UTTARANCHAL UNIVERSITY

DEHRADUN law REVIEW

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Editorial

About 2350 years ago, Aristotle a Greek intellectual genius declared "State is prior to individual". Actually, he meant to say that psychologically the concept of state preceded individual. Retrospectively, Law College Dehradun and its ultimate culmination Uttaranchal University both as a concept and reality preceded this journal 'Dehradun Law Review'. Our intellectual journey which began a decade ago in the form of Law College Dehradun in 2002 came across many milestones along with its plenio - potentiaries UIT and UIM. We achieved the practical Zenith with the establishment of Uttaranchal University constituted with the merger of Law College Dehradun, Uttaranchal Institute of Technology and Uttaranchal Institute of Management vide the Uttaranchal University Act, 2012 (Uttarakhand University Act No. 11 of 2013), passed by the legislative assembly of Uttarakhand. Hence, a pleasant coincidence synchronizing the inauguration of Uttaranchal University and publication of the current issue of Dehradun Law Review appears to me an exquisite example of academic symphony.

The Editorial Board of the Journal, Law College Dehradun takes pride in bringing the Vol 5, Issue 1 November 2013 of 'Dehradun Law Review: A Journal of Law College Dehradun, Uttaranchal University'. This edition attempts to critically analyse the developments that have taken place in divergent areas of Law both at the National and the International levels. Crucial questions of law concerning with women rights, crime against women, consumer protection, arbitration, sustainable development, inter-country adoption etc. have been discussed at length by legal academia and the research scholars in this journal.

Articles

Akhilendra Kumar Pandey in his article (statics) 'Promise to Marry and Rape : A Plea for Constructing Non - consent' gives an insight into the misconstrued conception of consent in rape cases. The author pleads to eliminate institutional sources of women oppression for the sake of justice.

As a nation we are struggling to reconcile our efforts to develop with the compelling need to protect our effort. Socio-economic conditions of our rural as well as urban areas are making the situation worst. 'Sustainable Development in India' some Reflections by Dr. N.P. Verma focuses on field realties and points out the drawbacks in our policies and makes valuable suggestions to improve the situation.

Everyday we apprise ourselves with some incidents relating to the crime against women. 'Judicial Response in the Matters of Crimes against Women' by Gyanendra Kumar Sharma and Pranav Vashishtha emphasizes upon the need for speedy redressal of human rights violation cases relating to women.

'Consumer In E- Commerce: A New Challenge for Consumer Protection Jurisprudence in India' by Gagandeep Kaur throws valuable insights upon the changing notions of consumer protection jurisprudence in India in the context of current scenario.

'Quest for Information' - A Convergence of Right to Information with other Citizen Friendly Acts' by Dr. Suchismita Sengupta Pandey analyses the convergence of citizen friendly acts along with right to information.

Vijay Srivastava in his article 'International Commercial Arbitration and Legal Issues in India' discusses at length different legal issues which are disputed in International Commercial arbitration like issues relating to place of arbitration, jurisdiction of tribunals and issues relating to arbitral proceedings.

'Inter-country Adoption - A Solution or a Problem to a Solution' by Navtika examines the problems relating to cross-border adoption.

Acknowledging the debt is the sincerest and most pleasing task especially in academic endeavours. On behalf of Editorial board, I express special gratitude to Shri Jitendra Joshi, Hon'ble Chancellor, Uttaranchal University for his constant as well as constructive cooperation and valuable guidance which have been instrumental in the steady progress of this intellectual procreation 'Dehradun Law Review' - A Journal of Law College Dehradun, Uttaranchal University. I also offer my heartiest compliments to the distinguished authors of articles for their thought provoking intellectual inducements through their reflective writings.

Anticipating your constructive criticism and valuable suggestions.

God Speed!

Prof. (Dr.) RAJESH BAHUGUNA
Editor-in-Chief

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PROMISE TO MARRY AND RAPE: A PLEA FOR CONSTRUCTING NON - CONSENT

Akhilendra Kumar Pandey*

Abstract

Rape violates the dignity and privacy of woman. The element of 'non - consent' on the part of the woman is central to rape. This non - consent is shown by the fact that woman resisted the sexual intercourse. The provisions relating to consent contained in the Indian Penal Code is in negative terms and the existing law of consent, reflecting the masculine perception of non - consent, is based on element of coercion or mistake along with the knowledge on the part of the accused that such consent was given either because of fear of injury or mistake. Iit does not represent the woman's experience and understanding. Where the accused made promise to marry and obtained the consent of woman for sexual intercourse and subsequently refused to marry her, may or may not be an offence of rape depending upon the fact whether the accused from the inception did not intend to marry or because of subsequent eventualities he could not marry. This approach of defining 'non - consent' does not adequately represent the women's perception particularly when her capacity to consent is emotionally overpowered by the promise of marriage. An attempt has been made to incorporate woman's understanding about non - consent in such cases and, in order to do justice it is desirable that the institutionalized sources of women oppression be eliminated.

Key words

Rape -Promise to marry - Sexual intercourse - Refusal to marry - Consent or non - consent -- Sexual intercourse by deceitfully inducing the woman to believe marriage - concealment of fact - offence relating to marriage or rape.

I. Introduction

Rape is not only a sexual crime rather it involves aggression leading to oppression of woman. It leaves the woman under state of psychological trauma besides the social stigma. The social stigma which the victim of rape carries with her during entire life has an irreversible devastating effect. Such a woman needs the protection of law. Unfortunately, the social and legal setup does not address this problem effectively. Rape is defined in such a manner that the non - consent on the part of woman is an essential ingredient. Usually, the fact of non - consent is legally established when the woman resists against the sexual intercourse. There might be a situation where a woman submits herself on the basis of a false promise of marriage made by the man who subsequently denies marrying the woman. Law does not consider such act to be in its ambit unless it could also be established by the prosecution that such a man had no intention of marrying her since the inception of the promise. In other words, it

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is established at the time of promise to marry, the accused did not intend to marry. The purpose of this paper is to discuss the response of law in those cases where woman submits herself on a promise to marry and thereafter the man does not keep the promise and refuses to marry her. The woman under such circumstances, though feels her dignity to be outraged by being cheated but the law refuses to hold the man criminally responsible for committing the offence of rape on the ground that such an act was done with the consent of woman and the consent of the victim exculpates the accused.

II. Iris Marion Young's Version on Oppression

Women are not born but they are made. While sex is biologically determined, the gender is a social and cultural construct. Law is one of the cultural instruments. Through its precepts and instrumentalities, law constructs woman. Feminism is political, philosophical and cultural concept. It is a method - a technique of objectivity in epistemological, psychological and social as well as legal terms.[1] Though there are many versions of legal feminism but all claim that the modern jurisprudence is 'masculine'. The values, the dangers, the fundamental contradictions that characterize women's lives are not reflected at any level of legal doctrines and principles.[2] Law permits terrorization and sexualization of female body, the feminists claim.[3]

The liberal feminists lay emphasis on 'sameness' and argue that women are rights bearing autonomous human beings and thus they are no different from men. Such an assimilative theory of equality is likely to give benefit to women only if they acted like men. But there are other feminists who have focused on 'difference'. Detecting a "different voice" Gilligan has drawn attention to a contrast between 'ethics of justice and right' and 'ethics of care and relationship'. This distinction is gender related; while the former category of ethics is associated with male thinking processes and the latter is with female thinking process.[4] Young suggests that 'social justice means the elimination of institutionalized domination and oppression'.[5] According to Young, there are five faces of oppression: exploitation marginalization, powerlessness, cultural imperialism and violence. While exploitation, marginalization and powerlessness are matter concerning the power in relation to others, cultural imperialism is experience, values, goals and culture of dominant group as norm creating and violence is a social practice depriving the oppressed of freedom and dignity.

In order to understand exploitation, Young substitutes 'classes' of Marx with 'gender'. The central insight expressed in the concept of exploitation is that this oppression occurs through a steady process of transfer of the results of the labour of one social group to benefit another. The injustice of class division does not consist only in the distributive fact that some people have great wealth while most people have little. Exploitation, in fact, according to Young, enacts structural relation between social

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[1] Ann Scale, The Emergence of Feminist Jurisprudence: An Essay (1986) Yale L J 1373

[2] Jurisprudence and Gender (1988) 55 Uni. Chi L. Rev. 1

[3] See, Marry Joe Frug, A Postmodern Feminist Legal Manifesto (Unfinished Draft) (1992) 105 Harv. L.Rev. 1045

[4] Gilligan, Carol, In *A Different* Voice (1982) as discussed in Freeman, M. D. A., *Lloyd's Introduction to Jurisprudence*, 7th Edn. (2001) Sweet & Maxwell, London.

[5] Young, Iris Marion, *Justice and the Politics of Difference*, (1990) Princeton University Press, New Jersey, at 15

groups. The injustices of exploitation cannot be eliminated by redistribution of goods because as long as institutionalized practices and structural relations remain unaltered, the process of transfer will re - create an unequal distribution of benefits. To bring justice where there is exploitation requires reorganization of institutions and practice of decision making.[6] To Young marginalization is, perhaps, the most dangerous form of oppression. A whole category of people is expelled from useful participation in social life and, thus, potentially subjected to severe material deprivation and even extermination. Material deprivation may be addressed by redistributive social policies but having shelter and food may not eliminate marginalization. One may have sufficient means to live a comfortable life but remain oppressed, because injustice in the form of marginalization would remain to exist in the form of uselessness, boredom and lack of self respect.[7] Powerlessness is such a social situation that allows persons to develop little opportunity to develop and exercise skills. Powerlessness is lack of autonomy, little creativity or judgment. Powerlessness lacks the authority, status and sense of self.[8] Cultural imperialism is experiencing the dominant meanings of society held by one group and the other group is compelled to accept such meaning as valid. It is universalization of experience and meaning held by dominant group and to establish theses experiences as norms and, consequently the difference between man and woman is reconstructed. Cultural imperialism involves the paradox of experiencing oneself as invisible at the same time that one is marked out as different.[9] Violence is a systemic social practice which constantly puts the oppressed in state of fear and thereby deprives them of their freedom and dignity.[10] All these forms of oppression, particularly oppression by cultural imperialism, finds sizeable space in our existing law defining non - consent under the Penal Code.

III. Meaning of Consent and Non - Consent

Sexual intercourse without consent or against will of the woman creates criminal liability. On various occasion the courts have referred to legal dictionaries in order to cull out the meaning of word 'consent' Consent is, in fact, 'an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side.'[11] According to Jowitt, 'consent supposes three things a physical power, a mental power and a free and serious use of them. Hence, it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of mind.'[12] According to Black's law Dictionary, consent is agreement, approval or permission as to some act or purpose especially given voluntarily by a competent person.[13] The meaning of consent in sexual intercourse, the following idea may be delineated:

> adult female understanding of nature and consequences of sexual act must be intelligent understanding to constitute consent...Consent within penal law,

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[6] Id. pp. 49-53

[7] Id. at 55

[8] Id. pp. 56 -58

[9] Id. pp. 58 -61

[10] Id. at 62

[11] See, Stroud's Judicial Dictionary of Words and Phrases, 7th Edn. (2005) Vol. I at 509

[12] Jowitt's Dictionary of English Law, 2nd Edn. (1977) Vol. I at 422

[13] Black's Law Dictionary, 9th Edn. (2009) at 346

> defining rape, requires exercise of intelligence base on knowledge of its significance and moral quality and there must be a choice between resistance and assent...[14]

In America, to constitute consent adult females understanding of nature and consequences of sexual act must be intelligent understanding is to be established. Consent within penal law, defining rape, thus, requires exercise of intelligence based on knowledge of significance and moral quality and there must be a choice between resistance and consent. In R. v Day[15] the Court pointed out that consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in face of inevitable compulsion, non-resistance and passive giving in cannot be deemed to be consent. In view of the meaning given in various dictionaries consent is valid when it is free from force. This meaning may be said to be the meaning given by the dominant group of the society and accepted as a norm for all and which may be regarded as oppressive.

A misrepresentation as regards the intention of the person seeking consent could give rise to the mis - conception of fact. The Madras High Court in re N. Jaladu[16] where the accused had obtained the consent of the girl's guardian by falsely representing that the object of taking the girl was for participating in a festival and when the festival was over the accused took the girl to a temple and married there against her will. The question arose whether the guardian gave consent under mis - conception of fact. Holding that the consent was given under the mis - conception of fact, the court observed:

> The expression "under a mis - conception of fact" is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation may be regarded as leading to a mis - conception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) illustrates that a person has a certain intention is treated as a fact. So, the fact which were made to entertain a mis - conception was the fact that the second accused intended the girl to get the girl married...thus if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such person...the effect of Section 90, IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence.[17]

The Bombay High Court in Parashottam Mahadev v. State[18] applied the test laid down in re Jaladu case[19] held that consent given in pursuant to a false representation that the accused intends to marry could be regarded as consent given under mis - conception of fact. The Punjab High Court in Rao Harnarain Singh Sheoji Singh v. State[20] observed that:

> there is a difference between consent and submission and every consent involves a submission but converse does not follow and a mere act of submission does not involve consent.

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[14] Words and Phrases, Permanent Edition (1951) Vol. 8 A, pp. 217 -218

[15] (1841)173 E R 1026 per Coleridge, J.

[16] ILR (1913) 36 Mad 453. The Supreme Court referred to this judgment in Pradeep Kumar Verma v. State of Bihar AIR 2007 SC 3059; See also Emperor v. Soma 18 Cri L J 18 (Lah)

[17] ILR (1913) 36 Mad 453 at per Sundara Ayyar, J.

[18] AIR 1963 Bom. 74

[19] Supra

[20] AIR 1957 Punj 123 per Tekchand, J.

The scheme of Section 90 of the Indian Penal Code is couched in negative terminology. In Deelip Singh v. State of Bihar[21], the issue before the court was whether the consent given by a woman believing the man's promise to marry her is a consent to exclude the offence of rape. In this case, the victim and the accused were neighbours and one day the accused forcibly raped her. The accused later on consoled her that he would marry her and consequently she succumbed to entreaties of the accused to have sexual relationship with him. On the promise to marry she had sexual intercourse on several occasions and became pregnant. She disclosed the fact of her pregnancy to the accused but he avoided to marry her. The victim lodged a complaint long after the act of rape. While convicting the accused, the trial court recorded that she was forcibly raped on first occasion and after that incident the accused went on to make false promise to marry her. Under the circumstances, the trial court came to the conclusion that either there was no consent or the consent was involuntary and thus irrespective of age of the victim the offence of rape was committed by the accused. The trial court convicted and the High Court reducing the sentence, maintained the conviction. The Supreme Court acquitting the accused, observed:

> The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too should have the knowledge or has reason to believe that the consent was given by victim in consequence of fear of injury or mis - conception of fact. Thus, the second part lays knowledge emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or mis - conception of fact and the court should also be satisfied that the person doing the act, i.e., the alleged offender, is conscious of the fact or should have reason to think that but for fear or mis - conception, the consent would not have been given.[22]

The second limb of Section 90 of the Penal Code requiring knowledge or having reason to believe that the consent was given under fear of injury or mis - conception shows that the law has accepted the meaning given by dominant group and has ignored the woman's experience and understanding on the subject.

IV. Communicative Sexuality: Towards a Probable Solution

Lack of consent is central to the offence of rape. In criminal justice process the state of mind, conduct, words and action before, during and after the commission of offence, of the victim is vital. The essence of consent is free agreement. Consent incorporates the idea of free and voluntary agreement between two parties engaged in sexual intercourse which means that sexual encounter should involve communication of desires, likes and dislikes in absence of force, fraud or coercion. Such an approach would afford people's respect of autonomy and sexual integrity.

The idea of communicative sexuality is based on mutuality which involves agreement and exchange. The communicative sexuality is not based on the notion that one of the partners of sexual intercourse desires sex and other simply submits to it. Instead, it is based on the conception that both the partners of sexual intercourse desire the

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[21] AIR 2005 SC 203

[22] Id at 205-206 per Venkatarama Reddi, J.

act and also communicate their desire as well. Lois Pineau, one of the proponents of communicative sexuality argues:

> Communicative sexual partners will not overwhelm each other with the barrage of their desire . . .a person engaged in communicative sexuality will be most concerned with the mutuality of desires.[23]

It is said that with the introduction of 'communicative sexuality' and the concept of 'free agreement' there would be a significant change in the trial of rape cases as it intends to shift the focus of rape trial away from complainant to the action of the accused. The focus would shift from the conduct of prosecutrix's whether she resisted or not, or whether or not she was in fearful or intimidated state of mind to the accused what action did the accused take to ensure that there was free agreement to sexual intercourse. The principle of communicative sexuality may to some extent answer the problem of non -consent in the problem at hand. There may not be doubt that the communicative sexuality will shift the attention towards the action etc. of the accused from that of the victim but it may fail to take into account of how consent is constructed in rape cases and how the behaviour of woman, her body and language are used to undermine her claim of non - consent. Such an approach of communicative sexuality may be free from doubt where the woman receives injury and her deposition is required to be corroborated by other evidences but in other cases problem may remain unresolved. The complainant's behaviour will continue to be the subject of detailed scrutiny by the defence in order to ascertain whether there was agreement, the nature and content of that agreement and whether there was any ambiguity in what the complainant said and did. Thus, the offence of rape so long it is defined on the basis of non - consent will continue to focus on the victim's state of mind and the consent obtained by the accused for sexual intercourse on the promise of marriage will continue to be constructed against the woman. Therefore, there is a need to recognize the difference that the consent given by a woman to the accused for sexual intercourse under a promise to marry cannot be compared with that of other consent required elsewhere in the criminal law because the promise to marry is such a promise to a women in general that they are swayed by emotion and the reasoning capacity is eclipsed for some time and therefore consent which is given subsequent upon the promise of marriage may not be treated as a valid consent for the purpose.

V. False Promise to Marry and Breach of the Promise to Marry: Judicial Perception

In cases where the woman has given consent for sexual intercourse on the basis of promise to marry, the courts have drawn distinction between false promise to marry and mere breach of promise to marry. There is a clear distinction between rape and consensual sex and in a case where there is promise of marriage, the Court must very carefully examine whether the accused had actually wanted to marry the victim, or had made mal fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between mere breach of a promise and not fulfilling a false promise. In Deepak Gulati v. State of Haryana[24] the appellant and the prosecutrix, aged about 19 years and student of plus 2 had known each other for some time. The appellant had

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[23] Pineau, Lois, Date Rape: *A Feminist Analysis* (1989) 8 Law & Philosophy 217 at 236 as referred by Philip N.S. Rumney in his article *The Review of Sex Offences and Rape Reform: Another False Dawn* (2001) 64 Mod. L. R. 890 at 899

[24] AIR 2013 SC 2071

been meeting the prosecutrix in an attempt to develop intimacy with her. The appellant induced her to go with him to get married and she agreed. The accused had sexual intercourse against her wishes and the appellant while staying with the relatives for 3-4 days committed rape upon her and the prosecutrix was, ultimately, thrown out by the appellant. Even thereafter the appellant allure her to go with him for marriage and to which she agreed to accompany the appellant to get married in the court. The father of the prosecutrix lodged an FIR with the police under Sections 365 and 366 of the Indian Penal Code. However, after the statement of the prosecutrix charges under sections 365 and 376 IPC were framed against the accused. The Court of Sessions convicted the appellant. Aggrieved by the judgment, the appellant preferred appeal in the High Court which was dismissed. The prosecutrix had deposed that the appellant had asked her to have physical relationship with him but she had not agreed to do so before marriage. At the time of sexual intercourse she neither raised any objection nor any hue and cry. The prosecutrix did not mention this incident to any one instead accompanied the appellant to his relative and stayed there for 3-4 days. She continued to stay with the relatives of the appellants and was raped there. The appellant continued to postpone their marriage on one pretext or the other. On one day, ultimately, she was thrown out of the house. From the fact it is clear that the prosecutrix had never raised any grievance and, in fact, had submitted herself to the will of the appellant possibly in lieu of his promise to marry her. The question involved was whether her consent was obtained on a false promise of marriage. The court observed:

> There must be adequate evidence to show that at the relevant time, i.e., at initial stage itself, the accused had no intention to whatsoever of keeping his promise to marry the victim.[25]

Under Section 90 of the Penal Code the consent under the circumstances cannot be said to be hit by mis - conception of fact, the court held. The Court further pointed out that:

> There may, of course, be circumstances, when a person having best of intentions is unable to marry the victim owing to various unavoidable circumstances. The failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to mis - conception of fact. In order to come within the meaning of the term 'mis - conception of fact, the fact must have an immediate relevance. Section 90, IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten liability on the other, unless the court is assured of the fact from the very beginning, the accused had never really intended to marry her.[26]

The Supreme Court in *Deepak Gulati case* explaining the consent, observed:

> Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and ...the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mal fide motives, and had made a false promise to this effect only to satisfy his lust, as the later falls in the category of cheating or deception.[27]

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[25] Deepak Gulati v. State of Haryana AIR 2013 SC 2071 at 2077

[26] Id. at 2077 per Chauhan B.S., J.

[27] Id. at 2076

The court has brought the element of intention in the offence of rape where the accused had sexual intercourse after making a promise to marry the victim. The accused can be convicted for rape only when the intention of the accused was malafide and he had clandestine motives. In pointing out the distinction between the mere breach of a promise and not fulfilling a false promise, the Court has emphasized upon at an early stage when the act was done. It has observed:

The court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a cause where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of mis-representation made to her by the accused, or where the accused on account of circumstances, which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so.[28]

In Deelip Singh v. State of Bihar,[29] the Court drew a distinction between false and fraudulent promise to marry and mere breach of the promise to marry and awarded damages of Rs. 50,000/ to the victim. In this case, the victim lodged a complaint to the police long after the alleged act of rape and on the date of report the victim was pregnant by six months. However, in this case the court did not find force in the argument that a promise to marry could never amount to mis - conception of fact. It was held that a promise to marry without anything more will not give rise to 'mis - conception of fact'. It needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the fact it is established that at the very inception of making of promise, the accused really did not entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, then consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 clause secondly.

The court also pointed out that there could be no strait-jacket formula for determining whether consent given by the prosecutrix to sexual intercourse was voluntary, or whether it was given under a mis - conception of fact. Before reaching to a conclusion, while considering a question of consent, the court must in each case consider the evidence before it and the surrounding circumstances.

In Uday v. State of Karnataka[30], the court observed that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a mis - conception of fact. A false promise is not a fact within the meaning of the Code.

In Pradeep Kumar v. State of Bihar[31] the report was lodged alleging that the accused made sexual relationship on a promise that he would marry the informant. The informant was taken to a temple where in presence of deity he accepted her to be his wife and an agreement of marriage was entered into. In the meantime, the accused was to get married with another woman. The accused having later denied the fact of marriage and any physical relationship, the report was lodged and the appellant/ accused was charged, inter alia, under Section 376 of the Penal Code. The

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[28] Ibid.

[29] AIR 2005 SC 203

[30] AIR 2003 SC 1639

[31] AIR 2007 SC 3059

appellant/accused filed an application for discharge. The trial court rejected the application and observed that the poor victim was put under mis - conception of fact as promise to marry her by the accused and the accused made sexual intercourse with her. The accused had done such act with other girls also. Further, the accused had entered into an agreement for marriage with the victim. From the case diary it was clear that the accused took consent of the victim on a false promise of marriage. Hence, the consent was not with free will or voluntary act. The trial court under the circumstances found that there was sufficient ground for framing charge against the accused. The order of framing of charge was challenged before the High Court and it was rejected on the ground that there was sufficient material against the accused showing his complicity in the crime. On appeal to the Supreme, it was argued on behalf of the accused, first, that he had physical relationships with her consent and, secondly, as she contended that the accused married her in a temple, the question of any offence punishable under Section 376 of the Penal Code did not arise. While it was argued on behalf of the State that prima facie the case was not covered under Section 376 rather it was a case covered under Sections 415 and 493 of the Penal Code, the argument on behalf of the informant was since on the pretext of marriage and by cheating the victim the accused had made physical relationship with her, it could not be said that there was an element of consent and thus Section 376 of the Penal Code was rightly applied.

On the sole testimony of the victim of rape where promise to marry has been an element would not be sufficient to convict the accused. In Vijayan v. State of Kerala[32], the prosecutrix, aged about 17 years and a member of Scheduled Caste community, was a neighbor of the accused appellant. The prosecutrix in her testimony stated that when no one was in the house, the accused approached the prosecutrix and asked for water. The prosecutrix went to kitchen to fetch water and the accused followed her to the kitchen, caught hold of her hand and despite her resistance removed her night dress and indulged in sexual intercourse. After the act, the accused consoled the prosecutrix by saying that she should not worry as he would marry her. The prosecutrix neither made a complaint to her parents nor to the police as the accused held a promise to marry her. She was carrying a child of 7 months, she protested and also requested the accused to marry her but the accused declined the request. The prosecutrix thereupon filed a complaint and the police registered the case under Section 376 of the Indian Penal Code. The prosecutrix later on delivered a child. The trial court and the High Court convicted the accused for offence of rape. On appeal to the Supreme Court, it was held that the conviction of the accused could not be sustained and appeal was allowed. The Supreme Court observed:

> In cases where the sole testimony of the prosecutrix is available, it is very dangerous to convict the accused, especially when the prosecutrix could venture to wait for 7 months for filing the FIR for rape. This leaves the accused totally defenceless. Had the prosecutrix lodged the complaint soon after the incident, there would have been some supporting evidence like the medical report or any other injury on the body of the prosecutrix so as to show the sign of rape. If the prosecutrix has willingly submitted herself to sexual intercourse and waited for 7 months for filing the FIR it will be very hazardous to the convict on such sole oral testimony. Moreover, no DNA test was conducted to find out whether the child was born out of the said incident of rape and the accused appellant was

[32] Cri App. No. 1110 of 2008 (Arising out of SLP (Cri) No. 7042 of 2007) : Manu/SC/8652/2008 decided on 16.7.2008

> responsible for the said child. In the face of lack of any other evidence, it is unsafe to convict the accused.[33]

In Zinder Ali v. State of W.B.[34] the appellant was trying to marry with the prosecutrix. On the day of incident when the prosecutrix was returning from her work, the accused taking advantage of dark caught her and committed rape. The accused after this incident threatened to kill the victim woman. Thereafter, also the accused committed forcible rape with the prosecutrix for 2 or 3 days and falsely assured her he would marry her. The accused however refused to marry and therefore the prosecutrix informed the matter to her family members and neighbours. A meeting in the village was convened and it was decided that the accused should marry the prosecutrix but he refused to marry her. There was nothing to suggest that there was any love affair with the accused. Then a complaint was filed before the magistrate and case was registered with the police. The accused was charge sheeted for offence, interalia, under Section 376 and 417 of the Penal Code. The accused stated that he was falsely implicated as he had refused to marry the prosecutrix. The Court of Sessions rejected the defence and concluded that offences of rape and cheating were proved against the accused. The accused preferred an appeal before the High Court and the same was rejected. Ultimately, the appeal by Special Leave was filed before the Supreme Court. It was argued on behalf of the accused that the victim was a grown up lady and the sexual intercourse was with her consent. Further, as there were no injury on the person of the prosecutrix suggested that the prosecutrix had surrendered to the advances made by the accused and engaged herself in the intercourse as per her will and moreover, the prosecutrix herself wanted to marry her and when the accused refused to marry her, he was falsely implicated. The Supreme Court found the accused guilty of rape not on the ground of non - consent by promise to marry the prosecutrix but the very first act of sexual intercourse was without the consent. The Court brushing aside the charge of cheating, observed:

> ...the version that he gave a marriage promise, would really go against the prosecution, whereby, it would mean that the subsequent acts were done with the consent of the girl on account of the promise of marriage. We do not think that such could be the approach. After all, if the promise of marriage was given and the girl had succumbed on that account, may not amount to cheating. Besides this, the girl has very specifically stated that even subsequently, she was ravished against her wishes. Therefore, the theory of promise of marriage and the consent for sexual intercourse will wither away.[35]

In K.P Thimmappa Gowda v. State of Karnataka[36] the prosecution story was that the appellant raped a lady of aged about 18 years but assured that he would marry her and asked her to keep quiet. Subsequently also the appellant had sexual relationship several times. The woman became pregnant and the appellant refused to marry her. The accused married another woman. The victim woman delivered a female child just few days after the lodging of the report with the police under Section 376 of the Penal Code. In trial court the woman admitted the fact she had sexual intercourse with the appellant several times and it was considered by the trial court that as the woman was above 16 years of age and was a consenting party thus offence of rape was not made out against the appellant. The High Court on appeal reversed the

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[33] Id at para 5 per Mathur and Dalveer Bhandari, JJ.

[34] AIR 2009 SC 1467

[35] Id at 1470 per Sirpurkar, J.

[36] AIR 2011 SC 2564 per Makandey Katju and Mrs. Gyan Sudha Misra, JJ.

finding of the trial court and the appellant guilty of rape. The High Court observed that as the accused had given an impression that he would honour his promise of marrying her, thus the lady did not disclose the fact to anyone including her mother. The Supreme Court gave benefit of doubt as the prosecution could not be said to have been able to prove the case beyond reasonable doubt. The Supreme Court pointed thus pointed out that a view was reasonably possible that the victim woman had sex with the appellant with her consent. The appellant in this case had filed an affidavit to the effect that he would transfer two acres of land due to breach of promise to marry and she has given consent to accept the same. Under the circumstances, the appellant was directed to transfer the land within three months.

In Jayanti Rani Panda v. State of West Bengal,[37] the complainant leveled the allegation that the accused used to visit her house and proposed to marry her. She consented to have sexual intercourse with the accused on the belief that the accused would really marry her. The accused subsequently refused to marry when the complainant became pregnant. The court insisted that as there was no evidence at that time the accused had no intention of keeping his promise to marry and thus he could not be held liable if he could not respect his promise subsequently. The court observed:

> The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to mis - conception of fact at the inception of the act itself. In order to come within the meaning of mis - conception of fact, the Fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a mis - conception of fact. ...If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by mis - conception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other unless the Court can be assured that from the very inception the accused never really intended to marry her.[38]

In *Jayanti Rani Panda case*, the court referred to the decision of Chancery Court in Edgington v. Fitzmaurice[39] where it was observed that to bring a case under mis - conception of fact, 'there must be mis - statement of existing fact.' The Calcutta High Court observed that a mis - statement of the intention of the defendant in doing a particular act may be misstatement of fact and if the plaintiff was misled by it and an action of deceit may be founded on it.

Submission of the body under the fear or terror cannot be construed as a consented sexual act.[40] : Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. The insistence of the court on reason and rationality when a woman is overwhelmed by emotion arising out of promise to marry does not represent the woman's perception of consent and non - consent.

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[37] 1984 Cri L J 1535

[38] Id. at

[39] (1885) 29 Ch D 459

[40] State of H. P. v. Mango Ram AIR 2000 SC 2798 per Balakrishnan, J.

In Uday v. State of Karnataka,[41] the Court further added that before reaching to a conclusion on the issue of consent , because each case has its own peculiar fact which may have a bearing on the question whether the consent was voluntary, or was given under mis - conception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredients of the offence, absence of consent being one of them.[42]

In order to hold the accused guilty of rape, the court is laying emphasis that the accused cannot be held guilty unless it could be assured that from the very inception the accused never really intended to marry her. It is thus difficult to hold a person guilty of rape where the accused initially intended to marry but could not marry her for certain reasons. In Pradeep Kumar case,[43] the Supreme further clarified the observation made in Uday case[44] by observing that:

> While we reiterate that a promise to marry without anything more will not give rise to mis - conception of fact within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused to with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of making of the promise, the accused really did not entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375.[45]

The judicial approach on the question of non - consent in order to create liability for rape thus depends upon the evidence whether there was something more, other than mere promise to marry the woman, otherwise the court in such cases also has relied upon force or coercion to hold a case for no - consent. In few cases, the court has even directed the accused to pay compensation to the victim woman.[46]

VI. Rape and Offences against Marriage:

Where the woman has given consent under belief that she was married to the accused while in fact the marriage was deceitful or under misrepresentation, in such cases also the court did not infer the case of rape instead has held such cases to be covered under Chapter XX of the Indian Penal Code dealing with the offences against marriage.

In Mahesh Kumar Dhawan v. State of M.P.,[47] the complainant made a written complaint alleging that her marriage was solemnized with the petitioner in March 2007. Till April 2007 they resided in Gwalior City and the petitioner made physical relation with the complainant. Both of them went to Dubai and when they were in Dubai, the complainant found some documents in the bag of the petitioner and thereby she came to know that the petitioner was already married and had 15 years old son. The complainant alleged in her complaint that the petitioner committed

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[41] AIR 2003 SC 1639

[42] Ibid.

[43] AIR 2007 SC 3059

[44] Supra Note 41

[45] AIR 2007 SC at 3064

[46] See, Deelip Singh v. State of Bihar, Supra

[47] 2012 Cri. L. J. 1639 (M.P)

cheating and suppressed the fact with regard to his earlier marriage and the petitioner committed sexual intercourse under a deceitful belief. The complainant came back to Delhi and called to first wife of the petitioner. It was also alleged that the petitioner had threatened the complainant that her father, mother and the brother would be killed if she told anything about it. On the basis of complaint an FIR was registered against the petitioner for offences punishable under Sections 498-A, 504, 493, 495 and 376 of the Indian Penal Code. The police submitted charge sheet before the competent Magistrate. The complainant made allegation of fraud played by the petitioner by suppressing the fact of earlier marriage and made physical relationship under a belief that she was a legally wedded wife of the petitioner. The petitioner aggrieved by the criminal proceeding against him filed a petition before the High Court for invoking the inherent jurisdiction under Section 482 of the Criminal Procedure Code to quash the FIR and criminal proceeding. One of the arguments taken by the petitioner was as the complainant was married to the petitioner the offence under Section 376 could not be made out. The court observed:

the bodily relationship or sexual intercourse by a husband with his second wife falls in the category of offence under Section 493 and 494 of IPC and it cannot be treated as rape as defined in Section 375 of IPC. It is an independent offence, the cognizance of which can be taken by the court on the basis of complaint filed by the complainant herself, therefore, the offence punishable under Section 376 is also not made out as the alleged act of sexual intercourse by the petitioner with the complainant may fall within the category of Section 493 and 495 of IPC but not in the category of rape as defined in Section 376 of IPC and made punishable under Section 376 of IPC, therefore, the cognizance of Section 376 of IPC is also against the settled principle of law.[48]

The Court quashing the FIR and criminal proceeding against the petitioner further observed:

So far as the offence punishable under Section 376 of the IPC is concerned, the alleged intercourse was the result of marriage of complainant with the petitioner, therefore, firstly intercourse with wife does not fall in the category of rape, secondly, if the intercourse has been committed under suppression of fact of first marriage, it may fall under the category of offence punishable under Section 493 and 495 of IPC and does not fall under the category of offence punishable under Section 376 of IPC.[49]

In this case court appears to agree that offence under Section 493 and 495 of the IPC[50] could be made out against the accused but as there was no complaint from the complainant's side and the police had filed charge sheet thus the power of the court to take cognizance was barred by virtue of Section 198 of the Criminal Procedure

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[48] Id at 1642

[49] Id at 1644

[50] Section 493 of IPC reads: **Cohabitation caused by a man deceitfully inducing a belief of lawful marriage** - Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished...

Section 495 of IPC reads: **Same offence with concealment of former marriage from person with whom subsequent marriage is contracted** - Whoever, commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished ...

Code.[51] It may be submitted that paradoxically the law is in search of marriage where in fact there was no marriage. It, thus, suggests that since law is made by male, thus, it has masculine perception.

VII. Conclusion

The prosecution has to face a difficulty in establishing the case where the woman submits herself on the promise given by the accused that he would marry her. For proving non - consent on the part of the woman, the court relies on the principle of resistance. The case where a woman submits herself on the basis of promise to the accused cannot be covered under the existing scheme of consent given in negative terms under Section 90 of the Penal Code. Such a provision is beneficial to man and goes against the woman. The court has treated only those cases of promise denying the consent which were found to be fraudulent from the inception. The difference between breach of promise and false promise delineated by the court is more favourable to man than the woman. Usually there happens to be no evidence to prove conclusively that the accused never intended to marry from the very beginning. It may be possible that the accused wanted to marry the woman but was not able to muster enough courage to disclose his intention to his family members despite the woman reposed full faith in the accused. The matter becomes further complicated where the woman becomes pregnant and she discloses the fact after sometime. Further, where an accused marries by resorting to deceitful means and the woman submits herself under a belief that she was lawfully married wife of such accused has also not been regarded as an offence of marriage on the ground that it was not a case of non - consent; instead it was a case covered under Section 493 of the Indian Penal Code. Similarly, where the accused concealed the fact of first marriage and has sexual intercourse with such woman from whom the fact of former marriage was concealed, such sexual intercourse has also not been brought within the meaning of rape on the same ground of non - consent. All these are suggestive of the fact that law still feels that the fact of non - consent in order to bring the conduct within the purview of rape involves forceful resistance on the part of woman and the law has failed to visualize the fact that there can be offence of rape where the faculty of reason of woman was eclipsed under the psychological and emotional force that woman could not exercise her intellect rather reposed her confidence and faith in accuse.

The existing law on consent incorporated in Section 90 of the Indian Penal Code represents the masculine understanding and does not take into account the woman's perception. It may be, thus, suggested that the sexual intercourse done with the consent of woman but obtained on the basis of promise to marry should also be brought within the ambit of offence of rape under the Indian Penal Code. Similarly, the consent of woman obtained by deceit and thereby causing her to believe that she was married also may be brought in public domain and not to confine it in private domain and should not be dealt under the chapter dealing with the offence against marriage because this chapter may be attracted in its true spirit only when there was marriage. It is, thus, submitted that to improve the disadvantageous status of woman, the law should be suitably altered in such a way that law does not appear to be oppressive in its character. Thus, there is a need to bring the issue of consent of

[51] Section 198 of Cr. P.C. reads: Prosecution for offence against marriage - No court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code except upon the complaint made by some person aggrieved by the offence.

woman for sexual intercourse under a promise of marriage as a case of non - consent in those cases where the man later on refuses to marry. Similarly, consent of woman obtained by inducing the woman by causing her to believe deceitfully that she was married to the accused may be brought in public domain and not to confine it in private domain lest the law should be oppressive.

SUSTAINABLE DEVELOPMENT IN INDIA: SOME REFLECTIONS

Dr. N. P. Verma*

Abstract

Sustainable development today, becomes a very common phenomenon in almost all the democratic countries. But, the outcome is not very encouraging. The reason behind such failure is the lack of efforts by the States to implement various doctrines of protection of environment like polluter pays, precautionary principles, eradication of poverty etc. However, in India, some half hearted measures were taken to apply the principle of sustainable development, but they failed. In this scenario, there is need of proper legislations and judicial watch over the proper implementation of programmes and policies to achieve the target of preservation and protection of environment.

Introduction

Stockholm conference in June 1972 emphasized that man has the fundamental right to environment of quality and also that he has a responsibility towards protecting the environment for present and future generations. It also maintained that natural resources of the earth must be safeguarded for the benefit of present and future generations. Thus the seed for the concept of sustainable development started to sprout. World Commission on Environment and Development constituted in 1983 which is popularly known as Brundtland Commission (1983) described sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". It requires an integration of economic, social and environmental approaches towards development.

From an environmental perspective the goal is to build an alliance with nature which balances the demands of social and economic development on natural resources and the environment. Agenda 21 of action plan, adopted in 'Earth Summit' held at Rio-de Janeiro in 1992, promised to reduce poverty, provide clean water and health care, and protect the natural resources and so on. Similar tasks were set in Millennium Development Goals and recommended by Intergovernmental Panel on Climate Change. Thus all the major world conferences and initiatives taken so far on environment conservation and development have stressed on equitable socio-economic development, for protection of the environment and attaining sustainable development.

In Delhi on 2nd February Prime Minister Manmohan Singh inaugurated the Delhi Sustainable Development Summit, organised annually by TERI since,2001. It is an international undertaking that provides a platform for knowledge exchange and debate on all aspects of sustainable development. This summit brings together important heads of the State and Central Governments, academics and policy makers

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to deliberate over environmental issues. We are organising such events at regular basis but what steps have been taken at ground level is a issue of depth study and debate.

As a nation we are still struggling to reconcile our effort to develop with the compelling need to protect our environment from air pollution, industrial pollution, increasing quantum of waste and pollution of our rivers. Socio-economic conditions of our rural as well as urban areas are making the situation worst. Thus we need to make a holistic policy which can deal with all these problems interlinked to reduce poverty, provide clean water and health care, and protect the natural resources and so on. In this paper attempt is made to focus on field realities and to point out the drawbacks in our policies and make suggestions to improve the situation.

WHAT SUSTAINABLE DEVELOPMENT MEANS:

Development comes through industrialization, which in turn the main factor behind the degradation of environment. To resolve the issue, the experts worldwide have come up with a doctrine called 'Sustainable Development', i.e. there must be balance between between development and ecology.

The concept of 'Sustainable Development' is not a new concept. The doctrine had come to be known as early as in 1972 in the Stockholm declaration. It had been stated in the declaration that:

"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being and he bears a solemn responsibility to protect and improve the environment for present and future generation "

But the concept was given a definite shape in a report by world commission on environment, which was known as ' our common future'. The commission, which was chaired by the then Norway Prime Minister, Ms. G. H. Brundtland defined 'Sustainable Development' as development that meets the needs of the present without compromising the ability of the future generations to meet their own needs. The commission defined sustainable development as:

"Humanity has the ability to make development sustainable—to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs." [1]

The report was popularly known as 'Brundtland report' the concept had been further discussed under agenda 21 of UN conference on environment and development held in June 1992 at Rio de Janeiro, Brazil.

Basic Principals of 'Sustainable Development':

Sustainable development as a concept involves a cluster of elements or principles. All these principals have its own important but some form the corner-stone of the concept of sustainable development. Some of these principles or elements are of utmost importance so they are mentioned here.

1. Principle of Sustainable Use:

According to this principle natural resources should be used in a manner which is

[1] World Commission on Environment and Development (WCED), *Our Common Future* (New York: Oxford University Press, 1987), 8

"sustainable" or "prudent" or "rational" or "wise" or "appropriate". It requires that natural resources be used for maximum benefit and misuse or disuse must be avoided.

2. *Inter-Generational and Intra-Generational Equity:*

This principal talks about the right of every generation to get benefit from the natural resources. According to principal 3 of Rio declaration "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

This principal is founded on the essentially utilitarian criterion of maximizing the sum total of welfare of different generations. It allows the welfare of one generation to be traded off one-for-one against that of another generation. If the benefit to us from economic activities which continue to emit greenhouse gases at the present rates outweighs the harm done to future generations from global warming, then the criterion would recommend no change in our activities.

Preservation of the resource base does not imply that all exhaustible (e.g. mineral and fossil fuel) resources must be conserved that is likely to be unfeasible. But if society's broad stock of capital is to be maintained, we have to replace the non-renewable resources that are used up with something else. That has to be reproducible capital, whether physical or human.

This principal also mandates intragenerational equity by which it means that the people of present generation have equal rights to benefit from the use of natural resources and from the enjoyment of a clean and healthy environment. This is environmental justice.

The Precautionary Principal:

Principle 15 of the *Rio Declaration (1992)* defines precautionary principle as:

"Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."

According to this principle if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:

i. careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment,

ii. and an assessment of the risk- weighted consequences of various options.

4. *Principle of Integration:*

This principal requires the effective integration of economic and environmental considerations in the decision-making process. This principle is the philosophical underpinning of the report *Our Common Future*.

According to this report ecologically harmful cycle caused by economic development without regard to and at the cost of the environment could only be broken by integrating environmental concerns with economic goals. Thus environmental concerns must be taken account of during the process of policy making so that harm to ecology may be avoided. This principle ensures mutual respect and reciprocity between economic and environmental considerations by:

i. Environmental considerations are to be integrated into economic and other development plans, programs and projects and

ii. Development needs are to be taken into account in applying environmental objectives.

This principle also takes into account social development along with economic development and environmental protection. The Plan of Implementation of the World Summit on Sustainable Development held in Johannesburg, 2002, noted the need to "promote the integration of the three components of sustainable development- economic development, social development and environmental protection- as interdependent and mutually reinforcing pillars.

5. Conservation of Biological Diversity and Ecological Integrity:

Sustainable Development mandates that the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making, including in the formulation, adoption and implementation of any economic and other development plan, program or project.

6. Polluter Pays Principal:

In *environmental law*, the polluter pays principle requires that the costs of pollution be borne by those who cause it. In its original emergence the Polluter Pays Principle aims at determining how the costs of pollution prevention and control must be allocated: the polluter must pay. Its immediate goal is that of internalizing the environmental externalities of economic activities, so that the prices of goods and services fully reflect the costs of production.

The first mention of the Principle at the international level is to be found in the 1972 Recommendation by the OECD Council on Guiding Principles concerning International Economic Aspects of Environmental Policies, where it stated that: "The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called Polluter-Pays Principle." It then went on to elaborate: "This principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state."

It is enacted to make the *party* responsible for producing *pollution* responsible for paying for the damage done to the *natural environment*. The polluter pays principle underpins environmental policy such as an *ecotax*, which, if enacted by government, deters and essentially reduces *greenhouse gas emissions*.

POLICY AND LEGISLATIVE MEASURES:

Policy and legislative measures dealing with environmental conservation and thus promoting sustainable development are discussed as under:

Environmental Policy in Ancient India:

In ancient India our ancestors were well acquainted with the need of protecting and preserving environment. They knew that the key lies in sustainability of environment and sustainability of development both. That was the reason why they have attached environment conservation with the faith and religion. The Arthashastra by Kautilya, written as early as between 321 and 300 BC, contained provisions meant to regulate a number of aspects related to the environment. There are several examples of plants and trees were given the status of god and goddess. Even he fifth pillar edict of

Emperor Ashoka also contains such regulations.

In almost all religions originated in India and in every culture of this country we can trace the element of Nature worship.

Environmental Policy in British India:

Problems of environment protection and conservation are not of modern world only. Even in colonial period British rulers' have also enacted more than half dozen legislations to protect and conserve environment.

Shore Nuisance (Bombay and Kolaba) Act, 1853
The Indian Penal Code, 1860
The Indian Easements Act, 1882
The Fisheries Act, 1897
The Factories Act, 1897
The Bengal Smoke Nuisance Act, 1905
The Bombay Smoke Nuisance Act, 1912
The Elephant's Preservation Act, 1879
Wild Birds and Animals Protection Act, 1912

Environmental Policy in Modern India:

National Council for Environmental Policy and Planning was set up in 1972 which was later evolved into Ministry of Environment and Forests (MoEF) in 1985. Now the pollution control boards (CPCB i.e. Central Pollution Control Board and SPCBsi.e. State Pollution Control Boards) together form the regulatory and administrative core of the sector.

National Environment Policy, 2006:

It was the first initiative in strategy-formulation for environmental protection in a comprehensive manner.

It undertakes a diagnosis of the causative factors of land degradation with a view to flagging the remedial measures required in this direction.

It recognizes that the relevant fiscal, tariffs and sectoral policies need to take explicit account of their unintentional impacts on land degradation.

Constitutional Provisions: There are three important provisions in the Constitution of India.

Article 21: *No person shall be deprived of his life or personal liberty except according to procedure established by law.*

In India the Supreme Court has adopted an expanded view of 'life' under Article 21 and enriched it to include environmental rights by reading it along with Articles 47, 48-A and 51A(g) and declaring:

> *"Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental, ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21."* [2]

[2] *Virender Gaur & Ors. v State of Haryana & Ors,*(1995) 2 SCC 577

Article 48A: *The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.*

Article 51A: *It shall be the duty of every citizen of India—*

(g) *to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;*

Legislative Framework:

There are nearly a dozen legislations of modern India which were enacted after independence having provisions regarding protection and p[reservation of environment so that sustainable development may be achieved. They are as follows:

Water (Prevention and Control of Pollution) Act, 1974
Water (Prevention and Control of Pollution) Cess Act, 1977
Air (Prevention and Control of Pollution) Act, 1981
Atomic Energy Act of 1982
Motor Vehicles Act, 1988
The Wildlife (Protection) Act, 1972
The Forest (Conservation) Act, 1980
Environment (Protection) Act, 1986 (EPA)
The National Environment Appellate Authority Act, 1997
Public Liability Insurance Act (PLIA), 1991
National Environment Tribunal Act, 1995
Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006
The National Green Tribunal Act, 2010

Environment Impact Assessment (EIA):

On 27th January, 1994 a notification was issued dealing with mandatory EIA. The notification requires project proponent to submit an EIA report, and environment management plan, details of the public hearing and a project report to the impact assessment agency for clearance, further review by a committee of experts in certain cases. By the amendment in the year 1997, public hearing was made compulsory before impact assessment was finalized.

JUDICIAL INTERPRITATIONS:

Since the last few decades, the Supreme Court of India has been actively engaged, in many respects, in the protection of environment and encouraging and directing sustainable development. While conventionally the executive and the legislature play the major role in the governance process, the Indian experience, particularly in the context of environmental issues, is that the Court has begun to play a significant role in resolving environmental disputes. Supreme Court has been engaged since 1980s in interpreting and introducing new changes in the environmental jurisprudence through the principal of sustainable development.

Significant environmental principles like polluter pays,[3] precautionary principle,[4]

[3] *M.C. Mehta v Kamal Nath* (2000) 6 SCC 213.
[4] *Vellore Citizens' Welfare Forum v Union of India* (1996) 5 SCC 647.

sustainable development,[5] public trust doctrine[6] and intergenerational equity [7] have become entrenched in the Indian law without explicit incorporation in any legislative framework.

In *Vellore Citizens' Welfare Forum v Union of India & Ors.*,[8] the Court employed the 'precautionary principle' to invent the special principle of burden of proof in environmental cases where burden as to 'the absence of injurious effect of the actions proposed, is placed on those who want to change the status quo' viz. polluter or the industrialist. In the process, the apex Court has gone beyond the statutory texts to refer extensively to international conventions and obligations of India and even to the historical environmental values reflected in the edicts of Emperor Ashoka and verses of *Atharva Veda*. The Supreme Court has, in clear terms, advised the State to shed its 'extravagant unbridled sovereign power' and to pursue a policy to maintain ecological balance and hygienic environment.

In *T.N. Godavarman Thirumulpad v. Union of India* case[9] was set in the backdrop of critical state of national forest cover, appalling apathy of governments towards forest management and conservation and open violations of forest legislations by illegal felling in North-Eastern States. A three judge bench of the Court, known as the 'Green Bench' or the 'Forest Bench', issued a 'continuing mandamus', operative for past twelve years, and has been using it to deal with prominent issues including conversion of forest land for non-forest purposes, illegal felling, potentially threatening mining operations, afforestation and compensation by private user agencies for using forest land.

In the Narmada Bachao Andolan v. Union of India case,[10] the Court did not allow Narmada Bachao Andolan from making any submissions on the pros and cons of large dams. Despite the dissenting judgment of Justice S.P. Bharucha, who pointed out that the Sardar Sarovar Project was proceeding without a comprehensive environmental appraisal, majority of the successive judges allowed the government to construct the dam without any comprehensive environmental impact assessment, which was necessary even according to the government's own rules and notifications. The majority judgment observed that a conditional clearance given in 1987 was challenged in 1994 and stated that the pleas relating to height of the dam and the extent of submergence, environment studies and clearance, hydrology, seismicity and other issues, except implementation of relief and rehabilitation, cannot be permitted to be raised at this belated stage.[11]

The subordination of environmental interests to the cause of development was also evident in Supreme Court's judgment in the PILs challenging the construction of Tehri Dam and the construction of power plant at Dahanu Taluka in Maharashtra, where the government's own expert committee had given an elaborate report pointing out a series of violations of the conditions on which environmental clearance

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[5] See *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664; *Goa Foundation v Diksha Holdings Pvt. Ltd* (2001) 2 SCC 97; and *N. D. Jayal v Union of India* (2004) 9 SCC 362.

[6] *K.M. Chinnappa & T.N. Godavarman Thirumulpad v Union of India*, AIR 2003 SC 724 and *Intellectuals Forum, Tirupathi v State of A.P. and Ors.*, (2006) 3 SCC 549.

[7] *State of Himachal Pradesh v Ganesh Wood Products*, (1995) 6 SCC 363.

[8] (1996) 5 SCC 647.

[9] Judgement of 12 December 1996, (1997) 2 SCC 267.

[10] *Narmada Bachao Andolan v. Union of India and Others*, Supreme Court of India, Judgement of 18 October Iqgh2000, AIR 2000 SC 3753.

[11] Ibid at 3761.

to the projects had been given by the Ministry of Environment and Forests. In such nature of environmental litigations challenging infrastructure projects, the Court held that in case of conflicting claims relating to the need and the utility of any development project, the conflict had to be resolved by the executive and not by the Courts.[12]

M.C. Mehta v. UOI, AIR 1997 SC 734 (Taj Trapezium Case): *while taking note of the disastrous effects that the emissions from the Mathura Oil Refinery had on the Taj Mahal, the Supreme Court applied the principle of sustainable development to the case, and apart from passing various directions, stepped in to execute and supervise the resultant actions.*

State of Himachal Pradesh v. Ganesh Wood Products, *AIR 1996 SC 149, the Supreme Court invalidated forest based industry, recognizing the principle of inter-generational equity and sustainable development.*

Doctrines Evolved By Judiciary:

Following doctrines of environmental jurisprudence were applied by the Supreme Court while dealing with cases relating to environmental conservation.

Public Trust Doctrine:

The genesis of the public trust doctrine can be traced from the doctrine of *res communes* of the Justinian code of sixth century Rome. This doctrine claims that some things are 'common to mankind - the air, running water, the sea, and consequently the shores of the sea and the right of fishing in a port, or in rivers, is common to all men'.[13] The title of *res communes* was vested in the state, as the sovereign, in trust for the people and it was excluded from private control. Thus the state as trustee was charged with the duty of preserving the resources in a manner that made them available for certain public purposes.[14] The Romans implemented a concept of 'common property' and extended public protection to the air, rivers, sea, and seashores. There existed common rights or easements to navigate and fish, and a presumption that the sovereign owned the submerged lands and the shores in trust for the people.[15]

In *M.C.Mehta v. Kamal Nath*,[16] where an attempt was made to divert flow of a river for augmenting facilities at a motel, it was held that State and its instrumentalities as trustees have a duty to protect and preserve natural resources.

In *MI Builders Pvt. Ltd. v. Radhey Shyam Sahu*,[17] a city development authority was asked to dismantle an underground market built beneath a garden of historical importance.

Precautionary Principle:

In the Rio Declaration (or Agenda 21) of 1992, states that:

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[12] See Videh Upadhyay, 'Changing Judicial Power', 35(43&44) *Economic and Political Weekly* 3789 (2000).

[13] Joseph L. Sax, 'Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 68 *Michigan L. Rev.* 471 (1970).

[14] Ibid.

[15] Ibid.

[16] (1996) 1 SCC 38.

[17] AIR 1996 SC 2468.

"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

In *Vellore Citizens Welfare Forum v. UOI*,[18] this principle was adopted by the Supreme Court to check pollution of underground water caused by tanneries in Tamil Nadu.

The Supreme Court in *Narmada Bachao Andolan v. UOI*,[19] and held that the precautionary principle could not be applied to the decision for building a dam whose gains and losses were predictable and certain.

Polluter Pays Principle:

In India Courts have followed with the object to make the polluter liable for the compensation to the victims as also for the cost of restoring of environmental degradation. This principal was used by the Supreme Court of India in *Indian Council for Enviro-Legal Action vs. Union of India* [20] commonly known as Bichhri village case.. In this case court ordered the polluter ccompany to pay for the pollution and redo the environmental damage and wrong caused by its industrial activity.

Again in *Vellore Citizens Welfare Forum v. UOI*,[21] the Supreme Court held that the precautionary principle and the polluter pays principle are part of environmental law of the country.

REFLECTION IN SOCIETY AND PROBLEMS:

The moral obligation underlying sustainability is an injunction to preserve the capacity for future people to be as well off as we are. This has a terribly hollow ring if it is not accompanied by a moral obligation to protect and enhance the well-being of present people who are poor and deprived. If one thinks that people will be deprived in the future unless different policies are followed, then one is morally obliged to ask whether people are deprived right now. It would be a gross violation of the universalist principle if we were to be obsessed about intergenerational equity without at the same seizing the problem of intragenerational equity: the ethic of universalism certainly demands such impartiality. A concern for equity right now, and not merely for equity between periods of time, requires redistribution to the deprived contemporaries. But redistribution to poor people today might be felt to be disadvantageous from the standpoint of sustainability. It might be interpreted as leading to an increase in current consumption, not to an increase in investment. However, much depends on what form that redistribution takes.

Redistribution to the poor in the form of improving their health, education and nutrition is not only intrinsically important--in enhancing their capabilities to lead more fulfilling lives but it is also instrumentally important in increasing their "human capital" with lasting influence in the future. Thus the concepts of interrelatedness, of a shared planet, of global citizenship, and of 'spaceship earth' cannot be restricted to environmental issues alone. They apply equally to the shared and inter-linked responsibilities of environmental protection and human development.

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[18] AIR 1996 SC 2718.
[19] AIR 2000 SC 375.
[20] AIR 1996 SC 1446.
[21] AIR 1996 SC 2718.

The integration of agriculture with land and water management, and with ecosystem conservation is essential for both environmental sustainability and agricultural production. An environmental perspective must guide the evaluation of all development projects, recognizing the role of natural resources in local livelihoods. This recognition must be informed by a comprehensive understanding of the perceptions and opinions of local people about their stakes in the resource base. To ensure the sustainability of the natural resource base, the recognition of all stakeholders in it and their roles in its protection and management is essential.

Problems in Moving Towards Sustainable Development:

Conservation, which covers a wide range of concerns and activities, is the key element of the policy for sustainable development. Framing a conservation strategy is, therefore, an imperative first step. Development requires the use and modification of natural resources; conservation ensures the sustainability of development for the present and in the future. The conservation strategy is to serve as a management guide for integrating environmental concerns with developmental imperatives.

There are many aspects in social development of country which are creating hurdles for environmental conservations thus also for sustainable development. Some important problems are discussed below.

1. Poverty:

In 1972, the then Prime Minister of India, Mrs. Indira Gandhi emphasized, at the UN Conference on Human Environment at Stockholm, that the removal of poverty is an integral part of the goal of an environmental strategy for the world.

Poverty and a degraded environment are closely inter-related, especially where people depend for their livelihoods primarily on the natural resource base of their immediate environment. Restoring natural systems and improving natural resource management practices at the grassroots level are central to a strategy to eliminate poverty. The survival needs of the poor force them to continue to degrade an already degraded environment. Removal of poverty is therefore a prerequisite for the protection of the environment.

2. Population:

Population is an important resource for development, yet it is a major source of environmental degradation when it exceeds the threshold limits of the support systems. Unless the relationship between the multiplying population and life support systems can be stabilized, development programmes, however, innovative, are not likely to yield the desired results. We have reached nearly to 1. 22 billion and still our growth rate is 1.58%.[22] This growth rate is also a hurdle in achieving sustainable development.

This population growth eventually relates to education. Increases in population and resource use are thought to jeopardize a sustainable future, and education is linked both to fertility rate and resource consumption. Educating females reduces fertility rates and therefore population growth. By reducing fertility rates and the threat of overpopulation a country also facilitates progress toward sustainability. The opposite is true for the relationship between education and resource use. Generally, more highly educated people, who have higher incomes, consume more resources than

[22] Accessed at http://www.indiaonlinepages.com/population/india-current-population.html; visited on 6th February 2012.

poorly educated people, who tend to have lower incomes. In this case, more education increases the threat to sustainability.

3. Lack of Education:

Education is an essential tool for achieving sustainability. People around the world recognize that current economic development trends are not sustainable and that public awareness, education, and training are key to moving society toward sustainability.

From the time sustainable development was first endorsed at the UN General Assembly in 1987, the parallel concept of education to support sustainable development has also been explored. From 1987 to 1992, the concept of sustainable development matured as committees discussed, negotiated, and wrote the 40 chapters of Agenda 21. Initial thoughts concerning ESD were captured in Chapter 36 of Agenda 21, "Promoting Education, Public Awareness, and Training."

But in India majority population is not educated about the needs of environment conservation.

4. Lack of Integrated Policy:

First and important step of sustainable development requires an integrated policy for development. Such policy must be made with consultation with local people as their consultation makes themselves responsible for execution of such policies.

For example, a community with an abundance of skilled labor and technically trained people can persuade a corporation to locate a new information-technology and software-development facility nearby. Citizens can also act to protect their communities by analyzing reports and data that address community issues and helping shape a community response.

5. Lack of Proper Mechanism for Distributing Benefit of Natural Resources:

When benefits of natural resources which are in principal the 'common property' are not distributed in justifiable manner, some amount of discontent is spread among people who traditionally used such resources. Such discontent may lead to naxalism and other kind of violent activities. People involved in such anti-social activities are the people who may have played their active role in development of society. Thus country suffers in many folds, firstly by anti-social activity, secondly by loosing human life and resources, thirdly economic loss of state in preventing anti-social activity, and lastly of natural resources.

6. Lack of Basic Infrastructure:

Infrastructure of a country plays an important role not only in economic development of that country but also in environment conservation and thus in sustainable use of resources and sustainable development. Lack of infrastructure such as electricity, roads, transport means, water, storage facilities, and other basic amenities lead to abuse or wastage of natural resources.

7. Lack of Proper Basic Amenities:

Lack of proper healthcare, proper basic education may lead to migration of population from rural areas to cities. Such migration results in over burden of infrastructures in cities which may also be the cause of many kinds of pollutions.

THE WAY FORWARD:

All the major conferences on world environment have stressed on need of development of the economy with social equity and protection and conservation of the environmental resources. In recent times, cities have become places of wasteful use of non-renewable resources and urban environmental degradation. Apart from that, Climate change is posing a challenge to the world and it has the potential to affect the economies, rich and poor both. This is likely to affect the water supply and ecosystems among other things. Climate change would affect the poor of the world more because they are more vulnerable and does not have the means to protect themselves against the vagaries of extreme climatic conditions. Manmade pollution of water, air and environment seriously affect the climates.

Sustainable development presents the solution to the problem of environment conservation but its implementation has to be very cautiously. Poor and needy must be treated preferentially so that they may be given their due which was not made available due to social injustice.

Several traditional practices that are sustainable and environment friendly continue to be a regular part of the lives of people in India. These need to be encouraged rather than replaced by more 'modern' but unsustainable practices and technologies.

The traditional approaches to natural resource management such as sacred groves and ponds, water harvesting and management systems, etc., should be revived by creating institutional mechanisms which recapture the ecological wisdom and the spirit of community management inherent in those systems.

Development decisions regarding technology and infrastructure are a major determinant of consumption patterns. It is therefore important to evaluate and make development decisions which structurally lead to a more sustainable society.

In policy making participatory method must be adopted and integration of all needs including social and environmental be done.

Benefits of natural resources which are in principal the 'common property' are not distributed in justifiable manner.

JUDICIAL RESPONSE IN THE MATTERS OF CRIMES AGAINST WOMEN

Gyanendra Kumar Sharma[1] & Pranav Vashishtha[2]

Abstract

Let's get real, women are still dependent on men. No doubt in the present era, due to education some of the old traditions, belief and culture prevailing in society about women's dependent on men have vanished but equality in status and opportunity is still a dream, not only in India but in the global societies too. Parliament, on several occasions has amended the law but lack of proper implementation of law by executive and the judiciary is responsible for violation of human rights of women. The judiciary at its threshold has failed in timely redressal of human rights violation issues relating to women. The district judiciary also failed to protect the dignity of women during trial resulting in more human rights violations. Hon'ble the Apex Court and the Hon'ble High Courts in India, in so many judicial pronouncements, have directed the trial courts to protect the human rights violation of women. But, the judiciary at its threshold, even in the present era is unable to cope up with the speedy redressal of human right violation cases relating to women. The courts below should be sensitized enough not only for the redressal of grievances of women, but also to adopt a scientific mechanism for protection of dignity of women and for ensuring inexpensive and speedy justice delivery trough the adjudication of cases. The Courts should over come from the traditional and the technical approach prevailing all around the country with some exceptions. To the surprise, the investigating agencies and the courts both have neglected the recent development of forensic science in criminal justice administration system and are still based on traditional method of direct and substantial evidences.

Introduction

Everyday we apprise ourselves with some incidents relating to the crimes against women. The crimes against women are increasing. In Guwahati, the capital city of Assam State of India, a young girl was humiliated in presence of so many persons. None amongst the males present at spot had opposed it. Even a member of fourth pillar of Indian democracy, the press and media, was busy in recording the incident without troubling his intellectual conscience for the safety of women. It was only the telecast of this incident on National News Channels; the government came into action that too under the pressure of some non government organizations. We are also aware of Khap Panchayats decisions on the issues of social behaviour and social economic upliftment of women. Ultimately, who will decide what a women should wear, their liberty to use mobile, their right to marry, right to choose the profession of

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their choice for the survival. Khap Panchayats have tried to regulate the individual rights and liberty of women. These decisions are the violations of the right to equality and equal treatment. Surprisingly, one of the senior political leaders of Haryana has appreciated and supported the decisions of Khap Panchayats taken on the problem of increasing the incidents of rapes in Haryana. On this problem, it has been suggested by the Khap Panchayats that to curb the problem of rape in Haryana, the age of marriage of girls should be reduced from 18 to 15 years. In the present era of medical science, we know the consequences of early age marriage of a girl child on her health. Is it not the failure of State to stop the menace of heinous crimes like rape against women, but as per suggestion, the punishment of rape should also be give to girls by marrying them at an early age of 15? It seems to be a failure of democratic government. We know what has happened with 'Nirbhaya' in Delhi. That was not an incident of rape only, but the rape was committed in such a manner and motive as if 'Nirbhaya' was not a human being but an article or a sex object which can be used by anyone in any manner. No doubt, the court at Delhi has awarded the capital punishment to all the persons, and rightly so, because such heinous act cannot be accepted from a normal human being and with such an abnormality no person should be permitted to live in the society.

Mr. Amir Khan, a prominent actor and social worker in his programme 'Satymeve Jayate' based on the scientific research, has stressed that almost 80% of the women in India are suffering with the domestic violence. It is not the wife only facing the agony of domestic violence by husband but daughter is facing the domestic violence by father, sister by brother, granddaughter by grandfather etc. Male preference is a dominant feature of Indian society which resulted in 'foeticide' consequently disturbing the sex ratio in Indian social structure. In fact, the men want to control and regulate the life of the women at their whims. Proper attention on education, nutrition, food and other social benefits is not given for the women.[3]

The parliament of India has tried to change the scenario by enacting the Criminal Law Amendment Act, 2013. Not only the definition of rape and other related offences of sexual nature have been amended but the procedure has also been streamlined. In the Criminal Law Amendment Act, 2013, all forms of penetration such as pineal vagina penetration, pineal oral penetration, pineal anal penetration, finger veginal and finger anal penetration and object veginal penetration has been included in the definition of rape. Some efforts have also been made for streamlining the procedure such as the victim of rape or any other such related crimes should not personally encounter the accused in court. The judge is supposed to make such arrangements which are necessary to implement this procedure. A time bound mechanism has also been mentioned. It has also been recommended to record the evidence by video conferencing. Instead of it, the crimes against women particularly the crimes of sexual nature are increasing even after the provisions of deterrent punishment for rape.

Position of women in Indian Society- Undoubtedly, in the global societies, women still have the secondary status. Being a research scholar, and a feminist, for the satisfaction of my research conscious, I conducted an empirical survey and interviewed so many personalities on the position of women in the society. One of the Hon'ble Ex. Chief Minister has expressed that we should not even think for equality of men and women in the society. When asked the reasons, Hon'ble the Chief Minister replied 'women in India are considered as mother and goddesses since time

[3] Amir Khan, Gharailu Hinsa Kee Tradsi, Dainik Jagran, dated 18.06 2012, page no 10

immemorial. How a mother or goddesses can claim equality with male counterpart of the family or the society?' Hon'ble the chief minister also viewed on the present system of nucleus families with working husband and wife, including social, moral and family support to the young ones of the family

Hon'ble the Chief Minister was right on nucleus families and the lack of supportive family mechanism for children. But, whether every woman in the global societies can be considered and accepted as mother or goddesses to deprive them the rights of equality and equal opportunity with their male counterpart of the society. Considering women as goddesses and motherly figure, gives an idea about the individuality of women and other relational capacity. In relational capacity, as daughter, sister, wife or mother the women may have some rights and privileges. But, when we talked about the individuality of the women, no one is ready to even talk for equal status and opportunity. The failure of recognition of individuality of women also inspires whether a women is a person.[4] Person means a human being to whom law attributes personality. A human being capable of exercising rights and privileges and observing duties in the eyes of law is a person. When women are claiming individual rights which may be education, clothing, social recognition or the sexual orientation, it appears that women are lacking legal personality. 'Nirbhaya' incident of Delhi is an example. The way 'Nirbhaya' was behaved by five culprits shows that she was treated as having no legal personality.

After the 'Nirbhaya' incident, United Nations Organization has referred the rape as national problem of India. The statement of United Nations Organization shows that this national problem of rape has direct nexus with the male personality and mentality. Male domination in the society is also reflected from views of some prominent persons like Abhijeet Mukharjee, M.P. and son of His Excellency the President of India, commenting on assembly of girls, men and women against the incident of rape with 'Nirbhaya' in Delhi. Likewise the statement of a spiritual guru that if Nirbhaya had accepted the rapists as brothers, the incident would have been avoided again shows the male domination and bias male attitude towards women. No one has stated it that the rapists could have treated 'Nirbhaya' not only as sister but as a dignified human being of Indian society. This all reflects the gender bias which is deeply rooted in the society.

On the causes of this gender bias, the European Institute of Social Sciences[5] conducted a research on 'Human Behaviors'. The research was basically on the bias attitude of male towards female in the society. The results of research are alarming. As per the research, the male counterpart of the society considers the women as an article, a sort of thing and a sex object. And the fact that a man considers woman as an article, a sort of thing and as a sex object has developed as a genetical character. If a practice is consistently observed in a human behavior for a long period of time, its continuance observance develops into a genetical characteristic. The other part of research is more alarming that women genetically considers the another women as an article, a sort of thing and a sex object for the purpose of male counterpart of the society. Thus, a general say in the society that a man considers woman as an article, a sex object has been proved by the European Institute of Social Science and Research that this habit of men is due to the genetical characteristic.

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[4] Sudhir Kakkar, Is an Indian Women a Person, Times of India, New Delhi, Wednesday, January 9, 2013.

[5] Nazar Kaa Fark, Editorial Hindustan, Hindi Daily, 30-7-2012, page no.10.

Crimes against women.- In the present time the prevalent crime against women is the rape. No doubt UNO has referred it to be the national problem of India but it is a worldwide malaise.

Rape, as said above, is the prevalent crime against women in India and worldwide Regarding consequences of rape on women, Brown Miller Susan's[6] following passage is brain storming:,

> "...in rape the intent is not merely to 'take', but to humiliate and degrade.....Sexual assault in our day and age is hardly restricted to forced genital copulation, nor is it exclusively a male-on-female offence. Tradition and biologic opportunity have rendered vaginal rape a particular political crime with a particular political history, but the invasion may occur through the mouth or the rectum as well. And while the penis may remain the rapist's favourite weapon, his prime instrument of vengeance... it is not in fact his only tool. Sticks, bottles and even fingers are often substituted for the 'natural' thing. And as men may invade women through other orifices, so too, do they invade other men. Who is to say that the sexual humiliation suffered through forced oral or rectal penetration is a lesser violation of the personal, private inner space, a lesser injury to mind, spirit and sense of self?"

The above passage also shows that most prevalent crime against women is the rape and sexual exploitation. No doubt acid throwing and other types of crime against women other than rape are also prevalent crimes. Apart from it, almost all women in India have faced the agony of human rights violations in family and society, but the prevalent crime against the women is the rape and other sexual misbehaviour. In Ram Dev Singh's[7] case, His Lordship Hon'ble Justice Arijit Pasayat in Para no. 1 of the judgment has held as under:-

> "Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity-it degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman; it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim's most cherished of fundamental rights, namely, the right to life contained in Article 21. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized judge is better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos."

In this judgment, Hon'ble the Apex Court has also held that "two finger" test is illegal and unconstitutional being against the dignity of women. Hon'ble the Apex Court has directed not to conduct such test in future during investigations, and if the test has been conducted, further directed the courts at its threshold not to rely upon this evidence.

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[6] Brown Miller Susan, Against Our Will, 1986, reported and relied in (2004)5 SCC 241.

[7] State of Punjab Vs. Ram Dev Singh (2004) 1 SCC 241

Apart from the sexual offences, we can also see some other types of crime against women such as the crime to deprive the women from ancestral or self acquired properties. One thing is sure that whatever may be the nature of crime against women that is due to the patriarchal nature of society. The majority of crimes against women are of sexual nature, so, I am explaining this crime against women in brief.

After the 'Nirbhaya' incident, Govt. of India has enacted the Criminal Law (Amendment Act), 2013,[8] to redefine the sexual crimes against women. The crime of rape has been altogether redefined and I will not hesitate to say that this definition and inclusion of some other acts of sexual nature against women as an offence is a new era of criminal jurisprudence. The rape is redefined as follows:-

Section 375. A man is said to commit "rape" if he-

(a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) Inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

Under the circumstances falling under any of the following seven descriptions:-

First-	Against her will.
Secondly-	Without her consent.
Thirdly-	With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
Fourthly. -	With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
Fifthly.-	With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
Sixthly-	With or without her consent, when she is under eighteen years of age.
Seventhly.	When she is unable to communicate consent.
Explanation 1. -	For the purposes of this section, "vagina" shall also include labia majora.

[8] Criminal Law (Amendment Act), 2013, Act. No.13 of 2013

Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- A medical procedure or intervention shall not constitute rape.

Exception 2.- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

The rape is made punishable under section 376 of the Indian Penal Code. Section 376 of the Indian Penal Code reads as under;

Section 376(1) Whoever, except in the cases provided for in sub-section(2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,-

(a) being a police officer, commits rape-

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or.

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or.

(e) being on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(n) commits rape repeatedly on the same woman.

Shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life and shall also be liable to fine.

Explanation.- For the purposes of this sub-section,-

(a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) "police officer" shall have the same meaning as assigned to the expression "police' under the Police act, 1861;

(d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

Section 376A. Whoever, commits an offence punishable under sub-section (1) or sub-section(2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that persons' natural life, or with death.

Section 376B. Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.- In this section, 'sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of Section 375.

Section 376C. Whoever, being-

(a) In a position of authority or in a fiduciary relationship; or

(b) A public servant; or

(c) Superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or on the management of a hospital or being on the staff of a hospital abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

Explanation 1. In this section, 'sexual intercourse' shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Explanation 2. For the purposes of this section, Explanation 1 to section 375 shall also be applicable.

Explanation 3.- "Superintendent", in relation to a jail, remand home or other place of custody or a women's or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4.- The expressions "hospital" and "women's or children's institution" shall respectively have the same meaning as in Explanation to sub-section(2) of section 376.

Section 376D. Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

Section 376E. Whoever has been previously convicted of an offence punishable under section 376 or section 376A or Section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.

2013 Amendment also make voyeurism as an offence. The voyeurism is defined and made punishable under Section 354(C) which reads as under:-

Section 354C. Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanation 1.- For the purpose of this section, "private act" includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim's genitals, posterior or breasts are exposed or covered only in underwear, or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.

Explanation 2.- Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.

Likewise, stalking has been defined and made punishable in Criminal Law (Amendment) Act, 2013. Section 354(D) speaks as under:-

Section 354D.(1) Any man who-

(i) Follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or

(ii) Monitors the use by a woman of the internet, email or any other form of electronic communication.

Commits the offence of stalking:

Provided that such conduct shall not amount to stalking if the man who pursued it proves that-

(i) It was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or

(ii) It was pursued under any law or to comply with any condition or requirement imposed by any person under any law, or

(iii) In the particular circumstances such conduct was reasonable and justified.

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine".

Acts of sexual harassment has been redefined and made more elaborate. Section 354A of the 2013 Criminal Law (Amendment) Act provides as under:-

Section 354A.(1) A man committing any of the following acts-

(i) Physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) A demand or request for sexual favours; or

(iii) Showing pornography against the will of a woman; or

(iv) Making sexually coloured remarks,

Shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Human Trafficking is also punishable disclosure of identity of prosecutrix has also been made punishable and acid throwing has been made an independent offence under Section 326(A) and 326(B) which reads as under:-

Section 326A. Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to

imprisonment for life, and with fine.

Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

Section 326B. Whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

Explanation 1.- For the purposes of section 326A and this section, "acid" includes any substance which has acidic or corrosive character or burning nature, that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability.

Explanation 2. For the purposes of section 326A and this section, permanent or partial damage or deformity shall not be required to be irreversible.

Some procedural aspects have also been looked into. Proceedings in camera, avoid the face of the accused during recording of evidence when the prosecutrix is a minor and presumption of absence of consent of sexual intercourse when the woman testifies that there was no consent, are the important procedural parts which have been streamlined. An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act, afford an opportunity to exercise the right of private defence to cause the death of assailant, have also been comprehensively dealt with.

Thus, it will be apt to say that it is a beginning of new era of criminal jurisprudence particularly in the matters of crimes against woman relating to sexual offences. I will not hesitate to write few words about the implementation of amended provisions of newly enacted and amended law. At least half of dozens amendments have been made in criminal law with in twenty years without proper implementation. The time has come that every component of the judicial system must be committed for the proper implementation of the amended provisions.

Regarding judicial behaviour in the matters of women in India, recently the Hon'ble Apex Court[9] has held-

> "Almost for the last three decades, the Supreme Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl (brutally raped by appellant), who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualized. The torment on the child has the potentiality to corrode the poise and equanimity of any civilized society. The age-old wise saying that 'child is a gift of the providence' enters into the realm of absurdity. The young girl, with efflux of time, would grow with a traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to

[9] Shyam Narain v. State, NCT of Delhi, (2013) 7 SCC 77.

a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers. When she suffers, the collective at large also suffers."

The Apex Court[10] has also viewed that-

"It is a matter of great shame and grave concern that brides are burnt or otherwise their life sparks are extinguished by torture, both physical and mental, because of demand of dowry and insatiably greed and sometimes, sans demand of dowry, because of the cruelty and harassment made it out to the nascent brides treating them with total incentivity destroying their desire to live and forcing them to commit suicide; a brutal self humiliation of life."

The court[11] further said that-

"Respect for reputation of women in society shows the basic civility of a civilized society. No member of society can afford to conceive the idea that he can create a hollow in the honour of women. Such thinking is not only lamentable but also deplorable. It would not be an examination to say that the thought of sullying the physical frame of a woman is the demolition of the excepted civilized norm.

On position of bride in the Indian families, The Court explained-

Respect of a bride in her matrimonial home glorified the solemnity and sanctity of marriage, reflects the sensitivity of a civilized society and, eventually aptomized her aspiration, dreamt of in nuptial bliss. But, the manner in which sometimes the brides are treated in many a home by the husband, in-laws and relatives creates a feeling of emotional numbness in the society. Daughter-in-law is to be treated as a member of the family with warm and effect and not as a stranger with despicable and ignoble indifference. She should not be treated as a house-maid. No impression should be given that she can be thrown out from her matrimonial home at any time.[12]

It shows the responses of the higher Courts in India regarding the crimes against women. But the District Judiciary has yet not reached up to that standard and there are certain bottlenecks and constraints before the District Judiciary in dispensation of justice in the matters of crimes against women. The District Judiciary is suffering with traditionalism and technicalism. Because of this traditionalism and technical approach of the judges and other stakeholders of the judicial system we are unable to see a proper judicial response in justice delivery to the women. In this article, I am not discussing the constraints and bottlenecks before the District Judiciary which are working as barriers in dispensation of justice. I will prefer to mention some measures which should be beneficial to women even in present constraints. Through this article the following mechanisms are suggested-

1. **Adoption of Total Quality Management (TQM) Mechanism by the Judicial Officers-** When a judge is appointed to the District Judiciary, he starts working in a very technical way and in as usual manner. It is necessary that he should assert for change of atmosphere in the court for proper judicial productivity. Every judge should manage and arrange the court room, the chamber, the retiring room and the office smoothly within

[10] Gurnaib Singh v. State of Punjab (2013) 7 SCC 108.

[11] Shyam Narain v. State (NCT of Delhi) (2013) 7 SCC 77.

[12] Supra Note 10

the infrastructure provided by the government. It is not proper in the concept of total quality management that infrastructure should be demanded, but I am suggesting the mechanism to improve the atmosphere within the constraints and the bottlenecks prevailing before the judges. Moreover, in the present time, infrastructure is not a serious issue. Whatever infrastructure is provided that can be placed in a systematic manner to create a clean, healthy and good atmosphere in court room, office and chamber. By doing so, it will be a step forward for enhancing quality of justice. The concept of total quality management begins with clean, good and healthy atmosphere so that litigants and all others associated with the court functioning may feel comfortable.

One important criterion for the total quality management is a feedback mechanism adopted by the every judicial officer which is totally lacking in the judiciary at its threshold. Every judicial officer must adopt this mechanism of feedback as per the circumstances of the court.

2. **Adoption of scientific mechanism for adjudication-** It is also a part of the total quality management. The judges should not work in as usual manner, but on the basis of circumstances prevailing in the court, they must adopt a mechanism for disposal of the cases. While doing so, it should keep in mind that main functioning of the judges is the justice delivery through adjudication. Meaning thereby, justice delivery is the goal and the adjudication is the means. It should be avoided that cases are disposed of without ensuring dispensation of justice. It is only possible while the judges are adopting a scientific criteria mechanism for adjudication of cases resulting in justice delivery. This criterion may include age of case, cases relating to the crimes against women and children and cases relating to the senior citizens. Once this criterion is settled, it should be informed to the public litigants and to Hon'ble High Court. After adopting such criteria, the goal should be its implementation. To be very precise, the quantum oriented approach should be changed to justice delivery approach. This traditional and technical working has to be given up in favour of scientific mechanism adopted by every judge. One of the criteria of the scientific mechanism should be the recognition of right of every litigant to know the tentative judicial life of his case. It is the right of every litigant to know the tentative judicial life of the case from the judge in whose court his grievances are pending, and likewise, it is the corresponding duty of every judge to let him know in how many days, months or year his grievances are going to be redressed. The period so informed after considering the circumstances prevailing in the court, must be honoured. The judge should also be assertive to the fact that the proceedings in the court are running uninterrupted and other stake holders creating hindrance in smooth functioning of the court must be dealt with politely but firmly. For this, institutional support is also required in favour of uninterrupted functioning of the courts.

3. **Creating good atmosphere in the court-** Generally no person prefers to go to court. This is not because of the reason that he has no inner will to approach the court for redressal of his grievances, but the atmosphere prevailing in the courts is such that nobody feels comfortable there. We should not forget that if the society exists, the disputes between its inhabitants are natural consequences. The State should redress the

disputes and grievances. The redressal system lies in the judiciary and if the person seeking redressal is not comfortable in the system, justice delivery cannot be imagined.

The judge should hear the litigants very calmly. The judge should prefer to hear the litigant in person and only on law points; opportunity should be given to the advocates. In the present traditional and technical district judicial system, sometimes, it happens that no importance is given to the litigant except recording his evidence that too in a very casual manner with half conscious presence of the judge. This has to be avoided and all possible opportunity of hearing should be given to the litigants on points of facts.

Here, it will be proper to mention that there is a distinction in judicial approach before the District Judiciary and before Hon'ble High Courts and the Supreme Court. The District Judiciary is the only court where the judges get opportunity to encounter with the litigants, to know the real factual position. In most of the cases Hon'ble High Courts, and in all the cases Hon'ble Supreme Court, have to decide on the point of law, even the presence of litigant is not even required. Accordingly, the judge should be very keen in providing opportunity of being heard to the litigants.

4. Adoption of scientific mechanism including the forensic science- The recent two judgments of Hon'ble High Court of Uttarakhand in Criminal Appeal no. 133/2010, Janardan Tiwari v. State of Uttarakhand and Criminal Appeal no. 187/2010 Amar Singh v. State of Uttarakhand decided on 18.10.2013 and 28.05.2013, respectively, shows the importance of forensic science, in the Criminal Justice Adjudication System. The accused persons in both of the appeals successfully created a reasonable doubt in the prosecution story on absentia of forensic science evidence. In Amar Singh's case, no DNA profile of Skeleton was matched with the family members of deceased causing the doubt regarding the recovery of Skeleton, whereas, in Janardan Tiwari's case the blood tests and other forensic evidence was not collected by Investigating Officer to prove the case beyond doubt. There was an appropriate opportunity to the trial court to collect forensic material, but the court also failed in passing orders for forensic science evidence collection. Forensic Science is an exact science and the forensic report can be used as conclusive proof of the fact mentioned in report. But, lack of awareness regarding new developments in forensic science and inaction of investigating officers for collecting forensic material and to get the Forensic Science Laboratory Report to prove the guilt of the accused, which are important factors for criminal justice system, warrants the acquittal of the accused persons. The hostility of witnesses has also compelled the judicial brains for suggestive use of forensic science. In the matters of crimes against women, by using forensic science tools and techniques, every step in the criminal justice administration may be made friendly and comfortable to the victims and witnesses.

Hon'ble the Apex court in several judicial pronouncements has held the "two finger" test to be void, illegal and unconstitutional being against the dignity and liberty of a woman. This test is also against the right to privacy of a woman. No investigating officer should order or request the medical officer to conduct this test. If the test is conducted, it is obligatory over the courts not to give any reliance on the finding of the test. Meaning thereby, the factum of crimes against woman relating to the sexual exploitation has to be proved without the help of this two finger test. The reason is obvious; that a woman who has lost her chastity voluntarily by exercising the right of sexual orientation, cannot be presume to give a licence to the society to commit the act of sexual exploitation against her. The forensic science can play a vital role in the following matters:

(i) In fixing the identity of the accused.

(ii) In proving the manner of committing crime.

(iii) In disclosing actual mode of coming crime.

(iv) In proving the crime against the accused beyond reasonable doubt.

While saying this, it should not be forgotten that in Selvi's case, Hon'ble the Apex Court has held that Narco analysis, polygraph test (lie detector test) and BEAP (Brain Electrical Activation Profie) test to be unconstitutional on several counts. In short, these two tests, lie detector test and brain mapping test are no more available to the system of judicial administration to prove the guilt against the accused without the consent of the accused. Instead of it, the new dimensions and discoveries in the field of forensic science by the forensic experts can be used to prove the guilt of the accused in the matters of crimes against women. Face identity of the accused, fingerprints and DNA profile pattern are rarely used by investigating officers and by the courts in such type of crimes. All the investigating officer should be sensitize to collect the forensic material from the place of commission of crime without any delay. It is the responsibility of the courts as well to ask the Investigating Officer for collecting such type of evidence and material. The courts cannot interfere in the matters of investigation, but asking to collect the forensic material/evidence is not the interference but an addition to collect scientific material and evidence. In no way, it can be term as interference. I am neither a forensic expert, nor the judges, but the subjective and objective knowledge in a particular case make a judge expert of experts even in forensic matters. I am sure, if the new researches in the forensic science are applied and implemented the following consequences will follow:

(i) Generally, the investigation is delayed. The cause of the delay may be non availability of the direct evidence to prove the guilt. If forensic material and evidence is available, this delay in investigation can be curtailed. The new researches in forensic science provide the accurate results which are very well reliable in the courts of law.

(ii) The quality of investigation is bound to improve. It will be beneficial to move from the traditional mode of investigation to the modern scientific way of conducting investigation and collecting evidence during investigation.

(iii) The forensic evidence may give an opportunity to the court to maintain the dignity of the woman (victim) against whom the crime is committed in the court premises. By saying adieu to the traditional evidence, which is the requirement of law, made by Supreme Court, it will be easier for the court to prove the guilt against the accused with the help of forensic science evidence.

(iv) The burden of recording number of witnesses will reduce. In the technical trial, numbers of witnesses are examined to prove the guilt against accused. By introducing this forensic evidence and material before the courts, only material witnesses are required to be examined and their evidence may be corroborated by forensic evidence. This will also result in curtailing the delays which is a prevalent problem before the courts dealing with criminal adjudication.

(v) The goal of courts is to do justice through the adjudication. Meaning thereby, to reach to the truth is the goal, whereas, disposal of case is a process to reach to the truth. Forensic evidence and material will help the

court to reach to the truth quickly, qualitatively and sharply.

(vi) It will result in improving the quality of adjudication and justice delivery.

(vii) By introduction of forensic evidences in the courts, it will also make the court proceedings less expensive. Delay is directly related to the cost of the justice delivery process. By introduction of forensic evidence in criminal justice administration, delay can be curtailed and consequently the court proceedings will be less expensive.

(v) The discipline in the courts- This means the regulation of the behaviour of a judge as per legal, social and ethical norms. A judge should properly and productively regulate his behaviour in courts and outside the courts. Discipline is a quality inbuilt and linked with the soul of a person. If it is not inbuilt, it can be developed through a scientific training. That is the reason Hon'ble the Apex Court has directed a lengthy scientific judicial education and training programme to the judges, at the time of recruitment and periodically, as refresher courses. Discipline is a concept and subject of judicial education having little concern with the judicial training. A judge should be self disciplines, disciplines in family affair, in economic affairs, in social affairs and in ethical affairs. If it is, I am sure there shall be no occasion to discuss the integrity of the judges. Nobody even can think of any problem of integrity with any person, who is disciplined in all vocations of life.

Discipline is also a concept of total quality management. It is very easy and safe to say that one should be disciplined, but difficult to learn the habit of being discipline. Time management is more important and time management can only be learnt through the healthy eating habits. Ultimate crux of being discipline is that first of all a judge should be disciplined in food habits. Without going to the controversy whether one should take vegetarian or non-vegetarian, I will prefer to mention that one should eat the food material in the natural form, as made by Almighty God. Eskimos cannot survive on vegetarian food, but they are eating the non-vegetarian food material as such provided by God. Converting the food and change in its quality by external acts, is not a good food. I am sure unhealthy food will make man indiscipline. In fact, every person is a judge for himself to decide what food is good for his health. A healthy person only can manage to be disciplined. The crux of the matter is that judge should lead the quality of a saint. The saint here means the person who is discipline in all vocations of the life may be eating habit, personal habits, social habits, family habits or judicial functioning habits. The above concepts for me are not the platonic justice which is unachievable. The concepts are very much achievable. Every person is having some inbuilt quality and that should be developed by a scientific, social, ethical and legal training by Judicial Academies. If it is done, I am sure we will see justice prevailing in District Courts and not mere adjudication.

CONSUMERS IN E-COMMERCE: A NEW CHALLENGE FOR CONSUMER PROTECTION JURISPRUDENCE IN INDIA

Gagandeep Kaur*

"When you put yourself in the customer's shoes and begin your dialog from there, an immediate connection develops that stems beyond basic commerce and encourages loyalty"

Steve Maraboli

Abstract

E-commerce, today has become an essential feature of social life. As it has become an integral part of social marketing behaviour, it has resulted into various hopes and problems as well. E-commerce has brought a revolution in the sphere of Cyber jurisprudence. Consumers are the backbone of global economy. As the economy has changed, therefore, the nature, choice, behaviour and mode of shopping have also changed in the online environment. The article attempts to examine the prospects of innovative trends in the concept of consumer protection jurisprudence. It is note-worthy to point out that a strong consumer protection policy is needed in India in order to facilitate consumer transactions and to respond to the increased ambiguity and risk in online transactions.

Introduction

The footprints of Indian- economic history depict that the trade or commerce has been one of the most prominent factor of Indian economy. Commerce has played a leading role in making India as a universal center of wealth throughout ancient civilizations. In the new millennium global economy has witnessed a new revolution- The Entrance of World from Physical World to Cyber World. The present universe is surrounded by the power of new mantra namely 'Information Technology'. By chanting this mantra the whole world has become a 'global village' and the economy has become 'global -economy'. With the appearance of Information Technology (IT) most of the countries have switched over from paper based commerce to e-commerce and from paper based governance to e-governance. The momentous development in the economy has witnessed the geometric expansion of trade, commerce and marketing in the commercial world in the lap of cyber space. The philosophy behind the Indian economy has transformed into a new concept that is digital economy. The digital economy is also sometimes called the Internet Economy, the new economy or the Web economy. In this new economy digital networking and communication infrastructures provide a global platform over which people and organizations devise strategies, interact, communicate, collaborate and search for information. The digital economy has helped to create an economic revolution, which is evidenced by unprecedented economic performance and the longest period of uninterrupted

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economic expansion in history. Consumers constitute the largest public body in the country. Every person is a consumer in one transaction or the other. A consumer can also be a producer and a producer or manufacturer cannot exist without himself being a consumer. Consumers are backbone of global economy. As the economy has changed, therefore, the nature, choice, behavior and mode of shopping has also changed in the online environment.

E- Commerce: A New Marketing Orientation

E-Commerce is a new gateway of technological success of the Indian business scenario in the era of information explosion. E-Commerce has revolutionized business activities globally through the use of information and digital technology in the new millennium. Digital technology provides effective communication platform to communicate to the consumers directly or through on-line marketing. It means conducting business through network technology. E-Commerce means application of electronics in commerce. 'e' is a question of technical capability and commerce is the way in which that capability is applicable. E-Commerce is a gateway of technological success of the Indian business scenario in the era of information explosion. With E-Commerce, shopping can be done at any time by using our "fingertips" instead of our "feet". The geographical barriers have become a blur. A shop located in another country and a shop next to your home is both on "one finger-click" away. In the context of E-Commerce, the relationship is not just selling through the web but managing customer relationship in general. Electronic commerce is all about commercial transactions, whether between private individuals or commercial entities, which take place in or over electronic networks. The only important factor is that the commercial transactions take place over an electronic medium.

Consumers create markets through demand of goods, services and ideas. Marketing is not a fixed system of concepts. Marketing is one of the most dynamic fields. During the last thirty years, multidimensional developments have been taken place in the field of marketing. Traditionally, a 'market' is a physical place where buyers and sellers gather to exchange their goods. In the recent years, marketing operations have undergone tremendous transformation in India due to emergence of Internet, Computer, Telephones, Mobile, Fax machine and other electronic gadgets. A new era of information technology has launched new marketing terminology like e-marketing, tele-marketing, kiosk marketing, e-shopping, on-line marketing, e-commerce marketing, e-business, cyber space marketing. E-Marketing facilitates quick and convenient shopping to consumers. Now instead of physical market place, cyber market provides tremendous speed of exposing amazing products at an amazing speed.

Entrance of Consumers in New Borderless Dimensions of E-Commerce: E- Consumers and Online Shopping

Traditionally, a 'market' is a physical place where buyers and sellers gather to exchange their goods and services. Presently, E-marketing in more general terms is buying and selling process that is supported by electronic means. The core focus of the Internet-business or e-marketing is on the creation of a new on-line market, customer satisfaction, opening new vistas for consumers and so on. Commerce in the on-line world has created the promise of 'anything, anyway, anytime." Customers can have their own version of virtually any product. Therefore, customer-driven customization is becoming crucial because of too many choices they have. E-consumers are consumers who are buying, consuming or purchasing goods or services using digital medium (Internet or any other electronic platform). The e-

consumers are consuming both tangible (physical goods) as well as intangible (digital) goods. The digital medium helps e-consumers to place orders for physical goods using e-commerce business models, like Business-to-Consumer (B2C), Consumer-to- Consumer (C2C). It helps to download digital goods in the form of mp3 music files, data, content and software etc. The foundation of E-Commerce has been strengthened by service-oriented products like: Hotel Booking, Travel Tickets, E-Mails and other modes of communication, On-line Advertisement of Matrimonial and Sale and Purchase of Goods.

With E-Commerce, shopping can be done at any time by using our "fingertips" instead of our "feet". The geographical barriers have become a blur. A shop located in another country and a shop next to your home is both on "one finger-click" away. In the global world, consumer is not a KING. A customer will have to satisfy himself before paying for any product and in this process, he uses his five sense organs like: Eyes, Ears, Skin (Feel), Nose and Tongue. Internet is now capable of satisfying only two senses: Eyes, Hearing. However due to lack of privacy, trust and security, this type of E-Commerce has chances of premature death survived by bankrupt companies and jobless computer professionals. In the real world, a consumer goes into shop, selects commodity and hands over cash in return for the goods which he carries away. The risks are very small, and even if things go wrong, consumer can usually exchange the faulty goods. Consumers know where to go back to shop because bricks and mortar rarely move overnights. However, when trading over the Internet, things are not simple: The dream of virtual trader can suddenly become a nightmare.

Threats to Consumers in Online Shopping or E-Commerce

Violations of rights of e-consumers (consumers using Internet), a 20th century foetus of technological development has grown to an epidemic and has become uncontrollable in the 21st century. Online shopping has already stepped into people's lives, and many people enjoy the convenience and benefits from it. But this new model of business transactions also exerts great impact on the traditional civil and commercial law. Cyber crime refers to all the activities done with criminal intent in cyberspace by using the medium of Internet. These could be either the criminal activities in the conventional sense or activities newly evolved with the growth of the new medium. Any activity, which basically offends human sensibilities, can be included in the ambit of cyber crimes. In online shopping most of the fundamental rights of consumers have been violated. The violations of these rights are not protected in any of Indian legislation. To adjust this new phenomenon, the existing legal norms cannot reach a lot of places and also have a lot of controversy. Some of threats to consumers in online shopping are highlighted as under:

- Since the cyber-consumer does not come face to face with the seller in an online purchase of goods, therefore, quality of delivered goods, non-delivery, deficiency in services and other frauds to consumers increases. Goods are purchased online from the cyber market and delivered later. The cyber-consumer does not get the opportunity to examine them. In case of defected ones, the process to repair is not trustworthy.
- In online shopping the identity of seller as well as buyers is virtual, therefore transaction process model is filled with uncertainty. In the traditional contract of sale, due to face to face transaction, the seller has corresponding business places. It is easy to determine the identity of the seller. However, in online shopping, especially in the trading system and third party cases, the

seller is only exhibited by electronic identity and network outlets.

- Electronic Contract is a valid contract under Chapter III of the Information Technology (Amendment) Act, 2008. Most of legal questions on the validity of sale in online contracts are still unanswered like an online contract entered by one party under Mistake, Misrepresentation and Fraud innocently.
- Retail web-shops can also disappear easily after booking orders and receiving payments through credit orders.
- Internet is a golden thread which runs throughout the fiber of e-commerce. Internet facilitates e-commerce; it is also a medium which can be misused by unscrupulous retailers and traders to exploit consumers. Since the Internet is an effective and very cost-friendly medium of communication, fraudulent schemes with fictitious promises of multiplying the consumers' money by several times in a short period, are also on the rise.
- With the growth of advertising on the Internet, other unfair trade practices such as misleading advertisements, false information and fraudulent seller are also likely to become rampant.
- The applicability of the laws which are applicable on consumers in traditional commerce and cross-border e-commerce also raises issue of jurisdiction of consumer courts in India.
- Legal issues relating to taxation, copyright and trademark in e-commerce are yet to be resolved.
- E-bay (C to C) is a new stream in e-commerce. It is not clear that does it cover under the definition of 'Consumer' under the Consumer Protection Act, 1986.
- Privacy issues like hacking of password, ATM account numbers and misuse of personal information through Phishing and Pharming are yet to be resolved. An ordinary citizen who is not computer expert can easily be entangled within the complexity of network protection.
- The Internet has improvement transparency in prices and brand selection, but not so much transparency in quality of products and services. The e-consumer is also more manipulated as a result of polished marketing strategies and less in control of what exactly happens with data, information and communication processes.
- Consumers usually lack the opportunity to obtain sufficient information about the identity of the supplier; the terms and conditions of any transaction (including the price of the goods and services); details of delivery costs; the quality of the goods or services; and fair, timely and affordable dispute resolution.

Plethora of Legislations for Consumer Protection : A Reflection of Indian Consumer Protection Jurisprudence

Under Indian Consumer Protection Jurisprudence the legal shield to consumers from the protection of malpractices has been provided since the time of Manusmriti and Kautilya. In the Medieval period Muslim ruler Ala-ud-Din Khalji had introduced strict price-control measures. In British period and Independent India several laws for the protection of consumers has been enacted namely: (1) The Indian Penal Code, 1860;

(2) The Indian Contract Act, 1872; (3) The Sales of Goods Act, 1930; (4) The Agriculture Produce (Grading & Marking) Act, 1937; (5) Drugs and Cosmetics Act, 1940; (6) Forward Market (Regulation) Act, 1952 (7) Prevention of Food Adulteration Act, 1954 (8) Essential Commodities Act, 1955 (9) Trade and Merchandise Act, 1958(10) Hire Purchase Act, 1972; (11) The Standards of Weights & Measures Act, 1976; (12) Monopolistic and Restrictive Trade Practices Act, 1969, 1984; (13) The Bureau of Indian Standards Act 1986 (14) Textile (Consumer Protection) Regulation, 1988 (15) The Consumer Protection Act, 1986 and many other legislations. In order to pave the way for the development of e-commerce and Internationally acceptable level of legal uniformity and compatibility of rules and practices, the United Nations Commission on International Trade Law (UNCITRAL) established by the United Nations General Assembly in 1996, adopted the Model Law of Electronic Commerce in 1966. On the foundation of UNCITRAL Model Law, India has enacted the Information Technology Act, 2000; which has been amended in 2008. Unfortunately in India, we are just thinking of touching the tip of the iceberg through ad-hoc measures. In India, the Information Technology Act, 2000 is silent on cyber consumers. The Guidelines for Consumer Protection in the Context of Electronic Commerce, approved on 9 December 1999 by the OECD Council, are designed to ensure that consumers are no less protected when shopping online than they are when they buy from their local store or order from a catalogue. The aim of these guidelines is to encourage: fair business, advertising and marketing practices; clear information about an online business's identity, the goods or services it offers and the terms and conditions of any transaction; a transparent process for the confirmation of transactions; secure payment mechanisms; fair, timely and affordable dispute resolution and redress; privacy protection; and consumer and business education. However the implementation of these guidelines is yet to be applicable in India. Moreover, people are not aware about these guidelines for their protection in e-shopping. The Bible on cyber crime is The Information Technology Act, 2000. However, not even a single provision has been enacted for the protection of consumers in online shopping. It is concluded that this is the greatest grey area which must be tackled for growth of online shipping in India.

Conclusion

With this 'e'-revolution electronic commerce has emerged as the potential emblem of a new worldwide virtual economy. With the development of an invisible world, in which consumers from all corners of the globe do business, difficulties in implementing traditional law are exacerbated. Traditional policies of consumer protection are not suitable for the Internet age and it is need of the time to make suitable amendments in Indian legal regime. The applicability and effectiveness of traditional rules of consumer protection in the online environment is limited. In this online shopping, on one hand, Consumers are tendered convenience, quicken and global choice in services, goods and, more importantly, prices. However, on the other hand, the Internet implies new hazards for consumers in the environment of e-marketing. The consequences of shopping in the borderless world of the Internet function differently from the offline world in various ways. The position of the consumer in an electronic environment is primarily weaker when it comes to issues concerning privacy, payments and transactions. Consumers usually lack the opportunity to obtain sufficient information about the identity of the supplier; the terms and conditions of any transaction (including the price of the goods and services); details of delivery costs; the quality of the goods or services; and fair, timely and affordable dispute resolution. Consumers using the Internet are usually obliged to pay entire purchase amounts in advance. In India the concept of 'E-Consumerism'

is an ignored phenomenon. It is need of the time to adhere to the concept of e-Consumerism. e- Consumerism is a movement of the consumer, by the consumer and for the consumers for the protection of their rights in on-line market. In India a strong consumer protection policy is needed in electronic commerce in order to facilitate consumer transactions, to respond to the increased ambiguity and risk in online transactions, to deal with violation of right of consumers in on-line market and to protect consumer interests in the formulation of legislation regarding Internet transactions.

QUEST FOR INFORMATION - A CONVERGENCE OF RIGHT TO INFORMATION WITH OTHER CITIZEN FRIENDLY ACTS

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Abstract

The information and disclosure of genuine information for public purposes is a base for a strong democratic set up. In the field of Indian judiciary the introduction of the Right to Information Act, 2005 is work as a revolution in the whole country. Under the provisions of this Act an effort has been made to social justice for a common people. Through the provisions of this Act, a common man can ask the information from any authority in a prescribed manner from the authorities who covered under this Act. The amalgamation of Right to Information Act 2005 especially with the elucidations made in section 4(1) b a mandatory provision for the Public Authority can create wonders if converged with other citizen friendly Acts. The need of the hour is to make suitable researches in this arena by stakeholders, law students as well as the sincere efforts to be made by public authorities themselves.

The Right to Information Act, 2005 since its enactment has unravelled innumerable closets of mystery hitherto unknown to us. The course of implementation of RTI has depicted various aspects of problems, grievances and pathos of the people who generally give a wide acceptance to Right to Information as an instrument to bring redressal to everything with the help of Right to Information Act 2005. The length and breadth of the country alongwith the ever rising populace has no dearth of problems, some so colossal that they have not seen the sunshine till date. Nevertheless, the general public, with the advent of RTI has been so enthusiastic with outcome and results, that they are seeing Right to Information as a messiah for every problem that come into their way. But the magnanimous question is 'Does Right to Information Act 2005 encompasses in itself all the necessary prowess to slash out all the problems confronted by the country's populace in all its totality?'

All those who have been using the various appendages of the Act will give an affirmative answer. The reason being the exact objective of the Act is to impart information to the seeker or more precisely the applicant. The ramifications of various clauses hover around the nitty-gritties of modus operandi for implementation of the Act which has an unidirectional approach of time bound aim of imparting information. Nonetheless, the mere texture of the Act has been interwoven through a perfect wiremesh of do's and don'ts in a manner which suffice the basic process of implementation of the act and the target of imparting exact available information therein.

To be more precise, the Right to Information Act renders ample space to the government institutions, public authority first to adopt the basic cardinal of self

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disclosure as prescribed in the clause 4 of the Act and take every plausible step in the arena of suo moto disclosure of information, both by preparing manuals as well as displaying them electronically through their websites. As eight years have passed away since the enactment of Right to Information, most of the Public Authorities have completed the mandatory compliance of Section 4(1)(b) of the Right to Information Act.

The sincere and honest approach of the Central and Public Authorities have exhibited praiseworthy piece of work through presentation of manuals. Nonetheless, certain lacunas remain in this arena where public authorities have not come up to the aspirations of the Act in showing their capability pertaining to compliance of section 4(1)(b) of the Right to Information Act. The pertinent question is that how is the compliance of section 4(1)(b) i.e. preparation of manuals so important and the answer lies in the spectrum of subjects which are elucidated in the 17 points of the above section.

The manuals prepared according to the spirit of these 17 points depict the structure, function and duties and responsibilities of the public authority and thus imparts a holistic disposition of the public authority as such. More explicit the disposition, less room for any information to be sought or for that matter minimum questions or information would be asked.

With the ever growing number of applications preferred under Right to Information throughout the nation, in the last eight years, it will be quite appropriate to state that the efforts made by public authorities in Preparating of Manuals u/s 4(1)(b) have not fulfilled the requisite expectation of the public mind and the blanks and gaps remain to be filled.

In brief the obligations u/s 4(1) (b) for a public authority is as follows:

1. Introduction (of the public authority)
2. Particulars of Organization, Functions and Duties
3. Powers and Duties of the Officers and Employees
4. The rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions
5. The particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or administration thereof
6. A statement of the categories of documents that are held by it or under its control
7. A statement of Boards, Council, Committee and other Bodies constituted as its part
8. The names, designations and other particulars of the Public Information Officers
9. Procedures followed in Decision Making Process
10. Directory of Officers and Employee
11. The Monthly Remuneration received By Each of its Officers and Employees, Including Systems of Compensation as Provided in Regulations
12. The Budget Allocated to Each Agency (Particulars of all plans, proposed expenditures and reports on disbursements made)

13. The Manner of Execution of Subsidy
14. Particulars of Recipients of Concessions, Permits or Authorization Granted by it
15. The norms set by it for the discharge of its functions
16. Information available in an electronic form
17. Particulars of the facilities available to citizens for obtaining information

The elucidations made in the previous paragraphs are a brief testimony to what the above basic cardinals have to elucidate. Any manual prepared by a public authority indicates the level of inclination for suo-moto disclosure which is an absolute necessity for implementing Right to Information in right earnest.

Given this scenario one would always hope that every public authority - be it a Chief Medical Officer's office, be it a Director of Education's office or be it a Collector's office, the manuals prepared u/s 4(1)(b) are sufficient enough to provide information from cover to cover, as far as the information pertaining to logistics and infrastructure is concerned.

At the outset of this write - up, it was elucidated that the applications seeking information has seen a augmenting trend over the last eight years throughout the nation clearly denoting the fact that although best of manuals could impart several information, they did not quench the thirst of the hydra - headed seekers of information with their million tentacles.

In this context, all the right thinking stake - holders should put their heads together in carving out a niche wherein Right to Information Act, 2005, alongwith several other citizen - friendly Acts can be taken to a point of convergence from where a ray of hope can arise for the betterment of society at large.

Let us start with the Consumer Protection Act, 1986. This Act mainly imparts 8 rights to the consumers, which are as follows -

1. **The right to satisfaction of basic needs**
2. **The right to safety**
3. **The right to be informed**
4. **The right to choose**
5. **The right to be heard**
6. **The right to redress**
7. **The right to consumer education**
8. **The right to a healthy and sustainable environment**

With reference to point number 3 i.e The right to be informed. It is imperative for a service provider, manufacturer or a seller to impart maximum information to his consumers pertaining to the services or good that he is providing or selling. The consumer as such has full rights to be informed about the product or the services for which he is paying an amount for the same.

But in reality, the scenario is altogether reverse. The Indian consumer's untold miseries are endless. The food and food - products, the medicines, the pesticides, the fertilizers, the seeds, the building materials and hundred other consumer goods are

marketed and sold to the public without proper and complete information. For example -

(i) The preserved food items viz. sauces, jams, pickles and several other food items generally display 'Class II Preservatives Added', 'no artificial flavours', 'no natural colours used' etc. We have become so used to with these labels that we tend to overlook the matter not very much pondering over the contents. The question hereby is that the half baked and incomplete information leaves room for questions like what are the natural additives, what are the class II preservatives? and what are the other classes of preservatives eg. class I & class II (if not others)? Why the class II preservatives are the ones allowed as edible. Now the point is without going into litigation with the private manufacturers under Consumer Protection Act, the correct information can be sought from a Public Authority - in this case it may be the Food Protection Organization (FPO) or the designate officer under the newly implemented Food Security Act, under the Right to Information Act.

(ii) The food material which is generally served by the open eateries now a days are also playing havoc with the life and health of the consumers generally the younger generation of the society. Nevertheless, the ingredients used by these eateries should as a mandatory process, exhibit information of the constituents, their expiry dates and other health related information, thus, leading to hazardous results. The public authority in charge of examination and scrutiny of purity of food materials catered to the public, should exhibit the standard, measurements, statements pertaining to purity of food, dates of tests etc in through a fixed process and this can very well be materialized through a process of self discloser u/s 4(1) b.

(iii) The health sector is one such arena where umpteen number of information are sought by thousands of stakeholders. The spectrum of requisite information is infinite and as magnanimous as the domain of Public Health itself. The general public's inquisitiveness to avail information pertaining to availability of low cost generic medicines, subsidized disposable paraphernalia, which hitherto meant for poor patients are screamingly absent from their desired space, and other information pertaining to various schemes for the welfare of the poor patients. But the pertinent question is that has the medical Health Department given out its explicit information pertaining to availability of say anti rabies / anti venom injections in the far flung areas? Or are the maternity and neo - natal care information are articulately exhibited in the remotest villages. Is it not a complacent approach on the part of Public Authority to post certain slogans on family planning on the walls of the hospitals, and thus put a full stop on their duties. Nowhere have we strived to exhibit the full and complete information about cautious usage of oral feminine contraceptives pertaining to their side affects. Perhaps the need of the hour is to take out the priceless information to the nook and corner of the villages and blocks, and further. In the process of doing so we can always converge the Right to Health and Right to Information at one point.

Some other Rights enacted by the government viz. Right to Education, Right to Food, Right to Safety etc. have been widely acclaimed by the masses as their daily needs have also been supplemented with but in these arenas too a long path has to be covered in arena of imparting information.

Keeping these in mind, let us ponder over a few questions and keep the loose ends open for appropriate public authorities to answer and react as well -

(a) The chemical fertilizers available in the market generally do not impart a exact ratio of NPK (Nitrogen, Phosphorous and Potassium). On one hand it is the violation of Right to be informed under Consumer Protection Act 1986, and on the other it clearly shows the apathy of the Public Authority to provide ample information to the public and the farming community at large.

(b) A packet of salt available in the market proudly depicts that it has been Iodized, but then it is again an incomplete information as the state of iodization is to be exhibited in parts per million (ppm) which can then be calculated for its exact level of value that can prevent Thyroidism. Also, the level of Iodine decreases if the food is overcooked, making it imperative for the salt to be added in the last phase of cooking so as to prevent Iodine loss. The general public should posses a sound knowledge that such grievances should be communicated to a particular cell in the Health department and a speedy redresal should be sought for. Here again the question arises that dissemination of information should initiate from the appropriate authority who can take su0 - moto steps in informing the public about the salty something through whatever means is justified.

(c) The statutory warning printed on the packets of cigarettes says 'Cigarette Smoking is Injurious for Health', the question is how much injurious? Is the message articulate enough to inform the public that such an amount of tobacco can cause oral cancer? Is it not imperative for the Public Authority of concerning department to impart information on the product itself? To be more precise, the public authority in this case may be as well as in this case of self disclosure should published a concise brochure stating the outcome of cigarette smoking and tobacco intake and distribute them freely at public places viz schools, hospitals, parks, railway stations bus stops etc.

(d) The Road Safety measure are taken time to time by Public Authority existing in Domain of Transport. In this arena, one is at awe to see that a two wheeler driver is only checked for wearing of helmet or not. To be very precise, the Public Authority of Transport department should have seriously informed the citizens that a helmet with ISI mark is only valid and nothing else. On the pretext of complying with provisions of section 4 (1) b of RTI Act the Public Authority of the transport Dept should publish and publicize the road safety rules Standard of Motor vehicles and Accessories and other related issues.

(e) The Operation Flood warrants for immediate examination of the sample of milk which are marketed, but in reality the examination for their state of adulteration is not amply published. The Public Authority is yet to impart information to milk buyers regarding availability of free test - kiosks in every village and block.

(f) The public authority existing in the domain of fuel sector plays a significant role in public life. The petrol pumps and LPG gas stations have lately become instrumental for rise and fall of the governments. Given this scenario, the self disclosure by the public authority regarding rates of fuel everyday, functions of dispensing units of the purpose as to when they have been checked when the standard of units have been examined, the process of examination of purity of fuel, weight of the LPG cylinders as to when they

have been examined in gross, who has been the examining authority. All these should be exhibited on the fuel station itself and this can very well be done through compliance of section 4(1) b of the RTI Act.

(g) The public authority existing in the Legal Metrology Dept also plays a very significant role in public life but the irony is the people at large know very little about the impact of laws that exist as well as the measures of redressal given to them. The matter of the fact is that the laws pertaining to legal metrology Dept ranges from sweetmeat boxes to gold jewelry, to the meter reading of taxis to the balances of fruits and vegetable vendors. The lesser known facts of the exact rules and regulations compel the general public to confront the wrath of the dishonest seller coming heavily on the consumer's pocket. Therefore, the public Authority of Legal Metrology Dept should publish and publicize details of the Weight & Measurement Act in a very simple and understandable language so as to make the consumer understand that the weight of the sweetmeat box is differently priced than that of the sweet itself, that the gold jeweler he or she is purchasing from his / Her handsome salary is rightly weighed and the motors rotating in petrol pumps are standardized and for that matter the potato vender does not weigh the vegetable with pebbles or stones.

The amalgamation of Right to Information Act 2005 especially with the elucidations made in section 4(1) b a mandatory provision for the Public Authority can create wonders if converged with other citizen friendly Acts. The need of the hour is to make suitable researches in this arena by stakeholders, law students as well as the sincere efforts to be made by public authorities themselves.

INTERNATIONAL COMMERCIAL ARBITRATION AND LEGAL ISSUES IN INDIA

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Abstract

The Arbitration is a method, useful for the settlement of disputes between parties, contractual or otherwise. Nevertheless, arbitration proceedings are also rule based. The arbitrators are governed by the substantive laws that are applicable to the disputes and procedural laws that regulate the proceedings these may be those of an arbitration institution, national laws or international laws. Further in the event that a party refuses to heed to an award of the tribunal, the courts may be approached for enforcement. It follows therefore that arbitration has strong jurisdictional elements. According to Le Ray Bennet "Arbitration as the application of the legal principles to a controversy within limits previously agreed upon the disputing parties".[1] Likewise "Arbitration has both a contractual and jurisdictional elements."[2] In the same way arbitration performs 'judicial like' functions, like national courts they conduct hearing issue subpoenas, take evidences form witnesses and sometimes award costs. They are also expected to observe the rules of natural justice. In the same way arbitrators perform their functions within a legal framework of laid down rules embodied in national legal systems.

Key words

- *The Jurisdictional Theory: According to this theory, Arbitration is based on state sovereignty and their authority to prescribe laws regulating arbitration.*
- *The Contractual Theory: According to this theory parties approach for arbitration have freedom to enter into contracts and this theory emphasis that arbitrator derive their authorities by virtue of the agreement of the parties, under the auspicious of the national legal systems*
- *The Hybrid Theory: This theory is the combination of jurisdictional and contractual theory*
- *The Autonomy Theory: This theory is relatively new and according to this theory that arbitration is based on norms created by merchants and is therefore an independent legal system.*

Traditionally, the arbitration clause is one of the most neglected clauses, and while drafting and agreement, is often referred as the "mid night" or "last minute clause." The approach usually followed is plain drafting, standard wording irrespective of the type of contract or parties involved. This poor dragging leaves loopholes and scope for

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1 Le Ray Bennet, ; International Organization : Principles and issues 3 ed (1991) 99

2 Fox International Commercial Arbitration 3rd edition (1998) 201

a dispute over the clause itself and jeopardizes the ability of parties to enforce their rights and resolves disputes amicably. Regularly overlooked parameters of the arbitrations clause include the governing law, selection of arbitrator, seat of arbitration, fees and jurisdiction. The past experiences with Indian courts, growing awareness and the benefits of the alternate means of dispute resolution have been key drivers for companies to focus on drafting a comprehensive arbitration clause.

In international trade and commerce, every commercial activity is generally preceded by contract fixing the obligations of the parties to avoid legal disputes. But in this ever changing world of trade and commerce, disputes between parties are investable. No matter how carefully a contract is drafted, one party to the contract may understand his right and obligations in a different way. Often international trade involves traders belonging to different countries whose legal systems may differ in many ways to that of the other, presenting complicated and even conflicting features. The law courts of each country have jurisdiction only within the territorial limits of the concerned country.

HISTORICAL JOURNEY OF ARBITATION AS AN ALTERNATIVE DISPUTE RESOLUTION MECANISIMS IN INDIA

The first arbitration law in India was the Arbitration Act, 1899 which was based on the English Arbitration Act,[3] thereafter, through schedule IInd of the Code of Civil Procedure[4] the provisions relating to the law of arbitration were extended to the other parts of British India later based on the English arbitration system , The Arbitration Act[5] was enacted in India to consolidate and amend the law relating to arbitration effective from 1 July 1940 which is known as Indian Arbitration Act, 1940. In the line of its progress, the another event has been concluded in its development that when India became a signatory country to the New York Convention, which was enforced on 7th June 1959. Accordingly The Foreign Awards (Recognition and Enforcement) Act[6] was enacted by Indian government to give effects the New York Convention. In this Act, there was no provision for challenging the foreign awards on merits similar or identical to the provisions contained in the Indian Arbitration Act, 1940. Thus prior to the enactment of the Indian Arbitration Act, the law of arbitration in India was contained in the Protocol and convention Act 1937, The Indian Arbitration Act, 1940 and the Foreign Awards Act of 1961. Over the period of time, it was generally felt that the arbitration laws in India had failed to keep pace with the developments at the international level. Therefore Arbitration and Conciliation Act, 1996 was enacted, with the aim and the objective to give effect to the United Nations Commission on International Trade Law on 21st June 1985 (UNCITRAL)[7] Model in four parts, which is first part for Arbitration, second is for Enforcement of Foreign Awards, third is for conciliation and for the is for Supplementary provisions.

International commercial Arbitration and legal issues

When the determination of disputes which is of a commercial nature involving an international element falls within the scope of private law, it gets **termed as International Commercial Arbitration.** International commercial arbitration is

[3] The English Arbitration Act, 1899
[4] The Civil Procedure Code. 1908
[5] The Arbitration Act,1940
[6] 1961
[7] United Nations Commission on International Trade Law on 21st June 1985

styled as international, not because sovereign nations participate, but because the parties, the facts, or the legal effects of the dispute extend beyond a single jurisdiction. The expenses, delay and complexity of a court action are normally avoided in the case of arbitration procedure. These problems arises when the parties fails to agree upon a choice of Law and disagreement in procedural aspects of substantive law.

Since the opening up of India's economy, membership of the World Trade Organization (WTO) coupled with near double digit of gross domestic product growth and consequent rapid integration of its economy with the global order, Indian judiciary has increasingly come to deal with diverse commercial issues transnational dimension. India being a signatory of General Agreement on Tariff and Trade, Trade Related aspects of Intellectual Property rights, United Nation Commission on International Trade laws, New York Conventions, Paris Conventions etc.., appropriate amendments have been made in India's domestic Laws to harmonize them with such International standards, keeping, of course, domestic interest as a prime concern. In the midst of such rapid changes, Indian judiciary, more often than not, finds itself at the crossroad of diverse interests, Faced with the daunting task of interpreting India's domestic laws in the light of the fast evolving International Legal Standards. International Commercial Law per se does not automatically become a law in India on its own force without any domestic law legislated by the Indian Parliament. Disputed legal issues in International commercial arbitration, these are the major issues which are normally found; International commercial Litigation, International Commercial Arbitrations and Enforcement of foreign Awards and conflict of laws etc...

INTERNATIONAL COMMERCIAL ARBITRATION UNDER, THE ARBITRATION AND CONCILIATION ACT, 1996

Following are the specific provisions under The Arbitration and Conciliation, Act, 1996 for International commercial Arbitration relating issues.....

- The Arbitration and Conciliation Act, 1996 has accepted the territoriality principle which has been adopted in the United Nation Commission on International Trade model law,1985 . Accordingly, Part I of the Act applies only to arbitrations taking place in India irrespective of whether such arbitrations takes place between Indian parties or between the Indian and foreign parties (domestic award). The domestic awards can be challenged (34) and are enforceable (section 36) under Part I of the Act.
- Part I of the Act has no application to arbitrations seated outside India irrespective of whether parties chose to apply the Arbitration and Conciliation Act, 1996 or not (foreign awards). The grounds to challenge of awards given in Part I (section 34) of the Act are thus applicable only to domestic awards and not to foreign awards.
- The law of the seat or place where law to govern the arbitration is held is normally the arbitration. If the agreement provides for a seat/place outside India, Part I of the Arbitration and Conciliation Act, would be inapplicable to the extent inconsistent with the arbitration law of the seat/place, even if the agreement purports to provide that the Act, shall govern the arbitral proceedings.
- In case domestic awards, Indian laws shall prevail if substantive law conflicts within the laws of India. In case of foreign awards, the conflict of

laws of the country in which the arbitration takes place would have to be applied.

- There is no provision under the Civil Procedure Code 1908 or under the Arbitration Conciliation Act, 1996 in arbitrations which take place outside India, even though the Parties by agreement may have made the Act, as the governing law of arbitration. An inter-parte suit simply for interim relief pending arbitration outside India would not be maintainable in India.
- The said Act, intentionally limits it to awards made in pursuance of an agreement to which the New York Convention or the Geneva Protocol applies. Therefore, remedy is provided for the enforcement of the 'non convention awards' under the said Act.
- Last but most important, these findings of the Apex Court are applicable only to arbitration agreements executed after 6 September 2012, in which the five members constitutional bench of the Indian Supreme court in *Bharat Aluminum Co. v. Kaiser Aluminium Technical Service Inc*[8] after reconsidering its various previous decisions on Indian Arbitration & conciliation Acr 1996 concluded that the Act should be interpreted in a manner to give effect to the intent of Indian Parliament. In this land mark judgment, the apex court also took note of the various foreign judgments, and the guidelines on United Nation Commission on International Trade Law (UNCITRAL) which is a Model Law in international trade law, including commentaries thereon of renowned authors, Geneva Convention and New York convention and thereafter reversed its earlier rulings in cases *'Bhatia International v. Bulk Trading S.A.& Anr*[9] and *Venture Global Engineering v. Satyam computers Services Ltd and Anr*[10] stating that finding in these judgment were incorrect.

The regulation of conduct of arbitration and challenge would be done by the courts of the country in which arbitration is conducted. Accordingly, a foreign award can be annulled by the court of the country in which the award was made, i.e., the country of the procedural law/curial law (first Alternative) and not before the courts of the country under the law of which the award was made, i.e., the country of substantive law (second alternative). It can be challenged in the courts of the second alternative, only if the court of the first alternative had no power to annul the award under its national laws.

Leading Indian cases relating to international commercial arbitration

The most contested issue on Foreign Judgment in India is the issue of 'jurisdiction'. The Supreme Court of India and High Courts have taken a pragmatic stand on this issue. In many cases, the defense against enforcement of foreign judgments in India is to question the As in other Jurisdictions, International Commercial Arbitration – adhoc as well as institutional is gaining popularity in India as well. Just as most domestic arbitrations in India are adhoc, most International Commercial Arbitrations in India are Institutional thanks to such Arbitration Bodies in India like International Court of Arbitration (ICA), Indian Council for Alternate Dispute Resolution (ICADR) etc The present Indian Arbitration and Conciliation Act, 1996, based on the United

[8] Civil appeal no. 7019 0f 2005
[9] 2004(2) SCC 105
[10] 2008 (4) SCC 140

Nations Commission on International Trade Law (UNCITRAL) model, has elaborate provisions on International Commercial Arbitration – adhoc as well as Institutional arbitration held in or outside India. Under the scheme of the Act, Arbitral Awards are enforceable as if such awards were the orders passed by the Courts in India. The almost '90% finality' of such Arbitral Awards is reflected in Section 34, which provides very limited technical grounds for challenging Arbitral Awards. Though the Supreme Court of India in *ONGC Ltd. v. Saw Pipes Ltd.*[11] has enlarged the scope of 'Public Policy' as a ground for challenging Arbitral Awards, the previous Judgment of a larger Bench in Renusagar *Power Co. Ltd. v. General Electric Co.*[12] would have a prevailing effect and hence, the position of very limited grounds for challenging International Commercial Arbitration Awards remains more or less unchanged. Apart from minimum interference with Arbitral Awards, courts in India have also been passing interim orders to protect the interest of o the parties. In *Bhatia International Ltd. v. Bulk Trading, S.A.*[13], the Supreme Court of India held that Part I of the Arbitration and Conciliation Act, 1996, which foreign parties in assets in India. gives effect to the UNCITRAL Model law and which confers power on the Court to grant interim measures, applied even to Arbitrations held outside India. This case pertains to an Arbitration held as per International Chamber of Commerce (ICC) Rules in Paris and it was during the pendency of such Arbitration proceedings that the foreign party applied to a court in India for interim measure for securing its interest in a property in India. Though the contention of the Indian Party was that New York Convention does not leave any scope for grant of interim measure/relief by a Court other than a court of the country in which Arbitration is being held, the Hon'ble High Court as well as the Supreme Court took a contrary view. This is one occasion where the Indian Judiciary has been confronted with interpretation of an International Convention as important as UNCITRAL and it goes to the credit of the Hon'ble Supreme that interim reliefs have been held to be permissible under the said Convention for securing properties in India, even though the place of Arbitration is outside India. Even under the old Arbitration and Conciliation Act, 1940, the Supreme Court of India had an occasion to interpret "what is commercial?" in *R.M. Investments V. Boeing Company.*[14] In this Judgment, the Supreme Court took guidance from UNCITRAL in giving a wide meaning to the expression 'commercial' so as to include all relationships of a commercial nature, whether contractual or not, for the purpose of International Commercial Arbitration. As regards enforcement, the enforcement procedure applicable to Foreign Judgments is more or less applicable to International Commercial Arbitration Awards, which takes us to the next issue of enforcement of Foreign Judgments in India. Enforcement of Foreign Judgments and Arbitral Awards: Under Sections 13 and 44A of the Civil Procedure Code ("CPC"), Foreign Judgments can be enforced in two different ways, depending on whether the country in which the Foreign Judgment is passed is located is a 'Reciprocal Country' or not. While an order passed by a court in a so called reciprocal country can be straightway enforced in India as if the same is a decree passed by a court in India, an Order passed by a Court in a non reciprocating country can only be enforced by filing a fresh suit on the basis of such an Order. Government of India has notified some countries including Singapore and Hong Kong as 'Reciprocating Territories'. However, as per Section 13 of the Civil Procedure Code, 1908, all Foreign Judgments, to be enforceable, should

[11] (2003) 5 SCC 705
[12] 1994 Supp (I) SCC 644
[13] (2002) 4 SCC 105
[14] AIR 1994 SC 1136

have been pronounced by a court of competent jurisdiction on merit, should not be violative of natural justice, should not have been obtained by fraud, should not sustain a claim founded on a breach of a law in force in India and should not have been passed by refusing to recognize the law of India in cases such law is applicable. More importantly, a Foreign Judgment which is founded on an incorrect view of International Law is not enforceable in India.

The most contested issue on Foreign Judgment in India is the issue of 'Jurisdiction'. The Supreme Court of India and High Courts have taken a pragmatic stand on this issue. In many cases, the defense against enforcement of Foreign Judgments in India is to question the Foreign Court's jurisdiction on the ground that the Party has not submitted itself to the jurisdiction of the Foreign Court. In *Andhra Bank ltd. v. R. Srinivasan*[15], a Suit was filed against a guarantor in a foreign jurisdiction but during the pendency of the proceedings, the guarantor/defendant died and the legal representatives of the Guarantor were brought on record. After the decree was sought to be executed, the defence of the legal Representatives was that they had not submitted to the jurisdiction of the Foreign Court. However, the Supreme Court of India held that the material time when the test of the rule of Private International Law is to be applied is the time at which the Suit was instituted. In *Shaling Ram v. Firm Daulatram Kundanmal*[16], the Supreme Court held that filing of an Application for leave to defend a suit in a foreign court amounts to voluntary submission to the jurisdiction of the Foreign Court. In fact, way back in 1914, in *Ramanathan Chettiar v. Kalimuthu Pillai*[17], the Madras High Court stipulated the circumstances in which a Party to a dispute can be said to have submitted himself to the jurisdiction of a Foreign Court Judgment:(a). Where the Party is a subject of the Foreign Country in which Judgments have been obtained against him on prior occasions. (b). Where the Party is a resident of the foreign country at the time of the commencement of Court action (c). Where the Party has selected the Foreign Court/Jurisdiction as the forum for taking legal action in the capacity of a Plaintiff, in which forum he is sued later. (d).Where the Party on summons has voluntarily appeared before the Foreign Court. (e). Where by an Agreement a person has contracted to submit himself to the forum in which the Judgment is obtained.

The above principles are more or less still followed for determining jurisdiction of Foreign Courts. Apart from the 'Jurisdiction' aspect, it is also required that a Foreign Judgment, to be enforceable, should have been passed on merit and after appreciating all the relevant facts and circumstances. In *Abdul Rahman v. Mohd. Ali Rowther*[18], the full Bench of the Hon'ble Supreme Court observed as under:' A decision on the merits involves the application of the mind of the Court to the truth or falsity of the plaintiff's case and therefore though a judgment passed after a judicial consideration of the matter by taking evidence may be a decision on the merits even though passed ex parte, decision passed without evidence of any kind but passed only on his pleadings cannot be held to be a decision on the merits.' This full Judgment still holds the field, followed later in *International Woollen Millsv v. Standard Wool (U. K.)*[19] *Limited* in which the Supreme Court of India did not accept the view that a decree passed in the absence of the defendant is a decree on merits or

[15] AIR, 1962 SC 232
[16] AIR 1967 SC 739
[17] AIR 1914 Madras 556
[18] 1928 AIR(Rang) 319 : ILR 6 Rang 552,
[19] 2001 (5) SCC 265,

the proposition that the decree was on merits simply because all documents and particulars had been endorsed with the statement of claim. In *Y. Narsimha Rao v. Y. Venkata Lakshmi*[20], the Supreme Court held that a Foreign Judgment to be enforceable in India should have been passed on merit, which means that the decision should be the result of a contest between the parties and this requirement is fulfilled when the Respondent is duly served and he voluntarily submits himself to the jurisdiction of the Foreign Court. Thus, for a Foreign Judgment to be enforceable in India, the Judgment should preferably be not exparte and the matter should have been heard on merit. Section 13 of the Indian Civil Procedure Code also clearly stipulates that Foreign Judgment, to be enforceable, should not have been passed based on an incorrect reading or understanding of an applicable International Law or there should be any refusal to recognize the law of India in case in which such law is applicable. Way back in 1934, the High Court of Madras in *Panchapakesha Iyer & Ors. v. K.N. Hussain Muhammad Rowther & Ano*[21]. refused to allow an Order passed by the Supreme Court of Penang on the ground that the Judgment is not in consonance with International Law.

Thus, though a International Commercial Law does not become a law in India on its own force without any domestic law legislated by the Govt. of India, the Civil Procedure Code of India provides 'incorrect reading of International Law' as a ground for nonenforcement of Foreign Awards in India. This speaks volumes of how important International Commercial Law has been for the Courts in India in evolving commercial law in India.

NEW TREND IN INDIAN INTERNATIONAL COMMERCIAL ARBITRATION LAW AFTER Bharat Aluminum Company Limited ("BALCO") V/s. Kaiser Aluminum Technical Service, Inc. ("Kaiser")[22] CASE

In Bhatia International v. Bulk Trading S.A & Anr. ("Bhatia International")[23] and *Venture Global Engineering v. Satyam Computer Services Ltd & Anr ("Venture Global")*[24], the Supreme Court had held that Part I of the Arbitration and Conciliation Act, 1996 ("Act") setting out the procedures, award, interim relief and appeal provisions with respect to an arbitration award, would apply to all arbitrations held out of India, unless the parties by agreement, express or implied, exclude all or any of its provisions. The Supreme Court set aside the doctrine in *Balco v. Kaiser.*

Facts

- An agreement dated 22 April, 1993 ("Agreement") was executed between Bharat Aluminum Company Limited (BALCO) and Kaiser, under which Kaiser was to supply and install a computer based system at BALCO's premises.
- As per the arbitration clause in the Agreement, any dispute under the Agreement would be settled in accordance with the English Arbitration Law and the venue of the proceedings would be London. The Agreement further stated that the governing law with respect to the Agreement was

[20] (1991) 3 SCC 451
[21] A.I.R. 1934 Madras 145
[22] AIR 2005 Chh 21, 2006 (1) MPHT 18 CG
[23] (2002) 4 SCC 105
[24] (2010) 8 SCC 660

Indian law; however, arbitration proceedings were to be governed and conducted in accordance with English Law.

- Disputes arose and were duly referred to arbitration in England. The arbitral tribunal passed two awards in England which were sought to be challenged in India u/s. 34 of the Act in the district court at Bilaspur. Successive orders of the district court and the High Court of Chhattisgarh rejected the appeals. Therefore, BALCO appealed to the Supreme Court ("Court").
- Another significant issue to be adjudged, in the case of Bharti Shipyard (clubbed together with the above petition for hearing), was applicability of section 9 (interim measures) of the Act. The parties had initially agreed to get their disputes settled through arbitral process under the Rules of Arbitration of the International Chamber of Commerce, at Paris, subsequently, mutually agreed on 29 November, 2010 to arbitration under the Rules of London Maritime Arbitrators Association, in London.
- During the pendency of arbitration proceedings in London, an injunction application was made by appellants, Bharti Shipyard Ltd., before the District Judge at Mangalore, against the encashment of refund bank guarantees issued under the contract (u/s 9 of the Act). The applications were allowed and were consequently challenged in High Court of Bangalore. The Bangalore High Court set aside the application so allowed on the grounds that the appellants had an alternative remedy (u/s 44 of the Act, being interim reliefs for international arbitration) in the courts of London and further since the substantive law governing the contract, as well as the arbitration agreement, is English law, the English courts should be approached. This was also challenged in this petition to the Supreme Court.
- The appeal filed by Bharat Aluminum Co. before the Division Bench of the Supreme Court was placed for hearing before a three Judge Bench, as one of the judges in the Division Bench found that judgment in Bhatia International and Venture Global was unsound and the other judge disagreed with that observation.

Principles laid down by the court

The judgment in detail analyses, the provisions of various sections in the Act and applicability of Part I of the Act to international commercial arbitrations. Some significant issues dealt with in the judgment are as follows:

- It was observed that the object of section 2(7) of the Act is to distinguish the domestic award (Part I of the Act) from the 'foreign award' (Part II of the Act); and not to distinguish the 'domestic award' from an 'international award' rendered in India. The term 'domestic award' means an award made in India whether in a purely domestic context, (i.e., domestically rendered award in a domestic arbitration or in the international arbitration which awards are liable to be challenged u/s 34 and are enforceable u/s 36 of the Act).
- It was held that there is a clear distinction between Part I and Part II as being applicable in completely different fields and with no overlapping provisions.
- The Court has also drawn a distinction between a 'seat' and 'venue' which would be quite crucial in the event, the arbitration agreement designates a

foreign country as the 'seat' 'place' of the arbitration and also select the Act as the curial law/ law governing the arbitration proceedings. The Court further clarified that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat / place of arbitration outside India, then even if the contract specifies that the Act shall govern the arbitration proceedings, Part I of the Act would not be applicable or shall not enable Indian courts to exercise supervisory jurisdiction over the arbitration or the award. It would only mean that the parties have contractually imported from the Act, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the English procedural law or curial law. Therefore, it can be inferred that Part I applies only to arbitrations having their seat / place in India.

- The Court dissented with the observations made in Bhatia International case and further observed on a logical construction of the Act, that the Indian Courts do not have the power to grant interim measures when the seat of arbitration is outside India. A bare perusal of Section 9 of the Act would clearly show that it relates to interim measures before or during arbitral proceedings or at any time after the making of the arbitral award, but before it is enforced in accordance with Section 36 (enforcement of domestic awards). Therefore, the arbitral proceedings prior to the award contemplated u/s 36 can only relate to arbitrations which take place in India.
- The Court further held that in foreign related international commercial arbitration, no application for interim relief will be maintainable in India, either by arbitration or by filing a suit.

Prospective Effects of the judgment

- This judgment shall be applicable prospectively (i.e. to all the arbitration agreements executed after September 6, 2012).
- As a result of this judgment, the seat of arbitration has now gained paramount importance for determining the applicability of Part I of the Act.
- The judgment also draws a distinction between the seat of arbitration and the place of arbitration. It therefore contemplates a situation where even though the parties have provided for a particular place for arbitration, that some of the proceedings themselves may be conducted in other territories as may be convenient to all.
- This judgment also ensures that foreign award (i.e. an award passed outside India) can no longer be challenged by an Indian entity u/s 34 of the Act and that the party which seeks to resist the enforcement of the award has to prove one or more grounds set out in section 48 of the Act.
- No interim relief u/s 9 of the Act or order 39 of the CPC (both pertaining to injunction) would be available where the seat of arbitration is outside India. As interim orders from foreign courts and arbitration tribunals are not enforceable in India such a situation would leave foreign parties remediless.

Universal Legal Traditions for International Commercial Arbitration

The Common and Civil Law systems have guided the enactment of major codes, laws and guidelines that regulate international commercial arbitration. From the doctrine of freedom of contract to the procedural rules governing arbitration hearings, international arbitration has built its legal culture around these two traditions. Codes, laws and guidelines governing international commercial arbitration developed by such organizations as the International Court of Arbitration (ICA), the International Bar Association (IBA) and the International Chamber of Commerce (ICC) have been drafted against the background of Common Law and Civil Law values. In balancing these two great legal traditions, it was assumed that together they represent a composite legal tradition governing international commercial arbitration. The result of that assumption was decades of fine work enshrining international arbitration doctrines, principles, and rules of law and procedures that blend these two important legal traditions. From the doctrine of freedom of contract to specific rules of evidence and procedures that govern arbitral hearings, the international arbitration community has sought to maintain the respected legal traditions that lawyer-arbitrators and counsel find familiar and comfortable.

There are different principles by which to gauge the legal tradition of international commercial arbitration. The **first principle** is consensual, namely, that the parties *choose* arbitration. The parties are free to select the nature, form and operation of arbitration, whether its nature is *ad hoc* or institutional, whether its form is modelled on European, English, American or "other" legal traditions, whether it is conducted primarily through oral testimony or written submissions, and whether it is impacted by a multi-or bilateral treaty or by discrete customary law influences. The parties to arbitration presumably exercise their choices for distinctive reasons, such as: because the arbitrators supposedly have commercial expertise beyond that of domestic courts of law, because international commercial arbitration is perceived to be lower cost, more efficient and more "party sensitive" than courts of law, or simply to avoid having to rely on the laws and procedures of the legal system and the courts of one party. These reasons for resorting to international commercial arbitration may be misplaced, but they nevertheless are repeatedly invoked as bases for resorting to arbitration. **second principle** is that parties can make choices that accommodate preferred legal traditions, while still *not* choosing domestic courts. For example, they may adopt a European-centric model of arbitration, such as that of the ICC, because it more closely resembles Civil Law traditions, even though it is international and does not replicate the proceedings followed by the courts in any one Civil Law jurisdiction. Alternatively, parties may choose the English model of the London Court of International Arbitration, or the American model of the American Arbitration Association for much the same reasons, along with local options, such as state arbitration before the Swiss Arbitration Association, the Australian Centre for International Commercial Arbitration, or China's CEITAC. Parties may also choose to "domesticate" arbitration, such as by appealing to local customary laws and procedures. A **third principle** is that the manner in which arbitration is conducted may reflect in varying degrees a particular legal tradition and more broadly, a preferred cultural orientation. **fourth principle** is that particular procedures associated with international commercial arbitration stand out more starkly when they are modelled on a particular legal tradition. For example, all other factors being constant, one may well expect to encounter less reliance on oral testimony before arbitration tribunals like the ICC that before an association like the AAA in which the examination and cross-examination of witnesses, including experts is often extensive. **fifth principle** is that variations in the services provided by international

commercial arbitration inevitably are impacted by the customer. The London Court of International Arbitration crisply states: "Changes in commercial dispute resolution procedures are, quite properly, driven by the end-user. That is, by the international business community."

International Arbitration: (Its features)

Neutrality

An arbitral tribunal consists of arbitrators nominated by the parties, or appointed by an authority selected by the parties, and the choice of the arbitrators is usually ensures a certain neutrality, at least as far as the nationalities of the arbitrators is concerned. In international commercial transaction, neither of the parties usually wants to accept the jurisdiction of the other party's country: this is partly due to the fear that a national judge might be included to decide in favour if the party who is of the same nationality as the judge, and partly due to the awareness that the party in whose country the proceedings take place enjoys the advantage of knowing the applicable law, procedural rules, and legal environment and mentality better than other party. Agreeing on international arbitration allows the parties to avoid this imbalance: the venue of the arbitral tribunal is usually chosen in a country different from the country of each party and the nationality of the arbitrators is also determined so as to avoid the over-representation of one party's nationality.

Expertise

The arbitrators can be chosen according to criteria that can be tailored to the particular dispute, so as to ensure that they possess the necessary expertise to understand and evaluate the matter at stake. If a dispute is submitted to national courts of law, the dispute will be resolved by one or more judges with a general knowledge of private and commercial law; in some circumstances, this general knowledge might not be sufficient to appreciate all the aspects of complicated transactions with technical implications or transactions based on international commercial practices. This might lead to lengthy proceedings to permit the judge to acquire the appropriate knowledge, or to errors in the judge's evaluations due to underestimating the technical aspects or commercial practices. Agreeing on arbitration permits a reduction of these difficulties, by selecting experts in the particular fields as arbitrators.

Confidentiality & goodwill

Arbitration is a way of solving disputes that, as opposed to proceedings before courts of law, permits confidentiality to be maintained with respect to the content, the outcome and even the existence of the dispute. The court hearings has an adversary nature that it usually the publicity brought about by a public trial will usually guarantee that parties to a dispute heard in court will never be able to work together again. Confidentiality can be important in certain situations, for example to avoid damaging the commercial reputation of the parties.

Finality and rapidity

An important characteristic of arbitration is that in most situations the award made by an arbitral tribunal is final and binding upon the parties: either because The parties have agreed this expressly in the arbitration clause, or because the arbitration

rules referred to by the parties exclude any appeal against the award.[25] By excluding the possibility of retrying the case in front of an appeal instance, therefore, the length of the proceedings is considerably reduced as compared to proceedings before courts of law. Moreover, arbitration may ensure that the dispute is solved rather quickly, as opposed to proceedings before courts of law, which in some countries may last for several years due to overloaded judges and bureaucratic proceedings.

Enforceability

International transactions concern the movement or organisation of assets across the borders of two or more countries, and might involve the entities of different countries. In the case of disputes regarding international transactions, it is important to ensure that the decision resolving the dispute is enforceable in all the countries affected by the transaction, preferably in all countries where the losing party has assets that can be attached to satisfy the credit of the winning party. The enforcement of foreign arbitral awards is regulated primarily by the New York Convention on the Recognition and Enforcement of foreign Arbitral Awards (1958), which has been ratified by very many states and therefore ensures, to a great extent, a uniform and effective treatment of arbitral awards' enforceability. The enforcement of foreign judicial decisions, on the other hand, does not enjoy the same uniform treatment: the principles of international cooperation and of economy of judicial proceedings are recognised in a large number of states, but implementation of the principles, which results in the recognition and enforcement of foreign judicial decisions, is left to the internal legislation of the single states or to bilateral or multilateral treaties concerning specific areas. Among treaties of outstanding significance ate the 1968 Brussels and 1988 Lugano conventions on the recognition and enforcement of decisions issued on civil matters by courts in the countries of the European Union and the European Free Trade Area.

As a consequence of the foregoing, the enforceability of foreign judicial decisions is not subject to uniform regulations to the same extent as the enforceability of arbitral awards. Exclusion of the jurisdiction of courts of law. One of the effects of agreeing to submit a dispute to arbitration is that courts of law are deprived theirs jurisdiction on the subject matter and, if an action is raised in them regarding a matter that had been submitted by the parties to arbitration, they are obliged to refer the parties to arbitration. The same effect applies while an arbitral procedure is pending or after an arbitral award has been made: the subject matter is covered by the arbitral agreement, consequently courts of law do not have jurisdiction.

Modern arbitration legislation

The basic principles of the modern arbitration statute may be summarised as follows:

a) a modern arbitration statute expressed the recognition of the parties' *right to settle their disputes in a private forum*. This is done through the obligation of the state courts to refrain from exercising their jurisdiction in matters submitted to arbitration on the basis of a valid agreement of the parties. These are the provisions on the so-called "indirect enforcement" of arbitration agreement that, almost without an exception, form part of any recently enacted arbitration statute.[26]

b) *Party autonomy*, the underlying principle of commercial arbitration, has been

[25] UNCITRAL RULES 1976 Article 32(2)

[26] UNCITRAL Article 8 (1)

widely accepted. Besides the right to agree on a private forum, the acceptance of this principle implies also that the parties are allowed to influence different aspects of arbitration by their agreement. Thus, they may choose the rules of procedure to be applied, to determine the seat of arbitration, to select arbitrators, as well as to choose the applicable substantive law.

c) ***Arbitrators are given wide powers*** to determine the different aspects of arbitration if the parties have failed to do so. Thus, they are free to determine rules of procedure, as they consider appropriate in the absence of the parties' choice thereto[27]. There are, usually, few procedural rules of a mandatory nature in arbitration laws *(lex arbitri)* that have to be respected and where no room for party autonomy is left. These, generally, relate to basic principles of due process, a violation of which would be contrary to the basic notions of justice or international standards of justice. The principle of equal treatment of the parties, namely, the equal opportunity to present a case, is such a principle, which may be considered to be a part of international or transnational *ordre public*. Similarly, the arbitrators will determine the applicable substantive law in the absence of the parties' choice in that respect[28]

d) Arbitration is based on private agreements, but results in a ***decision – an award – which is binding upon the parties***, and which can be enforced in legal proceedings by national courts, if not carried out voluntarily. Under modern arbitration statutes the enforcement may be denied only for a certain limited number of reasons. This is particularly so with respect to the enforcement of foreign arbitral award under the 1958 New York Convention. It lists a limited number of reasons for refusal of the recognition and enforcement of foreign awards[29].

e) Arbitration statutes usually provide solutions for the situations when the parties have failed to determine certain aspects of arbitration: Such provisions are not mandatory, but permissive or discretionary. Their primary and underlying purpose is to provide the possibility for arbitration to commence and to proceed efficiently, to provide the ***necessary assistance and support to arbitration***. Very often the arbitration will not be able to function at all, in the absence of such provisions.

f) From the relevant provisions of arbitration statutes relating to the role of national courts it may be concluded that there is, generally, ***a limited possibility of judicial intervention***[30]. The role of judiciary is mainly one of support and assistance to arbitration before, during and after the arbitral process. Such assistance is provided, for example, in enforcing the agreement to arbitrate, in the establishment of the tribunal, in taking evidence or ordering provisional measures, as well as in the enforcement of arbitral awards. As to the controlling or supervisory role of the judiciary, the general trend is towards a limitation of this function of national courts. Limitation of the reasons for challenge, as well as grounds for refusal of enforcement of the award is one of the common characteristics of recently enacted or amended arbitration statutes, in particular with respect to international arbitration. Indeed, it is not to be concluded that the grounds for challenge are the same in different legal systems. However, the merits of the arbitrators' decision may not, under any circumstances, be the subject of the control and examination by the judiciary, except in the case of violation of public policy. It is a widely accepted principle, which lies in a very heart of arbitration as a method of dispute settlement. Any provision

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[27] UNCITRAL Article 19 (1)

[28] Id Article 28(2)

[29] 1958 NEW YORK CONVENTION Art. V

[30] Art. V UNCITRAL

maintaining a different position is contrary to the very nature and the underlying purpose of arbitration. Control of the award with respect to the substance of the dispute undermines the effectiveness and attractiveness of arbitration and, as such, cannot form part of a modern arbitration law and practice. The need for a greater 'freedom' of arbitration from the supervision of national courts and restrains of national laws has more frequently been emphasised in the context of international commercial arbitration, than in situations, which are purely domestic. Therefore, some arbitration laws provide for a duel regulatory scheme, one applicable to domestic and another to international arbitration. Thereby, the latter usually maintains a system of a more limited control over arbitral awards and may even provide the possibility for the parties to exclude any recourse against the award. On the other hand, some jurisdictions provide for the same favourable legislative framework to apply both domestic and international arbitration (e.g. Germany, England, India). So as we can find there are many similarities between the UNCITRAL rules and national law rules on arbitration, in the same time the national laws on arbitration have similar points with each other.

Ad hoc and institutional arbitration

Once agreement is reached by the parties concerning arbitration as the preferred method for the settlement of their disputes, the second step is the choice between *ad hoc* and institutional arbitration. The distinction between the two alternatives is referred to by the European Convention[31] and has a direct bearing on the subject under examination. The parties to an *ad hoc* arbitration establish their own rules of procedure, which may be made to fit the facts of the dispute between them, whereas the parties to an institutional arbitration must conduct the arbitration in accordance with the procedural rules of the particular institution concerned. *Ad hoc* arbitration is not conducted under the auspices or supervision of an abitral institution. Instead, parties simply agree to arbitrate, without designating any institution to administer their arbitration.

Ad hoc arbitration agreements will often choose an arbitrator or arbitrators, who are to resolve the dispute without institutional supervision or assistance. The parties will sometimes also select a pre-existing set of procedural rules designed to govern *ad hoc* arbitrations. In an *ad hoc* arbitration, in fact, utmost care should be taken as to the drafting of the arbitration clause since the parties, by choosing this alternative, wish to shape the arbitration according to their needs and without reference to the services and, more importantly, to the rules of arbitration of a particular arbitral institution. Both institutional and *ad hoc* arbitration have strengths. Institutional arbitration is conducted according to a standing set of procedural rules and supervised, to a greater or lesser extent, by a professional staff. This reduces the risks procedural breakdowns, particularly at the beginning of the arbitral process, and of technical defects in the arbitral award. The institution's involvement can be particularly constructive on issue relating to the appointment of arbitrators, the resolution of challenges to arbitrators, and the arbitrators' fees. Less directly, the institution lends its standing to any award that is rendered, which may enhance the likelihood of voluntary compliance and judicial enforcement.

On the other hand, *ad hoc* arbitration is typically more flexible, less expensive (since it avoids sometimes substantial institutional fees), and more confidential than

[31] Supra Note 27, Art. V

institutional arbitration. Moreover, the growing size and sophistication of the international arbitration bar, and the efficacy of the international legal framework for commercial arbitration, have partially reduced the relative advantages of institutional arbitration. Nonetheless, many experienced international practitioners prefer the more structured, predictable character of institutional arbitration, at least in the absence of unusual circumstances arguing for an *ad hoc* approach. Should the choice be in favour of institutional arbitration, which is certainly the most widespread form of international arbitration, the drafting problems are to a large extent made easier thanks to the reference to the set of arbitration rules of the institution which has been selected. In fact, by incorporating directly into the contract the said rules, such a reference not only avoids the process of negotiating the arbitration clause, which constitutes an area of potential conflict, but eliminates the risk, inherent in an *ad hoc* arbitration clause, of mistakes, ambiguities or gaps in the drafting process. Suffice it to think of the risk of indicating as appointing authority an institution or a person which, when needed, may decline to act in that capacity with the resulting obstruction of the arbitral mechanism (save to the extent that resort may be made to make the relevant appointment(s) to the competent local court). The relevance of the difference between *ad hoc* and institutional arbitration tends to diminish if reference is made to rules of procedure prepared by an international institution, such as the UNCITRAL Arbitration Rules. Whether the arbitration is ad hoc or institutional, there are still pitfalls to be avoided by the drafter of the arbitration clause.

CONCLUSION

International commercial arbitration has met widespread success as a method of international dispute resolution. The multitude of changes that are occurring in the international plane testify to that fact. The increased acceptance of the autonomy of the arbitration clause and more recently of the competence-competence doctrine is part of this process of evolution of international arbitral practice. Specifically in relation to the latter doctrine, the divide between common law and continental jurisdictions seems to be closing. The principle of autonomy in its broad meaning of full autonomy covers all the grounds on which the arbitration agreement could be invalidated. Its purpose is to ensure the "substantive" effectiveness of the arbitration agreement. The competence-competence principle, also in its broad meaning, including the priority rule, aims to ensure the "procedural" effectiveness of the arbitration agreement. The two principles, as thus understood, ideally constitute a complete international system for the effectiveness of the arbitration agreement.

In general it is believed that the increased independence of international arbitration from the intervention of the national courts is a move in the right direction. It is also consistent with the practice of denationalizing most aspects of arbitral proceedings, ranging from the governing laws to the procedural processes.

India historically followed various means of arbitration or mediation in different forms. It typically used to be a king intervening between a dispute of two people or an official Panchayat intervening and giving their decisions. The Alternate Dispute Resolution (ADR) picked up pace in the country, with the inception of the Bengal Resolution Act, 1772 and 1781, which provided parties an option to submit the dispute to an arbitrator, appointed after mutual agreement and whose verdict would be binding on both the parties. ADR gained further importance in India, post the implementation of the Indian Arbitration Act, 1940, and The Arbitration and Conciliation Act, 1996, which was passed in consonance with the UNCITRAL Model Law of Arbitration. An important International Convention on Arbitration, which enhanced the Indian mechanism, was the New York Convention of 1958 on the

Recognition and Enforcement of the Foreign Arbitral Award.

The growing liberalization in India and extraordinary business growth in the last decade increased the interaction between Indian and international organizations. This has resulted in redefining global frontiers for organizations across industries. Such growth and interaction has considerably increased the number of disputes taking place in the last decades in India.

In India, we have witnessed a noticeable progress in the area of arbitration, particularly after the enactment of "The Arbitration and Conciliation Act, 1996." Today, due to new liberal policies and continuous efforts by the Government, India has opened up to foreign investments in varied industries and sectors, but this has been accompanied by a considerable increase in the number of commercial disputes. The scenario is further complicated with the use of technology in all aspects of business. There is pressure from international companies and various Governments as they are making it mandatory to enforce arbitration clauses in the contract.

All these factors coupled with delays in the traditional Indian litigation system, have led to a considerable increase in the number of arbitration cases. Historically, the awareness and reliance on alternate dispute resolution, as a solution, was very low. However, the recent increase in the number of cases, positive results and Government support has motivated companies to consider arbitration as an approach to resolve disputes

The need for international commercial arbitration and its services at global level is increasing day by day. The Information and Communication Technology (ICT) has given a new meaning to international commercial transactions and business. E-commerce has now become an indispensable part of our daily commercial activities. This has also given rise to both traditional as well as contemporary international commercial disputes all over the world. The scope of international commercial arbitration has also widened due to the disputes arising out of contracts on sale of goods, distributorship, agency and intermediary contracts, construction, engineering and infrastructure contracts, intellectual property contracts, domain name dispute resolutions, online dispute resolutions, joint venture agreements, maritime contracts, employment contracts, medico-legal disputes etc. The list is just illustrative as the business transactions are too many and it is difficult to categorize all of them here.

In a world which is evolving with globalization and Internet, has led in opening up unchartered avenues leading to much consternation in the growth of law. With the push of a button, money can be transferred from one place to another, shares can be bought and sold with ease, and property can be transferred without difficulty. Typically, the extrusion of a country's law occurs through its application by courts, nominally restrained by private international law, a context that is both transparent and subject to contest by the courts of other countries.[32]

Ten years ago, one could barely detect a separate breed of law for the investment industry, either in the courts or in the literature. In the classical system, national courts had very little role to play in the construction of international investment law and issues pertaining to the investment industry. Litigation involved national rights related to consumer based and contractual based claims made by individual people against investment contracting companies. Courts were reluctant even to adjudicate claims involving foreign investment issues and the rights of other countries'

[32] Graeme B. Dinwoodie, The International Intellectual Property Law System: New Actors New Institutions

investment industries, prompting serial national litigation of multinational disputes. National courts are, however, beginning to tackle multinational cases and are thus contributing to the effective creation of international norms. This has occurred most perceptibly in the copyright context in the United States, India and United Kingdom, where courts hear claims under foreign laws, provide multinational relief, and effectively regulate globally by localizing any Internet conduct in the United States.[33]

At the very outset, then the incremental character of common law comes to fore. It can achieve little that is akin to the dramatic rationalizations facilitated by major codification exercises or ratification of major international conventions.[34] The decisions of a court are binding only in a particular jurisdiction, and even within a given jurisdiction, some courts have more power than others. For example, in most countries, decisions of appellate courts are binding on lower courts and have precedential value, but decisions of non-appellate courts only have persuasive value. Interactions between common law, constitutional law, statutory law and regulatory law also give rise to considerable complexity. However stare decisis (the principle that similar cases should be decided according to consistent principled rules so that they will reach similar results) lies at the heart of all common law systems. **After analyzing the above stated problem**, its status and suggested solution, we can conclude it in a manner that, Arbitration can be said to be an amicable way of solving dispute between the parties whereby they parties agree in advance that the decision will be final and legally binding. Arbitration as opposed to court ligation is characterized by neutrality and confidentiality that is to say is a non state involvement process of solving dispute. Arbitration has been used throughout history as an alternative dispute resolution method with great success. Today, arbitration is commonly used in international trade related disputes as one of the most common dispute resolution methods. **Therefore**, keeping in view of all the developments, it is necessary to formulate the procedural rules for the arbitration accordingly. There are still challenges and opportunities in this specialized subject whom Asian countries need to explore and address. Particularly, In India, there is a dire need for the present arbitral setup to recognize and accommodate different cultural and legal traditions. Further, the traditional advantages of arbitration such as cost effectiveness and simplicity of procedure seem to have become redundant. These problems and lack of harmonization in arbitral law and practice have resulted in constant tension with national courts in the recognition and enforcement of foreign arbitral awards. At the same time, there is pressure on the developing countries to make their arbitral and other laws appropriate to attract investments. **Hence,** if arbitration is to continue to be a **preferred means** of resolving international trade disputes, it has to address the realities and specific needs of the developing countries particularly like India. There is also a need for **harmonization of arbitral law** in Asian regions. The above mentioned legal issues are some of the issues, of international commercial arbitration mechanisms, which need a serious consideration by the expert who are working in this field and also requires a universal solution for this global legal problem. So that the disputes relating to international trades may reduce and international business can achieve its objectives, in the name of economic development of a country.

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[33] Jane C Ginsburg, 'The Private International Law of Copyright in an Era of Technological Change', 1998 Recueil Des Cours De L'Academie Internationalle De La Haye (1999; Paul E Geller, 'The Universal Electronic Archive: Issues in International Copyright' (1994) 25 IIC 54.

[34] Considering the development of the Lex Fori Rule as an example- Phillips v. Eyre L.R. 6 Q.B. 1,28-29 (1870); Boys v. Chaplin AC 356 (1971); Red Sea Insurance Co v. Bouygues SA, AC 190 (1995)

INTER COUNTRY ADOPTION- A SOLUTION OR A PROBLEM TO A SOLUTION

Navtika*

Abstract

A child is an asset for the country, an uncut diamond, and adoption is one of the biggest problems faced by a child. If a child is not having family, he must have to given in adoption. So here, this paper is an effort to have a look on this problem. But giving in adoption is not an easiest task, we can give in adoption, when there will be a person to adopt. In the leading case L.K. Pandey, the Apex court, while discussing about the adoption said that if there is no one to adopt a child within country we can give that child to cross border adoption. But in the fast changing society there are so many ill practices, in the adoption that leads to so many problems such as trafficking. The Hague Convention on Inter-country adoption of 1993 and the findings of Supreme Court in the of L.K. Pandey case, are the two instruments, but these are not much effective for this problem. Hence here is an effort to highlight the issues relating to such problem and to find out the appropriate solution for the same. It is also an effort in the field of inter country adoption, that how this problem is effective in the international stage.

Key words

- *Adoption.*
- *CARA- The Central Adoption Resource Authority.*
- *Cross border adoption.*
- *Hague convention - The Hague Convention on Inter-country adoption of 1993.*
- *The guardianship court.*
- *Home study report.*
- *Child study report.*
- *Foreign adoptive agency.*

Background

The child is the future of a country, but what if his rights are not been protected, what if he is not secure in the society where he is living, what if he is not having the proper means for his life, these unsolved questions of a child's life had been discuss in the 20th century, "The 20th century is the 'century of the child'. With the declaration of the rights of child, the welfare of this vulnerable section of the society has come to be an accepted philosophy in modern times, resulting an upsurge of services for the rehabilitation of the destitute child. Millions of such children abandoned and

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deserted by parents or guardians, born out of wed lock, etc., are being cared for in institution which, functioning even under the most scientific conditions"[1].

As precisely observed by John Milton –

> "Child shows the man as morning shows the day"

It can also be better understood by the words of P. N. Bhagwati J., when he observed[2]:-

"Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family"

It is need of the time that child's fundamental right which has been provided by constitution[3], under Article 21[4] that " no person shall be deprived from his personal life and liberty", that can be gathered from the article 21, which ensure that right to life and personal liberty of every person (which even includes a child) is very important. The importance of a child can be better understood by the words of the CARA[5] where it has been stated that the Government of India, in pursuance of its constitutional mandate, has evolved a National Policy for the welfare of children. The thrust of this policy is summed up in the following words:

> "The Nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Child's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivation needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice."[6]

Child - As an asset of the nation

When a child is the future of a nation, how can a state play with his future which is in the form of a child is growing under the kinship of the child, that is why a state is under an obligation to take special care in upbringing of its future i.e the child and in a view of their emotional and intellectual bondage towards a state and the part that they would play in shaping its future fortunes. Every child is an unpolished diamond, an unopened bud, a dormant uniqueness, a national asset, with an inherent capacity to sparkle, to bloom to awaken and realize its potential when provided with the right environment.[7] The state is the ultimate guardian of its citizens under the doctrine of parens patria where the state is absolutely liable for the entire development as being the guardian. Even if a child is in affluent situation; it may be an abandoned child; a blossom in the dust. It may be a socially and economically deprived child[8], but he has

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1 N. M. Goriawalla, "Inter-Country Adoptions Policy and Practice with Reference to India", 37 IJSW 151 (1976).

2 L. K. Pandey v. Union of India, AIR 1984 SC 469.

3 The Constitution of India, 1950.

4 Ibid.

5 The Central Adoption Resource Authority.

6 Procedure provided by the Central Adoption Resource Authority (CARA), *avilable at:* http://www.adoptionindia.nic.in/parents/inter-Guidelines-for-Adoption.html, (Visted on Sep 11 2013).

7 Vibha Sharma, "Inter-country Adoptions in India- An appraisal", 45, *JILI* 543 (2003).

8 H. S. Ureskar, "Legislation Supporting Adoption", XXXVII *IJSW* 159 (1976).

a birthright to total development and this is the inherent right which cannot curtail by anyone.

One of the myth which is prevailing in the society is that the investment for the children's overall development is the wastage of the hard earned money but as the idea of human right is synonymous with human dignity and all these rights, which are essential for the maintenance of human dignity may be called human rights so human rights are being essential for all round development of the personality of the individual in the society, be necessarily protected and be made available to all individuals including children[9]. As every nation, (developed or developing) connects its future with the status of a child. Childhood holds the potential and also sets the limit to the upcoming development in the society.

Child is the most sensitive gift to humanity. The children signify external optimism in the human being and always provide the potential for human development. As children are the future of the world, they are to be provided with all necessary facilities and atmosphere to grow into responsible and useful citizens of the country.[10]

Child- As a Guardian of future

The child is a guardian of the future of a country; he will serve his life to the nation, so his today i.e childhood is the sole responsibility of the nation. Therefore, for the protection of the future of the child or in other words the future of the nation, the state must have to ensure that this child will have a good and healthy upbringing, but how, the future of the nation can be secured or what the basic requirement for this protection is? The basic or ground root requirement for a child or for the protection of the future of a child is the family, family where a child will open his eyes, the family where the child will groom, the family where the child will start his life voyage, therefore, the right to have a family is the first right of the child. However, right to have family is the first and foremost important right of a child and if a child is not having family than this is one of the serious problem, and this problem can be solved by the procedure of adoption, in other words it can be said that the incomplete life of a child can be complete by giving him into the procedure of adoption. Therefore, adoption is the only remedy which can be provided by the state a child who is not having this basic right, the right to have family.

The fundamental right of a child : The right to have a family

The first need of the child is the family, the family where he can brush up his future. But if a child is not having a platform i.e family to express his feelings and emotions, it is primary duty of the state machinery to provide him this platform. And the mechanism as been earlier discussed is the procedure of adoption. Therefore, giving a child into adoption can fulfill the basic right of the child i.e right to have a family. So here the adoption comes into picture for the fulfillment of the empty life of a child.

Adoption-a process for the completion of family

Adoption is regarded as the most perfect means to restore a child who is deprived of his natural parents or whose parents are in heaven. Adoption in Roman law was a very ancient institution having its roots in ancestor worship. The maintenance of the family 'Sacra', observance in honor of the ancestors of the family, was regarded as the

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[9] Dr. Mahendra Tiwari, "Human Rights and the Rights of Child in India", XXXVI *JLS* 215 (2006).

[10] *Supra note* 7.

highest importance and when a man was old and was likely to die without issue to carry on those observances, he was allowed to 'adrogate' some other independent citizen, 'a peter familias' and thereby make him a son"[11]. Thus under Roman law, adoption is the way to continue the family. By the influence of Roman law the institution of adoption extend to different countries and civilization.

Adoption is a way of forming a family, involving the placement of a child with adoptive parents, followed by a legal process, which establishes a child as if he or she was born to those adoptive parents. The concept of adoption was not unknown in Vedic times, in Aitareya Brahaman VII, 3 the legend of Sunahsepa refers to his father having sold him in adoption to king Harishchandra and to its subsequent adoption by the sage Viswamitra who had Aurasa sons of his own.[12]

Adoption is a social legal process[13], but according to the Hindu law it is spiritual too[14]. The ancient Hindu law, recognized 'adoption among Hindus. Adoption in a Hindu society has the sanction of religion. Adoption was always effected by ceremony, "the physical handling over the child was sine qua non of such ceremony". According to the traditional Hindu principles adoption takes place in order to provide male Hindu with an heir who will perform the Shradda ceremony[15] "after his death" son is indispensable for spiritual as well as material well being[16].

According to Vashistha[17]-

> "There is no heavenly region for a sonless man"

Here we have some of the reasons for adoption in the Hindu society as-

- The natural desire to have a son as an object of affection.
- As the protector in old age days.
- The celebration of name and also for the perpetuation of lineage.
- To have a son who can give pind- daan ceremony after the death of the parents.

In *Ganga Sahai v. Lekhraj Singh*[18], Mahmood J. observed that –

"Adoption in Hindu law, being in the nature of gift, three main matters constitutes its elements apart from the questions of form. The capacity to give, the capacity to take to be the subject of adoption seem to me to be matters essential to the validity of the transaction and such beyond the province of the Doctrine of "Factum valet"[19]

Adoption is considered as one of the ideal means for providing family life to a child who is deprived of his natural family. As also underlined by Bhagwati J. "the most congenial environment would, of course, be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to

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[11] Dr. Hari Dev Kohli, *Supreme Court on Hindu Law* 64 (Universal law Publishing Pvt. Ltd, Delhi, 2010).
[12] *Ibid.*
[13] S.D. Gokhale, "Inter-Country adoptions and consultancy in guardianship", 37 *IJSW* 109 (1976).
[14] Sanjay Sen, "Inter-Country adoption- A Tryst with destiny", 14 *DLR* 195 (1992).
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*
[18] (1887) 9 ALL 253.
[19] *Ganga Sahai v. Lekhraj Singh*, (1887) 9 ALL 253.

trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents"[20].

The child is the indispensable link in the perpetuation of the human race, the desire to have a child is an innate desire to have food, and the child is a bond of family joy, a living insurance in old age, an heir to the property and a perpetuator of the family names, traditions and values.[21] Adoption does not replace the biological relation which exists between the child and its natural parents, it does reconstitute a stable family through the enduring ties which it creates.[22] The concept of adoption is not at all new, it was there in the society from generations, and it is a well-known practice in Indian society and as well as in foreign countries people are willing to give and take a parentless child in adoption, and the parents are not getting only the only legal side of adoption but also they are enjoying the emotional(being a father/ mother of a child). Therefore it can be stated as adoption changed its earlier sense, as it was a purely legal concept, but now it becomes the genuine family relationship, a relationship which is no longer based upon the blood, but on the concept of living together.

"Adoption" is a process through which the adopted child is permanently separated from his biological parents or from any place/person who can give him/her in adoption, and the child will be the child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship i.e. being a child of that family.

Adoption is the act of affiliation by which the relation of paternity is legally established between persons not so related by nature.[23] As the Apex Court in its various judgments and the United Nations Declaration of the Rights of the Child adopted by the General Assembly in 1989 and also the Hague Convention on Inter-country adoption of 1993 clearly laid down that the best interest of the child cannot be served without a family, it can be served by providing an opportunity to be placed within a family within its own socio-cultural milieu. Therefore, the first and foremost imperative thing is to provide a family for the best and better development of a child. Adoption can be divided in two sub heads, as:-

- Intra Country Adoption.
- Inter Country Adoption.

Intra country or in-country adoption

Intra country adoption or in-country adoption is a procedure where a child could be given in adoption within the country; therefore, it is a process through which a child who belongs to a citizenship can only be adopted by the same citizenship person. For instance- Adoption of an Indian child by Indian parent(s) residing within India. In this kind of adoption we have different provisions[24], a Hindu[25] child could be adopted by

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[20] *Supra* note 7.
[21] *Supra* note 9.
[22] *Supra* note 13.
[23] *Supra* note 9.
[24] Section 6, 7, 8, of the Hindu Adoption and Maintenance Act, 1956.
[25] Section 2(1) of the Hindu Marriage Act, 1955.

the Hindu parents within the different provisions[26], provided by the Hindu law[27], as this law[28] is only applicable to a person who is Hindu within the definition of this act[29], and not applicable to all communities like Muslims, Christians, Parsi etc. but it doesn't mean that they cannot adopt a child, even they can adopt a child by the provisions mentioned under the special act[30], for the adoption of a child within the nation itself.

Inter country adoption

The Inter country Adoption is a method of adoption in which both the child and parent belong to different countries, and the citizenship of the child and of the parent is different. For Example - Adoption of an Indian child of US parents. In this kind of adoption, the child went to the other country with the prior permission of his own country and can get the citizenship of that particular country to which his adopted parents belong with the endorsement of that particular country.[31]

According to the Indian council of social Welfare, foreign adoption is a situation where, "the adopters and the child do not have the same nationality and as well as in which the habitual residence by the adopters and the child is in the different countries".

- Before moving ahead we have to see some of the major differences between the intra and inter country adoption, and the differences are as follows:
- Nationality-The first major difference between intra country and inter county adoption is the nationality. In the Intra country adoption both the child and adopted parents belongs to same nationality. But on the other hand in the Inter country adoption the child and parents belong to the different nationality.
- Trans- cultural relationship- Another important difference between these two is that they have a character of trans- cultural differences. In the intra country adoption the child and parents belongs to the same culture because they are from the one single country and in between that country the culture could be of same kind, but on the other hand in the intra country adoption the child and parents belongs to two different cultures which will totally different from each other.
- Procedure of adoption- The other bases which makes a difference between the in-country and inter country adoption is the procedure of adoption. In the Intra country adoption the adoption could be done within the county according to the laws which are available within the country but in the inter country adoption the adopted parent will be appointed as the guardian of the child and the child will be adopted according to the laws of the country of the adopted parents.
- Trans- Racial Relationship- The other difference between these two is the Trans – racial relationship. In the intra-country adoption the race is same

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[26] Supra note 24.

[27] Hindu Adoptions and Maintenance Act, 1956.

[28] Ibid.

[29] *Supra note* 24.

[30] The Guardians and Wards Act.

[31] Re *Rasik Lal Chhaganlal Metha*, AIR 1982 Guj. 196.

because the child is adopted by the same racial country, for e.g., if an Indian child is being adopted by an Indian parents than but obvious the race will be same with his/her parents being the person of the same country. But on the other hand in the intra country adoption the relationship between the child and the parents is trans- racial as they both belong to the different and their own respective races.

Inter country adoption: why or why not?

Inter- country adoption or international adoption means an adoption of a Child of one country by the parents of another country, it is also termed as cross border adoption. The inter-country adoption is a solution for those children who don't have/ or for them a parent cannot be found in between the country, then these children can be given in cross border adoption. Even it was one of the observation of the Apex court that it is necessary "when the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country, because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might arise on account of cultural, racial or linguistic differences in case of adoption of the child by foreign parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socioeconomic conditions prevailing in the country, it might have to lead the life of a destitute, half clad, half-hungry and suffering from malnutrition and illness"[32].

Therefore, inter country adoption is one of good solution as for a parentless child, and in lieu of this India has signed the Hague Convention on Inter-country Adoption-1993[33] on 9 January, 2003 and ratified the same on 6 June, 2003 with a view to strengthening International Cooperation and Protection of Indian Children placed in Inter-country adoption.

The primary object of giving the child in adoption should be the welfare of the child. Great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life or moral or material security or the child may be subjected to moral or sexual abuse or forced labor or experimentation for medial or other research and may be placed in a worse situation than that in his own country.[34]

Bhagwati, J. is of the view that every effort should be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is some time called 'inter country adoption', should be made. This principle stems from the fact that inter country adoption may involve trans-racial, trans-cultural, and trans-national aspects which would not arise in case of adoption within the country and the first alternative should therefore

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[32] Supra note 7.

[33] The Hague Convention on the Protection of Children and Co-operation in respect of Inter-Country Adoption, passed on May 29 1993, came into force on May 1 1995.

[34] Dr. Paras Diwan, Law of Adoption Minority Guardianship and Custody 111 (Wadhwa & Company, Allahabad, 2nd edn., 1993). s

always be find adoptive parents for the child within the country.

Kinds of Inter country adoption

Inter country adoption are basically of two kinds-

- Reciprocity of recognition exits- that means "an adoption having taken place in one country is, by virtue of an international treaty, recognized in the other country/countries. An adoption in any member country of the Hague Convention represents this kind of Inter country adoption".[35]
- Reciprocity of recognition does not exists- In this kind if arrangement two different modes of effects exits- "The child must be adopted in the country of origin as a pre- requisite for his or her leaving it (the country of origin) even though he has to be adopted again in the receiving country as per its law".[36]

In the second method, "a special permission is required for the child to leave the country of origin, following which the child is adopted in the receiving country"[37], which is not at all required in the first method. In India, we are following the second method for affecting an Inter country adoption in which Reciprocity of recognition does not exists.

INTER COUNTRY ADOPTION—A SOLUTION OR A PROBLEM TO A SOLUTION

The adoption is the only solution which can complete the emptiness of the two lives. If a child is not having anyone to take care of him, then what he will do, he/she will cry for the love and affection, will sleep empty stomach, will live like an object only. On the other side of the coin, a family who is not having a child even their life is not complete, they will not have the opportunity of parenthood, the mother will be so far from the enjoyment of motherhood, the father will not have a child who can hold his figure and he will play with him, enjoy the stories of fairytales. That means the adoption is a bridge which will tie the two different lives into one platform.

The solution to complete the lives of these two different worlds is the procedure of adoption, a child will be adopted by the family, he will enjoy a status as a part of family, on the other hand if a child will given in adoption the childless parents will get a child in their family and they will have the same feelings and emotions as being the father and mother of the child. The relationship and bonding which will built up by the procedure of adoption is very pertinent in the sense that it gives a beginning to a relation which start by the fulfillment of the necessary requirements for the procedure of adoption. But this is not a very easy task to give and take a child into adoption, this solution leads to the different problems and we should have to try to find out the solution for these problems.

Procedure for inter-country adoption

The adoption has two major branches and in which one of the branch is inter-country adoption. In inter-country adoption the foreign adoptive parents can adopt a child

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[35] *Supra note 8.*

[36] *Ibid.*

[37] *Ibid.*

from India, and this procedure start with the application for adoption and ends with the approval of adoption. But as approval is the last stage of the guardianship, it is not the last stage of adoption because the adoption will complete when the child will go to the concerned country and there he has to be adopted by the parents according to the laws and procedure of that country to whom the adoptive parents belongs. Therefore, the procedure of inter-country adoption can be divided into two stages, the primary stage and the secondary stage. In the primary stage the country from where the child is going to be adopted is coming into picture, and in the secondary stage i.e the even the final stage, the country to which the child is going to be adoptive is in the motion.

Primary stage of inter-country adoption

For the primary stage of inter country adoption, the law of the adopted country is prima facie very important because by the concerned law the child could be given in adoption, but in India the legislation is not giving the clear picture about the procedure of inter country adoption. In the beginning when application comes before the court for the cross border adoption, the court formed their own opinion and settled down the matter according to their own knowledge. It was nothing but a wish of the court if they want to give, they gave, if they don't want to give they don't gave, the basis of adoption i.e the right to have a family was not the chief concern of the court. But this was not the end of this problem, because the different courts formed their different opinion, and the differences amongst the opinion lead to lawlessness in the society and this lawlessness lead to one of the complex problem which cannot be overlooked.

As the procedure of inter country adoption even after the freedom, remains an unsolved question, and there was no proper law, no rules and regulations, no procedure, no authority, which can govern with this complex problem, and the lack of procedure and governance lead to uncertainty with the future of the child. As every problem has to solved, this problem solves after 30 years when this problem/ uncertainty of the procedure and governance of inter country adoption was busted down by the renowned advocate[38] of Supreme Court, when he wrote a letter to the court and said that "this problem is with the future of the world". This gave the risen alarm to the Supreme Court and the latter was treated as the PIL[39], and in that case[40] the Apex Court laid down the guidelines for the procedure of the inter country adoption, and furthermore court gave the direction to the Government of India that an authority should have to be established who can work for the procedure of adoption. These are some of the important aspects which has been discussed by the court:-

- To laid down a procedure for the inter country adoption.
- Who has the authority to give a child in adoption?
- How foreign adoptive parents will make an application for the adoption?
- Procedure for the recognition of Child's social and welfare agency and their role and function in the adoption procedure.
- Role of foreign agency in the procedure of inter country adoption.

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[38] *Supra note 2.*

[39] Public Interest litigation.

[40] *Supra note 2.*

- Role of scrutinizing agencies for the procedure of inter country adoption.

(vii) Role of different other agencies in the procedure of inter country adoption.

(viii) The role and function of the Guardian Court.

(ix) The charges which have to be paid by the foreign adoptive parents.

(x) The follow up procedure after the appointment as the guardian by the foreign adoptive parents.

Formation of CARA

As directed by the Apex Court that there should be an authority who can worked for the adoption, The Ministry of Social Justice & Empowerment established a functioning body as the Administrative Ministry and the Central Adoption Resource Authority (CARA) as the Central Authority. The procedure of adoption is one of the most important factor which will cover the relevant questions, as who can adopt, by whom can be adopt, who can be adopted, what will be the terms and conditions of adoption, and so on. So for the maintenance of check and balance there should be an agency or it can be said that a functionary body should have to be established who can take proper care of the complete procedure of adoption, even this kind of body has been demanded by the Hague convention[41], so therefore for the proper implementation of the Convention and the direction of the Court the CARA is working as the major functionary body in our country.

CONCLUSION/ SUGGESTION

The Inter country adoption is an adoption through which a child of one country could be adopted by the foreign adoptive parents. In India the law on inter country adoption is silent, and because of the lack of any settled legislation this problem is growing like a pain which cannot be restrain. So this is the time we have to think about the guidelines of the Apex Court and work upon it. And until there will be no medicine of this pain, the pain will not release. Therefore, it is the need of the hour to solve this unsolved question, and there are some of the suggestions for solving this problem:-

- Enactment of a legislation- this is the first and foremost requirement which has to be done as soon as possible. As it has been discussed previously through two bills which were introduced in the Parliament viz. The Adoption of Children Bill, 1972 and the Adoption of Children Bill 1980. These bills were dedicated to the procedure of adoption in which inter country adoption was also been discussed thoroughly, but after 1980, nothing has been done for this problem, so here, it is the high time to make things into right direction, and for this there should be an enacted legislation.
- Child with biological parents- the Category of child has been divided into three main branches, such as:-
- Abandoned, destitute, or neglected child.
- The child who is under the care and custody of any child welfare home.

  The child who is living with the biological parents.

[41] Supra note 33.

But out of these three categories the Supreme Court talked about the first two as if a child who is orphan and destitute can be given in inter country adoption, a child who is abandoned, destitute and surrender by the natural parents to any kind of child welfare home, that child could be given in adoption. But on the third category i.e. a child with biological parent has not been touched by the court and court was silent about this category, as if the court was of the opinion that the natural parents are the perfect persons, who can do and think the best option for their kith and kins.

- . The follow up procedure – the concept of follow up is one of the unique concept, which will maintain a check and balance over the foreign adoptive parents, but this concerned follow up procedure is only for the first three years of adoption, what will after three years, the time to misuse the child. Therefore, the follow up procedure is not appropriate, it should have a proper standard at least, till the time the child is going to attain the majority, he should have to be followed by the agency or the country or any regulating authority which has been appointed by the country of the child.
- The maintenance charges should have to be revised- The charges which have to be paid by the foreign adoptive parents to the social and welfare agency should have to be revised because, the charges were fixed by the court in 30 years ago, and a long time has been already passed from that fixation, so now it is the time that the maintenance charges should have to be revised and fixed up by this time and need an with the care of the child. As the maintenances charges and donation is the only earning of the welfare agency, so for the healthy working of the agency, proper charges should have to be given.
- Role of mediators- In the procedure of inter country adoption the role of mediators are very relevant. In this procedure there are three mediators:-
- The social and child welfare agency of the country of origin of the child.
- The foreign Adoption agency which sponsor the application of the foreign adoptive parents.
- The Guardianship Court.

These mediators played a very vital role and function in the whole procedure of the inter country adoption. Firstly the role of the social and child welfare agency- The Social and Child Welfare agency working in the field of child welfare and adoption procedure. These agencies are being recognized by the Government either central or state. They select the child which can be given in adoption to the foreign adoptive parents, then they prepares a child study report, in which all the necessary information relating with child is collected and written down. After that they provide these information's to the foreign agency which is working in this field for the invitation of any application from the foreign adoptive parents. The agency is very important in the sense that they play a role of pleader who start the proceeding, but the problem start when most of the agencies are not recognized due to some formalities and when they are not recognized they cannot come forward for the adoption procedure, the next problem is that they doesn't get proper monetary help (which already discussed above), so they cannot maintain themselves. So these basic problems should have to be removed first and then they can play their role in a proper and perfect manner.

The next mediator is the foreign adoptive agency which sponsor the adoption application made by the parents from their country, even they played a pertinent role in the cross border adoption, as they prepared a report i.e. home study report, in an

approach that on which the court and the agency of child should have to be impressed for giving a child into adoption. Therefore, it is one of the accountability of this agency to free from any kind of biasness and the home study report will give the real picture of the family.

The last mediator is the Guardianship Court which will give the final remarks over the adoption procedure. The Guardianship Court will check the application and the home study report provided by the foreign agency in the support of the adoption and through which the foreign adoptive parents want to satisfy the court for the final stamp of the court on the proposal of adoption.

These are some of the suggestions which can be considered as relevant for the procedure of inter country adoption. Furthermore, the world is moving upward, the air is going in the right direction, the water is still chilled, and then why not the men of integrity take care of others. In today's time no one is caring about others, so this is the high time when the proper law and legislation could be protect the needy persons. At last, it can be reviewed with the words of a child:-

"My life is just started, though I will be the future tomorrow,

My eyes are just opened, though I will see everything tomorrow,

My world is just the home of mine, though I will see the world tomorrow,

My words are not clear, though I will write a new story tomorrow,

I am a child, though I will be a complete man tomorrow"

Dehradun Law Review

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Articles - the Journal invites Articles related to law and inter-disciplinary areas. The manuscript should be a precise and elaborate review of current/contemporary legal issues or questions that need analytical explanation. The prescribed word limit for the submission of articles is 5000-6000 words inclusive of footnotes.

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- **Citation** - The Bluebook: A Uniform Method of Citation, 18th Edition should be strictly complied to.
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