the mega developmental projects. Under EIA Local people or project affected persons may raise their voice during Public Hearing, if such developmental project is prejudicial to them. At the time of assessment of profit and loss, the scheme also considers the number of persons to be displaced and their cost of rehabilitation.

c) Absence of Regional Planning

The decision for establishment of developmental projects is taken without proper regional planning, which resulted in multiple displacements. Some examples are as follows:

- The persons displaced by Rihand Dam in 1960 have been displaced four times.
- Saliga Tribals displaced by Kabeni Dam of Karnataka in 1970 are again displaced by Rajiv Gandhi National park.
- The fishing families displaced by Mangalore Port in 1960 were again displaced by Konkon Railway in 1980.

d) Compensation to the Displaced

Compensation should always be according to the replacement value. It must include market value of assets lost, lose of livelihood of Common Property Resource (CPR) dependents and lose of others who live by rendering services to the village community. Replacement value should include both material and monetary compensation which will make possible for displaced person and project affected persons to begin life anew because they have to face a new economic culture and society; they should be prepared psychologically, socially and technically; compensation cannot be only for patta land. It also includes the barbers, labourers, dhobi and merchants, vendors who depend on village have to be helped to begin life anew; the Common Property Resource (CPR) have to be replaced with viable alternatives; if necessary training may be given and they may be made literate; and all these aspects are the part of the social cost of the project and cannot be ignored.

IV. JUDICIAL INTERVENTION ON DISPLACEMENT

To protect the socio-economic justice, equality and liberty of the persons displaced the Supreme court has intervened in number of cases in order to make a balance between developmental interest of the state and individual interest of the displaced person.

In *B D Sharma v. Union of India*,[3] it was ruled that the overarching projected benefits from the dam should not be counted as an alibi to deprive the fundamental rights of out streets. They should be rehabilitated before six months of submergence. In *Narmada Bachao Andolan v. Union of India*,[4] it was observed that rehabilitation is not only about

[3](1992) Supp (3) SCC 93

[4]AIR 2000 SC 3751

providing just food, clothes or shelter. It is also about extending support to rebuild livelihood by ensuring necessary amenities of life. In *N.D. Jayal and Another v. Union of India* ,[5] the court held that the courts have recognised the rights of the ousters to be resettled and right to rehabilitation has been read into Article 21. *In Francis Coralie v.U.T. of Delhi*[6] Justice Bhagwati observed that the right to life includes the right to live with human dignity and all that gives along with it, namely the bare necessities of life. Such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing with fellow human beings. In *Olga Tellis v. Bombay Municipal Corporation*[7] case, the court observed that Article 21 means something more and "the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed.

V. CONCLUSION

The victims of displacement are the persons who scarify their life and liberty for the national development hence priority should be given for their protection above all national agenda. Development is inevitable but it should not at the cost of right to life and livelihood of individuals who are victim of such development programmes. Displacement should be minimized and it should be only for a public interest. People's livelihood should be in consideration while taking decisions about displacement. There is requirement of rationalization of public purpose in a restrictive manner as public interest as the only principle on which acquisition could be based. The Displaced Persons/Project Affected Persons should be given opportunity to participate in decision making process. Deprivation even for a public interest must require their prior informed consent. The decision should recognize the historically established rights of the tribal and rural communities over natural resources and their subsistence. The principle of compensation should be on replacement value and not the market value or present depreciated value of assets. Alternative must also be adopted to ensure that they get permanent income from the project. Regional planning is required to avoid multiple displacements.

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[5] (2004) 9 SCC 362

[6] AIR 1981 SC 746

[7] AIR 1986 SC 180

NEED FOR WITNESS PROTECTION IN INDIA: A LEGAL ANALYSIS

Zubair Ahmed Khan*

Abstract

Witness is an indispensable aid in the justice dispensation system in any civilized society. The greatest weakness of our criminal justice system is that it has become stagnant and does not function in a expedite manner resulting in deciding the conviction or innocence of those charged with crime. The most unfortunate thing is that the parties often threaten the witnesses, turning them hostile and interfering with the fair administration of justice. Various courts and authorities in India have raised the issue of witness protection several times since Independence. The whole issue of hostile witness came under legal analysis after various landmark judgments and various reports. These cases came as a bombshell showing inefficiency and insecurity in the judicial system. Providing witness protection may be difficult in a country with a limited police force, but it is a key aspect of justice. Whether innovative techniques adopted by Court can secure safeguarding the interest of witness? What can be the criteria for the Court to decide on providing the security of witness? When should witness protection be provided? This paper discusses how the law relating to the protection of witnesses is insufficient and also emphasize on the need for a witness protection programme.

Key words

Administration of Justice, Witness, Hostile Witness, Witness Security and Anonymity.

I. INTRODUCTION

Fair justice is not difficult to comprehend in Criminal justice system, but due to various complexities it is difficult to obtain. Fair justice has various aspects like fair investigation, fair inquiry, expeditious& fair trial. Since India follows adversarial system of court proceeding where impartiality hold the key, it is important to note that procedural justice is the main cornerstone to achieve fairness. Procedure justice is the objective which ensures transparency during investigation stage & trial stage by implementing due procedure established by law. But, there are manyimportant considerationneeds to be followed like responsible & vigilant role of government, police and public prosecutor to bring transformation in the administration of justice. Fair trial has some inherent features likeequal opportunity of representation of court hearing from both sides, absence of delay & pendency of the cases. It is also expected in the adversarial court of proceeding that all possible kind of oral& documentary evidence should be heard, verified and cross-examined wherever possible. There is one crucial point, which has to be considered seriously that is vulnerable position of victim/witness

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during pre-trial, trial & post-trial stage. The fate of whole case depends on version represented or information given by witnesses. It has to been whether evidence provided by any witness is substantive piece of evidence or not? But the whole principle of equity and natural justice rests on reliability &credibility of evidence provided by witness even in those cases where there is some sort of conflict of interest in existence of direct evidence and circumstantial evidence. So it is quite evident of the fact that witness plays a very important and responsible role for any case in the dispensation of justice. The word witness is not specifically defined in The Indian Evidence Act, 1872. But, legislators are tried to explain the concept of witness through section118 of Indian Evidence Act, 1872 where competent person can give testimony under declaration of oath.[1]

It means any person who is directly connected with the case who is aware about facts of case and know accused & victim meaning thereby someone who has seen the incidents the case; or someone who is experienced in specific field with having specialized knowledge on general issues related to case. Though, there are certain references in Criminal Procedure Code, 1973 related to preliminary stage of investigation where witness's role is important. It is described that police has power to call upon witness in police station for getting information related to facts & circumstances of case.[2] A witness can be examined by police officer and he has to respond the questions in appropriate way that may be reduced in writing.[3] However, statements made before police officer in the police station cannot be considered as prima-facie evidence for the simple reason, witness is only permitted to give evidence before judge in the Court of law as mentioned in section 3 of Indian Evidence Act, 1872.

But the relevancy of evidence procured through witness can serve the purpose of justice especially when it is made in the absence any kind of biasness, false, misleading & deceptive statements. That is why it is important to expedite the process of investigation & trial so that there won't be presence of sufficient time gap by which accused or close associate can use their undue influence to instill fear or pressurize witness. But there are other issues, which further aggravate complications for fair justice delivery system like lack of well-trained police officers, non-sensitivity of media over these issues, involvement of influential persons (politicians, mafia gangster) in high-profile cases, non-cooperation of the state with full sincerity due to lack of legal obligation, influence over witness through convincing methods like providing bribe, threat of any sort. Either of the above situations will directly or indirectly inculcate fear & intimidation in the mind of witness. As a consequence of it, witness will either lose his confidence in providing truthful information in the court or will abstain from presenting himself before court even after receiving summon.

With the same thought, the High court highlighted in the case of *Mrs. Neelam Katara v. Union of India & others*[4] that it is the fundamental principle of justice that witness should testify before court of law by providing true facts without any fear or temptation. His truthful statement can decide the nature of circumstances of the case through which

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[1]The Indian Evidence Act, 1872, Section 118

[2]The Code of Criminal Procedure 1973, Section 161

[3]Id., Section162

[4]ILR (2003) II Del 377

guilt or innocence will be proved. But testimony under fear, undue pressure & temptation will vitiate the proceeding of the case and compromised with justice.

Production of ocular & other substantive evidence will definitely help every criminal trial to reach its last stage without any foul play. A sensible & impartial judgment will come into picture when investigating officer complete his job sincerely without any delay and every person who has relevant information related to case must bring the same in to the notice of investigating officer, court whenever he is summoned. If any person avoids such responsibility in facilitating information, then court's verdict & societal order will be hampered and accordingly it will lose public confidence in criminal justice system.

In the case of *Swaran Singh v. State of Punjab*,[5] Supreme Court highlighted on the importance of witness in justice delivery system in general. In many cases, witness has to face multiple ordeals in overall court proceeding starting from pendency of case adjourning from one date to another, thus delaying the trial. Sometimes witness gets killed, beaten up as no specific protection is available to them. Sometimes they are unnecessarily harassed during cross-examination for a long period of time. So common people often try to maintain distance from court & investigating authorities. They don't turn up as witness. But the matter becomes more degradable & dangerous when the case is related to violence against women & victim is herself witness. Due to absence of effective protection from the state & police, the situation is more vulnerable during investigation. Defamatory questions are framed directly during cross-examination result into more embarrassment.

The Committee on Reforms of Criminal Justice System under the chairmanship of Dr. Justice V.S. Malimath categorically emphasized on importance of legal relevancy of evidence procured through witness. A sensible responsibility of witness is to provide assistance to the court in deciding conviction or innocence in case. He cannot refuse to respond questions during cross-examination. It is important for judge to have a bold & rational approach while deciding the matter so as to maintain impartiality throughout the trial. It is also necessary for judge to uphold justice by preserving the rights of victim so as to avoid the miscarriage of justice.[6]

II. INTRODUCTION TO HOSTILE WITNESS

The term hostile witness is not directly defined in Indian Evidence Act, 1872. Legislators might not have imagined this existence of this term in trial. But the problem of hostile witness becomes very prevalent nowadays in many criminal cases. The concept of hostile witness is basically inspired from common law principle. It is important to provide safety against the adverse statement made deliberately by witness in the court of law. There is no clarity as such on the term hostile at that time when it was coined. After independence, Court's observation has given some clarity where it is shown to be contrary, adverse and inconsistent. When a witness before court of law gives adverse statement, which is contrary to previous statement made by him.

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[5]AIR 2000 SC 2017

[6]Justice V.S. Malimath Committee Report on Reforms of Criminal Justice System (Ministry of Home Affairs 2003), available at:

http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf (Visited on 12th June,2015)

There are specific procedure laws that clarify it further. During preliminary investigation, police has power to call a witness in the police station to seek permission.[7] Police has also power to examine the witness and if certain questions can be asked, witness has to answer it, though witness cannot sign the statement that is reduced in writing in the record of police diary.[8] Now situation of hostile witness will arise especially when party take permission from court to call witness in the court of law for checking his veracity through cross-examination.[9] This is the time where witness gives unfavorable and adverse statement and he is called as hostile witness. A hostile witness actually weakens the case of the party for whom he is giving the statement. Leading question can put forward when Judge declares witness hostile.

Since, no specific definition for hostile witness is available; identification for the same is a matter of discretion for court. Generally, a Judge has to give notice on the nature of statement with great scrutiny because it is a matter of conviction or acquittal. Sometimes there is thin-line difference between merely unfavorable or disagreeable and being hostile. An impartial Judge needs to find the major inconsistency part of the oral evidence given by witness. Sometimes, a witness concocted the whole version of his story in such a way so that it favors the opposite party. Though picture will be clear while dealing with a hostile witness after cross-examination, re-examination and availability of proof of previous statement. In some cases there are number of witness are available, it is important to scrutinize a particular witness effectively where he is supposed to provide a crucial piece of evidence which can decide the matter.

III. REASONS FOR WITNESS TURNING HOSTILE

One inference can be drawn that hostility arise whenever a witness conceal certain true facts. His statement may be directly or indirectly in favor of opposite party. This is quite obvious when unscrupulous methods are adopted to vitiate the fair proceeding of the case. Witness intimidation is the most common reason for hostility. Scare tactics created pressure that can obviously effect psychologically. Sometimes inducement by through various courses can also make witness more vulnerable and inclined towards antagonism.

In a very famous case of *Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others*,[10] the Supreme Court emphasized on the importance of victim and witness in broader view of justice. Proper justification, rational investigation and fair exoneration of guilt give the foundation of justice and instill confidence in the society. The present case of hostility gives grim face of harsh reality that has become a hassle for fair trial. It is the right moment to bring transformation when the whole justice delivery system is crippled and disabled with the influence of browbeating tactics, continuous coercion, involvement of political patronage & despotism. Continuous oppression in this form will lead to mockery of justice and ended with complete breakdown of social order. Supreme Court reminded the State about Directive Principle of State Policy to maintain public

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[7] *Supra note* 2, Section160

[8] *Id.*, Section 161

[9] Supra note 1, Section 154

[10] (2006) 3 SCC 374

order in the society. It is the obligation to protect the rights and interest of citizens. Similarly police also has official duty to provide all possible kind of safeguards.

Similarly, in the case of *Manu Sharma v. State (NCT of Delhi)*,[11] which is also known as Jessica Lal murder case, three key witnesses turned hostile. There was huge public outcry when trial court acquitted all accused due to presence insufficient evidence against them. Due to bold effort of key witness, Delhi High Court came to fair conclusion at last. The Court convicted all accused. Hostility of witness is not new concept, since this is a case influential people and huge media attention that is why it came into light. Later on hostile witness were charged with perjury.

The Supreme Court of India has also shown great concern over the plight of witness. In the case of *Surinder Singh v. State of Haryana*,[12]Supreme Court observed a valid point that trial courts needs to be vigilant and take prompt action against hostile witness giving false &adverse evidence. An impartial Judge needs to uplift the moral and boost the confidence of vulnerable victim & witness whenever they feel it necessary according to circumstances. If a witness give false evidence, it is necessary to start summary procedure for trial for proving fabricating evidence under Section 344 of Criminal Procedure Code, 1973.

IV. PRECAUTIONS TAKEN DURING INVESTIGATION & TRIAL FOR WITNESS SECURITY

Proper implementation of Procedural laws can ensure administration of justice. But, practical application of laws is very difficult due to the presence different complexities in crime. The literal meaning of Witness protection is safety of witness from physical suffering & life threat. But, interpretation of limited provisions related to witness protection is against hindrances in obliging legal duty & disruption. The concept of equality plays an important role in justice delivery system. Fair trial &investigation ensures equal rights to accused and victim. There are some fundamental principles of natural justice like presumption of innocence, Audi Alteram Partem, right to have legal representation, right against double jeopardy, etc. Whereas victim and more specifically witness doesn't enjoy such liberty and all possible kinds of basic rights. In pre-independence era, legislators wouldn't have imagined the need protection for witness so that it can be brought somehow under the purview of Indian Evidence Act, 1872. The point of deliberation is how to tackle in such an uneven restricted procedural aspects of law where witness's situation is vulnerable and defenseless. Obviously, a witness will abhor in becoming a witness in such an entangled & wearisome position. This is the common reason why witness either avoids visiting court or absconding from the place in spite of issuance of summons. There can be three situations in this dilemma namely:[13]

1.) Victim and accused are familiar to each other before the incident ocrime
2.) Accused is not acquainted with witness's identity

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[11](2010) 6 SCC 1

[12](2014) 4 SCC 129

[13]Law Commission of India, 198th Report on "Witness Identity Protection and Witness Protection Programme" Seventeenth Law Commission under the Chairmanship of Mr. Justice M. Jagannadha Rao 2003-2006, in 2004, available at: *http://lawcommissionofindia.nic.in/reports/rep198.pdf* (Visited on11th June, 2015)

3.) Accused is not acquainted with victim & witnesses (a case of genocide or terrorist act)

All the above-mentioned categories need security of witness at different perspective with contemporary approach. The main question is when does a witness need safety or protection? It is evident that accumulation of evidence starts from the stage of investigation. Investigation is the stage where facts & circumstances of the case come into picture. It includes many aspects like search at the location of crime, knowledge of victim's condition, and other prevailing circumstances around the location, etc.[14]

For the purpose of filing a First Information Report, a formal preliminary inquiry needs to be completed by a police officer. Collection of direct and circumstantial evidence is utmost priority for an investigating officer. Since there is always reasonable apprehension that accused or his associates may tamper or destroy evidence at the initial stage, it is important for a police officer to complete his probe in a fair & expedite manner with strict scrutiny. A police officer may examine the witness related to the facts of case provided if there is any inconvenience or threat to witness, and then witness's statement can be recorded through audio-video electronic means.[15] While preparing a report by police officer post-investigation without delay, which will be forwarded to Magistrate, if police officer thinks certain statement should not be disclosed to accused, he can send it to Magistrate separately with reasons in a secret note to maintain fair investigation.[16] Now it is explicit that when trial starts witness's role becomes more crucial. A witness can face any kind of hindrance during trial, so if he receives any kind of threat from someone to give false & fabricating evidence, he can file a complaint for the same before the Court of law under the offence mentioned in Section 195A of Indian Penal Code.[17]

A Judge has also some responsibility in protecting the interests & rights of witness during trial. Court can check the reasonableness of questions whether it can be asked or not.[18] Court cannot permit improper way of cross-examination that is why offensive, defamatory and annoying questions can be ruled out.[19] Similarly, Court has to give prompt disapproval/repudiation when certain immoral & offensive questions are asked to rape victim who is also a witness in rape case during cross-examination.[20]

Generally, defense party adopts some delaying tactics during trial to adjourn the proceeding for many days. As a result of which, witness cannot afford to visit court every time as he has to wait for his deposition many times due to maladministration. Accordingly, Court may order the State Government to bear reasonable expenses of witness to avoid hassle for inquiry or trial.[21] There can be some circumstances where accused disrupt the trial continuously and thereby vitiate the Court proceeding by

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[14]*Ibid*.

[15]*Supra* note 2, Proviso to Section 161

[16]*Id*., Section 173 (6)

[17]*Id*., Section 195A

[18]*Supra* note 1, Sections 148 and 149

[19]*Id*., sections, 151 and 152

[20]*Id*, Section 146 (proviso)

[21]*Supra* note 2, Section 312

threatening or inducing victim/ witness. This type of situation can be possible either in heinous criminal case or in case involving influential people especially nexus of criminal gangs & politicians. Accordingly, Court can start the trial in the absence of accused for a particular period of time in which witness's statement can be taken though defence counsel is allowed to appear during the trial. Later on, Court can direct accused's presence appearance in the trial. Technically, this can ensure impartial & legitimate trial or inquiry before Court.[22]

So, analysis of Criminal Procedure Code, 1973 and Indian Evidence Act, 1872 can give clear picture that witness protection is not properly described. Though, it lays down responsibilities of Police and Court at certain level. But there is no scope of witness protection after trial in procedural laws, which is a matter of taking undue advantage by accused or his associates. There is a specific act named as the National Investigation Agency Act, 2008 under which National Investigation Agency is established to investigate terrorism based cases with professional skill. This act provides protection for witness (under section 17) where different constructive steps can be taken. In camera proceeding and classified & undisclosed records of identity (including address) of witness should be maintained. If a witness or public prosecutor wrote a formal requisition for taking protection to the Special Court, process will become more convenient.[23] There are few susceptible circumstances in any case in which threat & insecurity are imminent for witness, so the act provide few contemporary facility wherever possible like proceeding can started at different place as decided by the Special Court. Similarly, non-divulgence of identity of witness in the judgment should be implemented along with restriction on print publication of court proceeding to maintain privacy.[24]

Similarly, Law Commission of India has recommended a specific procedure in which a witness will get benefitted through Witness Protection Programme. Accordingly, formal requisition in the form intimation can be given by public prosecutor to Magistrate by which witness can give a new identity for the trial and if necessary his position & location will be readjusted secretly. A witness needs to enter into Memorandum of Understanding with State Legal Aid Authority out of which his bare expenses & maintenance charges will be taken care by State. A witness needs to complete his responsibility by giving true evidence. If he fails to give evidence in the trial, it will result into exit from Witness Protection Programme. So, this procedure creates a reciprocal responsibility of State and Witness to complete their respective duty.[25]

The Apex Court realized in *State of Punjab v. Gurmit Singh*[26] that administration of justice through fair trial without any hassle could arise if there is reasonable protection available for victim and witnesses especially in serious criminal offence like rape. Supreme Court emphasized the importance of trial in camera on the basis that it can provide a kind of convenience &comfort for victim to depose before court as mentioned in section 327 of Cr.P.C. It can avoid the disruption in the form hesitation or any kind of

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[22]Supra note 2, Section 317

[23]The National Investigation Agency Act, 2008, Section 17

[24]*Ibid.*

[25]Supra note 13

[26](1996) 2 SCC 384

oral threats, unnecessary psychological pressure that can be possible from accused either through continuous gazing or other means.

Similarly, in the case of *National Human Rights Commission v. State of Gujarat,*[27] Supreme Court while forming Special Investigation Team observed that the principle of fair trial has many legal dimensions, which needs to be taken care with equity and reasonableness. Since witness plays a very role in the trial, it is important for State to take every possible step for the protection of witnesses and victims. Interest of justice will be failed if witness cannot appear before the Court of law and give statements. Supreme Court also emphasized the practice of witness anonymity as a part of witness protection.

The Punjab & Haryana High Court made a bold & painful admission in the case of *Bimal Kaur Khalsa v. State of Punjab*[28] that there is no possibility of complete security or protection for the witness or any investigator. Court or Government cannot give assurance for the same. Since a witness who provide evidence in a case as a responsible duty, so it is incumbent upon Court to provide secrecy in case of identity & address of witness and wherever it is possible for Court to take protective steps like in Camera proceeding or screen trial or video- conferencing so as to project the interest of witness by best possible means. Thus, modern technology and innovative tactics can make convenient in functioning of the Court trial efficiently. So, additional measures like video-conferencing, screen arrangement can avoid direct showdown between accused and witness. Practically speaking, physical distance will ensure safe environment in which witness can give his statement.

In the case of Saint *Shri Asharam Bapu v. State of Rajasthan*,[29] the bail application was rejected by High Court because grant of bail will vitiate the fair proceeding of the case. It is important to avoid miscarriage of justice by all possible means, because there is a reasonable apprehension that it may meddle with witnesses and coercive means will adopted to influence the witness so that he give adverse statement favorable to the defence side. Unfortunately, in spite of public outcry and huge media attention, no serious effort has been taken as a result of which three witnesses are already shot and few other witnesses are attacked. There is no effective measure for witness protection that has been adopted by the State.

V. WITNESS ANONYMITY

Witness anonymity is a kind of witness protection. Though it is not defined explicitly anywhere. Basically it means a sort of non-divulgence and non-revelation of the identity of witness. But, there many issues of deliberation related to its validity and practical implementation, which needs to be discussed. Since it is the responsibility of police and Court to provide protection to witness, but a Court can order for witness anonymity. Secondly, it is reasonable to provide witness anonymity at preliminary inquiry or investigation stage where an investigating officer has to be alert and cautious about the same fact. Thirdly, it is not an easy task to implement witness anonymity at the inquiry or trial stage because of following legal complications.

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[27] AIR 2009 (SCW) 3049

[28] AIR 1988 P H 95

[29] S.B. Criminal misc.2nd Bail Application no.10115/2013

a) Whenever the matter of taking evidence comes before the Court, it is necessary that all kind of evidence must be produced & taken in the presence of accused or if his presence is done away with, then in the presence of his pleader i.e., his pleader's presence is deemed to be the presence of accused. So it signifies that all evidence will be secured & taken either in the physical or legally constructive presence of the accused.[30]

b) It is necessary to give equal opportunity to both parties for cross-examining opposite party & their witness in the Court proceeding because it is a fundamental part of principle of natural justice and right to have fair hearing. Accordingly, parties can send their written questions to Court for consider it relevant. Then, Court can ask the party to cross-examine witness.[31]

c) It is important for Court to enquire or go for trial without any kind of restraint in accessing the same in public for the purpose of transparency & fairness in trial in the interest of justice. Though in exceptional case, Court can put complete restriction on printing & publication of the trial proceeding in the case related to rape to maintain privacy.[32]

That is why Supreme Court took strong notice of the same under the case of *Delhi Domestic Working Women's Forum v. Union of India*,[33] where it has been emphasized case related to rape should be dealt with broader sensitivity in the interest of justice because of two reasons namely, victim's vulnerable nature & victim's position as a witness. So it is maintain victim's anonymity in rape cases and trial proceeding shouldn't be considered for printing or publication. Court has to ensure proper reasonableness again during cross-examination in rape cases so as to put restriction on humiliating & undignified questions.

Similarly, Supreme Court took a serious note in the case *Sakshi v. Union of India*[34] on the issue of victim/ witness protection with a different new perspective. It was observed that there wouldn't be any compromise with fair trial. It is important to comprehend relevancy of evidence through the real truth will come out. So, with the same objective, if it necessary to adopt any unique method for taking evidence from victim or witness like use of specific screen or similar arrangement, the Court will encourage such practice to have fair trial.

VI. CHALLENGES

There are few challenges that can become hindrance for any Witness Protection Programme. There is complete ambiguity on two broader issue namely, application and organizational structure. There is no clarity about the duration of period of witness protection so time for witness protection is not explicitly fixed. It is very difficult to provide protection after the end of Court proceeding. Next problem is consistent adjournment of cases, which doesn't come with appropriate solution. One of the major

[30] *Supra* note 2, Section 273

[31] *Id.*, Section 287

[32] *Id.*, Section 327

[33] 1995 SCC (1) 14

[34] 2004 (6) SCALE 15

issue is unnecessary political interference in the whole process of Justice delivery system as a result of which it encourages anti social elements in the society. This problem is aggravated further with another factor where protectors themselves are not sufficient in number, i.e. lack of police officers & security guard in State level according to population in a particular area.[35]

VII. CONCLUSION

Different Law Commission Reports and landmark judgments passed by Supreme Court have paved a clear way in the form of documentation for legislature to frame legislation namely, Witness Protection Act. If legislature framed legislation as Whistleblower Protection Act, 2014 (though not implemented yet) for the protection of Whistleblower, then why shouldn't there be legislation for the security & safeguarding the interests of witness. It is important to have legislation flexible in nature so that it is convenient to witness's position. Successful implementation of legislation depends on cooperation of police, Judiciary and society. There are some basic principles which need to be followed for a proposed legislation for witness protection:

a) Policy and guidelines for Witness Protection Unit should be framed in confidential manner. Personal details related to recognition of witness should be kept private in nature. His changed destination or location should also be kept secret. Even Confidentiality clause includes details of police officer or special security guards who are employed for witness protection.

b) While framing the Witness Protection Act, if any specific authority will be given the main charge to provide protection for witness, it is important that Departmental & Managerial independence should be deeply rooted in the regulation of that specific authority so as to eliminate all possible kinds of influence from financial or political power. A magistrate can decide whether witness has to be protected or not in a particular case. While deciding the same, it is important to have impartial approach by observing the gravity of case.

c) There can be two situations either witness seek protection from the Court or Court itself take the case *suo motu* in both situation witness needs to enter into Memorandum of Understanding with the authority in which a witness will be given protection in all dimensions. The agreement must not have ambiguous provisions wrt entry of witness under protection and exit from ambit of protection. Non-obligation of responsibility of witness should result into exit from the protection. The authority should extend their purview to provide protection from giving new temporary identity to changing address temporarily.

It is obvious that policy & legislation related to Witness protection programmme can be successful only when some reformative steps should be taken simultaneously in the functioning of court & police station. It is necessary to enhance the capacity of fast-track court for speedy justice. It is also incumbent upon the State to increase the numbers of police personnel so that employment for witness protection become convenient.

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[35] Naveena Varghese, "Witness Protection: Problems Faced and Need for a Protection Programme in India", *Academike*, 2015, available at: *http://www.lawctopus.com/academike/witness-protection-problems-faced-and-need-for-a-protection-programme-in-india/#_edn34* (Visited on 09th June, 2015)

RIGHT TO INFORMATION ACT: A WEAPON TO STRENGTHEN GOOD GOVERNANCE AND FIGHTING AGAINST CORRUPTION

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Abstract

Governance experiences show that there has always a vital need for improving government administration. Governance is considered as the process or system ensuring certain activities to be carried out, managed or controlled within the parameters of accountability, legitimacy and transparency. Good governance works on the concept of positive, responsive and sensitive administration and considered as a value-laden which emphasize forcibly on the public interest, public welfare, public service and public goods. Today in our country there is unprecedented corruption at all levels and the feeling is pinching but corruption is roaring high. The main cause behind such corruption is secrecy, which was considered as the tool of faithfulness towards the government is past era. In order to have the transparency in the governance, there is a need to crack the walls of the secrecy and to ensure the good governance. It is in this content the present paper argues that Right to Information Act is a weapon to strengthen the good governance and also examines its role in fighting against corruption in India.

Key words

Right to Information, Administration, Good Governance, and Corruption.

I. INTRODUCTION

Good governance is prerequisite for any democracy that includes some of the factors as transparency, accountability, rule of law and people's participation. Governance and good governance at time have become the main theme and matter of discussion and deliberations. As the government is playing a vital role in the life of a man and the act and process by which a government governs our people is called governance. The requirement of good governance is universally accepted. Good governance always constitutes the cornerstone of every democracy. Good governance includes wide range of issues like economic, political, administrative and judicial as well. Governance is considered as a process or system that ensures certain activities to be carried out, managed or controlled within the parameters of accountability, legitimacy and transparency. Good governance rest on positive, responsive and sensitive administration. Today in our country there is unprecedented corruption at all levels and the feeling is pinching but corruption is roaring high. The main cause behind such corruption is secrecy, which was considered as the tool of faithfulness towards the government is past era. In order to have the transparency in the governance, there is a need to crack the walls of the secrecy and to ensure the good governance. It is in this content the present paper argues that Right to Information Act is a weapon to strengthen the good governance and also examines its role in fighting against corruption in India.

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II. RIGHT TO INFORMATION AND GOOD GOVERNANCE

The concept of governance is as old as human civilization and defined as the process of decision making and includes the process by which the decisions taken are to be implemented or any act or process by which the government governs the people. The concept of good governance includes some of factors as transparency, accountability, rule of law and people participation. The need of good governance is universally accepted and prerequisite for democracy. India is also one of the democratic countries so there is a need of good governance and transparency. The government played an important role in the life of a common man as the state and its machinery should work for the welfare of the peoples. Good governance also includes within its ambit the wide range of issues as economic, political, judiciary and administrative as well and constitutes the cornerstone of every democracy.[1]

This Act provides an opportunity to the common people of the country to interact with the official and institutions. This Act is also considered as a potent missile to fight against corruption, arbitrariness and misuse of the power and having a noteworthy bearing on the good governance and development. Transparency and the accountability are the two very facets of the good governance and in the absence of any one the other cannot be in existence. To ensure the good governance there should be maximum disclosure and minimum confidentiality. The main thrust of such law is to transform the traditions of secrecy, red tapism and detachment that have long plagued India's monolithic and opaque bureaucracy.[2]

Accordingly to the World Bank, good governance entails sound public sector management (efficiency, effectiveness and economy), accountability, exchange and free flow of any information (transparency), and a legal framework required for the progress (justice, respect for human rights and liberties).[3] In seeming agreement with the World Bank, the Overseas Development Administration of the United Kingdom of Great Britain and Northern Ireland (now the Department for International Development), defines good governance by focusing on four major components namely legitimacy(government should have the consent of the governed), accountability (ensuring transparency, being answerable for actions and media freedom), competence (effective policy making, implementation and service delivery), and respect for law and protection of human rights.[4] The basic premise behind the rule of Right to Information is, since the government is for the people, it should be open, accountable and should not conceal anything from the people.

"Good governance" means the efficient and effective administration in a democratic framework. It involves high level organizational efficiency and effectiveness corresponding in a responsive way in order to attain the predetermined desirable goals of society. Good governance is essential dovetailing policies which the respective states must ensure while formulating their policies, necessary vary according to the particular

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[1]*Shilpa, "Right to Information: A Tool to Strengthen Good Governance and Tackling Corruption", 2 International Journal of Humanities and Social Science Invention, 2013, pp. 46-51*

[2]*Ibid.*

[3]*Available at: http://www.ifad.org/gbdocs/eb/67/e/EB-99-67-INF-4.pdf*

[4]*"Taking Account of Good Governance", London. 1993*

circumstances and needs of different societies. Simultaneously the responsibility for determining and implementing such practices,based on transparency and accountability. According to the World Bank document viz. Governance and Development the parameters of good governance are as follows:[5]

- Legitimacy of the political system. This implies limited and democratic government.
- Freedom of association and participation by various social, economic, religious, cultural and professional groups in the process of governance.
- An established legal framework based on the rule of law and independence of judiciary to protect human rights, secure social justice and guard against exploitation and abuse of power.
- Bureaucratic accountability including transparency in administration, public policies, decision-making, monitoring and evaluation of government performance.
- Freedom of information and expression required for formulation of public policies, decision-making, monitoring and evaluation of government performance.
- A sound administrative system leading to efficiency and effectiveness.
- Co-operation between government and civil society organizations.

Actually good governance has eight major facets including participatory, consensus oriented, accountable, transparent, responsive, effective, efficient and equitable and also follow the rule of law. Good governance is an ideal which is difficult to achieve in its totality. However to ensure sustainable human development action must be taken to work towards achieving this ideal. The RTI is one of the important method by which the success in good governance may be achieved.[6]

The first and foremost task appears to attempt for a fundamental redefinition of governance, to change the mind set of bureaucracy, to overcome to colonial hang-over of the persistent notion of the Rulers and the Ruled, Governors and Governed, Government and the People, the us and they. The interaction between the administration and the citizen needs to be enhanced by the awareness of and respect for the constitutional rights of the people. Interaction is essential between free and self governing people and the agents appointed by them. Massive and sustained participation of civil society initiatives, self-help groups, voluntary organization etc is necessary to achieve a faster pace of socio socio-economic development and for building a more just caring and equitable society as envisioned by the constitution. The movement must be from governance to self-governance. This requires a radical re-shaping of policies so as to create an enabling and facilitating environment in which effective interaction between the government and the institutions of civil society becomes possible.[7]

III. MAJOR COMPONENTS OF GOOD GOVERNANCE

As per the World Bank, the united nation commission on human rights and Asian

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[5]www.worldbank.org[visited on 20-11-2015]

[6]Caesar Roy, "Right to Information and its Significant to Ensure Good Governance in India", 2(3) Nyaya Deep, 2012, at 90

[7]The National Commission to Review the working of the Constitution paper on Enlargement of Fundamental Rights, Ministry of Law and Justice, GoI,New Delhi (2000), para 11

development bank the good governance includes some attributes and some of them are discussed here:

a) Transparency and Openness

Transparency is always considered as the information is freely available and directly accessible to all those who will be affected by any decision and their enforcement. Access to any information is a great enabler of transparency and the citizens right to Information is considered as the soul of the transparency that improves the quality, ethics and the decision making power of the concerned authorities. In the perspective of governance, transparency refers to availability of information to the common public and clearness about functioning of government institutions. Without transparency that is unfettered access to timely and reliable information on decisions and performance, it would be difficult to call the general public sector entities to account as failure to supply information on any matter is a major problem with most of the legal system of the developing world. Without the concept of accountability, transparency would be of little value. The existence of both accountability and transparency is a precondition to effective, competent and equitable management in public institutions.[8]

b) Accountability

Power corrupts and absolute power corrupts absolutely. Right to Information attempts to lose the power syndrome of those entities that control the communication, gathering, processing, distribution and storage of information system because they will lose their power if such information is transferred from such power group to the common man. By transferring the information from such power groups to the common people they will be made accountable as the notion of democracy prescribed that the government is for the benefit of the common people at large and for the few of the chosen ones. Modern democracy embraces a wider and more direct concept of accountability as that goes beyond the traditionally well deified principle of accountability of the executive towards the legislature. Accountability is possible only when common people have access to information relating to the functioning of the government agencies.[9] Hence not only government institution but all private and civil organizations must be accountable to the public and to their institutional stakeholders. Accountability is one of the prerequisites of democratic or good governance. Accountability may be categorized into four broad types:[10]

(a) Accountability is associated with the idea of answerability, based on the premise that individual identity is determined by one's position in a structured relationship;

(b) Liability, a second form of accountability, sees individual identity rooted in more-formalized expectations developed through rules, contracts legislation and similar relationships based on legalistic standing;

(c) Accountability is associated with role-based expectations. Such roles foster blameworthiness as a basis for shaping and directing one's behaviour;

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[8]The United Nations Development Programme, Transparency and Accountability in the Public Sector in the Arab Region, New York, 2004

[9]"Working Group Report on the Right to Information and Promotion of Open and Transparent Government", Government of India, 1997, Para 2.2

[10]Definition of basic concept and terminologies in governance and public administration, the United Nations Economic and Social Council, January 2006

(d) Accountability expectations are derived from an individual's perceived status in a community where attributions come into play.

c) Participation

Good governance requires that civil society has the opportunity to participate during the formulation of development strategies and that directly affected communities and groups should be able to participate is the design and implementation of programme and projects. Even where projects have a secondary impact on particular localities or population groups, there should be a consultation process that takes their views into account. This aspect of governance is an essential element in securing commitment and support for projects and enhancing the quality of their implementation.[11]

d) Public Accountability

Public accountability is a facet of administrative efficiency and the publication of any information serves as an instrument for the oversight of citizens. Information is considered as one of the means for fighting against the corruption therefore the government that creates or produces the trustworthy flow of information creates greater openness, transparency and accountability. International experience also shows that countries allow their citizen's access to public information held by the government, have checked on the reduction of the corruption and this resulted into the substantial increase in the administrative efficiency.

The public accountability is a part of the governance and the Government consist of public servant is accountable to the public for their service. Therefore accountability and governance is the part and parcel of the government, which acts as principle and the agent and make an impact on the public. When any government agency translates any government policy into any programme, the success of such transaction is very much dependent on a clear understanding and outcome of the result that was sought. There is no surprising fact that the history of accountability and governance within the public has shifted from measuring inputs to measuring outputs and matching outputs to identifying outcomes. The only point that weakens the accountability or the effectiveness of the government or the public sector is the lack of information on any matter.[12]

e) Responsibility of Public Authority

Public authority is responsible to maintain its records and if possible on computer.[13] The authority is to publish within the time period of four months from the enactment of the Act some of the following information:

- The particulars of its organisation, function and duties.
- Powers and duties of its officers and employees.
- Procedure followed in the decision making process including supervision and accountability.

Public authority is to designate some of the officers to provide information to the

[11]Supra note 1

[12]Liann Datziel, "Governance and Accountability in the Public Sector", 2003, available at: www.scoop.co.nz visited on 20-11-2015

[13]The Right to Information Act, 2005, Section 4

citizens.[14] Request for seeking the information can be made in Hindi, English or in any other official language of the area.[15] Such application is too accompanied with the prescribed fee and no fee is to be charged by any person of below poverty line. The application for information can be made to the Central or State office accordingly and the reason for seeking need not to be provided. On receiving the application the concerned is to provide the information within a time period of 30 days or otherwise may reject the application and in case where the information sought relating to the life or liberty of any person shall be provided within 48 hours only. This is the most comprehensive right and includes many things in its ambit for the benefit of the common people of the country.

IV. RIGHT TO INFORMATION AND FIGHT AGAINST CORRUPTION

The right to information, likely to reduce the corruption and increase administrative efficiency in so far as it provides every citizen of the country an enforceable right to question, examine, audit, review and assess government acts and decisions to ensure that these are consistent with the principles of public interest, integrity.

Different aspects of the importance of the right to information are discussed in a different way as: Abraham Lincoln, the very first President of the USA, understood the importance of right to information, when he rightly said, Government is of the people by the people and for the people. The first part of the people includes participative management the second by the people includes openness and transparency for the people and the third part for the people includes accountability, which means participation, minimizing corruption and good governance by sensitization of bureaucracy and bringing efficiency in the system. Right to Information Act, 2005 was accepted with the objectives of:[16]

- Greater Transparency in functioning of public authorities.
- Improvement in accountability and performance of the government.
- Decision making process: and
- Reduction in corruption in the government departments.

The philosophy of secrecy rests on the ground that governance is not the business of the common people; however, in a democracy barring people from access to information smacks and sows the seeds of fascism. Granting maximum access to governmental materials and limiting confidentiality to minimum are a way for developing into a global jurisprudence of open government. It is important that locking up informational sources needs to be looked down, in the new world over.

Since law serves life, informational law has therapeutic value for the already anaemic Human Rights and people. Such a law is anathema for those in power. Power to the people implies their Right to Know and denies to government the right to hide. It “We the people” are final masters and performance auditors of bureaucracy, and then need for free access to all public information, agues for itself. How can Stockholm resolutions for environment conservation or “Health for all” or any other social welfare project may be

[14] Id., Section 5

[15] Id., Section 6

[16] M.M. Ansari, “Impact of Right to Information on Development: A Perspective on India's Recent Experiences” paper presented at the UNESCO Lecture, Paris, May 15, 2008

meaningful, if full disclosure and processing of facts is not made into a human right? No people's struggle or workers fight for fair employment terms, or women organizations fighting for equality against gender discrimination, or effort of the disabled to be a part of the mainstream, or the displaced seeking relief and rehabilitation can achieve success in the absence of this right.[17]

Right to Information Act has become a reality consistent with the objectives of having a stable, honest, transparent and efficient government. True governments are not elected just by holding elections but from informed franchise. Efficient government cannot be run, by its mystic babu but from the enlightened participation of its populace in public affairs. Now the government will have to move fast a few steps further, as free flow of information for the citizens and non government institutions still suffers from several bottlenecks, for example existing legal framework, lack of understanding, the philosophy at the grass root level, and mind set of middle level employees for secrecy. To bring a change in attitude and mindset of civil servants, explicit change is required in the old rules so that it become a locomotive for human progress. Non obstinate clause in Section 14 of the Freedom of Information Act may not be sufficient to motive the bureaucracy to make access to information, and more liberal. The Act ensures free flow of information to the public, while inter alia protecting the national interest, sovereignty and integrity of India and friendly relations with foreign states.

Right to Information has been declared in truly sense as the concept of human rights and apart from the reactionary statutes like Prevention of Terrorism Act, 2002(POTA), police terror, misinformation and disinformation are the methods adopted by the States to conceal its crimes. Official secrecy being a shelter for the Government and ignorance of facts or their distortion becomes a tranquilizer for the public. Sometimes even the parliament is kept in the dark. Truth has no chance when it is stifled at birth. Freedom of information is fundamental of freedoms. The human essence fails to find expression under the legalized repression and the society is in itself fails to protest or dissent if the right to know is gagged by secrecy. Humanity is unable to manifest itself when sources of information are frozen beyond common access and the voices of resistance are terrorized into muteness or corrupted into silence.[18]

A fundamental postulate in a democratic polity means where the common people possess as a public right all the information affecting the matters of public concern, without which the business of the government or the private operations cannot intelligently be directed, controlled, mould, monitor or superintend. Without having the information on any matter the participation with absolute responsibility in the process of decision making cannot be taken by the common people of the country either directly or indirectly. In the quest for universal answer to this persistent malaise, it is much important to identify the main sources of the corruption inherent within the character of the state machine that include a determined denial of transparency, accessibility, accountability, cumbersome and confusing procedures.

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[17]*Harsh Mander and Abba Joshi, "The Movement for Right to Information in India: People's Power for the Control of Corruption", available at: www.humanrightinative.org/rti/India/articles/the%20Movement2* visited on 15-11-2015

[18]Justice V.R. Krishna Iyer, *The Dialectics and Dynamics of Human Rights in India: Yesterday, Today and Tomorrow* (Eastern Law House, Calcutta, 1999) pp.15-16

As the information is considered a power of the common man and the executive at all the level attempts to withhold the information from the reach of such common man in order to increase its scope for control, patronage, arbitrary, corrupt and unaccountable exercise of power. Therefore demystification of rules and regulations, procedures, complete transparency and pro- active dissemination of the relevant information amongst the common public is potentially much strong safeguard against the corruption. Ultimately the most effective check on the corruption is that where the citizens of the country themselves have the right for seeking the information from the state and thereby to enforce the transparency and accountability.[19]

Information is the currency and every citizen requires it into their life as necessary for governance of the society, the greater the access of the citizen to information the greater would be the responsiveness of government towards the community and the greater restriction are placed on access, the greater feeling of powerlessness are held. Without the proper information common people cannot adequately exercise their rights and responsibilities as the citizens or make any informed choice. The information kept by the Government is the national resources, neither the particular government of the day nor any public officials creates those information for their own benefit but such information is created in order to discharge their legitimate duties and for the service of the public for whose benefit the institution of the government exist. It follows that the government and their officials are the trustees of such information created for the common people.[20] The Right to Information enables the members of the public to access the information contained into the documents that may otherwise be available only at the discretion of the government.

There are a numerous ways in which the information kept by the government is at least in theory accessible to the citizens of the country and the parliamentary system promotes such kind of procedure by transferring the information from the government to the parliament or to the respective legislatures and from there to the people, members of the public can also seek information on the concern matters from their elected representatives. Annual reporting, different committee reports, publication of the information and the requirements of the administrative law also increase the flow of information from the government to the common people.

However in practice the overwhelming culture of the bureaucracy remains as that of the secrecy, distance and mystification and not fundamentally different from the colonial times. In fact this preponderance of the bureaucratic secrecy is usually legitimized by a colonial law, the Official Secrets Act, 1923 that made the disclosure of any official information to the common pubic by any public servant an offence.

There is an expectation from the Right to Information laws in order to improve the quality of the decision making by the public authorities in both policy and administrative matters by removing the unnecessary secrecy that surrounded the decision making process. It also enables the groups and individuals to be informed about the criteria applied by the government agencies in making their decisions. It is hoped that this would enhance the quality of the participatory political democracy by providing all the

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[19]Supra note 16

[20]Minal M. Bapat, "Right to Information: Its Scope and Need", AJHC, 2008, pp. 14-15

citizens an opportunity to participate in a more full and informed way. By securing access to the relevant information and knowledge, the citizens of the country be enabled to understand the government performance and the cumulative impact of such procedure will be the control on the corruption and the arbitrary exercise of the power.

V. CONCLUSION

Good governance is one of the prerequisite for democracy and India being a democratic country required good governance and transparency like any other democratic country. Today in India there is unprecedented corruption at all levels and the main factor behind such corruption is secrecy. For making the transparency in the governance, there was a need to crack the corruption by removing the secrecy. In such direction the government of India introduced a new era of good governance by enactment of the Right to Information Act, 2005 that provides an opportunity to interact with the officials and institutions. This Act is a potent weapon in the hand of the common people of the country to fight against corruption, arbitrariness and misuse of the power simultaneously a tool for good governance. The main thrust of the RTI law is to change the culture of the secrecy, red tapism and aloofness in the country.

DEFINITION OF SUBSIDY UNDER THE WTO AGREEMENT

Anoop Kumar*

Abstract

The attempt to define subsidy emerged with GATT. But, neither the GATT nor the Tokyo Round Subsidies Code contained a definition of the term subsidy. The situation changed when the WTO SCM Agreement came into being. It provides that there must be a financial contribution by the government or any public body. It is important to note that the concept of subsidy cannot be defined in general but depends substantially on its context, be legal, political, economic, etc. It is in this context that the present paper examines the legal definition of subsidy provided in SCM Agreement. The paper also examines the case law of WTO appellate body to understand whether the concept is defined too broadly.

Key words

Subsidies, Financial Contribution, Income and price support, benefit, Specificity.

I. INTRODUCTION

The international rules that affect subsidization in international trade may be classified in two sets of such rules: those regarding the use of countervailing duties and those providing certain substantive international obligations against the use of subsidies that may affect international trade. The Starting point of the quest for a 'Legal definition' of subsidy comes from the GATT. But neither the GATT nor the Tokyo Round Subsidies Code contained a definition of the term "subsidy". This changed when the WTO SCM Agreement came into being. It provides that there must be a "financial contribution by the government or any public body". The legal concept of subsides does not exist in *rerumnatura*: it is not a fact but an artificial construct of a given legal system with a given practical purpose.[1] The concept of subsidy cannot be defined in general but depends substantially on its context, be legal, political, economic, etc. The legal system, with its material prohibitions, procedural rules and remedies and ultimately its objectives, does influence the actual definition of subsidy in that 'legal system'. The second remark is that more than just a description, the definition of subsidy refers to the characteristics that are normally and positively present when that legal system concludes 'we have subsidy' or 'this subsidy' is objectionable or rather 'this subsidy' is permissible.

In this context the present paper brings to fore the discussion on provisions of Subsidies

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[1] Luca Rubini, *The Definition of Subsidy and State Aid, WTO and EC Law in Comparative Perspective* (New York: Oxford University Press, 2009 First Published) at 17

and Countervailing Duties Agreement (SCM) that have bearing on subsidy in international trade.

II. DEFINITION OF SUBSIDY UNDER WTO

One of the most important achievements of the Uruguay Round negotiations was the inclusion of a definition of 'subsidy' in the SCM Agreement. A subsidy within the meaning of the SCM Agreement exists if two distinctive elements are present (i) a financial contribution by a government (or any form of income or price support in the sense of article XVI of the GATT); and (ii) a benefit is thereby conferred. To be subject to the disciplines of SCM Agreement and contervailable, this subsidy must also be specific.[2]

It is important to note that the application and scope of SCM Agreement depends upon the definition of subsidy. If there is no subsidy in the term of SCM Agreement then no one could apply the WTO law to countervail those aids/ subsidies. Article 1 of the SCM Agreement provides the definition of subsidy.[3]

Financial Contribution

Article 1.1 (a) (1) of the SCM Agreement defines the term "financial contribution,"[4] which is the first point of the definition of a subsidy. It requires a financial contribution by a government or any public body, including quasi-governmental entities. Financial contribution is defined more broadly than a charge on the public accounts. The SCM

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[2] Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures (Balancing Policy Space and Legal Constraints)* (United Kingdom: Cambridge University Press 2014 First Publish) at 39

[3] Article 1: Definition of a Subsidy: 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a) (1) There is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where: (i) A government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) Government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) (iii) A government provides goods or services other than general infrastructure, or purchases goods; (iv) A government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or (a) (2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and (b) A benefit is thereby conferred.

[4] In the dispute of *US - Exports Restraints*, the Panel considered the negotiating history of - financial contribution and concluded that: "Article 1 as ultimately adopted incorporates the requirement of a financial contribution by a government or other public body as a necessary element of a subsidy. The submissions by participants to the negotiations suggest that the proponents purpose behind including this element was to limit the kinds of government actions that could fall within the scope of the subsidy and countervailing measure rules. In other words, the definition ultimately agreed in the negotiations definitively rejected the approach espoused by the United States of defining subsidies as benefits resulting from any government action, by introducing the requirement that the government action in question constitute a "financial contribution" as set forth in an exhaustive list." (Para 8.69) US- Export Restraint, para. 8.73 Available at:

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds194_e.htm accessed on 26 May 2015

Agreement points to the three[5] different kinds of financial contribution. It is an exclusive[6] list of financial contributions, not an illustrative one. It includes the following:

a) A government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

b) Government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)

c) A government provides goods or services other than general infrastructure, or purchases goods;

The SCM Agreement contains an exhaustive list of measures that are deemed to be a financial contribution. The list identifies government practices that range from grants and loans to equity infusions, loan guarantees, fiscal incentives, the provision of goods or services and the purchase of goods. The SCM Agreement covers such measures even if they are carried out by a private entity, provided that a government has 'entrusted' or 'directed' the private entity to carry out one of the enumerated practices normally followed by governments. One of the most significant aspects of Article 1 is what is not included in that definition. 'Any government practice that does not meet one of the three criteria laid out therein cannot be considered a subsidy for the purposes of the Agreement'. Although Luca Rubini regret such as closed list in the light of the ingenuity of governments in inventing new form of assistance, moreover the three types of financial contribution are formulated, and interpreted, broadly, to cover a wide variety of financial contribution.[7]

(a) The (potential) direct transfers of funds or liabilities

First type of financial contribution[8] refers to a government practice involving direct transfers of funds (e.g. grants,[9] loans, and equity infusion) or potential direct transfers of

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[5]Article 1.1(a) (1) (iv) is not a type of financial contribution because it deals with the way, manely indirectly, in which the government provides a financial contribution. Panel Report, *US- Export Restraint,* para. 8.73 Available at: *https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds194_e.htm* accessed on 26 May 2015. Panel Report, EC-Countervailing Measures on DRAM Chips, para7.53 Available at:

https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds299sum_e.pdf accessed on 26 May 2015. Appellate Body Report, US - Countervailing Duty Investigation on DRAMS, paras. 124-125. Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds296sume.pdf accessed on 26 May 2015

[6]Appellate Body Report, *US-Large Civil Aircraft, para*.613 Available at:

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds353_e.htm accessed on 26 May 2015

[7]*Supra* note 1 at 40

[8]Article 1.1(a) (1) (i) of the SCM Agreement

[9]In the dispute of Australia Automotive Leather the Panel considered the meaning of the word -grant and stated that - the ordinary meaning of the term “grant” means “the process of granting or a thing granted, and therefore includes both the government's commitment to make payments (that is, the grant contract), and the grant payments themselves, including all possible disbursements, whether past or future. (para 9.39). This meaning of the term -grant” was in the context of payments under grant contracts to the exporter. However similar meaning could be imputed to-grants‖ in Article 1.1. (a)(1) (i)

funds or liabilities (e.g. loan guarantees). The Appellate Body has concluded that view, the term 'fund' encompasses not only 'money' but also financial resources and other financial claims more generally.[10] 'A direct transfer of funds' captures all conduct on the part of the government by which money; financial claims are made available to a recipient. Transactions similar to those explicitly listed are thus equally covered.[11] Examples of other direct transfers of funds accepted in the case law are debt forgiveness; the extension of a loan maturity, an interest rate, debt-to-equity swaps and joint ventures.[12] This broad reading implies the change of ownership (by an equity infusion or debt to equity) to make financial contribution to itself (e.g. cash grant by a government to a government owned company). Appellate Body has emphasized that the scope of direct transfers of funds is confined to those transaction that have sufficient characteristics in common with one of the listed items. This means those acts which normally involve financing by the government to the recipient. The phrase 'government practice' in Article 1.1(a) (1) (i) of the SCM Agreement simply denotes the originator of the action (i.e., government) and does not restrict the scope to functions normally performed by government.

Export credit guarantees or insurance are considered examples of potential direct transfer of funds because funds are only transferred where the export credit is not repaid due to a covered risk.[13]

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[10]Appellate Body Report, *Japan – Drams* (Countervailing Duties on Dynamic Random Access Memories) *(Korea) para*. 250 WT/DS336/AB/R 28 November 2007 available at:

https://www.wto.org/english/tratop_e/dispu_e/336abr_e.docaccessed on 26 May 2015

[11]Id., para.251 – 252

[12]Appellate Body noted that"We observe that the words "grants, loans, and equity infusion" are preceded by the abbreviation e.g., which indicates that grants, loans, and equity infusion are cited examples of transactions falling within the scope of article 1.1(a) (1) (i). This shows that transactions that are similar to those expressly listed are also covered by the provision. Debt forgiveness, which extinguishes the claims of a creditor, is a form of performance by which the borrower is taken to have repaid the loan to the lender. The extension of a loan maturity

enables the borrower to enjoy the benefit of the loan for an extended period of time. An interest rate reduction lowers the debt servicing burden of the borrower. In all of these cases, the financial position of the borrower is improved and therefore there is a direct transfer of funds within the meaning of article 1.1(a)(1)(i).

With respect to Korea's argument that debt-to-equity swaps cannot be considered as direct transfers of funds given that no money is transferred thereby to the recipient, the panel reasoned that "the relinquishment and modification of claims inherent in such transactions similarly result in new rights, or claims, being transferred to the former debtor." again, we see no error in the panel's analysis. Debt-to-equity swaps replace debt with equity, and in a case such as this, when the debt-to-equity swap is intended to address the deteriorating financial condition of the recipient company, the cancellation of the debt amounts to a direct transfer of funds to the company." *Japan –Drams (Korea) para. 250* WT/DS336/AB/R 28 November 2007 available at:

*https://www.wto.org/english/tratop_e/dispu_e/336abr_e.doc*accessed on 26 May 2015.

[13]In the dispute of Brazil Aircraft, the Panel observed that: "potential direct transfer of funds" exists only where the action in question gives rise to a benefit and thus confers a subsidy irrespective of whether any payment occurs. In arriving at this view, we have taken contextual guidance from the example of loan guarantees provided in Article 1.1(a)(1) of the SCM Agreement. Whether or not a loan guarantee confers a subsidy does not depend upon whether a payment occurs (i.e., whether the beneficiary of the guarantee defaults and the government is required to make good on the guarantee). For example,

(b) The government foregone revenue which is otherwise due

This sub section explains that government can provide subsidy by negative action, when it refrains from collecting revenue which is otherwise due.[14] Revenue could be forgone in relation to all forms of taxation, such as internal taxes, covering direct taxes[15] (raised on Income) and indirect (raised on products) taxes[16] and import duties (tariffs).[17] Only one specific exception is included.[18] Rebates of indirect taxes and import duties upon exportation are explicitly excluded from the subsidy definition and thus from the scope of the SCM Agreement. Such rebates are not considered as revenue forgone. The Appellate Body has confirmed that rebates on direct taxes are not covered by this exception.[19]

(c) The provision of goods or services other than general infrastructure or purchase of goods

The second form of financial contribution[20] refers to the provision of goods or services by the government. This category has the potential for controversy regarding the question

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Article 14 of the SCM Agreement provides that, when examining benefit to the recipient in a countervail context, "a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that a firm would pay on a comparable commercial loan absent the government guarantee." Thus, whether or not a loan guarantee confers a benefit depends on its effects on the terms of the loan and not on whether there is a default (Para 7.68)

If the category of potential direct transfers of funds referred simply to the situation where a government may in the future make a payment, almost any direct transfer of funds could, at an earlier date, be qualified as a potential direct transfer of funds. Nor do we see any reason to believe that a possible future payment is a "potential direct transfer of funds" merely because of a high probability that a payment will actually occur. The word 'potential' has been defined as 'possible as opposed to actual' or 'capable of coming into being'. If the determination whether a measure was a 'potential direct transfer of funds' depended upon the degree of likelihood or probability that a payment would subsequently occur, then the drafters surely would have chosen an adjective more suggestive of high probability than 'potential.'(Para 7.69)

[14]Article 1.1(a) (1) (ii) of the SCM Agreement

[15]Footnote 58 of SCM Agreement, for the purpose of this Agreement: Footnote 58 of SCM Agreement. The term 'direct taxes' shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property.

[16]Footnote 58 of SCM Agreement, for the purpose of this Agreement: The term 'indirect taxes' shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

[17]Footnote 58of SCM Agreement, for the purpose of this Agreement: The term 'import charges' shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

[18]Footnote 1of SCM Agreement, In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

[19]Appellate Body Report, US –Tax treatment for foreign sales Corporations (FSC), WT/DS108/AB/RW2, adopted 14 March 2006 pare 93. The exclusion of direct taxes is also confirmed by the different treatment of indirect and direct taxes under Annex I of the SCM Agreement (items (g) and (e)).

[20]Article 1.1(a) (1) (iii) of the SCM Agreement

of what constitutes a good and what constitutes a service. The advent of electronic commerce has raised the question of whether there exists another category of "thing" that is neither a good nor a service (e.g., in which category does intellectual property fall). If so, does the government provision or purchase of this third category ever constitute a financial contribution?[21]

The Appellate Body has endorsed an expansive definition of the terms 'goods' and 'provision'. First, goods include 'property or possessions' and thus also immovable property.[22] Second, goods or services are provided by the government not only when they are directly supplied but also when an intangible right is offered having the effect of making these goods/services available. What matters is that the transaction makes the goods/services available.[23] This only supposes a reasonably proximate relationship between the action of the government providing the goods or services on the one hand and the use or enjoyment of the good or service by the recipient on the other.[24] In the case *US – Softwood Lumber IV*, Canada argued that the United State preliminary determination that Canada's stumpage programs provided a good for less than adequate remuneration were not in accordance with the WTO. First it argued that "stumpage" (which Canada stated is the right to harvest standing timber) is not a good. The Panel however, concluded that what Canada was providing was standing timber; the "stumpage" at issue was merely the means of providing the timber. The Panel further found that "timber" was a good within the meaning of the ASCM, The Panel also rejected a Canadian argument that Article 1.1(a) (1) (iii) does not apply to rights to exploit natural resources in situ. According to the Panel, the term "goods and services" covers "the full spectrum of in-kind transfers the government may undertake by providing resources to an enterprise," the only exception being the one explicitly mentioned in Article 1.1(a)(1)(iii), the provision of general infrastructure.[25]

As an explicit exception, the government's provision of 'general infrastructure' is carved out from the subsidy definition. The ordinary meaning of infrastructure refers refers to installations and services (power stations, sewers, roads, housing, etc.) regarded as the economic foundation of a country. Such infrastructure is only excluded if it is 'general' in nature. This calls for a determination of the existence of de jure or de facto limitations on access to or use of infrastructure, but other factors could also be relevant (e.g. purpose of the infrastructure, nature and type of infrastructure). In *EC – Large Civil Aircraft*,[26] the

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[21]*Supra* note 4 at 690

[22]The Appellate Body subsequently adopted a somewhat broader definition of the term "goods," noting that the French and Spanish terms used included a wide range of property. "tangible or movable personal property, other than money". *See United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, AB-2003-6, WT/DS257/AB/R (2004) at 59

[23]Appellate Body Report, *US – Softwood Lumber*IV (United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, WT/DS257/AB/R, adopted 17 February 2004available at: *https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds257sum_e.pdf*accessed on 26 may 2015.

[24]Hence, a government must have some control over the availability of a specific thing being made available. *Ibid* paras70-71

[25]Peggy A. Clarke and Gary N. Horlick, 'The Agreement on Subsidies and Countervailing Measures' in Patrick F. Macro, et. al. (eds.) *The World Trade Organization: Legal, Economic and Political Analysis* (New York: Springer 2007, Vol. I)at 690.

[26]European Communities and Certain Member State – Measures Affecting Trade in Large Civil Aircraft, WT/DS

Muhlennberger Loch industrial site was not considered general infrastructure because it was specifically undertaken and tailor- made for airbus. Equally, the runway extension was not considered general because it was undertaken to cater for the specific needs of Airbus and its use was de jure limited to Airbus. In contrast, the road improvements challenged in *US –Large Civil Aircraft*[27] were considered 'general infrastructure', because they were accessible to the general public and designed to achieve a broad range of safety, environmental and economic objectives.

In addition to above government makes a financial contribution when it purchases goods.Yet the purchase of services in not covered in particular provision because the drafters (incorrectly) considered that these could only affect trade in services and should thus be disciplined under the GATS.[28] The panel decided that the purchase of services is excluded from the ASCM, even if such a services is purchased from a goods provider and could thus affect trade in goods.[29] The Appellate Body bypassed this question by characterizing the R&D work performed by Boeing for NASA and the US Department of defense as a part of joint ventures instead of purchases of services and joint venture were characterized as a financial contribution within the meaning of the SCM Agreement. The purchase of R&D that have the potential to distort trade in goods would share the essential characteristic of joint ventures and equity infusions and thus be covered under the SCM Agreement.[30]

(d) Financial contributions by a Government or a public body

An essential feature of subsidies is that financial contributions should directly or indirectly be made by the government. The Contribution could be made directly by the government in the collective sense which covers the government in the narrow sense as well as any public body within the territory of a member.[31] Financial contributions offered by a private body could be indirectly attributed to the government in the narrow sense [32]or by a public body.[33]

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316 AB/R, adopted 1 June 2011.paras 7.1038, 7.1081 available at:

https://www.wto.org/english/tratop_e/dispu_e/316abr_e.pdf accessed on 26 May 2015.

[27]*United State– Measures Affecting Trade in Large Civil Aircraft* WT/DS 353 AB/R, adopted 23 March 2012. paras.7.444, 7.464-7.470- 7.470 available at:*https://www.wto.org/english/tratop_e/dispu_e/353abr_e.pdf* accessed on 26 May 2015.

[28]*Supra* note 2 at 44

[29]*United State– Measures Affecting Trade in Large Civil Aircraft, Supra* note 27

[30]The appellate Body approach is, however, less clear with regard to the purchase of services that do not share the features of an equity infusion (e.g. information technology services provided by a computer producer). Some element of Appellant Body report indicates that the payment for such services could qualify as a financial contribution under the item (i). If so, the potential loophole would be do facto closed, because any purchase of a services would be covered under item (i) as the payment for this service is covered as a transfer of funds. If not, a potential loophole exists which would only be closed if the Appellate Body finds that purchases of services are covered under item (iii) despite the lack of explicit reference therein.

[31]*Supra* note 1 at 49

[32] Government in the narrow sense covers: National and regional as well as local government. This conforms to the public international law principle that the conduct of any organ of the State, at whatever layer, is attributable to that state.

[33]The five factors for determination of public body: (i) government ownership; (ii) government presence on the board of directors; (iii) government control over activities; (iv) pursuit of governmental policies or interests;

(e) Indirect financial contributions: entrustment or direction of private body

Article 1.1(a) (1) (iv) of the SCM Agreement stipulates that such contributions can be made indirectly by a government. This occurs when the government makes payments to a funding mechanism or when it entrusts or directs a private body to carry out one of the three types of financial contribution. This provision is in essence an anti-circumvention provision. It prevents governments form circumventing the SCM Agreement by channeling their contribution through an intermediary or by using a private body as a proxy to make that contribution. Hence it assumes a demonstrable link between the government and the conduct of the private body.,[34,35]

Indirect subsidization occurs where, *inter alia*, (i) the government 'entrusts or directs'[36] a private body to subsidize, or (ii) the government provides one entity with a subsidy which then transfers or 'passes through' to another entity. The second case takes place when, for example, a producer of a subsidized input (upstream producer) sells the input to another producer who subsequently uses it in the manufacture of a processed good (downstream producer). Having obtained such an input product, the downstream producer can become an indirect recipient of the subsidy bestowed at the upstream level, as illustrated in Figure 1.[37]

Income or Price Support

Subsidies can exist not only when the government directly or indirectly provides a financial contribution but also when there is any form of income or price support in the

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and (v) whether the entity was created by statute; *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, on 31 August 2012 para. 343. available at:

www.worldtradelaw.net/reports/wtoab/us-adcvdchina(ab).doc accessed on 26 May 2015.

[34]In the dispute *US - Exports Restraints*, (*Supra* note 28) the Panel believed that: —the term 'private body' is used in Article 1.1(a)(1)(iv) as a counterpoint to 'government' or 'any public body' as the actor. That is, any entity that is neither a government nor a public body would be a private body. Under this reading of the term 'private body', there is no room for circumvention in subparagraph (iv). As it is a government or a public body that would have to entrust or direct under subparagraph (iv), any entity other than a government or a public body could receive the entrustment or direction and could constitute a 'private body'. (Para 8.49)

[35]Supra note 2 at 54

[36]Entrusts and directs must contain a notion of delegation and command respectively. Appellate Body held that-"we are of the view that, pursuant to paragraph (iv), 'entrustment' occurs where a government gives responsibility to a private body, and 'direction' refers to situations where the government exercises its authority over a private body. In both instances, the government uses a private body as proxy to effectuate one of the types of financial contributions listed in paragraphs (i) through (iii). It may be difficult to identify precisely, in the abstract, the types of government actions that constitute entrustment or direction and those that do not. The particular label used to describe the governmental action is not necessarily dispositive. Indeed, as Korea acknowledges, in some circumstances, 'guidance' by a government can constitute direction. In most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction. The determination of entrustment or direction will hinge on the particular facts of the case." (Para 116) US-Export Restraints. Available at:

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds194_e.htm accessed on 26 May 2015

[37]Shadirhodjaev, Shezod, "How To Pass a Pass-Through Test: The case of Input Subsidies", 15(2) *Journal of International Economic Law*, 2012, pp.621-64, at 622

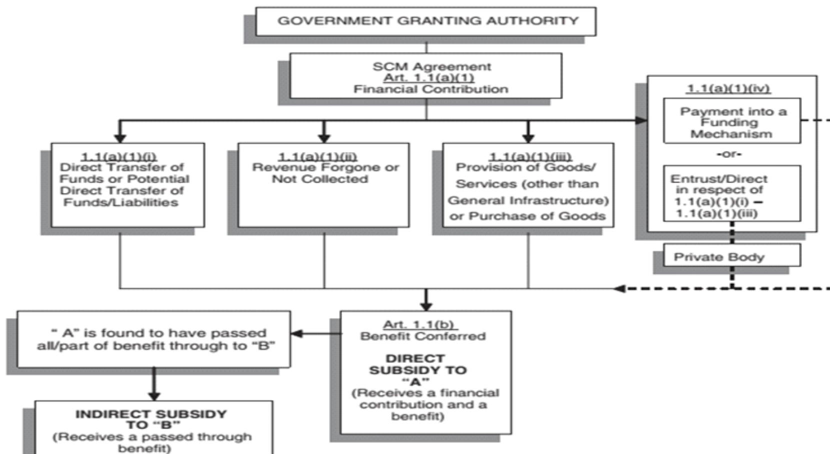

Figure 1. Subsidy pass-through.
Source: WTO, Negotiating Group on Rules—Benefit Pass-Through—Communication from Canada, TN/RL/GEN/7 (14 July 2004).

sense of Article XVI[38] of GATT 1994.[39] the notion of income and price support are not defined by either in GATT nor ASCM. The inclusion of second alternative in the definition of a subsidy was, as Luengo clarifies, away to include Article XVI of GATT in SCM Agreement.[40] It suggests an expensive interpretation, covering any government measure having an effect on income or prices. This would capture government measures that directly or indirectly have an impact on the recipient, without involving a financial contribution. Although there was an option for broad interpretation the penal considered a narrower interpretation because this second alternative was not intended to capture all manner of government measures that do not otherwise constitute a financial contribution but may have an indirect effect on a market including on prices. Similarly to the first alternative (financial contribution) the focus of income or price support should be on the nature of government action, rather than upon the effects of such action. The narrow reading of the scope of second one fit the purpose of the subsidy definition better than expensive interpretation which reintroduces an effect based approach.

Benefit

A financial contribution by a government does not constitute a subsidy unless it also

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[38]Article XVI, Subsidies, Section A – Subsidies in General: 1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the Contracting Parties, the possibility of limiting the subsidization.

[39]Article 1.1(a) (2) of the SCM Agreement

[40]Supra note 2 at 57

confers a benefit[41] on a recipient. A benefit could not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient, which could be a person, natural or legal or a group of persons. Whereas the financial contribution element focuses on government in the determination of a benefit the focus shifts towards the recipient in the determination of a 'Benefit'.[42]

The SCM Agreement does not provide extensive guidance on the question of what constitutes a 'benefit'. In *Canada – Measures Affecting the Export of Civilian Aircraft* (Canada-Aircraft), the Appellate Body decided that the existence of a 'benefit' has to be determined by comparison with the market, that is to say, by comparing what the recipient of the financial contribution received from the government with what it would have received on the market.[43]

The Appellate Body stated:

> "We also believe that the word 'benefit', as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' that it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market".[44]

The question of identifying the recipient has also proved controversial, with most countries objecting to the U.S. practice with respect to subsidies to privatized companies. Certain types of subsidies are considered to confer a benefit over several years. However, with the wave of privatization of formerly state-owned firms in the late 1980s and early 1990s, the question arose as to whether the newly private firm continues

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[41]In the dispute of US - Exports Restraints, WT/DS194R, adopted 23 August 2oo1, the Panel considered the negotiating history and concluded that: —In short, the negotiating history confirms that the introduction of the two-part definition of subsidy, consisting of 'financial contribution' and 'benefit', was intended specifically to prevent the countervailing of benefits from any sort of (formal, enforceable) government measures, by restricting to a finite list the kinds of government measures that would, if they conferred benefits, constitute subsidies. The negotiating history confirms that items (i)-(iii) of that list limit these kinds of measures to the transfer of economic resources from a government to a private entity. Under subparagraphs (i)-(iii), the government acting on its own behalf is effecting that transfer by directly providing something of value - either money, goods, or services-to a private entity. Subparagraph (iv) ensures that the same kinds of government transfers of economic resources, when undertaken through explicit delegation of those functions to a private entity, do not thereby escape disciplines. (Para 8.73)

[42]The Panel has given its clarification regarding the meaning of benefit. In its opinion - the ordinary meaning of 'benefit' clearly encompasses some form of advantage. We do not consider that the ordinary meaning of 'benefit' per se includes any notion of net cost to the government. *Canada - Measures Affecting the Export of Civilian Aircraft,* WT/DS70/AB/R, adopted 20 Aug. 1999 Para 9.112

[43]Steger, Debra P. 'The Subsidies and Countervailing Measures Agreement: Ahead of its Time or Time for Reform?' *Journal of World Trade* 44 (4) (2011) at 781

[44]Appellate Body Report, *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 Aug. 1999, para 157

to benefit from such long-term subsidies bestowed on the state-owned entity.[45]

To determine whether such a recipient has received a benefit, the Appellate Body developed what could be labeled the *private market test*. A benefit arises if the recipient has received a financial contribution on the terms more favorable than those available to the recipient in the market. Thus, if private actors would have provided on the same conditions, the government's would not confer a benefit on the recipient. This private market test exactly fits the rationale behind the benefit element. If the government acts in the way similar to a commercial player, its action does not distort trade.[46] Determining whether a financial contribution by negative action is offered equally detects whether a benefit is conferred. In contrast, determining whether a financial contribution by negative action ('revenue forgone') is offered equally detects whether a benefit is conferred. Although the benefit threshold should formally still be passed, a substantive analysis will not be requisite because a benefit seems *ipso facto* conferred when revenue is forgone by the government.[47]

It is important to note that even if a practice does constitute a financial contribution and confers a benefit, it is not necessarily actionable, either multilaterally through the WTO dispute settlement mechanism, or unilaterally through the application of countervailing measures. Article1.2 provides that a subsidy is actionable only if it is also specific as defined in Article 2.

Specificity

The two constitutive elements (financial contribution and Benefit) of a subsidy have been explored. In this section the object to discuss the aspect of 'specificity'[48] elaborated under Article 2 of the SCM Agreement. Specificity is not a constitutive element of a subsidy, but a necessary condition for subsidies to be subject to the SCM Agreement discipline. Non-specific subsidies can be neither challenged nor countervailed.

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[45] *Supra* note 25 at 692

[46] *Supra* note 1 at 60

[47] In the dispute US Lead Bismuth (WT/DS138/R adopted 7 June 2000) before the Panel US argued that Article 1.1(b) of the ASCM only requires 'benefit' to be established once, as of the time of bestowal of the 'financial contribution'. The United States based the argument on the fact that Article 1.1 describes the relevant 'financial contribution' and 'benefit' in the present tense. According to the United States, 'the ordinary meaning arising from the use of the present tense to describe both elements is that Article 1.1 is concerned with, and requires the identification of, the 'benefit' that is conferred at the time that the government provides the 'financial contribution'. The Panel was not convinced by the US interpretation of the use of present tense in Article 1.1. According to the Panel the use of the present tense simply means that the requisite 'financial contribution' and 'benefit' must exist during the relevant period of investigation or review. The use of the present tense does not speak to the issue of whether or not the existence of 'benefit' should be determined at the time of bestowal of the 'financial contribution', or whether or not there is any need for any subsequent review of the original determination of "financial contribution" and / or 'benefit'. It simply means that when an investigation or review takes place, the investigating authority must establish the existence of a 'financial contribution' and 'benefit' during the relevant period of investigation or review. Only then will that investigating authority be able to conclude, to the satisfaction of Article 1.1 (and Article 21), that there is a 'financial contribution', and that a 'benefit' is thereby conferred. (Para 6.73)

[48] Article 2 of the SCM Agreement, Specificity 2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to

a) Subsidies deemed to be specific

The specificity test should not be passed in cases where export subsidies and local content subsidies are challenged or countervailed. Both types of subsidy are presumed to be specific.To be precise, as the text of Article 2.3 of the SCM Agreement suggests and the case law confirms that the irrefutable presumption of specificity is not dependent on whether these subsidies are prohibited but on whether they qualify as export or local content subsidies. Hence, it includes a subsidy that is specific for the purpose of both part II (prohibited export subsidy) and part III (actionable subsidy) claims.[49] Likewise, such subsidies could be deemed to be specific in Subsidies and Countervailing (CVD) procedures.

Article 2 of the SCM Agreement sets forth principles for determining the following types of specificity: (1) enterprise specificity (a government targets a particular company or companies for subsidization); (2) industry specificity (a government targets a particular sector or sectors for subsidization); and (3) regional specificity (a government targets producers in specified parts of its territory for subsidization).

b) Specificity *de jure and de facto*

Regarding all other type of subsidy, specificity in the meaning of Article 2.1 and 2.2 of ASCM shall be clearly substantiated on the basis of positive evidence if challenged before the WTO adjudicating bodies or scrutinized in a CVD investigation. Positive means that the evidence should be of an affirmative, objective and verifiable character and that it must be credible.[50] The burden of proof for passing this test rests on the complaining party or CVD investigating authority.

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in this Agreement as 'certain enterprises') within the jurisdiction of the granting authority, the following principles shall apply: (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific. (b) Where the granting authority, or the legislation pursuant to which the granting authority pirates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification. (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation. Article 2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement. 2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific. 2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

[49] Panel Report, *Korea-Commercial Vessels*, WT/DS273/R, adopted 22 April 1998, para.7.514

[50] *Supra* note 17, If an investigating authority were to focus on an individual transaction, and that

Article 2.1 somewhat cryptically describes that the subsidy should be specific to 'an enterprise or industry or group of enterprises or industries'. On this basis the panel in *US-Softwood Lumber IV*[51]found that specificity has 'to be determined at the enterprises or industry level, not at the product level' and that a single industry may make a broad range of end products.[52]

Article 2.1 Subparagraph (a) stipulates that a subsidy is specific if it is explicitly limited to certain enterprises (i.e. de jure specific) whereas Subparagraph (b) stipulates that specificity would not exists if objective criteria or conditions are established governing the eligibility for subsidy. The focus under both paragraphs is on whether certain enterprises are eligible for subsidy not on whether they in fact receive it. As a result, the application of both provisions might point to opposite directions: Paragraph (a) might rise to indications of specificity, whereas paragraph (b) might suggest non specificity. A subsidy may still be considered de facto specific by virtue of paragraph (c). The application of these three paragraphs is examined below.

i. ***De jure* specificity**

Paragraph (a) of Article 2.1 of SCMA indicates that a subsidy is *de jure* specific if it is explicitly limited to certain enterprises. This could be an explicit limitation on the access to the financial contribution and access to the benefit or on access to both.[53]

AB suggests two step approaches for this inquiry. First, the proper subsidies scheme has to be identified. This covers not only those subsidies that have been challenged, but also other subsidies that are same. Such similar subsidies could be provided through different legal instrument or distributed through different granting authorities. This determination requires a careful scrutiny of broader legislative framework and pronouncements of the granting authority. Second, once subsidies scheme has to be identified, the question is that whether that subsidy scheme is explicitly limited to 'certain enterprises'.

This enquiry of de jure specificity is not per se conclusive on whether the subsidy is specific within the meaning of Article 2. A positive finding of de jure specificity could still

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transaction flowed from a generally available support program me whose normal operation would generally result in financial contributions on pre-determined terms (that are therefore not tailored to the recipient company), that individual transaction would not.. become 'specific' in the meaning of Article 2.1 simply because it was provided to a specific company. 'Instead, an individual transaction would be 'specific' if it resulted from a framework programme whose normal operation: (1) does not generally result in financial contributions, and (2) does not predetermine the terms on which any resultant financial contributions might be provided, but rather requires (a) conscious decisions as to whether or not to provide the financial contribution (to one applicant or another), and (b) conscious decisions as to how the terms of the financial contribution should be tailored to the needs of the recipient company. (Para 7.374) *Japan - DRAMS CVDs*

[51] *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada,* AB-2003-6, WT/DS257/AB/R (2004)

[52]Id, Similarly, the panel in *US-Uplend* Cotton clarified that an industry covers producers of certain products but recognized that 'the breadth of this concept of industry may depend on several factors in a given case' in a different case appellant Body said that 'Certain enterprises' refers to a single enterprises or industry or a class of enterprises or industries that are known and particularized.US-Softwood Lumber IV, .

[53]Appellant Body Report, *US-Anti-dumping and Countervailing Duties (China),* WT/DS282/AB/R, adopted 28 November 2005.para. 369. In the dispute of *US – CVD China (AB),* China argued that relevant inquiry under Article 2.1(a) is whether the actual words of the legislation limit access to the particular financial contribution

be overturned on the basis of the objective criteria (paragraph (b)) whereas negative finding could be overturned by a de facto specificity determination (paragraph (c)).

Paragraph (b) of Article 2.1 of SCMA stipulates that specificity would not exist if financial assistance is granted on the basis of objective criteria or conditions are established governing the eligibility for subsidies. Such eligibility has to be automatic and the criteria should be strictly adhered to and clearly spelled out in law, regulation or other official document so as to be capable of verification. These criteria and conditions are considered objective[54] if they are neutral, do not favour certain enterprises over others and are economic in nature and horizontal in application.[55]

ii. *De facto* specificity

It is relevant to note that, even if the subsidy is not specific by law but there are reasons to believe that the subsidizing programme may in fact be specific. Even if the program appears on its face to be non-specific, the program may be found to be *de facto* specific. Four factors may be taken into consideration for the purpose of identification of *de facto* specificity: (i) Use by a limited number of enterprises; (ii) Predominant use by certain enterprises; (iii) The grant of disproportionately large amounts of subsidies to certain enterprises; and (iv)The manner in which discretion is exercised by administering authorities.[56] These elements define the landscape for assessing whether a subsidy appearing non-specific on the basis of paragraphs (a) and (b) would nonetheless be de facto specific.

It is not out of place to discuss in short three factors mentioned in paragraph (c) in the light of Appellant Body Interpretation. First, an assessment of whether a subsidy is used by 'a *limited number of enterprises*' focuses on the number of enterprises that use the programme, rather than the proportion of the subsidy granted to such enterprises[57].

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and its associated benefit that the investigating authority has to satisfy the two part definition of a 'subsidy' under Article 1 of the SCM Agreement. The Appellate Body rejected China's argument and said that: "We also note that both provisions turn on indicators of eligibility for a subsidy. Article 2.1(a) thus focuses not on whether a subsidy has been granted to certain enterprises, but on whether access to that subsidy has been explicitly limited. This suggests that the focus of the inquiry is on whether certain enterprises are eligible for the subsidy, not on whether they in fact receive it. Similarly, Article 2.1(b) points the inquiry towards 'objective criteria or conditions governing the eligibility for, and the amount of, a subsidy.

We do not share China's view that the use of the word 'subsidy' in the chapeau of Article 2.1 of the SCM Agreement means that each of the definitional elements of a subsidy bears upon the question of whether a subsidy is specific under Article 2.1(a). Rather, what must be made explicit under Article 2.1(a) is the limitation on access to the subsidy to certain enterprises, regardless of how this explicit limitation is established. In this respect, we consider that, generally, a legal instrument explicitly limiting access to a financial contribution to certain enterprises, but remaining silent on access to the benefit, would nevertheless constitute an explicit limitation on access to that subsidy." (Paras 368, 377)

[54] Appellant Body Report, *US- Large Civil Aircraft* WT/DS 353 AB/R, adopted 23 March 2012. Para. 951 concluded that the conditions for the objective eligibility criteria could not alter the finding of *de jure* specificity because the challenged measure appears reeducation to a discrete category of business activity carried out by certain enterprises within a particular industry.

[55] Article 2.1 (b) foot not 2 of SCM Agreement, Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

[56] *Supra* note 4 at 695

[57] According to the panel in *US- large Civil Aircraft*, WT/DS 353 AB/R, adopted 23 March 2012

Second, subsidy could be *predominantly used by certain enterprises,* which is, where a subsidy programme is mainly or for the most part, used by certain enterprises this does not show in and itself *de facto* specificity,[58] because the question whether it is predominant has to be assessed in the light of the diversification of the granting authority's economy and the length of time during which the subsidy programme has been in operation. Third, *de facto* specificity could be established on the basis of the manner in which discretion has been exercised by the granting authority in the decision to offer a subsidy. The frequency with which applications for subsidy are refused or approved and the reasons for such decisions should be considered.[59]

Regional Subsidy

Regarding regional Subsidies, Article 2.2 of the ASCM stipulates a subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

Subsidies are regionally specific by virtue of this provision, even if such a granting authority offers it to all enterprises within a geographical region of its jurisdiction. Article 2.2 states that a program available only to certain enterprises within a designated geographic region of the granting authority's jurisdiction is specific.[60]The second sentence of Article 2.2 stipulates that the change of generally applicable tax rates by all levels of government entitled to do so is deemed non-specific.[61] General tax policies were exempted from the specificity consideration.

A subsidy is non-specific if the granting authority (Center or state) makes a subsidy available to all enterprises in its territory (Nationwide or statewide), whereas it would be specific if it is limited to *certain enterprises*[62] within the authority's jurisdiction (by the virtue of Art. 2.1) or offered to all enterprises within a sub - geographical region authority's jurisdiction (by the virtue of Art. 2.2)

Article 2.4 requires that any determination of specificity must "be clearly substantiated on the basis of positive evidence." This requirement arguably places the burden of proof on the investigating authorities (or the complaining Member) to demonstrate specificity. Prior to this, at least in the United States, the practice was to presume a program was

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[58]According to the panel in *EC- large Civil Aircraft,* WT/DS 316 AB/R, adopted 1 June 2011

[59]According to the panel in *EC- large Civil Aircraft,* WT/DS 316 AB/R, adopted 1 June 2011

[60]*Supra* note 4 at 695

[61]Under the original Dunkel Draft, this second sentence clearly served as an exception to the main principle set out in the first sentence.

[62] In the dispute of *US – CVD China,* (Supra note 37)US and China disagreed whether the reference to 'certain enterprises' meant that for specificity in the sense of Article 2.2 of the SCM Agreement to exist, there must be a limitation of a subsidy to a subset of enterprises allocated within a designated geographical region, or instead whether limitation of a subsidy on a purely geographical basis to part of the territory within the jurisdiction of the granting authority, is sufficient. The US argued that reference to

specific, unless positive evidence to the contrary was provided. Because the defending exporting member is the entity most likely to have access to the information regarding specificity or the lack thereof, this has the potential for creating a significant hurdle to taking action.[63]

III. CONCLUSION

The foregoing suggests that with SCM Agreement one long standing need to define the term subsidy got resolved. It is also realized that the concept seem to be defined in sufficiently broad language so that the most common forms of subsidy are included in the definition. The case law discussed in the paper also indicates the same. It is important to note that the concept may be realized upon by nations as legitimate policy tool to meets its specific needs. The clarity on the definition is required as the application of SCM Agreement depends on the concept. It is at the same time believed that further clarification by Appellate Body decisions is still required.

'certain enterprises' in Article 2.2 serves to distinguish those enterprises within the designated region from those outside it. On the other hand, China argued that the phrase means that only if a subsidy is limited to some subset of enterprises within the region is that subsidy regionally specific. The Panel concluded that certain enterprises' in Article 2.2 'refers to those enterprises located within, as opposed to outside, the designated geographical region in question, with no further limitation within the region being required.'(Paras 9.125-135)

[63] *Supra* note 4 at 696

IMPLEMENTATION OF PROTECTION OF CIVIL RIGHTS ACT, 1955 AND SC AND ST (PREVENTION OF ATROCITIES) ACT, 1989: AN EMPIRICAL STUDY

Harbansh Dixit*

I. INTRODUCTION

Law is an instrument of regulating society. It helps in implementation of constitutional values. It is powerful means of social change. Legal enactments play a very important role in the process of empowerment of weaker sections of society but it has its own limitations. Letters of law have to travel a long distance before it reaches to its beneficiaries. Social environment plays a crucial rule in this process. As legal-system is a sub-system of social-system, preconceived notions, historical facts and such other factors are vital to the implementations of law and also in providing justice to beneficiaries of law.

The Protection of Civil Rights Act, 1955 and The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 were passed in order to lead the process of empowerment of those downtrodden sections of the society, who were being subjected to social disabilities and were facing atrocities of dominant groups because of their birth in a particular community. In order to gauge the actual impact of these legislations, it is essential to know the impact of law at the ground level.

Objectives of Study:

This study aims to evaluate the impact of the Protection of Civil Rights Act, 1955 and the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 in process of empowerment of the members of schedule castes and schedule tribes. It focuses itself on the following areas to achieve its objectives:

- To know the rate of cases registered under the Protection of Civil Rights Act, 1955 and the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 during last two years.
- To know the rate of convictions in cases registered under these legislations.
- To gauge the level of security enthused in these legislations in the mind of people belonging to scheduled caste community.
- To assess the level of confidence of these communities in non-judicial enforcing agencies.
- To assess the role played by social welfare agencies in assisting the victims of caste based atrocities.

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- To suggest changes in these legislations to make them more effective.

Scope of the Study:

As proposed, two states namely Uttar Pradesh and Uttaranchal would be covered by this empirical study. The study was conducted in eight districts of Uttar Pradesh namely: Moradabad, Jyotiba Phule Nagar, Bijnore, Bareilly, Rampur, Badaun, Meerut and Buland Shahar and two districts of Uttaranchal namely: Udhamsingh Nagar and Nainital.

I. ANALYSIS OF PRESENT STUDY

Sampling Procedure:

Sampling pattern for purposes of Survey was as following table:

Table-1

S.No.	Sampling Unit	Sample Size
1	States	02 (U.P. & Uttaranchal)
2	Districts	10 (8 from U.P. & 2 from Uttaranchal)
3	Blocks	20 (2 from each district)
4	Village	40 (2 Village from each block)
5	Cities	10 District headquarters.
Total No. of Samples - 500 (50 from each district)		

Total of five hundred persons of scheduled caste community were interviewed in the abovementioned manner. In order to analyze the actual position of the cases data was collected from district headquarters and state capitals. Special cell of Police Department of Uttar Pradesh has also provided crucial information in this regard.

Assessment of Responses:

Answers given by respondents on different questions were calculated by simple arithmetical method. Percentage of responses was worked out. For purposes of evaluating the judicial response of the cases registered under these legislations. Actual data regarding institution, conviction, acquittal and compromise was collected from district headquarters of Moradabad, Rampur, Bijnore, Jyotibaphule Nagar, Meerut, Buland Shahar, Badaun and Bareilly of Uttar Pradesh and Udhamsingh Nagar and Nainital districts of Uttaranchal.

a) Fate of Cases registered under PCRA & SC/ST Act

Data received for calendar year 2002 and 2003 were taken into consideration for purposes of this study. Data of 8 districts of Uttar Pradesh and those of two districts of Uttaranchal were separately analysed so that comparative study may be made.

b) Cases Registered in Uttar Pradesh

Summary of the fate of cases registered in 8 district of Uttar Pradesh during the calendar year 2002 and 2003 may be described by following table.

Table-2

Years	No. of Cases Decided	Conviction		Acquittals		Compromise	
		No of case	%	No of case	Percentage	No of case	Percentage
2002	979	138	14.09	768	78.44	73	7.45
2003	772	80	10.36	690	89.37	02	0.26

As shown in the table in 2002 rate of conviction of cases registered under PCRA and SC/ST Act was 14.09% while in 78.44% cases accused were acquitted. Total of 7.45% cases ended in compromise. In 2003 , total of 772 cases were decided by different courts in the eight district for which study was conducted. Accused were convicted in 10.36% cases, while in 89.37% cases accused were acquainted. Only 2% ended in compromise between the parties.

c) Fate of Cases registered under PCRA & SC/ST Act in Uttaranchal

Data received from district headquarters of Nainital and Udham Singh Nagar are as follows:

Table-3

Year	Cases Registered	Committed for trial	Dismissed/ Acquitted	Convicted	Final Report	Pending Investigation	Frivolous Complaints
2002	23	15	01	NIL	03	NIL	04
2003	49	26	08	NIL	07	04	04

As shown in the table total of 23 cases were registered under P.C.R.A. & SC/ST Act in district Nainital and Udham Singh Nagar during calendar year 2002. There was no conviction in any case, 1 case ended in dismissal/acquittal, final report was submitted in 3 cases while 4 cases were found to frivolous after investigation. Peculiar feature of the data was that there was no conviction in any case in the two districts for last two years. It implies that either all the cases registered under PCRA & SC/ST Act were baseless and malicious or cases registered under these legislations are not properly investigated, prosecuted and pursued, by concerned authorities.

It is not rational to conclude that all the cases registered under PCRA & S.C./S.T. Act are baseless. The logical conclusion to this phenomenon is that cases registered under these legislations are not properly investigated, prosecuted and pursued. It is certainly a serious fault and it must be looked into.

Performance of Investigating Agencies:

Investigation plays an important role in grievance redressal system of state. Timely intervention and professional attitude of persons responsible for investigation contribute a lot in bringing the accused to book and in getting him convicted.

In order to assess the role of investigating agencies, we relied upon the data collected from police headquarters of concerned districts. Details of those information's may be summed up as follows:

a) Status of Cases During 2002 was as follows

Table-4

Year	State	Total Number Number of case under	Chang sheet filed	Final Report	Quashed cancelled	Pending Investing	Found Frivolous after inves-tiga-tion
2002	U.P Utta-ranchal	602 23	428 15	76 03	86 01	12 NIL	NIL 04
	Total	625	443	79	87	12	04
	Perce-ntage		70.88	12.64	13.92	1.92	0.64

As shown in the table during calendar year 2002, total of 625 cases were referred for investigation in which chargsheet was filed in 70-88% cases, final report was submitted in 12.64% cases, total of 13.92% cases were quashed/cancelled, there was pendency in only 1.92% cases while less than one percent (0.64%) cases were found to be frivolous by investigating agencies.

b) Status of Cases During 2003 was as follows

Table-5

Year	State	Total Number Number of case under	Chang sheet filed	Final Report	Quashed cancelled	Pending Investing	Found Frivolous after inves-tigation
2002	U.P Utta-ranchal	187 49	140 26	10 07	40 08	13 04	NIL 04
	Total	236	166	17	48	17	04
	Perce-ntage		70.33	10.24	20.33	7.20	1.69

III. CONCLUSION

Analysis of the above data shows that during the year total of 236 cases were referred for investigation in 8 districts of Uttar Pradesh and 2 districts of Uttaranchal. Out of those cases 70.33% cases were committed for trial after charge sheet was submitted, in 10.24% cases final report was submitted, 20.33% cases were quashed, 1.69% cases were found to be frivolous after investigation while investigation in 7.20% cases were pending at the end of the year.

CURRENCY MANIPULATIONS AND INTERNATIONAL TRADE LAW: AN OVERVIEW OF THE EXISTING IMF LEGAL REGIME

Ajit Kaushal* & Tabrez Ahmad**

I. INTRODUCTION

As per the principles of Law of Contract, trade or business is a process of enrichment for the participants in the agreement. In order to ensure a flourishing economy it remains imperative to adopt a good economic Laws & policies for all the participants of the trade. A good economic policy, which includes a good currency culture, ensures not only prosperity within the economy but also ensures peace and stability in the world. It is not a surprise that the preamble part of the World Trade Organization stresses upon the trade and economic endeavors which infuses stability and sustainable development. The Preamble part of the WTO rules (i.e. Marrakesh Agreement Establishing the World Trade Organization) provides for recognizing relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[1]

II. INTERNATIONAL TRADE LAW AND CURRENCY MANIPULATIONS

The experience has shown that no economic policy can achieve a prosperous international trade system without controlling the currency manipulations as money is the media of all the trade and business. It has been estimated that the currency manipulators affect the flow of currency about $1.5 trillion per year. Historically, there have been numerous cases of currency devaluation by Countries and even currency wars[2] in order to gain unfair trade advantages. The most notable point over here, though there have many complaints regarding the currency manipulations in the international trade arena though not even one country has been declared as a manipulator by the International Monitory Fund. Hence, in order to infuse an ideal international trade legal

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[1]Preamble, Marrakesh Agreement Establishing the World Trade Organization

[2]Most notable case of currency devaluation during the great depression 1930s when the major economies had abandoned the gold standard and for the purpose of getting economic advantages they resorted to competitive devaluation.

regime there is a crying need to investigate the issue of currency devaluation along with its potential and real impact on the international trade.

III. WHAT IS A CURRENCY MANIPULATION?

The case of currency manipulations occur when a government adopts a policy to devalue its currency to gain an unfair trade advantage over others in international trade market. The value of currency under the floating exchange rate reflects a confluence of various demand and supply factors in a currency market (in other words, like any other commodity the value of the currency is decided by the demand and supply factors in the currency market). The major factors which affect the value of the currency (in floating exchange rate regime) in the international market are current account balance, inflation rate, interest rate etc. Because of the interaction between the various demand and supply factors the currency of any country attains the 'equilibrium value' which is the actual value of the currency. When a government through various instrumentations disturbs this equilibrium value in its favour (to gain an unfair advantage in trade) this situation is known as 'currency manipulation'.

The equilibrium value of the currency may be disturbed by the acts of government or private players. To depreciate its currency the government may sell out its own currency and buy the foreign currency. On the other hand for the purpose of appreciating its currency the government may sell the foreign financial assets, like bonds, bank deposits (which are generally officially kept as reserve by the government).

In the appreciation or depreciation of the currency there is the role of private players also. For example the FIIs might be lured to invest in the country where they can get higher rate of return.[3] Though with regard to the currency manipulations the role of the government is more important as it can control the conduct of the private parties too and at the same time it can influence various capital control measures such as taxes or other regulatory restriction for the purpose of the private capital inflows and outflows. It should be noted that such measures (for devaluation of currency) will not give rise to a case of currency manipulation if it has been done in order to achieve a domestic financial stability. It is the mandate of the IMF which is the reflection of the generally universally acceptable norms of currency and exchange.

IV. CURRENCY MANIPULATIONS AND ARTICLES OF AGREEMENT (IMF): LEGAL MANDATES OF ARTICLE IV OF IMF

The Article IV of the Articles of Agreement, International Monetary Fund deals with the issue of currency manipulations. It provides the general as well as four specific obligations for the parties. The general obligations of the parties as provided under Article IV recognizing that the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services, and capital among countries, and that sustains sound economic growth, and that a principal objective is the continuing development of the orderly underlying conditions that are necessary for financial and economic stability, each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to

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[3] This was a major reason of devaluation of rupee in August, 2013 in India as the Indian market is deeply dependent upon the foreign institutional investors.

promote a stable system of exchange rates".[4]

The Article IV of the IMF can be conveniently divided into three parts Preamble, General Obligations and Specific Obligations.[5] The Preamble part (or even the Section 1 of the Article) is not obligatory in nature. It merely provides the essential guidelines which are to be observed by the member nations while doing the trade with each other.[6] The general obligation of the member is to collaborate with the fund and other members so that a goal of stable and orderly exchange rate in the world could be achieved. At the same time the International Monetary Fund provides the following four specific obligations:[7]

a) Endeavour to direct its economic and financial policies towards the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances;
b) Seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions;
c) Avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members; and
d) Follow exchange rate policies compatible with the undertakings under this Section.

The phrase "In particular, each member shall:" in Article IV links the general obligations of the members with the particular obligations. The phrase also indicates that the list of four specific obligations is not exhaustive and the general obligations are broader than the specific obligations.

Legal Remedies for Currency Manipulations

Currency manipulation has a very wide impact upon the international trade. The IMF regime provides the checks and balances over the exchange rate of any currency for the purpose of regulating the instances of currency manipulations. Section 2 of the IMF mandates the member nation to notify any changes in its exchange arrangements. Section 2 provides that each member shall notify the Fund, within thirty days after the date of the second amendment of this Agreement, of the exchange arrangements it intends to apply in fulfillment of its obligations under Section 1 of this Article, and shall notify the Fund promptly of any changes in its exchange arrangements. Further, Article IV, Section 1(iii) mandates that each member shall avoid

manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members.

Hence, the Fund mandates the members to not to resort to any manipulative exchange rate. But at the same time it does not provide any guideline about the acts which

[4]Section 1 of Article IV, Articles of Agreements, IMF.

[5]*See Also*, IMF, Article IV of the Fund's Articles of Agreement: An Overview of the Legal Framework, at 7, Legal Department, In consultation with the Policy Development and Review Department (2006)

[6]The relevant part of the Preamble provides, ´Recognizing that the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services, and capital among countries, and that sustains sound economic growth, and that a principal objective is the continuing development of the orderly underlying conditions that are necessary for financial and economic stability….."

[7]Section 1 of Article IV, Articles of Agreements, IMF.

constitute the manipulative policies. Further it does not provide any remedy in case any member nation adopts any manipulative exchange rate policy. Although for the purpose of ensuring compliance the Fund has the provisions of surveillance which are commenced on routine basis.

Fund Surveillance

The Fund surveillance is also known as Article IV consultation. Under Article IV of the IMF, Section 3 (a), the Fund is duty bound to ensure compliance from the member nation and the member nations are also bound to abide by the rules provided by the IMF under Articles IV of the Articles of Agreement. For the purpose of ensuring compliance under Section 3, of Article IV, the IMF has the right to institute a process of surveillance. In the process of surveillance the IMF supervises and even advises the member nations over its exchange rate policies [under Section 3 (b) of IMF]. The Section 3 (b) of Article IV, Articles of Agreement, International Monetary Fund provides in order to fulfill its functions under (a) above, the Fund shall exercise firm surveillance over the exchange rate policies of members, and shall adopt specific principles for the guidance of all members with respect to those policies. Each member shall provide the Fund with the information necessary for such surveillance, and, when requested by the Fund, shall consult with it on the member's exchange rate policies. The principles adopted by the Fund shall be consistent with cooperative arrangements by which members maintain the value of their currencies in relation to the value of the currency or currencies of other members, as well as with other exchange arrangements of a member's choice consistent with the purposes of the Fund and Section 1 of this Article. These principles shall respect the domestic social and political policies of members, and in applying these principles the Fund shall pay due regard to the circumstances of members.

The surveillance is undertaken by the IMF may be bilateral or multilateral (or integrated surveillance). Under the bilateral surveillance the staffs of IMF visit the concerned member nation and collect information about the macroeconomic policy of the country such as fiscal policy, exchange rate, soundness of economy etc. A report is prepared by the IMF mission and its summary is referred to the executive board for its discussions. If the member nation is agreed with the report the findings and observation in such report is adopted and its summary is published. While preparing the report the socio-economic-political situations are also taken into account.

V. CONCLUSION

After having discussed the IMF provisions, a natural corollary can be drawn that the existing IMF regime is not sufficient to deal with the currency manipulations cases. The present IMF regime does not provide the remedies or dispute settlement mechanism for the currency manipulations cases. It is not a surprise that there have been so many instances of selfish exchange rate policies and currency manipulations cases but till date IMF has not declared any country as the currency manipulator. The reason behind it that the IMF provisions seem vague in nature with regard to the currency manipulations and it is moreover reduced merely to a soft law. Even though IMF provides some mandatory provisions regarding compliance but it has no dispute settlement mechanism. Some respite in the form of dispute settlement mechanism is provided by WTO but it remains to investigate whether WTO has any role to play at all in the cases of currency manipulations and the policy makers are badly divided on this issue in the world over.

DOCTRINE OF LEGITIMATE EXPECTATION: CRITICAL ANALYSIS

Vijay Kumar*

I. INTRODUCTION

The doctrine of legitimate expectation belongs to the domain of public law and it is intended to give relief to the people when they are not able to justify their claims on the basis of law in the strict sense of the term, though they had suffered a civil consequence because their legitimate expectation had been violated. The term 'legitimate expectation' was first used by Lord Denning in England in 1969. 'Expectation' may be based upon some express statement, or undertaking by, or on behalf of public authority which has the duty of making the decision, or from the existence of regular practice which the claimant can reasonably expect to continue. When an expectation arise either from express promise or from existence of regular practice which the applicant can reasonably expect to continue the court may protect his expectation by invoking principle similar to Natural Justice a '*fair play in action*'. A legitimate expectation is not the same thing as anticipation. It is the distinct and different from a desire and hope. Legitimate Expectation is considered to be a part of the principles of natural justice. This doctrine would be applicable, if by reason of existing state of affairs, a party is given to understand that the other party shall not take away the benefit without complying with the principles of natural justice.

Therefore this doctrine provides a central space between 'no claim' and a 'legal claim' wherein a public authority can be made accountable on the ground of an expectation which is legitimate. A natural habitat for this doctrine can be found in article 14 of the constitution which cancel arbitrariness and insist on fairness in all administrative dealings.

When a person who bases his claim on the doctrine of legitimate expectation, in the first instance he has to satisfy that he relied on the said representation and denial of that expectation has worked to his detriment. The court could interfere only if the decision taken by the authority was found to be arbitrary, unreasonable or in gross abuse of power or in violation of principle of natural justice and not taken in public interest.

II. DEVELOPMENT OF LEGITIMATE EXPECTATION

The term 'legitimate expectation' was first used by LORD DENNING in *Schmidt v. Secretary of state for Home Affairs*.[1] In this case the government had cut short period already allowed to an alien to enter and stay in England. The court held that person had legitimate expectation to stay in England which cannot be violated without following a procedure which is fair and reasonable. LORD DENNING used the term 'legitimate

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[1] [1969] 2 WLR 337

expectation' as an alternative expression to the word 'right'. However, In *Breen v. Amalgamated Engineering Union*[2] the doctrine of legitimate expectation found its legitimate place. In this case the District Committee of a trade union had refused to endorse a member's election as shop steward. The court held that, if a person claims a privilege he can be turned away without hearing but here a person has something more than a mere privilege; a legitimate expectation that his election would be approved unless there are relevant reason for not doing so, therefore the natural justice principles are attracted to the case in order to ensure fairness.

In the case of *A.G. of Hongkong v. Ng. Yuen Shieu*[3] , there was an announcement by the authority that while examining the case of illegal immigration each case would be decided on its merits and therefore, removal cannot be passed without fair hearing. The Privy Council in this case quashed the removal order passed by Hongkong Immigration Authority without notice and hearing also held that there is a violation of the legitimate expectation of immigrant based on announcement. The concept of natural justice in U.K. has been developed in the context of reasonableness with the development of new trends of natural justice. It has been held that duty of consultation may arise from a legitimate expectation of consultation aroused by a promise or by an established practice of consultation.[4] Though the doctrine as evolved in England is still in an evolutionary stage yet one thing in certain that it is an equity doctrine and therefore, the benefit of doctrine cannot be claimed as a matter of course. It is a flexible doctrine which can be molded to suit the requirements of each individual case.

In India, the Supreme Court has developed this doctrine in order to check the arbitrary power exercised by administrative authorities. In a private law a person can approach the court only when his right based on statute or contract is violated but in public law, the rule of *locus standi* is relaxed by the Doctrine of Legitimate Expectation that it allows standing before the court when legitimate expectation from a public authority is not fulfilled. So, the administrative authority could be made accountable on the ground of an expectation which is legitimate but not fulfilled by the authority.

This doctrine is a part of 'Principle of Natural Justice' and anyone could not be deprived of his expectation without following the principle of natural justice. Legitimate Expectation is the creativity of the judiciary, although this doctrine has natural habitat in the Article 14 of the Constitution which very much dislike the arbitrariness and insist on fairness in administrative dealings. The protection of Article 14 is always available to the arbitrary action of state. Thus, the 'doctrine of legitimate expectation' is applied to check the administrative authorities from violating the legitimate expectation of the people and on second face compelled the administrative bodies to fulfill the legitimate expectation of the people. It is the capacity of the apex court to import legal doctrines and to plant them in different environment and judicial ecosystem and to make them flourish. In India the first reference to this doctrine is found in the case:

In *State of Kerala v. K.G. Madhavan Pillai*[5] the government had issued a sanction to the respondent to open a new un-aided school to upgrade the existence ones. However after

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[2](1971) 2 QB 175

[3](1983) 2 AC 629

[4]Re Westminister CC, (1986) AC 668

[5]1988 SCR Supl (3) 94

fifteen days direction was issued to keep the sanction in suspension. The court held that the sanction order, created legitimate expectation in the respondents which was violated by the second order without following the 'principle of natural justice'.In the leading case of *Navjyoti Co-operative Group Housing Society v. Union of India*[6] in this case the development authority without notice and hearing had changed the order of priority for the allotment of land to co-operative societies from *serial number of registration to the date of approval of list of members*. The court quash the order on the ground of violation of legitimate expectation and held that where a person enjoying certain benefits or advantage under old policy of government, derive a legitimate expectation even though they may not have any legal right under private law.

In *Food Corporation of India* v. *Kamdhenu Cattle Feed Industries*[7] the court held that legitimate expectation cannot be claimed if hearing was given. The court observed that that the concept of Legitimate Expectation has now gained importance in administrative law as a component of natural justice, non- arbitrariness and rule of law. In *Union of India v. Hindustan Development Corporation*,[8] in the absence of any fixed procedure for fixing price and quantity for the supply of food-grains, the Government adopted a dual price system that was lower price for big suppliers and higher price for small suppliers in the public interest in order to break the cartel (agreement to fix price). The court held that there is no denial of legitimate expectation as it is not based on any law, custom or past practice. In *Supreme Court Advocate-on- Record v. Union of India*[9]*,* the Supreme court held that in recommending appointment to the Supreme court, due consideration of every legitimate expectation has to be observed by the Chief Justice of India.[Just as a High court Judge at the time of his initial appointment has the legitimate expectation to become Chief Justice of High court in his turn in ordinary course, he has the legitimate expectation to be considered for appointment to the Supreme court in his turn according to his seniority.]

II. CONDITIONS WHEN DOCTRINE OF LEGITIMATE EXPECTATION CLAIMED

On a general note the doctrine of legitimate expectation may arise or claimed; if there is an express promise held out or representation made by a public authority; or because of the existence of past practice which the claimant can reasonably expect to continue; and Such promise or representation is clear and unambiguous.

Lord Denning propounded the view in *Schmidt v. Secretary of State for Home Affairs*[10] that an administrative authority should give a hearing when a person's liability, interest or even some legitimate expectation is being affected. If a person has some legitimate expectation, it would not be fair to deprive him without hearing what he was to say.

First time Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service*[11]

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[6](1992) 4 SCC 499

[7]AIR 1993 SC 1601

[8]AIR 1994 SC 988

[9]AIR 1994 SC 268

[10]1969) 2 WLR 337

[11]1985 AC 374

laid down two conditions, when the legitimate expectation arises. He observed that, the decision of the administrative authority affect the person by depriving him of some benefit or advantage which either; (i) a person had been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from decision-maker that the benefit and advantages given will not be withdrawn without giving him an opportunity for advancing the reason for contending the benefit or advantage, that they should not be withdrawn.

In Re Liverpool Taxi Owners Association[12] it was proved that legitimate expectation may arise from express promise made by a public authority. In this case it was held that though determining the numbers of taxi cabs license to be issued was a purely a policy matter yet the corporation should have acted fairly having due regard to the conflicting interests. The city corporation was bound to give a hearing to the association before deciding to increase the cab license beyond 300. In *R v. Home Secretary Exp. Ruddock*[13] it was held that where there was a published criterion for regulating the case of telephone tapping it created a legitimate expectation that criteria would be properly observed and court may enforce the criteria if it was violated without any published change in policy.

III. WHEN DOCTRINE OF LEGITIMATE EXPECTATION CANNOT BE CLAIMED

The doctrine of legitimate expectation has its limitations; it has procedural impact and has no substantive impact. In *Attorney General for New South Wales v. Quinn*[14] , one stipendiary Magistrate in charge of Court of petty session, that court was replaced by local court by an Act of legislature but the Magistrate was not appointed under new system. That action was challenged but the Court dismissed the claim observing that if substantive protection is to be accorded to legitimate expectations, it would result in interference with administrative action on merits which is not permissible.

In *R. v. Ministry of Agriculture, fisheries and food, exp Jaderow Ltd*.,[15] under a new policy, conditions were imposed on fishing licenses. The said action was challenged contending that new policy was against the legitimate expectation, but the Court rejected the argument and held that the doctrine of legitimate expectation can not preclude legislation. Likewise, in *Srinivasa Theatre v. Govt. of Tamil Nadu*[16] the method of taxation was changed by an amendment in provisions of the Tamil Nadu Entertainment Tax Act, 1939. The validity of amendment was challenged that it was against the legitimate expectation of law in force prior to the amendment. The Supreme Court rejected the argument and followed the Council of Civil Service Unions (CCSU) case, held that a legislation cannot be invalidated on the basis that it offends the legitimate expectation of the person affected thereby. So the doctrine of legitimate

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[12](1972) 2 AII ER 589

[13](1988) 1 WLR 972 (HL)

[14](1990) 64 Aust LJR 327

[15](1991) I AII ER 4I

[16]AIR 1992 SC 999

expectation cannot be claimed if it is against the public policy or security of the state.

Again in *State of Himachal Pradesh v. Kailash Chand Mahajan*[17] the age of superannuation was provided by an amended act which was challenged and contended that when appointment was made by fixing a tenure, there was a right to continue and the legitimate expectation would apply, but the Court rejected the argument and observed that a legislation could not be prevented by legitimate expectation.

In Ram *Pravesh Singh v. State of Bihar*[18] The Supreme court held that legitimate expectation is not a legal right; it is an expectation of a benefit, relief or remedy that may ordinarily flow from a promise or an established practice. The Supreme Court observed the 'Established practice' refers to a regular, consistent predictable and certain conduct. In *Confederation of Ex-serviceman Association v. Union of India*[19] The Supreme Court observed that, a person is said to have a legitimate expectation of a particular treatment if any representation or promise is made by an authority either expressly or impliedly or if there is regular or consistent practice by the authority. On the question that can Legitimate Expectation be postponed by the administrative authorities for an indefinite period on the ground of any future proposed plan or change of policy which has not yet come into existence? In *T. Vijayalakshmi v. Town Planning Member*[20] the Supreme Court held that the administrative authority cannot postpone the decision on any right for indefinite period. The decision must be taken within reasonable time or statutory time limit. The right of parties must be decided on existing laws and cannot be postponed on the ground of any proposed future law or change in policy.

IV. CRITICISM OF DOCTRINE OF LEGITIMATE EXPECTATION

The doctrines of legitimate expectation as an equity doctrine are not rigid and operate only in area where the injustice is clearly visible or understandable. It enforces certain public morality in all public dealings. This doctrine as a part of equity has very weak application to correct the injustice because it depends on the clear visibility of the injustice. Although it has habitat in the Article 14 of the constitution however, it is the last and least recourse to correct the injustice. Consideration of public interest would disadvantage this doctrine application. The Supreme Court in recent decision, speaking through J. PASSAYAT, held that a Government promise cannot be enforced on the ground of legitimate expectation. Doctrine can be applied only if decision is not arbitrary or unreasonable and is taken in public interest. The court further

explained that if promise is a question of policy, even then the court cannot interfere unless it is irrational, perverse or one which is no reasonable man could have made. A legitimate expectation without anything more cannot give a right, same as in manifestos of political parties do not attract the Legitimate Expectation.[21]

V. CONCLUSION

The 'doctrine of legitimate expectation' emerged as an important concept and the latest recruit in the various concepts by the court to review an administrative action. The root

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[17] AIR 1992 SC 1277

[18] (2006) 8 SCC 381

[19] (2006) SC 513

[20] AIR 2007 SC 25

[21] *The Hindu*, 19th April 2008, at 13

of this doctrine is the 'Rule of Law' which requires that no person would be made to suffer except for the breach of law means, there should be equality before law. Article 14 of the Constitution which provides 'equality before law' and 'equal protection of law' insists on the 'principle of non- arbitrariness' and fair play in administrative action; is the home of the doctrine of legitimate expectation. For this an expectation should be based on an express promise or representation or by established past action or settled conduct now it is clear that doctrine of legitimate expectation in essence imposes a duty to act fairly. Legitimate Expectation may come in various forms and exist in different kinds of circumstances. It is not possible to give an exhaustive list in the context of vast and fast expansion of government activities, but the trend which the Indian judiciary has adopted, it helped in application of this doctrine beyond the law which does not create a legal right but may justify a claim on the basis of person's legitimate expectation.

The Supreme Court in *Official Liquidator v. Dayanand*[22] Observed that the doctrine of legitimate expectation is a recent addition to the rule of natural justice. It goes beyond the statutory right by serving as another device for rendering justice. No fresh right can be created by invoking the doctrine of legitimate expectation. Only the existing right is saved, subject to the provisions of statute.[23] Consistent past practice adopted by the state can furnish grounds for legitimate expectation.[24] It is well settled that the concept of legitimate expectation has no role to play where the state action is a public policy or in public interest unless the action taken amounts to an abuse of power.[25] But, now Doctrine of legitimate expectation shares spaces with the *principle of promissory Estoppels. In the Southern Petrochemicals Industries Co. Ltd. v. Electricity Inspector & ETIO*[26] ordinarily the doctrine of legitimate expectation would not have any application where the legislature has enacted a statute, but in this case resulting in the application of promissory estoppels the court observed that there may not be any reason as to why the doctrine of legitimate expectation would not apply.

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[22](2008) 10 SCC 1

[23]*State of Tamil Nadu v. Seshachalam,* (2007) 10 SCC 137

[24]*State of Haryana v. Jagdish,* (2010) 4 SCC 216

[25]Sethi Auto Service Station v. Delhi Development Authority, (2009) 1 SCC180

[26](2007) 5 SCC 447

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