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Chief Editor sayeth!

Evening classes of Faculty of Law, University of Delhi have been around since the inception of the Faculty of Law in the year 1924. In the year 1970, the evening classes were given the name of Law Centre I and shifted to city Centre near Connaught Place and Central Secretariat, which were hub of the capital city of Delhi. In 1994 the Law Centre I was shifted back to the campus of Faculty of Law thereby ending its exile of 24 years. In the meanwhile, the Campus Law Centre was established in 1975. In 1971 another Law Centre II was established in south Delhi, which continues to function there.

The Faculty of Law has been decorated with persons like Sir Maurice Gwyer, Chief Justice, Federal Court and Vice Chancellor, Prof. P.K. Tripathi, Prof. Upendra Baxi, Prof. N.R.M. Menon, Prof. M.P. Singh. The teachers and alumni of all the Centres of Faculty of Law is a virtual Who is Who comprising ministers of Central Government, State Governments, Supreme court Judges, High Court Judges and innumerable high positions as also individuals of high thinking.

The Law Centre I has always been a trend setter in academic activities—in mooted new laws or amendments, developing the knowledge base of contemporary subjects such as information technology, intellectual property rights, biotechnology, Launching of JOLT-I is yet another contribution of Law Centre I to the legal academics of India.

The Law Centre I started a journal in the year 1996 for a year, but could not flourish. I as the Professor Incharge, had thought to build an identity of LC I in the national mainstream, for which I successfully took a step of organising a 3-day Workshop-cum-Conference in the contemporary area on Information Technology Laws and Related Intellectual Property in the form of 'Training the Trainers Programme' during March 19-21, 2010. This ambitious Programme was inaugurated by Hon'ble Union Minister for Law, Sh. Veerappa Moily and brought together stalwarts from the fields of Information Technology(IT) law, IT Bureaucrats including technologists from Ministry of Information Technology, Law Professors and HOD's experienced in IT and IP, advocates, judges from the Supreme Court/High Courts. The Association of Law Teachers and Institutions

of India with the undersigned as its President was also formed on that occasion.

The Association draws strength from numerous Professors and Vice chancellors and other teachers of law from all over India. It was thought that a journal sought to be run by a set up of LC I may end up as the previous one or the way many journals could not sustain. It is, thus, thought that a journal be initiated by ALT-I and its first issue be published by LC I. Practically, whole of the teaching staff of LC I is member of ALT-I. Later if possible the LC I may continue with it, otherwise the ALT-I secretariat may render assistance or if it is not published by LC-I, then it shall be published by ALT-I.

I am proud to present to you the first issue of the Journal of Law Teachers of India (JOLT-I), which has been produced alone by Law Centre I and the first right of refusal is reserved to Law Centre I. The Journal of Law Teachers of India (JOLT-I) is a Bi-Annual Research Journal in which members of ALT-I shall enjoy preference.

The colleagues at Law Centre-I believe in innovation and always aspire for better quality of life for all concerned and create a path for progress of teachers and students. The legal research we conduct, lead, or assist should serve humanity and should be done by humility, is our purpose. In order to actualise this urge, Law Centre I invited articles/monographs and papers from all and publish a select few in this issue of JOLT-I. As a precursor to publishing JOLT-I, last year, LC-I organised a 'Legal Article/Comment Writing Competition for LL.B/LL.M students. Prizes for three best entries were announced and it was decided that the winning entries would be published in JOLT-I. The promise is being kept.

The main objective of this journal is to encourage good legal writing on all areas of law and research amongst students and teaching faculty alike. All the papers are reviewed before publication. The journal has an Advisory Board as well as Editorial Board comprising eminent scholars.

Desk of Law Centre I

As the Head of LC-I, I take this opportunity to highlight a few other achievements of the past academic year, of the Centre, that deserve a special mention. Eminent scholar and academician, Prof. M.P. Singh, VC NUJS Kolkata, Sh Parag Tripathi, Addl Solicitor General of India and Sh

Sushil Jain, Advocate on Record, Supreme Court were invited to exchange their views on 'Constitution and Reservations' in April 2010.

Justice P.V. Reddi, Chairman, Law Commission of India, formerly Judge Supreme Court of India on 23 September 2010 traced the 'Developments in Constitution through Judicial Review by Judiciary'. He did not mince words and put all his thoughts before the audience in so intelligently chosen words that each person understood as per one's own comprehension. Shri Ashok Panda, senior advocate candidly brought out the topic of Public Interest Litigation in all its ramifications in a concise manner.

In this age when 'Right to Information' has mandated timely response to citizen's requests, the actual working of the Act and the practical difficulties faced in implementing the same were discussed by the then Central CIC Mr Habibullah. Needless to add, that it opened our eyes to many hitherto unknown facets of the implementation of the Act.

The Workshop on Law and Medicine, PNDT Act and sex selection, Medical Negligence and Legal support to Breast Milk on 29 October 2010 brought together two important disciplines that serve mankind. It contributed to an informative exchange of ideas and perspectives.

In keeping with the spirit of remaining proficient and dynamic, a 4-day event comprising two grand Workshops and a Conference is being organised during 11-14 March 2011 on Information Technology, Legal Education, and Intellectual Property Laws in collaboration with United States Patent Trade Mark Office.

Coming back to JOLT-I, the articles in this Inaugural Edition of the Journal present a wide variety of perspectives on myriad areas of law. The Editorial board would enjoy the freedom to use the materials or portions from any submitted articles, Comments/Notes after giving due credit. For errors that may remain, the editors take responsibility.

We welcome corrections, suggestions, and submissions from our readers. Don't hesitate to approach us!

Best wishes,

20 February 2011

Prof. Ashwani Kr Bansal
Elected Member, Governing Council of ILI
President, Association of Law
Teachers and Institutions of India
Professor Incharge LC I

Journal of Law Teachers of India

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Reviewing Information Technology Legislation in India

*Ashwani Kr Bansal**

This paper seeks to take stock of happenings in relation to IT Act 2000 from its inception and in view of the amendment of 2008 enforced on 27 Oct 2009. In November 2002 the Department of Information Technology (DIT) had set up Inter-ministerial Working Group on Cyber Laws and Cyber Forensics; the present author was appointed Member Secretary of the group and was entrusted the job of initiating the discussion. Three other groups were also set up, the work done by those groups and Group on Cyber Laws and Cyber Forensics would in the end was to be sewn together and final actions of the government were to emerge. This paper incorporates the backgrounder which was written in 2002 and projected an agenda for the Group on Cyber laws and Cyber forensics. However, the author returned to parent department of University of Delhi in 2003 itself.

The deliberations of the Groups constituted in 2002 and other inputs had resulted into an Amendment Bill in 2006. The amendments relate to the ideas which has largest acceptance. Thus the result may not be to the liking of each one, but what is best understood and most acceptable. It is time to evaluate the best interest of the growth of Internet in India and possible contribution to the economy and quality of life in India as delivered by law. The legal provisions have view point of private individuals and those of the government. Normally, the law making requires achieving the result with least disturbance to the private rights of individuals. But the governance must deliver with or without laws.

* Formerly, Dy. CCA(F&L) a joint secretary rank officer in DIT, Government of India; now Professor Incharge, Law Centre I, Faculty of Law. Paper was presented in the Workshop-cum-Conference on IT-IP Law, 19-21 March 2010.

In India cyber laws were put in place by enactment of Information Technology Act, 2000 (hereinafter Act) in June 2000 following the UNCITRAL model law. The Act was enforced on 17 October 2000. The Act has been useful in its capacity as an enabling legislation. Contrary to the then popular criticism and expectations, it was an epoch making Act. In the hindsight it can be said that without such a law in place, the phenomenal development of Internet catering to so many activities as also to Banking would not be possible.

What IT Act did?

The IT Act 2000 brought far-reaching changes in the legal system, preparing the country for present-day, detailed analysis of laws applicable in cyberspace, cyber security, security of information and security of vital installations run on automation brought about by integrated or stand-alone computers and networks.

The Act has performed the vital function(s) of- (i) declaring e-documents equivalent to paper documents and (ii) digital signatures to natural signatures, and (iii) introduced accountability in relation to cyberspace by attributing e-records to the originator (iv) declaring certain offences and providing a framework as a result of which the whole set-up of the Controller of Certifying Authorities and licensing of certifying authorities has been established. Thus, the country was brought to a take-off stage in relation to e-commerce and e-governance. But for the skeletal nature of the Act, many of the developments in the e-sphere may not have been possible.

In 2002, we had amended the Act under the 'removal of difficulties clause' when six minor amendments were carried out by notification saving the time of Parliament. I had said on the basis of difficulties experienced, the needs and aspirations of the society, the industry, logistics of the security of information, the network infrastructure, vital installations, and to top it all, the security of the country loomed large, all these hold out a need to revamp the whole of cyber law.

A new thinking to provide the fullest linkage between the physical space and cyberspace is necessary. The activities in cyberspace do have an impact on the physical space. At this juncture what has come to the forefront is the issue of security of cyber installations from all types of attacks—in the physical world or in cyberspace. The security of

physical objects being targeted by terrorist groups aided and abetted by secret communications achieved through the Internet, including the possibility of attack on physical objects by convergence of Internet and other cell phones or communication technologies to target devastating signals on such objects is real.

Cyber Crimes

A crime is always real. A real person inflicts harm or automates the harm, and a real person, property or installation is affected. The environment and means in which the crime occurs may differ, but its effect is to be measured with one touchstone—how the means affected real people, property or resources in the real world.

The problem of identifying cyber crimes, boils down to first mapping cyberspace into the real world; and then translating the effects of individuals' actions on the Net, into their actions within the jurisdictions of the State.

The Parallel between Physical and Virtual Space

Is communication by e-mail or chat like sending a hand-written letter or talking on the phone? Is copying something from a website like copying something from a book or magazine? Is selling a spurious product from an e-commerce website like selling a spurious product in a shop? Should an e-trader be held as responsible to an e-consumer as a retailer is to a consumer? Is publishing something offensive about someone on a website slander? Is breaking a promise made in cyberspace like breaking a promise made in the real world? The underlying thread in all these questions is a judgment on 'intention'. The answer to all these questions is *yes*. As their effects have exact parallels in the real physical world, such questions constitute the *first level* of mapping of the cyberspace into the real world.

Peculiar to Cyber Space: At the second level come questions where the effects of a person's actions in cyberspace have no parallels in the real world. Such actions are unique to the Internet in as much as they primarily vilify cyberspace. These include hacking a website to cause disruption in cyberspace, and spamming someone with the intention to harass or send unsolicited advertisements.

Using IT for Real Terrorism: At the third level are issues, where the cyberspace is directly used as a means to spread *real* destruction and loss through sabotage of key computer systems and networks, and sometimes installations like dams and bridges. The possibility of harm in the real world at the hands of saboteurs, terrorists and anti-national elements will grow with the development of the technology.

Already in India, key civil and defence installations are increasingly becoming computer-dependent in our quest to achieve higher levels of automation and efficiency. Hence the Railways, telephone exchanges, air-traffic control radars – they are all vulnerable to attacks from computer-literate terrorists working from remote locations.

The above are broad categories under which criminal acts are termed as cyber crimes. The 2008 Amendment Act has enacted large number of offences as would be noted later, but there does not appear to be mechanism in place for redressing the difficulties of victims. It is only in far and few cases there is possibility of officers moving to take action.

Cyber Forensics

The evidence and investigative procedures needed to prove a person guilty of a cyber crime in a court of law constitute cyber forensics. Such evidence would have to be attributed indisputably to the person, and would have to be tracked to the person in question. Technology for the purpose of validating documents exists in the form of encryption and decryption, including digital signatures and secure sites.

Criminals in cyberspace, much like the real world, leave trails that can be tracked to pinpoint their origin. Enforcing a system to rid netizens of the anonymity they enjoyed can bolster the effectiveness of such a tracking mechanism. It is necessary to educate cyberspace denizens about a sense of responsibility and accountability.

Cyber forensics is largely an implementation issue, and in this light, a critical review of the experience with the enforcement of offences chapter of Information Technology Act, 2000, would be of immense value.

In s 79A of Evidence Act the Central Government is seized of the matter to provide whole scale system of giving expert opinion on electronic form evidence before courts or other authorities.

Section 79A reads:

S 79A Examiner of Electronic Evidence:

The Central Government may, for the purposes of providing expert opinion on electronic form evidence before any court or other authority specify, by notification in the Official Gazette, any Department, body or agency of the Central Government or a State Government as an Examiner of Electronic Evidence.

Explanation—For the purposes of this section, “electronic form evidence” means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines.

This provision is an enabling legislation and we have to wait to scrutinize the working for some years. It is better than not having anything.

Cyber Emergency Response Teams

On the other hand, preventing cyber crimes, systems failure and cyber terrorism is an issue of more concern than punitive investigation and punishment. Cyber Emergency Response Teams (CERT IN) at National and Regional levels, CERTs, as also sectoral CERTs shall be the answer and they would have to be furnished with the most modern equipment, together with the enabling powers to practically do anything in relation to cyber applications. Some of these things are based on the experience of other countries as India has not achieved the kind of automation as is experienced by some other countries. There are spheres in India that require this sensitivity as is being highlighted in countries like the USA. Therefore, it would be useful to have the laws and institutions in place or in readiness for implementation.

The Amendment Act 2008 has made two provisions in s 70A in relation to critical information infrastructure protection and s 70B on Indian CERT again we will evaluate the sufficiency only after lapse of

some time to see the working. Provisions are excerpted for reference of readers:

70A. (1) The Central Government may, by notification published in the Official Gazette, designate any organisation of the Government as the national nodal agency in respect of Critical Information Infrastructure Protection.

(2) The national nodal agency designated under sub-section (1) shall be responsible for all measures including Research and Development relating to protection of Critical Information Infrastructure.

(3) The manner of performing functions and duties of the agency referred to in sub-section (1) shall be such as may be prescribed.

70B. (1) The Central Government shall, by notification in the Official Gazette, appoint an agency of the Government to be called the Indian Computer Emergency Response Team.

(2) The Central Government shall provide the agency referred to in sub-section (1) with a Director General and such other officers and employees as may be prescribed.

(3) The salary and allowances and terms and conditions of the Director General and other officers and employees shall be such as may be prescribed.

(4) The Indian Computer Emergency Response Team shall serve as the national agency for performing the following functions in the area of cyber security,—

(a) collection, analysis and dissemination of information on cyber incidents;

(b) forecast and alerts of cyber security incidents;

(c) emergency measures for handling cyber security incidents;

(d) coordination of cyber incidents response activities;

(e) issue guidelines, advisories, vulnerability notes and whitepapers relating to information security practices, procedures, prevention, response and reporting of cyber incidents;

(f) such other functions relating to cyber security as may be prescribed.

(5) The manner of performing functions and duties of the agency referred to in sub-section (1) shall be such as may be prescribed.

(6) For carrying out the provisions of sub-section (4), the agency referred to in sub-section (1) may call for information and give direction to the service provider, intermediaries, data centres, body corporate and any other person.

(7) Any service provider, intermediaries, data centres, body corporate or person who fails to provide the information called for or comply with the direction under subsection (6), shall be punishable with imprisonment for a term which may extend to one year or with fine which may extend to one lakh rupees or with both.

(8) No court shall take cognizance of any offence under this section, except on a complaint made by an officer authorised in this behalf by the agency referred to in sub-section (1).

Vital Assurance vs Dampener to e- Commerce

If an assurance as to its security is not forthcoming from the technology, institutions and cyber laws taken together as one coherent whole, e-commerce, e-governance and e-fund transfers/ payments on the Net shall not take off and the New Economy may not be able to deliver. The cyber crimes would increase when e-commerce, e-governance, and electronic fund transfers/ payments and banking system based on intranet applications becomes the order of the day. *The more secure the system, the faster would be the growth of e commerce.* The introduction of Electronic signatures may contribute to better authentication than when only digital signatures were eligible.

National Territory Based Laws and No Geographical Boundaries

Since the Internet has done away with geographical boundaries, the national territory based laws may never suffice. Individuals and businesses would drive through and establish their portals/websites in various countries, depending upon the advantages they perceive because of the local laws or out of a desire to keep the facilities away from certain national jurisdiction/s.

There is a tangible probability of the possibility of creation of such facilities at places where no nation may enjoy jurisdiction, e.g. at high

seas. Based on the benefits to be derived, nation states may compete with each other in providing liberal laws or incentives. This has been proven in case of administration of domain names, where India does not earn much of the revenue from registration of domain names. Its policies and requirements of transparency make .in domains unattractive.¹

Cyber Laws to Contribute to Development vs Only Cyber Crimes

There is an un-necessary emphasis on cyber crimes, whereas the effort should be to exploit the potential of NET. Cyber laws have a wider scope than cyber crimes or forensics enabling investigation. The function of laws is not geared to prevent or punish perpetrators of cyber crimes, but is to translate the policy of development and economic administration. There is clarity about the desirability of development, and accordingly to encourage the growth of all Internet related applications as also to give a boost to Internet related economy.

By precedent as well as the current thinking in India, the development of a robust New Economy that gels well with the overall philosophy of open markets and integration with the world economy is a desirable end. However, the security concerns have to be addressed as a pre-condition for the existence of such an economy. A system would need to be evolved whereby an individual who suffers losses would be compensated by community either through government or Insurance sector and not necessarily by taking recourse against offending party.

Free flow of information and reliable communication, forms the backbone of the new economic system. It subsumes a safe playing ground, which has come under very real threats. *Cyber laws have to provide for the prevention and punishment of crimes, and yet they have to make sure that laws do not work at cross-purpose with the policy of encouragement of Internet and related activities.*

¹ The .in domain is operated by INRegistry under the authority of the National Internet Exchange of India (NIXI). The liberalised policies for the .in domain allow unlimited second-level registrations under .in. Before the more liberal policies for the .in domain, only 7000 names had been registered between 1992 and 2004. By the end of 2006, that number had increased to over 200,000, with names registered by web users in over 150 countries. Roughly 80% of the registrants are from India, Germany, and the United States.

On an economic front, cyber laws have to facilitate e-commerce and resolve issues of delivery of goods and content across State boundaries. They must also compensate for losses in employment opportunities and revenue to the State that the re-location of such activities to cyberspace would entail. For instance, why should an official electronic agreement/ document be free when the same document when entered into traditionally incurs a stamp duty? Similarly, why should interactive website broadcasting on-demand video and audio clips not be charged an entertainment tax?

The Group was to examine cyber laws and cyber forensics with a view to govern such a mapped cyber reality. Issues such as those related to cyber security and cyber terrorism (both of a terrorist using the Internet, and terrorism in cyberspace), e-commerce, e-governance, cyber crimes, e-courts and cyberspace disputes were to be addressed by the working group.

Framework for Action

In 2002 it was stated that in relation to the I T Act, 2000, the following appear to be necessary for deliberation for making laws or scrutiny as to sufficiency.

Need of Cyber Crimes Law

The four-five provisions in IT Act, 2000 do not provide sufficient security either to Internet resources or to its applications in e-governance, e-commerce, and transmission of information, as a communications hub or so many other capabilities of Internet or Intranets. There is a pronounced and established need of Cyber Crimes Law and law providing Security of Cyber Space and Physical Infrastructure which shall include hardware.

The very tools that the Internet provides for the benefit of people at large are used by individuals and groups to actively engage in crimes.

Illustrative crimes: Criminals exchange information through e-mails, they post data and innocuous looking messages in chat sites, encrypt messages using cryptographic techniques, hide messages in innocent images such as photographs. They keep in touch and form groups through the Net which poses a difficulty in keeping a watch on their communications.

Nature of Crimes: The crimes noticed on the Internet include cyber thefts, financial embezzlement, banking frauds, economic espionage, etc. Some of the other areas include harassment of citizens in cyberspace, cyber defamation, threats to life, cyber frauds, spreading obscenity, spreading hate messages, spreading racism, etc. Websites are destroyed by people for competitive gains in business. The websites of competition are sometimes made ineffective.

Hacking as a term was invented only in the context of computer code, which can destroy working computer systems partially or completely. Child pornography, although present in society in a very restrictive manner earlier, has become an evil of menacing proportions.

The following definitions in s 2 of IT Act, 2000 would contribute to the identification and precision in the understanding of cyber law as also crimes.

(ha) "communication device" means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image;

(j) "computer network" means the inter-connection of one or more computers or computer systems or communication device through—

- (i)* the use of satellite, microwave, terrestrial line, wire, wireless or other communication media; and
- (ii)* terminals or a complex consisting of two or more inter-connected computers or communication device whether or not the inter-connection is continuously maintained;

(na) "cyber cafe" means any facility from where access to the internet is offered by any person in the ordinary course of business to the members of the public;

(nb) "cyber security" means protecting information, equipment, devices computer, computer resource, communication device and information stored therein from unauthorised access, use, disclosure, disruption, modification or destruction

In s 2(v) the message has been included in the definition of information, text

There are many ways of grouping cyber crimes. Some of the offences now in IPC need to be directly put in some sort of Cyber /IT law with

amplification or making the matter easily understandable for law enforcement agencies/ public. Launching of a virus, though covered under the IT Act, is not a criminal offence and attracts only a civil penalty.²

Cyber crimes are grouped as follows:

- | | |
|--|---|
| 1. Cyber frauds | For meeting these offences see the new provisions in s 66A. |
| 2. Cyber stalking, Harassing, Irritating, E-mail threats, spamming | |
| 3. Hacking, Worms and Trojans | See the new provisions in S 66B and 66C of Act |
| 4. Cyber theft | |
| 5. Information warfare: denial-of-service attacks | See the new provisions in S 66F of Act |
| 6. Cyber terrorism | |
| 7. Child pornography, obscene materials | See the new provisions in S 67, 67A, 67B of Act |
| 8. Economic espionage | See the new provisions in S 66A or 66B of Act |
| 9. Wiretap, Consumer harassment/vulnerability | See the new provisions in S 26 of Act |
| 10. Privacy of citizens | See the new provisions in S 43A of Act |
| 11. Cyber defamation, Hate speech | |

Cyber Forensics

Among other provisions to be enacted, methods for collecting and presenting soft evidence in courts shall be codified after being evolved by computer forensic experts. This has been taken care of vide s 79A of 2008 Amendment. European Treaty on Cyber Crimes needs to be studied and provisions as per Indian needs should be adopted. The inputs of CBI and Intelligence Bureau were likely to be important.

² If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.

S. 66. If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.

Explanation.—For the purposes of this section,—

(a) the word "dishonestly" shall have the meaning assigned to it in section 24 of the Indian Penal Code;

(b) the word "fraudulently" shall have the meaning assigned to it in section 25 of the Indian Penal Code.

Setting up of Cyber Forensic Labs

The IT department shall in collaboration with MHA/Intelligence / Police Depts shall establish advanced level Forensic Labs. It was the thinking of the government that in the first phase 6 – 7 labs may be created out of which one could be located at National Cyber Space Academy then sought to be established by DIT. In the second phase one lab for each state may be necessary.

Liabilities of ISPs

There is a feeling the Act is soft on ISPs. There is no provision mandating the ISPs to maintain login records. The provisions adopted in 2008 amendment display that ISPs enjoy sufficient clout with law makers and the DIT.³

The law has not empowered the investigating agencies adequately in relation to ISPs. A balance between the powers of the Agencies and the freedom of ISPs needs to be set up. The exercise done in the amendment has proven that the balance normally hinges in favour of private parties rather than the government.

The new s 79 inserted by amendment reads as under:

79. Exemption from liability of intermediary in certain cases

- (1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hasted by him.
- (2) The provisions of sub-section (1) shall apply if—
 - (a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hasted; or
 - (b) the intermediary does not—
 - (i) initiate the transmission,

³ The amendment to section 79 was propelled in part by the poorly drafted previous provision which led to the case of baze.com where the CEO of Baze.com was arrested for not complying with the requirements of section 79 under the un-amended version. The amended section attempts the relevant safeguards so that the ISPs are not made scapegoats for the offences committed by others.

- (ii) select the receiver of the transmission, and
 - (iii) select or modify the information contained in the transmission;
 - (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.
- (3) The provisions of sub-section (1) shall not apply if—
- (a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;
 - (b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.—For the purposes of this section, the expression “third party information” means any information dealt with by an intermediary in his capacity as an intermediary.

It is only after some lapse of time we will be able to review efficacy of these provisions.

Cyber Security⁴

It was decided at high level to set up computer emergency response teams to be named as CERT – IN and regional level CERTS. It is also thought that government departments and private sector both may have their own mini CERTS. Laws need to be put in place defining the functions / operations and responsibilities of the national level CERT. The powers of CERT will also have to be elaborated. The defence CERT might be given an additional power to take all measures it thinks fit which are in the interest of the national security as well as the security of installations vital for the nation. This power shall include e.g. dropping / hacking of the sites of others. Similarly, the power to

⁴ S (2) (nb), The Information Technology Act 2000 defines ‘cyber security’ as, protecting information, equipment, devices computer, computer resource, communication device and information stored therein from unauthorised access, use, disclosure, disruption, modification or destruction.

intercept various messages is vital both to internal security and external security. At times, it is also necessary for maintaining law and order in this regard.

Blocking of Websites for Public Access of any Communication

The new provision for blocking of websites is inserted in s 69A of the Act. It is noteworthy that we had done a similar exercise by notification admittedly even without proper powers in the Act.

69A. (1) Where the Central Government or any of its officer specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

- (2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.
- (3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and also be liable to fine.

The provision in 69B also appears necessary, but the basic provision in s 69 is controversial as it is liable to be misused by officers and party in power.

69B. (1) The Central Government may, to enhance cyber security and for identification, analysis and prevention of intrusion or spread of computer contaminant in the country, by notification in the Official Gazette, authorise any agency of the Government to monitor and collect traffic data or information generated, transmitted, received or stored in any computer resource.

- (2) The intermediary or any person in-charge or the computer resource shall, when called upon by the agency which has been authorised under sub-section (1), provide technical assistance and extend all

facilities to such agency to enable online access or to secure and provide online access to the computer resource generating, transmitting, receiving or storing such traffic data or information.

- (3) The procedure and safeguards for monitoring and collecting traffic data or information, shall be such as may be prescribed.
- (4) Any intermediary who intentionally or knowingly contravenes the provisions of sub-section (2) shall be punished with an imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.—For the purposes of this section,—

- (i) “computer contaminant” shall have the meaning assigned to it in section 43;
- (ii) “traffic data” means any data identifying or purporting to identify any person, computer system or computer network or location to or from which the communication is or may be transmitted and includes communications origin, destination, route, time, data, size, duration or type of underlying service and any other information.

S 84A, 84B and 84C are consequential in nature – one is authorizing the government and the others are logical provisions normally found in the laws.

Security of Information

Security of information is another area. It may take the form of espionage. Information warfare – peaceful, offensive or preventive geared to defence needs and appropriate authorizations have to be provided in the laws. Information has to be ‘reliable, available and survivable. Mechanisms are needed to be built up and manpower trained in this regard. Information infrastructure of organisations can not be allowed to be made ineffective.

It was stated earlier, that large scale encryption of messages, including with public key authorized under the IT Act 2000, can pose serious problems for enforcement agencies. There is a power vested in sub-section (1) of section 69. The provision was so worded that the power may not be exercised properly and the offence created in section 69 sub-section (3) may go unpunished. We had said that the provision needs redrafting with suitable modifications. Now that it has been

done but powers taken are to the disliking quite disproportionate. S 69 reads as under:

"69.(1) Where the Central Government or a State Government or any of its officer specially authorised by the Central Government or the State Government, as the case may be, in this behalf may, if satisfied that it is necessary or expedient so to do in the interest of the sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource.

- (2) The procedure and safeguards subject to which such interception or monitoring or decryption may be carried out, shall be such as may be prescribed.
- (3) The subscriber or intermediary or any person in-charge of the computer resource shall, when called upon by any agency referred to in sub-section (1), extend all facilities and technical assistance to—
 - (a) provide access to or secure access to the computer resource generating transmitting, receiving or storing such information; or
 - (b) intercept, monitor, or decrypt the information, as the case may be; or
 - (c) provide information stored in computer resource.
- (4) The subscriber or intermediary or any person who fails to assist the agency referred to in sub-section (3) shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.

We had stated there might be necessity of power to coerce the decryption of any message. The power to require decryption in relation to e-records may have to be far-flung and may have to be available with many different kinds of authorities including tax authorities as may be considered fit. S 84 A may kindly be seen.

Creating Offences in Relation to Damage / Pilferage to Hardware

IT Act 2000 had made certain provisions in section 43 which provide redressal to the grievances of an aggrieved party. In the Act damages by way of compensation of Rs 1 crore have been provided. Damage to hardware facilities may be covered in one or the other clauses of section 43 but predominantly the provision addresses the software or the content of computer, computer system or computer network. The consequential amendment of adding the word compensation in the heading is clarificatory. Two new clauses (i) and (j) have been added in the list attracting penalty or compensation, which are by way of abundant caution as they would be covered even in the previous clauses but make the things more clear.

There is an urgent and pressing need for the creation/declaration of offences against the persons who violate any of the facilities of Internet by any manner or such other persons trying to gain unfair advantage in relation to the Internet. The whole of the infrastructure consisting of hardware, cables, facilities, locks, and so on, if tempered with physically or by any mechanism or sending various signals, including by way of bombarding e-mails, need be made punishable. The protection of hardware is vital both to national security and to commercial exploitation of the Internet. Even though the hardware is covered in property it would be better to provide special protection to hardware.

Critical Infrastructure Protection

To create offences in relation to any attack on critical defence infrastructure or infrastructure of power generation and distribution, communication, road transport, highways and all the infrastructures established by civil aviation Ministry, infrastructure established by banks, department of banking, Govt. of India, RBI, the critical installations in relation to petroleum, natural gas and railways and others as notified by the government. S 70 and s 70 A may be looked at in this regard.

Cyber Terrorism

The convergence of cellular telephones with computer networking /Internet has further enhanced the potentiality of putting the system to

use by terrorists.⁵ Therefore, in addition to cyber crimes, cyber terrorism using the mechanism of Internet will have to be tackled by creating offences in relation to the same.

The response of Parliament is seen in enacting s 66F brought in force on 27 Oct 2009. It reads as under:

S 66F. (1) Whoever,—

(A) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people by—

- (i) denying or cause the denial of access to any person authorized to access computer resource; or
- (ii) attempting to penetrate or access a computer resource without authorisation or exceeding authorised access; or
- (iii) introducing or causing to introduce any computer contaminant;

and by means of such conduct causes or is likely to cause death or injuries to persons or damage to or destruction of property or disrupts or knowing that it is likely to cause damage or disruption of supplies or services essential to the life of the community or adversely affect the critical information infrastructure specified under section 70⁵ or

(B) knowingly or intentionally penetrates or accesses a computer resource without authorisation or exceeding authorised access, and by means of such conduct obtains access to information, data or computer database that is restricted for reasons for the security of the State or foreign relations, or any restricted information, data or computer database, with reasons to believe that such information, data or computer database so obtained may be used to cause or likely to cause injury to the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, or to the

⁵ As borne out by the 13 December 2001 attack on Parliament, Jammu Temple and Akshardham terrorists attacks in 2002 at the time of writing and use of these in 26/11 attacks on Mumbai in 2008 in India.

advantage of any foreign nation, group of individuals or otherwise, commits the offence of cyber terrorism.

(2) Whoever commits or conspires to commit cyber terrorism shall be punishable with imprisonment which may extend to imprisonment for life.

Extra Territoriality

Extra territorial operation of cyber laws needs to be strengthened. Reciprocal arrangements need to be entered into with other countries for prosecution of crimes committed in respective countries. The laws may also provide reciprocity clauses for taking action against individuals in other countries, making it applicable to a country dependent on notification and a treaty with the country for reciprocal enforcement.

Management of Network Systems Post Disaster

Manpower needs to be trained for handling disaster situations caused in physical world that is damage to installations and hardware, be that natural or man made or the damage caused to software and the data handled by the network systems. Procedures need to be established to that end.

e-Commerce

Formation of e-Contracts

Presently the rules for formation of e-contracts are contained in S 12 and 13 of the Act. There are certain circumlocutions in S 12(2) and S 12(3) of the Act. Similarly there is certain inexactitude in the language of the S 13(2) clause (a) and (b), which would pose an unnecessary difficulty and give rise to litigation. Therefore, the amplification and correction of the language of S 12 and 13 to bring it in line with the experience of other countries in formation of contracts is necessary.

- i) The precise moment as to whether a contract has been entered into or made;
- ii) when it was entered/made; and

iii) the place of the formation of contract need to be deliberated and amplified so as to avoid the ambiguity arising from the present language.

These issues are vital for performing the contract or making the payment.

"Validity of contracts formed through electronic means. 10A. Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose."

In section 12 of the principal Act, in sub-section (1), for the words "agreed with the addressee", the word "stipulated" shall be substituted.

Accountability of e Traders

In no case any license may be introduced for trading or providing services on the Internet originating in the territory of India. The persons who supply goods/services on the Net should be encouraged to submit to the jurisdiction of e-consumer courts.

Setting up of e-Consumer/ e-Business Courts

In relation to B to C or B to B commerce there can be many combinations. Different sets of rules or norms out of the following may be required for the various permutations:

- (i) In relation to the goods/services ordered through e-documents/message and physically delivered.
- (ii) In relation to the delivery of goods/services complete on the computer network itself.
- (iii) In relation to the payment made physically against delivery of goods order on the Net.
- (iv) In relation to the advance payment made online for any purpose, which is to be completed online or physically.
- (v) In relation to payment not made after the delivery of goods/services online; or the goods are delivered/ not delivered after payment.

E Courts suggested: Legislation needs to be enacted whereby e courts in the nature of Consumer Courts may be established. The instrumentalities would need to be worked. The theme would be that anyone who offers goods/services on the net would have to accept the jurisdiction of e courts. The e traders may be called upon to provide security for paying damage. Firstly mechanisms may be developed nationally as a pilot programme. The it may be taken to International level. Ultimately, every trader may be called upon to designate e courts in 5-6 countries with specified jurisdiction.

The traders would have to assure their customers that in case an e-consumer court decides against the supplier/trader, then the particular banking/ financial institutions will guarantee the refund of the payment or of damages in various eventualities. Eventuality may include return of the goods, deficiency in services amounting to non- rendition of services. The court after looking into all aspects may determine that the supplier/trader is in default and the buyer deserves damages.

In such situations a mechanism has to be built whereby grievances of online consumers are redressed online and refund of the payment to the consumers is ensured online by crediting the amount to the designated account of the consumer.

Some credit rating system or assurances flowing from e traders/ suppliers would do good to the growth of the system. It has also to be ensured that traders/suppliers from India do not cheat on the Internet so that the image of suppliers from the country is sustained. Once such a system is started and operative in few countries, there would evolve strategies to reach an international understanding on the norms as also on enforcement of awards.

Delivery of Goods/ Services through Medium of Internet

Internet is not only the source of communication but it also finally delivers the goods across to buyers who may be situated within the country or outside it. The nature of such content is all books, magazines, written or spoken material or music composition, all films, and all software related goods. This mode/type of delivery of goods dispenses with:

Foreign Trade Regulations of the two countries:

- o Custom Duties and Procedures
- o Regulations in relation to dual purpose content – capable of use in civil as well as defence installations.
- o Avoidance of sales or service taxes
- o Violation of intellectual property laws

Delivery and Distribution of Software through Net

Software-related applications and services are being rendered on the Net. The State should have the power to regulate the delivery or transmission of the content on Internet. Even though there may be an assurance not to exercise the power to prohibit transmission of the content on the Net. However, the dual purpose software or for use in terrorist activities may have to be prohibited and its transmission on Internet may need to be regulated.

Protection of Domain Names

The law relating to protection of domain names, addresses, their misuse, usurpation and dispute resolution as also linkages with TLDs of other countries need to be put in place so as to give competitive edge to population looking for Indian domain name as also protection from similar domain names registered internationally or with other countries.⁶

Reliance by Banks on Internet and Other e-Payments

This area is closely linked with E Commerce, but may be treated an independent subject in itself. Inter-bank payments, settlements and many other banking activities in relation to fund transfers are now done by computer Network and satellites. The infrastructure established by the Institute for Development and Research in Bank Technology (IDRBT) Hyderabad a subsidiary of RBI, in this regard in India is a pointer.

Negotiable Instruments Act was amended in 2003 and was notified for commencement. Now IT Act is applicable to cheques. That means cheques may be signed digitally. In addition the Central Government

⁶ At present the disputes as to domain names are resolved at two levels of court system and through the Uniform Domain Name Dispute Resolution policy (UDRP) and .INDRP Policy for .in domain names.

in consultation with RBI has been given power to adapt the IT Act to suit the needs of banking systems in s 81A of the Act.

Many activities of the banks have become Internet dependent and the security and privacy of the transactions is to be ensured. This area in itself is likely to assume importance and would attract new type of violations which may have to be addressed in future. The ATMs, Credit and Debit card services/ industry world wide is dependent on computer networks, but is functioning on some passwords based on faith system of banking industry.

At what point of time it may require switch over to digital signatures would become known only in future. The transactions of money is a major area for cyber laws with as large operations that the governance and commerce both are not possible without putting the legal system of assurances in relation to money in place.

Intellectual Property Issues

All intellectual property is best exploited if there are licensees willing to pay royalty for the use of intellectual property. The purpose of all IP is to create wealth for the creator. It may be licensed voluntarily or one claims damages for use of IP. State also seeks to constitute offences for violation of IPRs. A mix of the solutions should be provided for in favour of IPR rightholders.

Proviso to s 81 keeps the rights of patentees and copyright holders intact even though otherwise the Act has an overriding effect.

Internet and Broadcasting

Computer networking and Internet has a proven potential to provide broadcasting services. The broadcasting services provided on the Internet are more effective as they give an additional choice to the recipient to view the content of the broadcasting at a time of his/ her own liking. The existing broadcast channels may experience all-round losses and unemployment as they suffer deprivation of viewer-ship of their broadcasts. There will be displacement of advertisement revenue from the existing channels to the players of Internet. There is a related issue of Censorship of the content hosted on portals/ web sites or also of pornography.

Re-location of Sources of Revenue

As the new economy is ushered in, the tax revenue from the traditional sources or old economy would dry up. Therefore, there is a need to re-locate the sources of revenue. Various activities on the Net and intranet may provide the ground for raising resources for the country. The software writers and hardware ingenuity would have to cope with these facts, as the States would need revenue from e-transactions.

Internet – Free of Regulation?

It looks decent to talk about keeping the Internet free of regulation, but the revenues have to be raised for the State. If a substantial part of the trade in physical space is substituted by trade taking place through cyberspace and the trade in cyberspace is allowed to happen tax free, it would put an additional burden on the transactions in the physical space. This burden is necessarily to be avoided.

Taxation Issues

It may be understood that the population using the Internet facilities belongs to affluent sections as against the population using physical space for their transactions. The free atmosphere on the Internet already saves a lot of time and costs in relation to transportation, conveyance, etc. There is no need of giving tax holiday on the Net in preference to the physical space. There has to be a level playing field among players in physical space and cyberspace, with the in-built advantages of both being allowed to each of them.

This is not to make a case for heavy taxation of trade on the Internet, but if the trade in the physical space is substituted by the trade in cyberspace, an equal amount of taxation should be imposed on all transactions, whether on the Net or in physical space. Various services rendered on the Net may be taxed in the same fashion as in the physical world. For example, the entrepreneurs rendering the services of call centers should be willing to contribute some money for using the infrastructure and cheap labour of India. If the State or the infrastructure does not earn out of the activities of call centers, then only employment generation may not be considered to be a full contribution to the national economy. Presently the services rendered

by call centers go tax-free. The call centers sometimes do a lot of value addition. They import and export the material on the Net itself.

Entertainment: Posting content by any person be that a song, music, film or any other such material on a portal may take the shape of interactive broadcast. If the person himself posts this material on the Net and is able to charge the users, the State would need to impose a tax in some form or the other, otherwise the sources of revenue for the State would be dried up because the clientele would be able to entertain itself without payment of entertainment tax.

We do not want to tax the activities on Internet additionally or at a higher rate, but the source of revenue for the State cannot be allowed to dry up by providing tax-free entertainment on the Internet. It is to be kept in view that the Internet is used by those who are in a position to pay tax and who are conventional tax payers in the field of entertainment.

Online Dispute Resolution

It is desirable to provide a mechanism for online dispute resolution in the case of e-contracts, e-receipts and e-payments. There is a need to introduce accountability online in relation to the transactions on the Internet. Even though e-records and digital signatures together with a secure system of payments provide a sufficiently safe mechanism for authenticity of the transaction, still the transaction may be marred by non-delivery of goods/services or defective/deficient goods or services. There might be a delay or the goods simply may not match with the expectations. In this situation, it is desirable to set up e-consumer courts.

Adjudicating Officers under IT Act 2000

Provision has been made for appointment of one or more adjudicating officers to adjudge contraventions under chapter 9 which comprises five sections i.e. s 43 to 47. There is lack of clarity as to the jurisdiction of the AO to adjudge in relation to the whole of the Act and accordingly difficulties are being faced in framing of the rules providing for the manner of holding enquiry or to how to file the report of contraventions.

Fee: However, a more important infirmity in the adjudication system is that damages by way of compensation to the extent of Rs 1 crore are allowed to be filed. There is no enabling provision for the charge of any fee. It is considered absolutely necessary to impose some fee howsoever concessional it might be than the physical world. But it is necessary because otherwise false and malicious litigation will ensue. The whole purpose of providing an effective grievances redressal system would be destroyed simply because there is no fee and the genuine complaints will have to wait for years together.

Fivolous complaints: In addition, the Adjudicating Officers may be flooded with frivolous complaints. Therefore, in addition to the imposition of a fee, there is a necessity of imposing fines and penalties in addition to the costs of the opposite party in case of frivolous complaints.

Video conferencing/Recording: The parties in relation to e-commerce may be placed far-flung. There is a need for the Adjudicating officers to video conference with the complaining or defending parties as also among themselves so that an effective, easy and workable and judicious system of adjudication is put in place.

Investigations: There is a need of vesting a power in the Adjudicating officers to order *suo moto* or some other agency has to be authorized to investigate in relation to any contraventions of the Act and also of mis-utilisation of Internet resources.

The amendment failed to address the above concerns, even though s 46 was on agenda and subsection (1A) has been inserted restricting the jurisdiction of AOs to 5 crores.

In this regard it is worthwhile to state that the appointment of all AOs by one notification of the Administrative Officers not having legal or judicial experience is unwarranted.

e-Governance

The framework for introducing electronic governance in the country is prescribed under Ss 3 to 7 of the IT Act, 2000, which is to be supplemented by the rules. Three types of rules are particularly necessary for:

- 1) Filing of applications forms, applications or any other documents

- 2) Issue or grant of any license, permit, sanctions or approval
- 3) (a) Receipt of money in a particular manner, or
(b) Payment of money in a particular manner has to be provided.

The provision for these rules under the IT Act is in active consideration and progress.

However, a question has arisen in this regard: *Once e-governance is implemented all the documents, forms or applications shall be allowed to be filed only electronically.*

Presently S 6 of the Act gives the *option* to the government as also to private individuals *to use any one of the formats* — paper or e-record format. If this option to the individual is to be withdrawn then legislation is necessary, as no one can be mandated to file electronically when he/she has the *option to do so* on paper or e-record. This withdrawal of option cannot be achieved by subordinate legislation.

If the private individual has an option to choose either the paper document or the electronic document, but technically it would be necessary that the concerned department followed one method and maintain records *either electronically or on paper*, it would not function very properly.

The switch over period of 5-10 years may be necessary and provided for. If a person, firm, etc. do not have the facilities or means to make their documents electronic or to authenticate their documents by electronic signatures the State may have to provide for subsidized conversion of the paper documents into electronic documents. This has been done by mechanisms.

Which of the documents is authenticated: Thus if an individual files a paper document which will have to be converted into an electronic document, a decision has to be taken with regard to which will be the authenticated copy because the individual has submitted the paper document and has signed his natural signature and he has not signed electronically.

The provision in s 6A is related provision vesting the service provider with certain duties as also enabling the government to proceed with prescription or insistence to use electronic documents as against paper documents.

Data Protection

In other countries there are detailed provisions and some time full scale laws on data Protection. This is essentially a legislation to respect privacy. Virtually everything one does on computer can be traced by various players and individuals have faced adverse consequences because of such leaks of data by ISPs. 2009 Amendment has by s 43A introduced Data Protection. S 43A is in the nature of enabling legislation. Beginning has been made and the detailed rules shall follow in due course of time. S 43A is reproduced below;

43A. Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.

Explanation.—For the purposes of this section,—

- (i) "body corporate" means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities;
- (ii) "reasonable security practices and procedures" means security practices and procedures designed to protect such information from unauthorized access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit;

Implementing Electronic Gazette

There is a provision in S 8 of the Act of publication of an electronic gazette simultaneously with the official gazette. It is also clear that the date of notification shall be the date on which it is first published, either in print or in electronic gazette. The availability of the matter printed in one form in the alternate form is desirable

for wider dissemination of laws. If it were published in two forms, it would also be necessary to declare which out of the two copies shall be authentic. Presently the one which is first published would have to be taken to be authentic.

Digital Signatures

The 2000 Act prescribed a technology with which digital signatures may be made. There are many countries, including the UNCITRAL model law, in which the digital signatures are technology neutral. Some countries have adopted the model in which in addition to digital signatures, e-signatures may be there and many other technologies may be employed for signing under that method. It is considered desirable to allow other technologies for signatures whether by adopting a mechanism in which law is amended or by providing additional e-signatures. In India, the use of any other technology except asymmetric cryptography does not have legal validity and any violation of rights or any liability arising from the use of any other technology will be denied any legal remedy.

Normally, IT and Cyber law legislations¹ across the world always would hesitate to specify technological standards in legislations as technology may change very fast. It is difficult for the law to keep pace with the speed of change of technology. It is not considered proper for the legislatures to keep enacting legislations due to changes necessitated by the change in technologies.

Certifying Authorities (CAs) permitted parameters

The liability of CAs needs to be clearly defined. The escape from liability clauses may be precisely regulated so that the CA remains responsible to subscribers for losses caused by the acts or omissions at the CA's end. if there is no negligence on the part of CA, but loss has been caused to subscriber without his fault, whether there is any liability? There are More Issues to Keep Care, e.g., Freedom of speech & expression on the NET

Privacy, Equitable access to Internet, Issue of censorship of the content hosted on portals/ web sites - These issues are already answered in physical space. The same would be applied on Net. But the question of

jurisdiction and impact in other country from the material hosted in one country would continue.

Software Development for Crime Prevention

There have to be developed technologies/ software written for early detection of attempts to commit cyber crimes or man made cyber disasters or for attack on the security installations. The provision of deterrent punishment and success rate in tracking the culprits can turn the cyber security perfect.

Putting appropriate laws in place is a partial action in itself. The law may enact powers to prevent crimes, preventive forfeiture of computer gazettes, preventive interception and so much so preventive detention of individuals who are a threat to cyber security or may be involved in cyber terrorism. The laws which are preventive will have sufficient inbuilt mechanism/safeguards against misuse as is provided in preventive detention matters and in compliance with Constitution of India.

Dissemination of Cyber Laws

The legal knowledge brings about compliance with laws and works as deterrent. Large scale dissemination in all Computer and IT related institutes/ training centers and in all law faculties in the country as also training through Bar Associations to the advocates and judges would be useful. When a person has the knowledge that he/she can have legal recourse, in case of loss arising by using computer networks, it shall build additional faith in the e system.

Training of Manpower

Sufficient manpower is necessary trained in the twin fields of Information technology and law so that they could man the position of Cyber judges, Cyber prosecutors, Cyber Investigators or Cyber forensic experts, Manpower trained in preventing -- cybercrimes/ avoidance of revenue. They have to contribute to economic development.

Summary

The IT Act, 2000 was scrutinized in 2002 and deliberations were made on various issues and suggested the need for amending the act to meet the challenges faced in the virtual world. Crimes were increasing on the computers against the government as well as individuals on cyberspace. Hence, it was suggested to include crimes relating to cyber thefts, financial crimes, harassment of individuals, threat to life, obscenity, child pornography, spreading racism, consumer harassment, crimes preventing competition privacy related crimes . The terror caused by use of computer or other communication devices was of immediate concern. The role of ISP in transmitting such kind of information had to be settled. Further, there was need for cyber forensic experts to provide assistance in resolving the cyber crimes. The recommendation was made to establish cyber forensic lab. If any damage is made to, the hardware the same should be compensated. The attack on critical infrastructure may be looked at and a new offence has to be created. Extra territoriality operation of cyber laws to be strengthened by reciprocal arrangements with other States.

The crimes committed in virtual world required its policing to make it a secure place. The Computer Emergency response team to be given power to monitor the activities, which may requires decryption of keys. It can also be empowered to block sites involved in terror activities.

The issues in Information Warfare and broadcasting sector are not commented upon in this paper.

The e-contracts or some aspects of contract formation like time and place of entering into contract still require legal clarity. The digital signatures have been made technology neutral but require amplification. The disputes between e-business and the consumers can be resolved through e-consumer courts online in order to avoid any inconvenience. The payments made through e-banking need to be secured and personal information should be protected to safeguard privacy.

There is need of similar tax treatment on e-transactions equal to the amount levied in real word transactions. The similar provisions and tax should be imposed on supply of software. The entertainment tax needs to be imposed for providing films, songs or other material on

internet as in physical space. The mechanism has to be developed for online dispute resolution in cases of e-contract, e-receipts and e-payments. There is need for data protection provisions. A legislation to safeguard privacy is required as there had been adverse consequences in past due to leakage of data.

The Indian domain names require protection from similar domain names registered internationally. The internet broadcasting can lead to displacement of advertisement revenue from existing channels to the players of Internet.

The damages by way of compensation to the extent of 1 crore should be allowed in the form of compensation by the Adjudicating officer dealing with the disputes under s 43 to 47 and fines and penalties in case of frivolous complaints. The videoconferencing may be used for adjudicating. The Adjudicating Officer should be given power to *suo moto* make the investigations into contraventions.

For implementing e-governance, rules for filing applications, documents, grant of licence, receipt, payment of money electronically under S.6 need to be provided. Presently the option is available to use paper format. The period of 5-10 years be given to switch over electronic filing. The law should clarify the which copy of gazette will be authentic, the one published in electronic form or printed.

The liability of Certifying Authorities needs to be clearly defined and be made responsible for losses caused to subscribers without his fault. The above recommendation resulted in the enactment of the Information Technology (Amendment) Act, 2008, where most of recommendations were included except few.

The definitions of communication device, computer network, cyber café were added to cover crimes committed using these means. The cyber security was defined. The other types of crimes were created computer fraud, cyber stalking, theft of computer resources, identity theft, cheating by personating, violation of privacy, cyber terrorism, child pornography and preservation and retention of information by intermediaries beyond the period specified by Central Government. With regard to cyber forensics, section 79A has been introduced for appointment of an examiner of electronic evidence for expert opinion.

The Resource Centre for Cyber Forensics (RCCF) of CDAC, Trivandrum successfully completed the setting up of Cyber Forensics Labs in Offices of Income Tax Department at Delhi and Mumbai regions, which enables Income Tax Department to Control Tax evasion by effectively dealing with Cyber Crimes involving financial frauds.⁷ The Cyber Forensics and Digital Analysis Centre was set up by the Centre for Development of Advanced Computing (CDAC) in Kerala in December 2009. It will provide forensic expertise and training to police officers investigating cyber crimes. It will train judges and prosecutors in digital forensics for effective administration of justice in cyber crime cases. The centre will be a repository of modern cyber forensic tools used for analysing digital devices, including the latest BlackBerry and Personal Digital Assistant (PDA) phones, involved in crime cases.⁸

With regard to ISP liability s79 has been amended and they have been exempted from third party information except in case of knowledge or conspiracy.

A definition of cyber security has been added. An offence under s 70 has been created for accessing and destroying critical infrastructure and provision under s70A has been made to national nodal agency for protecting and for Research and Development relating to Critical Infrastructure. S 70B provides appointment of Computer Emergency Response Team, to serve as a nodal agency to perform the functions in the area of Cyber Security. The provision has been made for blocking of websites from public access for national security, friendly relations with foreign States etc. S 84A gives power to Central Government to provide modes of encryption. The abetment of offences and attempt to commit offence has been made punishable under s 84B and s 84C respectively. The interception, monitoring, decryption of information has been allowed under s 69 of the Act. The procedure has been given under The Information Technology (protection and safeguards for interception, monitoring and decryption of Information) Rules, 2009. The rules have also been provided for blocking under the Information

⁷ <http://www.cyberforensics.in/pages/newsdetail.aspx?id=20>

⁸ <http://www.cyberforensics.in/pages/newsdetail.aspx?id=20>

Technology (Procedure and Safeguards for Blocking Access of Information by Public) Rules, 2009. Further rules have been provided for monitoring and collecting traffic Data under the Information Technology (procedure and safeguard for monitoring and collecting Traffic data or Information) Rules, 2009.

No provision is there to provide redressal of the consumer disputes online. The amendments are not dealing with the tax liability for supply of services online. Regarding the privacy of sensitive information of a person collected by the e-businesses for certain purpose and failure to protect data, s 43A makes corporates liable to pay compensation for wrongful gain/loss of data. Further offence has been created for disclosure of information in breach of lawful contract under s 72A.

The Adjudicating Officer (AO) under the Act has been given power to grant compensation apart from the power of levying penalties. The rules relating to manner of holding enquiry by adjudicating officers provides for levying fine for frivolous complaints it can also *suo moto* take action for investigating complaints. There is no rule for making adjudication online. The jurisdiction of AOs is restricted to claims upto 5 crores in s 46(IA). The rules for qualification require the possession of technological and legal or judicial experience.

Need to Amend Abortion Law In India

Sarbjit Kaur*

Introduction

An abortion is a medical process of ending a pregnancy so that it does not result in birth of a baby. There are many reasons why a woman might want to have an abortion, such as personal circumstances (unwanted pregnancies, teenage pregnancies, pregnancies resulting from sex crimes like rape, incest, etc.), health risk to her, health risk or high probability of the baby being born with a medical condition, etc. However, malpractices in abortions mainly on the ground of sex of the foetus (female foeticide), are also there. Female foeticide is the actual cause of worry in India. With the advancement of modern technology, its practice, however, has taken a different shape. Now it is possible to detect the sex of the baby when it is still in the womb of the mother. This has made it possible to abort the female foetus, if it is unwanted.

There may be cases where reason for termination of pregnancy is not sex of the foetus but some fatal or catastrophic abnormalities in the foetus detected in later weeks of pregnancy. There are some disabilities such as congenital heart defects and other chromosomal anomalies in the foetus that can be confirmed only by the 20 to 24 weeks of gestation. The 40 year old Medical Termination of Pregnancy Act, 1971 (MTP Act) in India provides that pregnancy cannot be terminated after the 20th week unless there is a health risk to the mother. What should a mother do if congenital heart defect is detected in her unborn child after 20 weeks? Watch her child suffer in front of her eyes all her life or try to find out a solution legally and approach the court to allow her to

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terminate her pregnancy as was done by the petitioners in *Niketa Mehta* case¹. The Mumbai High Court rejected the plea as it would be against the provisions of the MTP Act. It was further held by the Court that it is up to the Parliament and not the Court to change the provisions of the law. Till recently, the issue of abortion was discussed in India only in the context of declining sex ratio, however, with the Mumbai High Court verdict, an altogether new angle in termination of pregnancy has emerged. This paper highlights the relevant provisions of MTP Act, health interests of the foetus and the expectant mother. Sometimes, health interest of the foetus may directly come in conflict with that of the expectant mother. Should termination of pregnancy be allowed in such a case? Reference is also made to the positions in UK and USA.

Abortion Law in India

In India, the MTP Act, 1971² provides for termination of pregnancy, though subject to certain conditions. According to section 3(2) of the

¹ *Dr Nikhil D. Datar and others v. Union of India and others*, Writ petition (L) No. 1816 of 2008 of the Mumbai High Court, popularly known as *Niketa Mehta* case.

² Section 3(2): Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-

(a) Where the length of the pregnancy does not exceed twelve weeks if such medical practitioner is, or

(b) Where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioner are, of opinion, formed in good faith, that -

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities to be seriously handicapped.

Explanation 1 - Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2 - Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

Section 3(3): In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant women's actual or reasonable foreseeable environment.

contd...

Act pregnancy can be terminated up to 20 weeks in two conditions: (1) if continuation of pregnancy would involve risk to the life of the pregnant woman or her physical or mental health is at stake or (2) if there are chances that the child, if born, would suffer from such physical or mental abnormalities to be seriously handicapped. Termination of pregnancy beyond 20 weeks is not possible except when the case comes under Section 5(1) of the MTP Act, *i.e.*, to save the life of the expectant mother in an emergency.

Thus, Section 5 nowhere speaks of any right of a pregnant woman to terminate pregnancy on the ground that delivery of a child may result in some abnormalities to the child to be born. If medical examination conducted after 20 weeks of pregnancy shows that the child, if born, would be seriously handicapped, should the expectant mother be allowed to terminate her pregnancy? This situation arose in *Niketa Mehta* case³. In this case, a foetal echocardiography test was conducted on the expectant mother in the 24th week of pregnancy. It revealed that the foetus has congenital complete heart block. The upper two chambers beating at rate of 133 per minute and lower two chambers beating at rate of 50 per minute suggest functional abnormality; the atrioventricular connections are abnormal (*av* discordance). Vessel which needs to arise from right ventricle arises from left and vice versa (*av* discordance) suggest structural anomaly. The medical experts advised that the baby would require permanent pace-maker implantation at birth and as the pace-maker has limited life of 4-5 years, it would require replacement subsequently. As a result, the child might require several surgeries (pace-maker replacements) throughout

Section 3(4): (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is mentally ill person, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

Section 5: Sections 3 and 4 when not to apply.-

(1) The provisions of Sec.4 and so much of the provisions of sub-section (2) of Sec. 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioner, shall not apply to the termination of a pregnancy by the registered medical practitioner in case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

³ *Supra* note 1.

its life-span, which would cause financial and emotional hardships for the parents. It would need hi tech operation theatre to perform the procedure. Since it is a surgical procedure, it has its own set of complications such as infections, risk of anaesthesia etc. After putting the pacemaker there will be restrictions on activities of the child (such as swimming, running etc.). It may have detrimental effect on foetal brain. In general, the experts predicted that the quality of life of the child would be poor. The petitioners expressed their inability to bear the psychological and monetary burden of giving birth and raising a child suffering from serious health problems. The petitioners sought a declaration from the Court that Section 5 of the MTP Act be pronounced as a bad law as it does not allow termination of pregnancy beyond 20 weeks unless there is immediate risk to expectant mother's life. They pleaded that Section 5(1) should be read to include the following words "and when there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped" and hence direction should be issued to the respondents to allow the petitioner (Niketa Mehta) to terminate the pregnancy.

The Mumbai High Court directed the Chief Medical Officer of the JJ Hospital to constitute a committee of gynaecologists, paediatricians, experts in the field of cardiology and submit its opinion as early as possible. The Committee stated:

"... the consensus of the committee is that whatever is visualised and opined by the gynaecologist from the pertaining area may not be 100% truth. The committee is of the opinion that there are *very fair* chances that child may be born incapacitated and handicapped to survive. On medical reasons, the committee feels that the findings observed do not have substantive significance to resort to the termination of pregnancy. However, it is the liberty of the patient to choose continuation of the pregnancy after knowing the reality."

The Court in view of the confusing and non-committed report stated:

"prima facie we find contradiction in the report and since the Court is not in the position to get a real picture from the report of the committee, as at one place the committee has said that on

medical reasons the committee feels that the findings do not have substantive significance to resort to the termination of pregnancy and at another place it says that it is of the opinion that there are very fair chances that the child will be born incapacitated and handicapped to survive."⁴

The Court did not itself permit abortion because of lack of expertise and the committee constituted by it further confused the Court. The Court requested the said committee to give a firm (perhaps unequivocal) finding and to submit an additional report. In the additional report, the words "very fair chances" were replaced by the words "very least chances". The Dean, JJ Hospital explained that it was a mere typographic error in the first report.⁵ Niketa took permission of the Court to get herself examined through an expert paediatrician/cardiologist/gynaecologist. The doctors examined her and were of the view that the quality of life for the child is likely to be severely compromised. There is every possibility that the child, if born, may be incapacitated or handicapped. In other words, the risk to the foetus is substantial risk. The Court observed that the medical experts have not expressed any 'categorical opinion that the child if born would suffer from serious handicaps'. Strictly applying the provisions of the MTP Act, the Court held that the patient does not have any choice in the matter and cannot terminate the pregnancy beyond 20 weeks which is the applicable law in this case. The Court said that the legislature in its wisdom has imposed certain time period within which pregnancy can be terminated. The Court cannot raise that period on its own. In the absence of any specific provision in that regard, nothing prohibits the Court from laying down certain guidelines whenever required for effective implementation of any statutory provision. However, that would not include the power to frame law relating to the substantive rights of the parties. Assuming there is a defect or an omission in the words used by the legislature, the Court could not go to its aid to correct or makeup the deficiency as it would amount to usurpation of legislative power. Under the guise of reading down a provision of law, the Court is not empowered to

⁴ *Id* at para 6.

⁵ "A 'typo' that swung the case", *The Times of India*, August 5, 2008, available at <http://timesofindia.indiatimes.com/articleshow/msid-3326577,prtpage-1.cms>.

legislate upon a statute. This is essentially the function of the legislature.⁶

Soon after, Niketa had miscarriage. Her husband said in an interview to the newspaper that God was with them⁷. The Mumbai High Court judgment triggered a new debate- was the Court right to stop Niketa from aborting?

Arguments For and Against Abortion

Pro-life and Pro-choice arguments: The world population is divided between pro-life and pro-choice groups. Pro-life individuals generally believe that human life should be valued either from fertilization or implantation until natural death.⁸ God is giver of life and death, not the pregnant mother of an unwanted child.⁹ Any action that destroys an embryo or foetus kills a person. Any deliberate destruction of human life is considered as ethically and morally wrong.¹⁰ On the other hand to be "pro-choice" is to believe that individuals have unlimited autonomy with respect to their own reproductive system as long as they do not breach the autonomy of others.¹¹ Pro-choice individuals accept that woman should have complete control over her fertility and pregnancy. It is personal choice of woman to have children as it affects her body, personal health and future. These are two extreme views. One view opposes abortions and another gives freedom to the expectant mother to terminate her pregnancy even after viability of the foetus. Generally, the view adopted by most of the countries is to take a balanced approach and permit abortion in certain conditions including 'health risk to the foetus'. The law in India is also balanced one and gives choice to the people to terminate pregnancy though with some restrictions. It allows abortion on the

⁶ *Supra* note 2 at para 19, 24.

⁷ "Niketa has miscarriage, Hareesh says god was on their side", *DNA*, August 14, 2008.

⁸ Available at <http://en.wikipedia.org/wiki/Pro-life>.

⁹ Available at <http://www.christianet.com/abortionfacts>.

¹⁰ *Supra* note 8.

¹¹ Tom Head, "Civil Liberties, Pro-life Vs Pro-choice", available at <http://www.about.com Guide>.

ground of 'health risk to the foetus' when it is below 20 weeks into development.

Whether foetus is an independent entity or not: One argument is that foetus is a separate person, therefore, termination of pregnancy would amount to 'killing of life'. Another argument is that foetus is not an independent legal entity as it cannot survive outside mother's womb before it attains viability. The second argument was highlighted in the *Roe v. Wade*¹² which is a landmark US Supreme Court judgment. The Court held that the foetus before it attains viability, that is, before it attains the potentiality of surviving outside the mother's body, with or without aid, the mother has a right to abort the pregnancy for any reason. Thus, the US Supreme Court gave absolute right to the expectant mother to abort the foetus before it attains viability, for any reason and it further held that even after viability she can terminate the pregnancy, if her health is at stake. A foetus is viable when it reaches an "anatomical threshold" when critical organs, such as the lungs and kidneys, can sustain independent life. Until the air sacs are mature enough to permit gases to pass into and out of the bloodstream, which is extremely unlikely until at least 23 weeks gestation, a foetus cannot be sustained even with a respirator, which can force air into the lungs but cannot pass gas from the lungs into the bloodstream.¹³ The state of technological advancement in neonatal care in a country is a deciding factor in determining the viability and consequently improvements in technology can allow foetal viability at lower limits. For example, in UK the Human Fertilisation and Embryology Act (HFEA), 1990 amended the Abortion Act, 1967 applicable to England, Scotland and Wales. The Section 37 of HFEA lowered the viability limits from 28 weeks to 24 weeks for most cases. It was claimed that due to advancement in medical technology it had become possible to save a child of gestational age of 24 weeks upon premature delivery. There is debate going on to reduce this limit even further¹⁴. In India, generally the viability is only after 28 weeks.

¹² 410 US 113 (1973).

¹³ Available at: <http://www.ppacca.org/site/pp.asp?c=kuJYJeO4F&b=139571>.

¹⁴ See http://www.bma.org.uk/ethics/reproduction_genetics/Abortiontimelimit.jsp.

Whether abortion after 20 weeks of gestation should be allowed or not: The law in India does not allow abortion after 20 weeks of gestation on health issue of foetus. It is submitted that the object of the MTP Act is to prevent avoidable wastage of mother's health, strength and sometimes life also. The provisions relating to termination of pregnancy are nothing but measures in cases where there is danger to the life or risk to physical or mental health of the woman as also on humanitarian grounds such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc. Additionally, where there is substantial risk that the child, if born, would suffer from deformities and diseases (eugenic grounds), pregnancy can be terminated up to 20 weeks. Twenty weeks is a long time but not enough to cover the scenario where the foetus has medical defects. Too often, defects show up much after the 20 weeks mark. No woman would want to abandon a foetus that she has carried for 20 weeks unless there is some compelling reason for her to do so.

Performing an abortion after 20 weeks of gestation may pose a risk to the mother's life: Risk to mother's life is there but then, pregnancy itself, even with a normal foetus can pose medical risks for the mother. If she is forced to retain a pregnancy knowing fully well that the child, if born, will be seriously handicapped, this may further deteriorate her health. The MTP Act was enacted long back in 1971 when medical science was not so advanced. Now medical technology can save the life of an expectant mother, even if she undergoes abortion after 20 weeks of pregnancy.

Painful death versus painful life- which is desirable: Some argue that the foetus at 26 weeks can feel pain: The choice is between a painful death before birth and an extremely painful and abnormal life. Moreover, this argument does not hold good because now the doctors give an injection into the foetus to slow its heart until it stops so that the foetus would not feel any pain.

Government funding or fund raising by private individuals to raise the disabled child: The judges in *Niketa Mehta* case offered to have the government pay for the foetus's lifetime expenses for the pacemaker. The petitioners rejected the offer saying they did not trust the government. Jaslok Hospital in Mumbai had offered to

bear the entire expenses for the delivery and post-natal care of the baby but it was not clear if the offer was for baby's entire life. There are people willing to pay the expenses of the child and there is always such a thing as fundraising, so the finance issue alone should not be a cause for aborting or retaining the foetus.

Child can be given for adoption: If the parents are still not willing to bring up the child, they could always give it up for adoption. There would be many parents, both Indian and foreign, willing to adopt the child or donors willing to pay for its medical expenses. Giving a baby for adoption is not that simple. Which mother would like to give her child to live on charity? Even if she did not have to raise the child or bear its expenses, watching one's disabled child suffer and lead a painful life is not easy. It is easy to sermonise on morals, ethics and religion but practical life is different. When parents watch their child suffer while other children play happily, they die a hundred deaths.

Bar of 20 Weeks under MTP Act—Unreasonable

Abortion laws are more relaxed abroad. Had Niketa been a resident of USA or UK, she would have in all likelihood, got a judicial go-ahead to abort her foetus. In USA¹⁵ and UK¹⁶, an expectant mother can abort even at 24 weeks of gestation. It is worthy to note that even beyond viability, which may be anywhere between 24-28 weeks, the mother can terminate the pregnancy in UK and USA (in many states), if there is risk to the foetus. Considering that in UK and USA, the termination of pregnancy is permissible even after viability if the risk to the foetus is involved, the cap of 20 weeks under MTP Act is unreasonable restriction on the liberty of the expectant mother.

The MTP Act has become old and a lot of new scientific and technological developments have taken place since 1971. With foetal monitoring becoming more commonplace it is possible to track foetal abnormality. It would be cruel if an expectant mother comes to know of serious abnormality in the foetus and yet is forced not only to

¹⁵ Available at: <http://www.rhrealitycheck.org/print/10285>.

¹⁶ Rebecca Allison, "Does a Cleft Palate Justify an Abortion? Curate wins right to challenge doctors", *The Guardian*, Tuesday December 2, 2003.

continue bearing the child but also to take care of a deformed, seriously handicapped or ill child for several years, perhaps for the rest of her natural life. It would also be violative of her fundamental right to privacy, recognised under Article 21 of the Constitution of India, 1950. By forcing the pregnant woman to undergo mental and physical trauma of delivery and raising a deformed child, the MTP Act leads to an avoidable damage to her health and emotional well being. An unloving mother/family will not be able to provide amenable environment to the unwanted child and that will be against the interest of the foetus/child. If there are other children in the family, parents may not be able to give enough time to them and that will affect their development also. For these reasons, if abnormality in the foetus is detected after 20 weeks as in *Niketa Mehta* case and the mother does not want to keep the foetus, she should be allowed to abort the foetus provided she herself is healthy to undergo an MTP procedure. It is the parents, who are responsible for the well being of the child, so it is fair to allow them to decide their future course of action. But abortion should be allowed only when the foetus is suffering from severe mental or physical abnormalities that cannot be cured. There are a number of cases (UK and USA), where several parents looking forward to bringing a child into the world, were forced to abort the foetus because of severe foetal abnormalities. According to a statistics put out by the UK government, the vast majority of abortions beyond 24 weeks are on the ground of serious foetal abnormalities.¹⁷ There are many American and British websites¹⁸ containing a number of stories of women who had to seek out late term abortions, such as a 2004 case from Kansas, USA, wherein the mother during pregnancy had complete renal failure and most of her organs (kidney, pancreas, liver) shut down. After plasma transfusion and different medicines, she started to recover. Certain tests conducted on the foetus (baby boy) followed by amniocentesis, ultrasound and genetic testing, revealed that something was wrong with the foetus that doctors could not pinpoint. At 25 weeks the foetus was measuring only 20 weeks. The foetus had stopped growing and the amniotic fluid around it was low.

¹⁷ "Abortion laws are more relaxed abroad", *The Times of India*, August 7, 2008.

¹⁸ "A heartbreaking Choice," available at: <http://www.aheartbreakingchoice.com>; <http://www.rhrealitycheck.org/print/10285>

The mother was told that the child, if born would not survive. She had to decide whether to end the pregnancy or wait till delivery. Though it was a hard decision, but she decided to terminate the pregnancy. Autopsy performed on the foetus revealed that mother had viral infection during pregnancy which the foetus could not survive and stopped growing and developing.

In another case, a 26 weeks pregnant woman's scan showed that the brain of the foetus (baby girl) was severely calcified, parts were not symmetrical and there was fluid. Doctors told her that foetus could die in uterus or shortly after birth or be a vegetable. The couple decided to terminate the pregnancy, though with heavy heart.

In a case, the pregnant woman had a triple screen test showing elevated level of AFP, which is indicative of *spina bifida*, but doctors asked her to wait for level II ultrasound as the level was not too high (normal level is less than 2.5 and she had 2.54). Level II ultrasound confirmed *spina bifida* and also showed indications of *Down's syndrome*. Still they wanted to keep the child (baby boy), but another ultrasound done at 23 weeks showed a change in the foetus's movement patterns. It began to move for shorter periods of time and not as often, probably because of *spina bifida*. It had developed ventriculomegaly; fluid on the brain that would affect the size of foetus's brain. Its movements continued to decrease, so the mother had to take the tough decision of ending her pregnancy.

In an extreme case, during the level II sonogram done at 34 weeks on a pregnant woman, the radiologist noted that the lower abdomen of foetus appeared to have duodenal artesia (or double bubble). It was also noted that the heart had an endocardial cushion defect (hole between the right side and the left side) plus diagnosed hypoplastic left ventricle (underdevelopment of the left side of the heart) repairable only with a complete heart transplant and/or three open heart surgeries. She underwent amniocentesis which revealed *Down's syndrome*. Thinking of a heart transplant or three open heart surgeries, that too on a child with *Down's syndrome* and lower abdomen problems, what would be the quality of the life of the child, the parents decided to abort the foetus as the doctors did not give any hope.

Some more foetal conditions that may require late term abortions and some conditions affecting the health of the mother so as to require late term abortions are summarised in the tables below.

Some Foetal Defects Requiring Late Term Abortions

Condition	Detected after	Cause	Symptoms
DiGeorge Syndrome ¹⁹	Level II Ultrasound at 19 weeks, followed by Amniocentesis	Incomplete chromosome no. 22	180 different symptoms, including anomalies of heart, genitalia, ear; mental and growth retardation; renal, digestive immune and psychological problems.
Potter's syndrome ²⁰	Ultrasound at 20 weeks	Bilateral renal agenesis (occurs 1 in 4000 pregnancies)	No amniotic fluid around baby due to absence of kidneys
Thanatophoric Dysplasia ²¹ (Thanatophoric death bearing)	Level - III u/s after 20 weeks	Mutations in the FGFR3 gene prevent cholesterol production which is necessary for normal embryonic development	Small chest cavity preventing heart and lung development. Occurrence 1 in 20,000 births Infants with thanatophoric dysplasia are usually stillborn or die shortly after birth from respiratory failure
Trisomy 13 ²²	Level II u/s at 20 weeks confirmation with amniocentesis	Three copies of chromosome no. 13 instead of normal 2 copies	Any or all of the following: Malformed brain, cleft palate, missing eye, club feet, holes in heart, intestines outside of body, extra fingers and toes.
Smith-Lemli-Opitz syndrome ²³		Mutations in the DHCR7 gene cause Smith-Lemli-Opitz syndrome.	Small head size (microcephaly), intellectual disability or learning problems, behavioural problems, generally autism, weak muscle tone (hypotonia), feeding difficulties, slow growth, fused second and third toes (syndactyly), and some have extra fingers or toes (polydactyly). Malformations of the heart, lungs, kidneys, gastrointestinal tract, and genitalia are also common.

¹⁹ Available at: <http://emedicine.medscape.com/article/135711-print;http://www.aheartbreakingchoice.com/digeorgesyndrome1.html>

²⁰ Available at <http://www.aheartbreakingchoice.com/potterssyndrome.html>

²¹ Available at <http://ghr.nlm.nih.gov/condition=thanatophoricdysplasia>

²² Available at <http://www.aheartbreakingchoice.com/juliehannahT13.html>

²³ Available at <http://ghr.nlm.nih.gov/condition=smithlemliopitzsyndrome>

Some Maternal Issues Requiring Late Term Abortions

Condition	Cause	Symptoms
Maternal Renal Failure ²⁴ Severe clinical depression ²⁵	Virus infection	Kidneys, liver, pancreas shut down. Medication not compatible with foetal growth and health.
German measles ²⁶	Virus infection	The infection can cause miscarriages, stillbirths or birth defects. Birth defects may include growth retardation, mental retardation, cataracts or other eye problems, deafness, congenital heart defects and defects in other organs. The highest risk to the foetus is during the first trimester, but exposure to rubella during the second trimester also is dangerous.
Preeclampsia ²⁷	True cause isn't known	o High blood pressure o Swelling of the face and hands o Protein in the urine after the 20 th week of pregnancy The only cure for preeclampsia is delivery Left untreated, preeclampsia can result in eclampsia. With eclampsia, seizures can occur, and this severe complication has significant risks for both mother and baby

However, for every minor disability like cleft lip and palate, congenital jaw defects, etc., abortion should not be allowed. These defects can be corrected and have no other medical complications. Cleft Lip and Palate Association of UK criticised 24 weeks abortion on the ground of cleft palate as it does not constitute 'severe disability' which is a ground of abortion under UK Abortion Act.²⁸

Before aborting the foetus, however, all medical options should be explored. In a recent case²⁹, a four month pregnant woman was told that the foetus had excess fluid in the abdomen due to which the heart rate of the foetus was very low and there were chances that the baby

²⁴ Available at <http://www.aheartbreakingchoice.com/maternalrenal.html>

²⁵ Available at <http://www.aheartbreakingchoice.com/jennifer.html>

²⁶ Roger W. Harms, M.D., *Mayo Clinic Guide to a Healthy Pregnancy* (HarperCollins Publishers, Inc., 2004).

²⁷ *Ibid*

²⁸ Sarah-Kate Templeton "Law review after abortion for harelip", *Sunday Herald* November 2, 2003; Rebecca Allison "Does a Cleft Palate Justify an Abortion? Curate wins right to challenge doctors", *The Guardian*, Tuesday, December 2, 2003.

²⁹ "Docs gave her a fighting chance in womb", *The Times of India*, November 11, 2009.

would be born with multiple deformities. One doctor advised termination of pregnancy. Subsequent consultations with specialists in foetal medicine revealed no congenital abnormalities and the doctors were able to put a shunt, partially inside the abdomen of the foetus, to drain the excess fluid. This reduced the pressure on the heart and resulted in improvement in the heart rate of the foetus. A healthy baby girl was born and at the time of writing, she had celebrated her first year after birth.

Conclusions and Suggestions

In sum, the bar of 20 weeks to terminate pregnancy under MTP Act is clearly unreasonable. The Act needs to be amended in the light of present day medical technology and awareness of people to take recourse to it. Rather than focussing on the week of gestation, the Act should look at the health of the child for allowing abortion. Sometimes, a disability cannot be picked up even late in pregnancy. Therefore, along with the present "risk to mother's life in emergency" requirement, "substantial risk to the foetus" needs to be included as a reason for termination of pregnancy under Section 5 of the Act. In other words, the expectant mother should be allowed to abort the foetus till child birth, if it is likely to be born with serious physical or mental disabilities. However, the risk to the foetus is required to be weighed against risk to mother's life. If health or life of the expectant mother is at stake then abortion should not be permitted.

To prevent misuse of such a provision resulting in female foeticide on the pretext of ill health of the foetus, a committee of experts should be constituted to review each such case. The committee should consist of psychiatrists and medical practitioners- gynaecologist, paediatrician and others, who are experts in various branches of medicine such as cardiologist for cardiac anomaly or neurologist for brain anomaly, etc. If the committee is convinced that the termination of pregnancy would be in the interest of the mother and unborn child, only then abortion should be allowed. By legalising abortions in such emergency situations women will be spared from unnecessary emotional trauma and that will make both parents' and children's lives better.

The Constitutional Vision of Socialism in India An Ideological Perspective

*P.B. Pankaja**

Introduction

Ideological debate is a continuous and unending process. Though the political economies of world nations during 19th and 20th century are eventually shaped by two distinct ideological traditions namely Capitalism and Socialism, the late 20th century witnessed a change in the ideological debate. With the disintegration of USSR and the collapse of Soviet communist economy, the debate 'whether Capitalism or Socialism is the best system?' has ceased to have relevancy and the debate 'whether Socialism is dead or does it have any future?' has come to forefront. With the collapse of capitalist economy too in the United States in the recent past, two divergent opinions surfaced among intellectuals. The first view is that 'ideology is dead'; the second view is that 'there is no end for ideology and it has the habit of coming back, though not in the original form'.

In the light of above discussion, the present Article is an endeavour to analyse the factors contributing for the emergence of two distinct ideologies in the international sphere and its impact on India, contributing for adoption of 'democratic socialism' as one of the values of the Constitution of India. The Article further looks into the status of Constitutional vision of Socialism in the light of Globalization.

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Role of Ideology and its features

Ideology is 'a set of ideas by which men explain and justify the ends and means of organized social action, irrespective of whether such action aims to preserve, amend, uproot or rebuild a given social order'.¹ Some ideologies emerge to preserve status quo while some endeavour to rebuild the existing socio-economic-political order either by bringing in changes or by uprooting the existing order. Whatever may be the purpose, an ideology plays an important role in shaping and moulding national policies. It creates history, guides politics and sustains economy. It is a crucial source for defining and evaluating political reality and establishing political identity.

Ideology forms the basis for any State to start the journey of governance. It is like a pole star, guiding the navigators of constitutional machinery to carry on their tasks and fulfil the obligations set forth by the Constitution—whether written or unwritten, enacted or evolved. As said by Durga Das Basu, "Every constitution has a philosophy of its own."² Philosophy in this context is manifestation of faith in an ideology having a set of goals.

Ideologies can be construed either in a narrow or in a broad way. Quite often they are narrowly equated with dogmas and are looked down upon. But the broader view is that an ideology is an action oriented system of thought. It is a fusion of thought and action, referring to what may be called as fundamental and operative levels of ideology³. At a fundamental level it takes the shape of philosophical interpretations and deal with abstract ideas and concepts. At an operative level, it takes the form of party manifestos and government policies and programmes. A good ideology must be both idea-oriented and action-oriented. Some ideologies are at times stronger at one level than the other. For instance, in India, the pre-independent socialist ideology was mostly philosophy oriented and post-independent

¹ Andrew Heywood, *Political Ideologies—An Introduction* 13 (Palgrave MacMillan, New York, 2003).

² Acharya Durga Das Basu, *The Introduction to the Constitution of India*, 20 (Wadhwa and Company Law Publishers, New Delhi, 2001).

³ *Supra* note 1.

socialist ideology, till 1970s, manifested itself through government policies and programmes.

Ideologies are also not hermetically sealed systems of thought; rather they are fluid sets of ideas that overlap with other ideologies and shade into one another. Moreover, each ideology is identifiable with certain core values and by abandoning it, the ideology loses its identity or gets absorbed into a rival or an adjacent ideology. This not only fosters ideological development but also leads to the emergence of hybrid ideological forms⁴. For instance, Socialism is known by its character of ensuring equal distribution of means and liquidation of concentration of economic power in the hands of few individuals. On the other hand, capitalism is characterized by forces of competition and self interest. If, in a socialist economy, concentration of economic power thickens, instead of liquidating, it gradually loses its shape and gets reckoned as 'Half-way Capitalism' or 'Pseudo-Socialism' or 'Market-Socialism' or 'Welfare-Capitalism'. Such ideological mutations are the results of politico-economic compulsions. Thus ideologies not only shape political economies, they in turn get shaped by them.

Socialism—An ideology of academic interest

The concept of 'Socialism' as an ideology has attracted the attention of Academicians, Politicians, Historians, Jurists and all others alike uniformly because of four reasons. One is its multifariousness that does not allow itself to be fit into any straight jacket of exposition and thus offers itself as a fertile ground for intellectual debates to crop up eternally. The second is the collapse of U.S.S.R that has kindled the debate to the extreme extent of concluding that collapse of Soviet Russia amounts to 'Death of Socialism' in the World.⁵ The third is, the onset of Globalization that has given a setback to the socialist values and rendered the socialist organizational structure redundant and replacing them with capitalist structure. The fourth is the collapse of Capitalism in America that compelled international community to look

⁴ *Ibid.* at 14.

⁵ This conclusion is evidentially an erroneous one because it failed to look into the distinction between Communism and Socialism on the one hand and Marxian Socialism and Democratic Socialism on the other hand.

back upon dangers caused by structural reforms introduced by way of Liberalization, Privatization and Globalization and evolve Market-Socialism as panacea for ills of unbridled Capitalism. This is interestingly called spiral flow of counter ideologies. Every ideology thus contains certain inherent weaknesses which give room for its counter ideology to intervene and declare its superiority and infallibility. Capitalist exploitation spur socialist reaction and deficiency in socialist organizations spur capitalist expansion. Indiscriminate Capitalism once again propels Socialism but of a different face. Thus ideological oppositions move in spiral manner.

Concept and emergence of Socialist ideology

Socialism is a concept of multifariousness

There are many words which are better known than described and which are easily proclaimed than defined. 'Socialism' is one such word. It means many things to many writers, jurists, political philosophers, economists and academicians. It has many colours and shades and many forms and shapes. It has come to mean different things to different people and to ones dismay, to some people it does not seem to mean anything at all. A Marxist will define it in one way and a Capitalist in another way. For a political philosopher it may sound one thing but for an economist another thing. For some, socialism is virtually equivalent to egalitarianism and for others it constitutes welfarism. Another difficulty of analyzing "Socialism" is that it has three dimensions. As an economic model it stands for planned economy as against Market economy of Capitalism. As an instrument of labour movement, it stands for Labour Welfarism. Thirdly as a political creed it stands for state control of economic structure. As a result of its multifariousness, in spite of more than a century of controversy, socialism remains an ideology in search of proper definition. The same view finds support in the judicial observations also. Justice Jeevan Reddy observed: "Both expressions - 'socialist' and 'secular'- by themselves are not capable of precise definition."⁶ What Justice Ahmadi said in *S.R. Bommai v. UOI* in

⁶ Subhash C. Jain, *The Constitution of India - Select issues and Perceptions*, 15 (Taxman Publications, 2000).

relation to the term 'Secular' also holds good for the term 'Socialism': "The term has not been defined presumably because it a very elastic term-not capable of precise definition and perhaps best left undefined"⁷ Whatever may be the difficulties, Socialism is popularly understood to stand for four important virtues namely socio-economic justice freedom from exploitation, equality of opportunity through equitable distribution and solidarity of human oneness.

Emergence of Socialism at International level

Tracing the origin and growth of 'Socialism' as an ideology,⁸ its origin is shrouded in mystery. Although Socialists claim an intellectual heritage from Plato to Thomas More, who advocated community ownership of property for an ideal state, it was Robert Owen of England and Saint Simon of France who had drawn society's attention to the inadequacies of industrial system through their writings. Their preaching of social transformation through charity of rich people failed to give practical solution to the 'exploited labour' against harsh realities of industrial life. Hence it gained the name of 'Utopian Socialism'. Thus the first emergence of 'Socialism' was a reaction to Classical Liberalism which stood for free-market, viewed State 'as a necessary evil' and believed in the least-interference of the State.

With the development of industrialization, Industrial Capitalism also grew, contributing for socio-economic inequalities, growth of slums and attendant maladies. 'Conservatism' developed among industrialists to preserve the *status quo*. During the latter part of 19th century, 'Scientific Socialism' advocated by Karl Marx appeared on the scene proclaiming revolutionary overthrow of capitalism, establishment of proletarian dictatorship to bring in social transformation and attainment of Communism necessitating withering away of the State. Thus 'Socialism' connoted a 'transition ideology' standing in between 'Capitalism' and 'Communism'.

Later modifications of Marxism appeared in the form of 'Leninism' advocating national communism, 'Stalinism' advocating international

⁷ AIR 1994 SC 1951

⁸ For in depth study on Political Theories see generally, O.P. Gauba, *An Introduction to Political Theory* (Macmillan Publishers, Delhi, 2000).

communism and 'Kuruschchevism' standing for democratic communism through *Perestroika* and *Glasnot*. All of them got labelled as 'Soviet Communist ideologies of totalitarian nature', resulting in incredible ideological confusions. During 20th century, 'New leftism' emerged as a Marxist Protestantism crying for repudiation of ideological worship. In the meanwhile 'Euro-communism' emerged in Europe as democratic communism of non-proletariat nature, attacking international proletarianism.

On the other side of the picture, thirty five years after the declaration of Communist Manifesto by Karl Marx 'Fabian Socialism' made its appearance in England as 'Non-revolutionary Socialism' and soon attracted many followers among whom Nehru was also an ardent believer. It was followed by 'German Social Democracy' pleading for workers majority in democratic legislative organs of the State. Revisionism also emerged in Germany to revise some of the basic tenets of Marxian theory. In France, 'Syndicalism' made its appearance pleading for total takeover of industries by the syndicates of labour unions and stood for abolition of political State. 'Guild socialism' as an intellectual child of English Fabianism and French Syndicalism emerged in England combining the good points of both.

All these international developments contributed for a situation that 'Socialism' is being misunderstood by many. It is used to describe an intermediary form between Capitalism and Communism and sometimes to describe Communism itself. A true understanding is required that Socialism is a negation of Capitalism and Communism. It stands for socio-economic transformation through constitutional machinery. It stands for freedom from want, squalor and exploitation, redistributive justice, protective discrimination and to achieve all through planned economy.

Indian socialist ideology

The universalistic content of Socialism that would guide the Socialists in all countries is different from the specific form of Socialism that would differ from country to country in accordance with the economic, social, cultural and political conditions of each country. In this context, 'Socialism' is neither a new nor a foreign concept to India. It has a

strong philosophical foundation with distinct cultural, economic, political and intellectual base.

Cultural base: Indian socialism has its deep roots in Indian heritage and culture. In *Samatha vs. State of A.P.*,⁹ K. Ramaswamy J., derived Indian approach to 'Socialism' from Indian spiritual considerations and said "All religions in India have contributed to the growth of socialist values in the form of respect for human dignity and human equality". The philosophy of Vedanta has seeds of socialism.¹⁰ The visions given by the philosophers, poets and religious peers like Sur, Tulsi, Nanak and others alike were nothing but the philosophical foundations of a socialist society. But their contributions were largely confined to literary activities. They gave a vision how society 'ought to be' and that was an egalitarian vision, which is one of the facets of Socialism.

Economic base: 'The joint family system', which is an institution *sui generis* of Hindu Jurisprudence, is nothing but a replica of an ideal socialist society which stands for collective aspirations and 'each for all and all for each' principle. The best social security that can be provided to the aged and the young, helpless and infirm is possible in a joint family culture which is the first platform of socialist spirit. However, practice was different from preaching. The British-patronized feudalism and feudal-patronized bonded labour system on one side and the caste system on the other side were blots on the socialist fabric. The emergence of 'Imperialistic Colonialism' and 'Industrial Capitalism' led to 'Drain of wealth' as expounded by Dadabhai Naoroji, Tilak and Gokhale differently.¹¹ Telang and Ranade raised their voices for governmental aid and protection to safeguard the budding pioneers of Indian industries and toiling agriculturists.¹² The economic consciousness generated by them served as a fertile ground for the socialist seedling to grow gradually in the country.

⁹ (1977) 8 SCC 191.

¹⁰ Puran Singh, *The Story of Swamy Ram*, 236 (Ram Tirtha Prakashan, Lucknow, 1935).

¹¹ Rathod and Vimla Rathod, *Indian Political Thinkers* (Commonwealth Publishers, New Delhi, 2006) 62-80

¹² Ghose Shankar, *Socialism, Democracy and Nationalism in India* (Allied Publishers, Bombay, 1973) 335-363

Political base: The institutional moulding of socialist structure began with the renaissance of nationalist feelings and culminated in the formation of Indian National Congress, in 1885. However initially socialist spirit lagged behind the nationalist spirit because of its 'moderatism' and presence of considerable number of capitalists and feudal lords within the Congress. With Russian revolution in 1917, 'Proletarian socialism' made an entry through labour and trade unions in India. Led by stalwarts and nationalists like B.P. Wadia, Baptista, N.M. Joshi and V.V. Giri, the concept of 'industrial socialism' attracted the attention of Indian National Congress. The period between 1919-1947 was very crucial in that it was the time during which the world was acquainted with various shades of revolutionary and evolutionary currents of socialism such as Utopianism, Marxism, Leninism, Fabianism, Syndicalism and Guild socialism and all these shades had their bearing on Indian national leaders too, which gave a colourful socialist content to nationalist movement.

Intellectual Base: Indian socialism is known for its pluralism. Andrew Heywood while exploring different characteristics of certain western ideologies observed: "Every ideology contains a range of divergent, even rival traditions and viewpoints. Not uncommonly, disputes between supporters of the same ideology are more passionate and bitter than arguments between supporters of rival ideologies, because what is at stake is the true nature of the ideology in question".¹³ In Indian context, this phenomenon appears to be absolutely true. Nehru, Gandhi, Ambedkar, Jaya Prakash Narayan, Lohia, Acharya Narendra Deva, Ashok Mehta, Bose and M.N. Roy constituted a galaxy of remarkable Socialist thinkers without whose contributions Indian socialism would have been a vacuum. Each had a unique perception on the concept and core principles of Socialism, needed for Indians. Nehru, as the greatest socialist thinkers of the time, did not want Indian Socialism to be either the carbon copy of Russian socialism or a replica of Western Capitalism. He evolved an indigenous model of 'Socialistic patterned democratic society' - *sui generis*.¹⁴ Gandhi

¹³ *Supra* note 1

¹⁴ In the famous Avadh session of the Congress in 1955, Nehru declared that India
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stood for 'Ethical Socialism' to be as pure as crystal and innovated 'Swadeshi', 'Sarvodaya' and 'Trusteeship', fostering the spirit of Socialism as a philosophy of mind.¹⁵ While Ambedkar pleaded for 'State socialism',¹⁶ J.P. Narayan preached 'Total Revolution'¹⁷ as a means to Antyodaya. Lohia's socialist mansion had Gandhian scaffolding with Marxian base.¹⁸ Ashok Mehta voiced Democratic Socialism¹⁹ whereas M.N. Roy stood for Radical Humanism.²⁰ Thus philosophical ascriptions of Indian socialism was a mosaic of multi-colours with a strong base. In spite of differences over principles, Socialist ideology acted as a form of social covenant binding them to one another and served as a unifying bedrock setting the goal towards which all their efforts were channelized. By the beginning of 20th century, the subsequent Nationalist movement got intertwined with Socialist movement because most of the nationalists were socialists and socialists were nationalists. The Constitutional vision of Socialism is nothing but a conglomeration of these ideas, chiselled and moulded so as to fit into the socio-economic frame work of Modern Independent India.

Socialist Ideology Acquiring Constitutional Status

On the eve of independence, India was infested with mass poverty, drain of her wealth, ruin of her agriculture and neglect of her industries. This situation warranted a stable polity with a commitment to bring about an egalitarian society wherein social and economic justice would prevail. It was widely realised that independence which

should have a Socialistic Pattern of Society and not a Socialist society. Socialist pattern is not Socialism in pure form but will lead the country in the direction of Socialism.

¹⁵ Swadeshi—avoidance of exploitations by other nations; Sarvodaya—end of social injustice, prevention of concentration of wealth and self sufficient village panchayat; Trusteeship—owner of the wealth to take only as much as he needs.

¹⁶ Socialisation of Agriculture and Nationalization of Industries

¹⁷ Social, economic, political, cultural, intellectual, educational and spiritual revolutions for the well being of the poorest

¹⁸ J.P.Narayan, quoted from the *Panchamarhi Report of Socialist party's Annual Conference* 28-33 (1952)

¹⁹ Ashok Mehta, *Socialism and Peasantry* 30 (A Praja Socialist Publication, 1953).

²⁰ Social reconstruction through values of Humanism, D.R.Bali, *Modern Indian Thought* 202 (Sterling publications Pvt Ltd, 1968).

ensured freedom from political slavery would not be meaningful unless it contributes for freedom from economic servitude and social pathologies. To quote Nehru, "I see no way of ending the poverty, the vast unemployment, the degradation and the subjection of the Indian people, except through Socialism that involves vast and revolutionary changes in the feudal and autocratic Indian state system. In short, it means a new civilization radically different from the present capitalist order".²¹ In this historical background, the mindset of almost all the prominent leaders of nationalist movement who found their way to Constituent Assembly through people's mandate to draft the Constitution was tuned to the noble philosophy of socio-economic justice.²²

Socialist Fabric of the Constitution

The first task of the Assembly was the formulation of the objectives and guiding principles that were to be the basis of the Constitution. The Objective Resolution, the brain child of Nehru, was moved and adopted on 22nd January, 1947 and it was a declaration of dedication for socio economic justice.²³ The Preamble, 'the spirit and backbone of the Constitution',²⁴ contains, in nutshell, the entire constitutional plan of building a welfare state and egalitarian society. Deriving its source from the 'People of India', it declares the four goal values namely Justice, Liberty, Equality and Fraternity and the three instrumental values namely Democracy, Socialism and Secularism.²⁵ The virtues of industrial socialism, industrial democracy, protection from 'five giants', abolition of untouchability, equal protection of law and distributive justice are all imbibed in the preamble.

²¹ B.C. Rout, "Nehru's Views on Secularism, Socialism and Democracy", [ed.] Jagadish P. Sharma, *Nehru and the People's Movement* 21 (Manak Publications, New Delhi, 1991).

²² Austin Granville, *The Indian Constitution - Cornerstone of a Nation* 18-19 (Oxford University Press, New Delhi, 2000). The list contains Dr. Prasad, Patel, Nehru, Pant, Ambedkar, Rau and others.

²³ See Clause 5 of Objective Resolution.

²⁴ Justice R.C. Lahoti, *Preamble - The Spirit and Backbone of the Constitution of India* (Eastern Book Company, Lucknow, 2004).

²⁵ There is no hard and fast rule to demarcate the twin values. To some all are goal values, the instrument being Fundamental Rights and Directive Principles of State Policy.

Insertion of the word 'Socialist' in the Preamble

In spite of the fact that Socialism was much favoured, the constitutional journey of the term 'Socialist' was full of ups and downs, confrontations and compromises and success and failures. From the beginning of presenting the Objective Resolution, there was a debate whether to include 'Socialism' in it or not. It was omitted because of Patel's deference to Nehru's inclination to include. Later while framing the preamble, the same debate arose for the second time. There were three channels of thinking.²⁶ One for specific mention, the second for specific non-inclusion due to the reason that the words in the preamble are socialistic in spirit and the third reluctant to include it branding it as a slogan of a particular political party, the Indian National Congress. Ultimately it was deliberately denied an express constitutional status on the reasoning that when Directive principles are socialist in nature, there was no need to mention 'Socialism' specifically in the Preamble. For the second time, it lost its opportunity. After coming into force of the Constitution, Zamindari abolition, land acquisition and nationalization measures were tried to be implemented to bring about socialist transformation. But judiciary²⁷ declined to recognize its significance and incidentally favoured the capitalist structure of economy by nullifying the socialist measures initiated by the Government. It preferred to safeguard the private property against State authority as unreasonable restrictions on the inviolable Fundamental Right to Property. Frustrated with the judiciary's perceived interference with socio-economic reforms, legislature brought amendment to the constitution nullifying Court's decisions.²⁸

²⁶ B. Shiva Rao, *The Framing of India's Constitution - A Study* 837 (Tripathi Publications, Bombay, 1968).

²⁷ *Kameshwar Singh v. State of Bihar*, AIR 1952 SC 252; *Mrs. Bela Benarjee v. State of West Bengal*, AIR 1954 SC 170; *Jaghir Ahmed v. UOI*, AIR 1954, SC 728; *Kochuni v. State of Madras*, AIR 1960 SC 1080; *Kumhikoman v. State of Kerala*, AIR 1962 SC 723; *Vajravelu Mudaliar v. Special Deputy Collector, Madras*, AIR 1965 SC 1017; *Golaknath v. State of Panjab*, AIR 1967 SC 1643; *R.C. Cooper v. Union of India*, AIR 1970 SC 564; *Madhav Rao Scindia v. Union of India* (1971) 3 SCR 9; *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC.

²⁸ The Constitution (1st Amendment) Act 1951; The Constitution (4th Amendment) Act 1955; The Constitution (17th Amendment) Act 1965; The Constitution (24th Amendment) Act 1971; The Constitution (25th Amendment) Act 1971; The Constitution (26th Amendment) Act 1971; The Constitution (42nd Amendment) Act

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In this process of amendment nullifying judicial decision and judicial decision nullifying amendment, the judiciary-pampered right to property survived the State-engineered socialist measures. For the third time 'Socialism' lost the case before the judicial ordeals.

The credit goes to Mrs. Indira Gandhi, who resolved to provide a dignified a constitutional status to it through the 42nd Amendment Act 1976, under which it was adumbrated into the preamble. The impact of the Constitution (Forty-Second Amendment) has been observed by the Supreme Court in the following words: "The insertion of the word 'Socialist' in the Preamble would enable the Courts to lean more and more in favour of nationalization and State ownership of industry."²⁹ Further to give smooth sail to socialism, its competitor, Fundamental Right to property was deleted from the Constitution through the 44th Amendment Act, 1978. Thus the events from 1951 to 1978 speak out nothing but a long story of constitutional battle between the executive and the legislature on one side and the judiciary on the other, a tug of war between judicial review and parliamentary supremacy and a long story of Fundamental Rights vs. Directive Principles of State Policy.

Socialist perspective of Fundamental Rights

Generally, Fundamental Rights are considered as individual-oriented rights based on capitalist concepts of individual liberty and freedom. But it is not so. They include the Doctrine of Reasonable Classification, a permissive penumbra of Art 14, Protective discrimination as an equalizer in Arts 15(3) and 15(4), abolition of untouchability in Art 17 and anti-exploitative human order in Arts 23 and 24. Apart from these provisions, the ambit of socialist nature of Fundamental Rights is equal pay for equal work, minimum wage, equal opportunities of livelihood, free and compulsory education, free legal aid and so on are brought within the fold of Arts. 14 and 21

Directive Principles of State Policy

Directive Principles of State Policy under Part IV reflect the core commitment to the socio-economic and distributive justice. Ambedkar said "If the Directive Principles of State Policy are not socialistic in the

1976.

²⁹ *Excel Wear v. Union of India*, AIR 1979 SC 25, para 24.

direction and in their content, I fail to understand what more Socialism can be?"³⁰ its significance is found in Article 37 which says 'Though the Directives are not enforceable as like Fundamental Rights, they are nevertheless fundamental in the governance of the country.' Countering the dissenting voice in the Constituent Assembly while debating on the utility of non-justiciability of the Directives, Ambedkar said, "There may not be a legal force behind them. But the highest tribunal—the Public opinion—stands behind them"³¹

Article 38 Cl(1) gives content to all the socialistic values imbibed in the preamble and Art 38 Cl (2) mandates State to strive for minimizing inequalities in income, status, facilities and opportunities. Art 39 is a complete code of economic and distributive justice providing for (a) adequate means of livelihood for men and women equally (b) equitable distribution of material resources (c) prevention of concentration of economic wealth (d) equal pay for equal work (e) State obligation towards workers, women and children and (f) protection of childhood and youth against moral and material abandonment. The Charter of Directive Principles is also known as Social Security Charter securing workers participation in the management of industries,³² employment and education and public assistance in cases of unemployment, old age, sickness and disablement³³ just and humane condition of work,³⁴ decent standard of living³⁵ free and compulsory education for children upto 14 years of age³⁶ and promotion of educational and economic interest of the weaker sections,³⁷ organisation of Village Panchayats³⁸ and organisation of agriculture and animal husbandry³⁹. To sum up the ideals proposed in Directive Principles of State Policy are meant for a socialistic pattern of society.

³⁰ *C.A.D.* Vol. II, p. 316.

³¹ *Report of the Sub-committee-Minutes of Dissent*, Select Documents II, 4(ix) 268

³² Constitution of India, Art. 43-49.

³³ *Id.*, Art. 41.

³⁴ *Id.*, Art. 42.

³⁵ *Id.*, Art. 43.

³⁶ *Id.*, Art. 45.

³⁷ *Id.*, Art. 46.

³⁸ *Id.*, Art. 40.

³⁹ *Id.*, Art. 48.

Indian Socialism is 'Democratic Socialism'

It is a world renowned fact that independent India is a brand of Democratic Socialism. Nehru said, "Socialism in India must be adopted to suit Indian conditions. To that extent, Indian socialism should be practical as well as indigenous."⁴⁰ When the country achieved freedom, the question was how Socialism could be brought about and practiced in India? In a message to Indian socialists in December 1936, Nehru posed two questions. "One is how to apply this socialist approach to the Indian Conditions? The other is how to speak of Socialism in the language of India?"⁴¹ Later it was debated and decided in the Constituent Assembly that India should adopt Democracy as a form of governance to lead the nation in the socialistic pattern.⁴² Though, as already discussed, Preamble as it stood on the date of framing of the Constitution expressly described India as a democratic country, for the reasons analysed, it did not contain 'Socialist', which was later on incorporated. In spite of this, the opening words of Preamble 'We the people of India' is a prelude for democratic socialism. The reasoned balance of Fundamental Rights in Part III and Directives in Part IV is a testimony for the same. As such the theory of 'Democratic Socialism' became the constitutional watchword for Indian political economy.

The relationship between Democracy and Socialism is a highly debated issue. Democrats believe that Democracy and Socialism are kindred phenomena and go with each other because a non-socialist system will definitely be deficient in Democracy. On the other hand, the libertarians' view is that both are antithetical to each other. They argue that a Democratic society cannot be Socialist because it must provide economic freedom to a Capitalist. But the Constitution makers adopted the former view and felt that Democracy is to be favoured because it furthers to gain and secure 'real Socialism' and Socialism is to be favoured mainly because it protects and advances 'real Democracy'. As Democratic Socialism stands between Capitalism and Communism,

⁴⁰ Jawaharlal Nehru, *Glimpses of the World History* 543 (Oxford University press, New Delhi, 1982).

⁴¹ Pattabhi Sitaramayya, *The History of the Indian National Congress*, Vol. II, 15 (Bombay 1947).

⁴² *Supra* note 31.

it has to confront with the dual tasks of securing Socialism against capitalist intrusion and not allowing Socialism to fall a prey for totalitarianism. It is an apt comment that "A marriage of Democracy and socialism has been embedded in the Indian Constitution"⁴³.

Towards this end, the planning process and policies were adopted on the bedrock of Socialistic pattern in consonance with socialist spirit, with 'Mixed economy' a natural corollary of Democratic Socialism. Labeled as 'Nehru-Mahalanobis model' it was ideologically desirable, theoretically sound and practically feasible given the structural constraints existing during the initial years of planning⁴⁴. Socialist ideals were attempted to be brought to reality through agrarian reforms, abolition of Privy Purses, Industrial Licensing Policy, nationalization of industries and banks, enactment of labour and industrial legislations, promotion of Small Scale and Village Industries through necessary infrastructural assistance, rehabilitation of sick units and above all placing public sector in the commanding heights of the economy. During Mrs. Gandhi's premiership everything that stood in the way of establishing a socialist society were thought to be removed peacefully, if possible through constitutional machinery, if necessary.

Socialism as a forgotten message Post 1991

Indian experience through the planning process witnessed glossing over of socialistic aspirations by implementers. Nehru's vision of Industrial India based on Socialistic pattern was shattered due to implementational failures⁴⁵ Evils of License Raj, misuse of bureaucratic power and faulty redistributive techniques resulted in a great internal economic crisis. Pressed by it and pressured by changing international economic scenario and conditioned by Fund-Bank financial institutions, India has to change its socialistic philosophy of political economy and opened the flood gates of economy to liberalization, privatization and globalization. Many things have been washed out in

⁴³ V.S. Deshpande, "Rights and Duties under the Indian Constitution" 15 *Journal of Indian Law Institute* 94 (1973).

⁴⁴ Sukhamoy Chakravarty, *Development Planning-The Indian Experience* 9 (Oxford University Press, New Delhi, 1987).

⁴⁵ M.L.Gujral, *Economic Failures of Nehru and Indira Gandhi* 183 (Vikas Publishing House, New Delhi, 2003).

the floods and constitutional philosophy of socialism is one among them. In the wake of emergence of capitalist- pampered market-driven economy, a constitutional drift and paradigm shifts are clearly visible. Planned economy is replaced with market economy; Ideology-driven policies are replaced with crisis-driven policies; Nationalization is undone with denationalization; MRTP Act is replaced with Competition Act; FERA with FEMA and SICA with SICA (Repeal) Act, and so on.

Agriculturalists feel the present measures as having an inequitable urban bias against agriculture. Labour organizations apprehend that these Structural Adjustment Programmes lead to freeze in public employment. I.L.O. opposed the idea of trimming of labour legislations as they adversely affect the interest of labour community. Most of the social security rights like safety tenure and collective bargaining, constituting the corner-stone of labour jurisprudence are on the verge of vanishing. The privatization and disinvestment measures are anti-labour and anti-socialist principles. Opening the doors of Indian Economy for Multinationals resulted in environmental crisis, marginalization of agriculture and piracy of Indian Traditional Knowledge. Human Rights advocates condemn Structural Adjustment Programme as a tool of human development without humane-face. Added to economic crisis, it has also contributed for cultural crisis such as westernization and forgetting the values and morals of long preserved Indian culture. A new 'crop' of billionaires indicates the fact of continuation and growth of monopoly capital in India.

Under Globalization, even State sovereignty is no more absolute when it comes to economic policies. State is forced to contract out of its constitutional commitments mandated in the Directive Principles of State Policy. Further, the preambular promise of 'Socialistic pattern' is not allowed to be kept up in the market economy. To this extent, new politico-economic policies are not in consonance with the Constitutional philosophy underlying Part IV of the Constitution. These developments are a total reversal of socialist measures.

Conclusion

Coming back to the discussion on the debate 'whether ideology is dead' or 'there is no end for ideology' the author, speaking for herself,

subscribes to the latter view. From ideology perspective there is no end for ideology. Ideological debate is a continuing and unending process. Ideology has a habit of coming back. In Indian context, what we are witnessing is not the end of Socialist ideology but only the truth that it has been out paced by 'Globalism' because of improper manning of socialist tools. It is only an eclipse. It is a thing to ponder that Globalization itself is an ideology. It has to come to assert its superiority over Socialist ideology and has also bailed out the sinking economy from economic crisis caused by ill-handling of Socialist tools. It promoted the spirit of competition, strengthened the performance orientation of Public Sector and increased the quality of public life. Globalization of information has made the public to be more analytic and weigh the good and bad consequences of any ideology. In spite of these things it has inherent deficiencies that go against Socialist values of eternal significance. Socialism is bound to come back as an inevitable phase of historical cycle, but not in the form of State as a producer of goods and commodities, but as a provider of social goods and as a harnesser of the ills of globalization. Effective working of any ideology ultimately depends on the morale of the government and the governed.

From global perspective Marxian socialism was a theory of 19th Century. Democratic socialism was a theory of 20th Century. Market socialism is a theory of 21st Century. What next? Let the search for a new socialist paradigm continue. As long as the preambular promises of 'Justice-Social, Economic and Political' and 'Equality of status and opportunities' cannot be taken out of the preamble, 'Socialism' would remain as Constitutional creed of the nation. As long as Directive Principles of State Policy constitute one of the cornerstones of Indian Constitution, State must be under constitutional obligation to perform its effective role in ensuring Directive Principles of State Policy to work. 'Growth with equity' and 'Reforms with humane face' warrants that the role of the State to be all the more omni-present in the globalization climate. The Constitution never fails; The 'Constitutional vision of Socialism' never dies; The 'Constitutional philosophy of Democratic Socialism' is irredeemable.

Critical Analysis of Surrogate Advertisements and its Impact in India

Tripti Malhotra*

Introduction

Advertisements play a quintessential role both in promotion of a product and to create a general awareness about the market. They perform a very important purpose of making the buyers/consumers aware of what already exists in the market and what the market is looking forth to launch. Advertising plays the role of creating awareness and delivering imagery, therefore, it is more important for a new brand to create its place in the market rather than a brand that has already created its place. Advertisements means to make an announcement and inform the public as well as disseminate information through media and other means, to draw the attention of the public/individual concerned to some information¹. However, while such advertisements are of great importance to the company as well as the buyers, they require to be monitored repeatedly, for they have an immense impact on the public at large in terms of its morality, decency, civility, decorousness and legality.

A nascent trend known as "surrogate advertisement" had emerged in the market approximately from past 6 to 7 years, which is commonly practiced by many alcohol and cigarette companies to promote their products. This largely gained momentum in India with the Cable TV Network (Regulation) Act, 1995 which prohibits tobacco and liquor

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¹ *Municipal Corporation of Greater Bombay v. Bharat Petro Chemical Corporation Limited*, (2002) 2 SCR 360.

advertisements². In the present day context, direct and indirect advertisements are employed to attract attention and interest, make the product known and justify its consumption and use. The present article highlights the growth of surrogate advertisement in India and its impact on the public. The laws in India have been very firm as regards to banning any form of liquor or tobacco advertisements. However, the companies have started advertising their products through surrogate advertisement. This article while analyzing the present scenario also suggests the necessary measures that can be taken to curb this problem.

Meaning and Method of Making Surrogate Advertisements

In India, it is legal to manufacture and sell liquor and cigarettes; however, it is illegal to advertise them in any manner. Therefore, the companies exploit the means of surrogate advertisement to meet their ends and use such clandestine methods to advertise their products. The word 'Surrogate' means a person or thing that acts for or is used instead of another, that is, a substitute³. Therefore, "surrogate advertisement" precisely includes utilizing of brand image of one product to advertise another subsidiary product which cannot be legally advertised⁴ or in other words where a product which is different from the main product (parent brand), is advertised and promoted with the same brand name as that of the main product (parent brand) to camouflage the later. The product, thus, advertised is called "Surrogate Product" and such advertising is referred to as "Surrogate Advertising"⁵. It involves duplicating the brand image of one product extensively to promote another product of the same brand⁶.

The most commonly used method of giving effect to "surrogate advertisements" is to launch any commodity with the same brand

² "Surrogate Advertising: Needed, A Spirited Attack", *Business Line*, May 23, 2003.

³ *Oxford's Advanced Learner's Dictionary*.

⁴ Cannon, T., *Basic Marketing, Principles and Practice* (Holt, Rinehart and Winston, London, 1986)

⁵ *Supra* note 1.

⁶ Pratul Sharma, "TV channels told to drop proxy ads of liquor & tobacco", *Mail Today*, July 4, 2010.

name as that of the liquor/cigarette and thereby, promote these products along with the legitimate products. Many of the main products being advertised generally range from tea to men's accessories, to music (bacardi), to fashion weeks (Smirnoff International Fashion Awards) to cricket accessories etc. Let alone big events (The Red and White Bravery Awards, Teacher's Achievement Awards etc.). These companies have also attempted to promote their products by organizing charities and auctions, especially Seagrams and Jonnie Walker⁷. Furthermore, Shaw Wallace had also launched a range of golf accessories under the Royal Challenge brand name⁸ and Kingfisher group introduced its airlines with the same brand name as that of its beer. Interestingly, the second-largest liquor major in the country introduced music spots on Radio Mirchi, along with live brand activation programs that are still on in the four metros⁹. Although, alcohol has become one of the most commonly consumed intoxicating substances in India, more and more people are imbibing wine especially in the metros¹⁰ and that is mainly due to these advertisements/promotional strategies.

Thus, it is apparent that the companies are dumping large sums of money for surrogate advertising; at times the money stocked for the product advertised is in reality used for the 'surrogate product'. In 1999, the alcoholic beverage industry spent \$1.24 billion on alcohol advertising¹¹. This has increased over the years and the budget kept for such advertisements is much higher than what it was previously. The motivations of firms look even more suspect when they advertise the products that are not bought or sold in market. In 2002, for instance, Jagatjit Industries, the maker of Aristocrat Whisky, advertised a product called 'Aristocrat Apple Juice.' The company reportedly confirmed availability of the fruit juice in Delhi, Haryana, Punjab and Rajasthan and yet no reputed shop in Delhi had ever seen it, let alone selling it¹². Thereafter, The Indian Broadcasting Foundation

⁷ Product and brand management - Indian alcohol industry (2005).

⁸ "Beating the ban", *Business Line*, January 10, 2002.

⁹ *Financial Express*, September 6, 2006.

¹⁰ *The Great Indian Wine Challenge Report, A Magazine For Alcobeo Industry*, June 11, 2010.

¹¹ *Survey by Center for Science in the Public Interest*, 2001.

¹² *Supra* note 2

(IBF) had declared that if liquor companies promote any juice, mineral water or soda, these should be shown in a proper manner and not as trimmings to liquor advertisement.

Nevertheless, India is a country wherein drinking and smoking is still considered as an indecent or immoral activity and stands against its cultural and religious sentiments of many people. These methods adopted by the big companies to promote their alcohol/cigarette brands are unreasonable and do not fit well into the social context in a country like ours. In most of the states, the population has to meet the minimum age limit of 25 years for drinking and smoking is banned in public places. Indian states maintain strict regulatory measures on alcohol sales. Many regulatory bodies in India including ASCI (Advertising Standards Council of India), The Information and Broadcasting (I&B) Ministry etc have explicitly banned surrogate liquor advertisement with the sole aim to reduce an overall consumption of alcohol/tobacco in the country and prevent the young generation from indulging in alcoholism or smoking. This was further done to foster the cultural integrity that prevails in India over the years and to reduce the innumerable damaging consequences of smoking and alcoholism.

To give effect to the same the I&B Ministry had issued show-cause notices in 2002 to broadcasters carrying surrogate advertisements for liquor. The Ministry had taken objection to surrogate advertisements of McDowell No 1 and Gilbey's Green Label in particular¹³, but all these attempts turned out to be futile as the such advertisements still continue to be broadcasted, recent example of the same can be Mr. Vijya Mallaya's strategy to promote his Liquor brand 'Royal Challenge' by naming his IPL T20 team as 'Royal Challengers'. At a later stage the team faced a bouncer from the then Health Minister, A. Ramadoss, who said that the team's name amounted to surrogate advertising and promoted alcohol.

The film stars and other celebrities are often hired to endorse many liquor/cigarette brands, which in turn leaves a heavy impact on many youngsters who tend to follow these stars. Therefore in 2008 Mr.

¹³ *India Business Insight*, July 4, 2002.

Ramadoss announced while appealing to film stars not to endorse alcohol brands through advertisements, direct or surrogate. He appealed to the World Health Organisation (WHO) to come forward and put in place a framework convention on alcohol like the one meant to curb tobacco consumption¹⁴. He made efforts to curb this menace of surrogate advertisement by touching each and every possible area which exposed people to any alcoholic or tobacco brands. In 2005, he had also set up a high level screening committee to look into the issue of surrogate advertising. The committee was to consist of MPs, officials from I&B and Health Ministries and Indian Council of Medical Research and will examine the issue on a case-to-case basis. Not only tobacco and alcohol, Ramadoss also included pan and gutka under the ambit of screening committee. The committee was to present a report, on the basis of which, if an immediate ban without any further examination was required, it would be imposed abruptly. However, as it is apparent, all his attempts to curb the nuisance of surrogate advertisements proved to be futile.

Why is the Ban on Surrogate Advertisements necessary?

The main aim with which the government seeks to enforce these bans is to preserve the health and well being of the public at large. The damaging consequences of smoking and drinking are known to all, especially when it comes to early age drinking and smoking habits. If it is important for a country to prosper, it must preserve the well being of its youth, which is largely influenced by these advertisements and thus, this gives rise to the utmost necessity of enforcing the ban on any advertisement which even remotely correlates to alcohol or cigarettes. It is also believed keeping certain things away from one's sight decreases the desire for them and therefore, prohibition will not only be beneficial for the young entrants into the drinking or smoking habits but also the ones who are already into it. Mr. Ramadoss while declaring the act of naming his "Royal Challengers" by Mr. Vijya Mallaya amounted to surrogate advertisement stressed that, "The alcohol problem is the mother of all problems - from social to economic. Though it's the third most health concern of the country, its

¹⁴ "India to unveil national alcohol policy", *Indo-Asian News* (April 29, 2008)

soon going to be a number one worry"¹⁵. He further stated that "We are in favour of banning all surrogate advertisements and those who violate it will face action"¹⁶. Some analyst argued that the ban would not affect the established domestic players severely. It would only affect the new launches and new brand building of these companies.

A market survey in 2001 revealed that advertising has a direct influence on the consumption habits of 431 million people in India and an indirect impact on 275 million 'aspirants' from the lower income group. Considering this and realizing that nearly 50 per cent of the television owners have access to cable channels, there is no doubt that the hidden call for alcohol consumption behind the surrogate advertisements is not escaping the eyes of viewers in the world's fourth highest liquor-consuming country. The very purpose of banning liquor advertisements is defeated by surrogate advertising¹⁷. Sociological studies have shown that, in India, a significant share of income of a large section of the population is spent on liquor, potentially leading to financial distress and health hazards. According to the International Wine and Spirit Board, a liquor industry publication, there will be a jump in the number of people reaching the legal drinking age of 25 within the next few years. The implication is that the problem is going to grow¹⁸.

In 2008, Minister of State for Youth Affairs and Sports Manohar Singh Gill (at the time of writing) demanded a complete ban on surrogate advertisements of alcohol in the media, especially on TV channels, arguing that "nobody was fool enough not to understand the products they promoted."¹⁹The main point behind this remark was that even though the companies conveniently state that these advertisements are of legitimate products and have nothing to do with their liquor or alcohol beverages, everybody, including children, is aware about what the ads are actually referring to²⁰. During cricket matches, when the

¹⁵ Report from *Indo-Asian News Service*, April 29, 2008.

¹⁶ *Ibid*

¹⁷ *Supra* note 2.

¹⁸ *Ibid*

¹⁹ Report from *UNI*, June 26, 2008.

²⁰ International Marketing Conference on Marketing & Society, *IIMK*, 8-10 April, 2007.

children were glued to TV, frequent promotion of alcoholic drinks in this garb, was really a matter of concern. We will have to take note of the fact that even young kid of 14 or 15 years would have been influenced by surrogate advertisement. The memories are not easily washed out and therefore, "it does not make any difference" is not an excuse.²¹

Surrogate advertisements are not only misleading, but also false and dishonest in many cases, for instances many of the claims made by the liquor companies that it helps evade various depressions, mental tensions or that they improve one's health. It thus, becomes extremely important to put a ban on such advertisement to mislead public into harmful drinking or smoking habits. Health being one for the key concerns of country today can be preserved majorly by doing away with all sorts of promotions done for these damaging products.

Not only television, movies have also proved have a lot of influence on the public's life. The younger generation is addicted to this media and it is shaping our cultural values, social mores and even what we eat and drink. Movies motivate high degree of attention, retention and have substantial impact on the mind of the viewer²². Research has demonstrated that exposure to portrayals of smoking in films is strongly associated with adolescents giving smoking a try. Not to forget the hoardings on streets and elsewhere which provokes and incites a person into drinking and smoking, especially the young children who are much more susceptible to these habits and have low analytical powers to decide between right and wrong.

Former Minister for Social Justice and Empowerment and present Lok Sabha speaker, Meira Kumar said earlier, when traditional values prevailed, there was some self-restraint which worked as preventive mechanism for drug addiction, but with changing times, modernity and individualism have eroded these values. Nowadays, the increasing stress on youth in today's globalised economy was another reason for their vulnerability to drug addiction. Today's youth start earning a lot of money at a very young age which with easy availability of drugs puts them in risk of taking to drugs and alcohol as

²¹ *United Breweries Limited v. Mumbai Grahak Panchayat*, (2007) CPJ 102 (NC).

²² *S. Rangarajan v. Jagivan Ram*, (1989) 2 SCR 204.

a means of relieving the stress of their demanding jobs and thus, it becomes an appalling situation for the government to curb to prevent its youth from entering into the dangerous habits of smoking and drinking. It is submitted that there are less people in our country who consume drugs than those who drink or smoke and that is due to a key reason that they do not have an open access to advertisements of the same. The only reason that there is a lesser population into consuming drugs is due to the fact that drugs are not as openly marketed or advertised as alcohol or tobacco. Therefore, advertisements indeed make a lot of difference. Moreover, 40 per cent of health problems in India are due to the use of tobacco products and those addicted to tobacco and alcohol face early death²³ and open advertisements will induce more and more youngsters to indulge into alcoholism or smoking. Tobacco is universally regarded as one of the major public health hazards and is responsible directly or indirectly for an estimated eight lakh deaths annually in the country²⁴. Therefore if these advertisements continue the situation will worsen.

Government's Role and Laws Enacted in this Respect

The Advertising Standard Council of India (ASCI), the body which monitors print and visual publicity materials, has laid down specific rules and guidelines prohibiting surrogate advertising. Section 6 of the ASCI Code states: 'Advertisements for products whose advertising is prohibited or restricted by law or by this Code must not circumvent such restrictions by purporting to be advertisements for other products the advertising of which is not prohibited or restricted by law or by this Code. It further states that 'In judging whether or not any particular advertisement is an indirect advertisement for product whose advertising is restricted or prohibited, due attention shall be paid to the following:

²³ Available at <http://www.Chennaisticklishissues.blogspot.com>

²⁴ The Statement of Objects and Reasons of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Bill, 2001.

- (a) Visual content of the advertisement must depict only the product being advertised and not the prohibited or restricted product in any form or manner.
- (b) The advertisement must not make any direct or indirect reference to the prohibited or restricted products.
- (c) The advertisement must not create any nuances or phrases promoting prohibited products.

Therefore, the Code quite manifestly prohibits any kind of alcohol or tobacco advertisements, whether in direct or indirect manner. The Code seeks to achieve a blanket ban on all sorts of surrogate advertisements and for this reason the Council has taken a number of steps previously in this respect. ASCI had taken strict action against Diago India and United Spirits Ltd for misleading advertisements and Diago was forced to withdraw its advertisements from print media.

In 2006, Mumbai Grahak Panchayat, Maharashtra State Commission issued directions to United Breweries Limited (UBL), to "Keep Liquor Away from Young Generation". Feeling aggrieved by the said order, the company filed an appeal in the National Consumer Disputes Redressal Commission, New Delhi²⁵. The panchayat had also filed a complaint against an appeal against UBL and Western Railways for having adopted Unfair Trade Practices in prominently displaying/exhibiting false, misleading and surrogate Liquor Advertisements on the coaches of the Western Railway trains and to seek discontinuance of the same along with corrective advertising by the opposite parties to neutralize the effect of the said advertising and punitive damages. The issue was also taken to the Advertising Standards Council of India. The complaint with regard to London Pilsner was upheld by the Advertising Standards Council of India. Similarly, complaint against Bagpiper Soda was also upheld. The mention of the word "Soda" in an inconspicuous manner, while boldly stating the brand name "Bagpiper" with the baseline, "India's largest, World's No. 3", was held to be misleading and contravened Chapter 1.4 of the Advertisement Code. It was further declared that the advertisement is surrogate for an alcohol produce brand and contravened Chapter III.6 of the Advertisement Code. Similar request was also made to the Advertiser

²⁵ *Supra* note 21.

to withdraw the advertisement. At a later stage the government had also notified that the advertiser shall submit an application with a copy of the proposed advertisement, along with a certificate by a registered chartered accountant that the product carrying the same name as cigarettes, tobacco products, wine, alcohol or other intoxicants is distributed in reasonable quantity and is available in a substantial number of outlets where other products of the same category are available and the proposed expenditure on such advertising thereon shall not be disproportionate to the actual sales turnover of the product²⁶.

Besides this the government had also enacted the Self - Regulation Guidelines on Advertising of Foods & Beverages directed at Children under 13 years of age, which explicitly mentions in its preamble that "Children's choice of diet (food and beverages) and level of physical activity, can impact their general health and well being. It can have a positive influence by encouraging a healthy, well balanced diet, sound eating habits and appropriate physical activity. Caution and care therefore should be observed in advertising of Foods & Beverages." This was an indirect attempt to prevent such advertisements from reaching the children and preserve their health and well being by keeping them away from all such influential advertisements.

Product advertising for liquor and cigarette companies was banned in the country since 1995 by Cable Television Network (Regulation) Act, 1995. The Act along with its rules introduced in 2002 was the root cause of advent surrogate advertisements. The very purpose of banning liquor advertisements is defeated by surrogate advertising and thus, the Act prohibits any form of liquor/cigarette advertisement on cable television. Since this ban had handicapped the communication of the company with the consumers as regards to their alcohol and tobacco products, companies with liquor brands stopped advertising liquor products; instead they extended the equity of their brands into other fields. Rule 6 of The Cable Television Network Rules, 1994 prohibited the broadcasting of any advertisement on the cable television which adversely affects the "good taste or decency" and the programmes or advertisements "unsuitable for children". Besides this

²⁶ *Ibid*

rule 7 overtly prohibits any broadcasts which "directly or indirectly promotes cigarette, tobacco, wine, alcohol, liquor or other intoxicant product." In a circular dated April 12, 2005 the Ministry warned broadcasters of severe action if brand names associated with liquor or tobacco continued to be advertised, drawing their attention to the section of the Act ²⁷. The circular emphasized that advertisements promoting direct or indirect production, sale or consumption of cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants shall not be permitted. This attempt to curb all forms of liquor/tobacco/cigarette/alcohol advertisements in television media provoked the companies to take recourse of other means to advertise their products and keep reminding the public of their alcohol and tobacco brands and thus, this gave rise to surrogate advertisement which remained the only way left to promote ones product in the market after such stringent laws.

Even The Press Council of India, had laid down the norms for journalistic conduct under Article 13 (2) (b) of the Press Council Act 1987, stating that "no advertisement shall be published, which promotes directly or indirectly production, sale or consumption of cigarettes, tobacco products and other intoxicants.

Further, Section 5 of the Cigarette and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, explicitly states that no person engaged in the production, supply or distribution of cigarettes or any other tobacco products shall advertise cigarettes or any other tobacco products and shall take part in any advertisement which directly or indirectly suggests or promotes the use or consumption of cigarettes. Section 22 provides the punishment for such advertisements:

- (a) in the case of first conviction, with imprisonment for a term which may extend to two years or with fine which may extend to one thousand rupees or with both, and

²⁷ *Indian Express*, April 23, 2005.

- (b) in the case of second or subsequent conviction with imprisonment for a term which may extend to five years and with fine which may extend to five thousand rupees.

In 2005, the Ministry of Health and Family Welfare, Government of India notified various rules with respect to the size of the boards on which the advertisements were displayed, various warnings to be mentioned necessarily under the advertisements as to the cancer causing aspect of smoking – "smoking kills", it shall not be illuminated and no individual in films shall display smoking scenes²⁸, so as to make them as less conspicuous and eye-catching as possible. The main aim was to avoid attention of the public towards such advertisements or boards by stipulating smaller sizes for them and making the people sentient about the consequences of smoking.

The Prohibition of Publication or Telecast of Vulgar, Obscene and Surrogate Advertisements and Re-mix songs by Print and Electronic Media Bill, 2004: though the bill hasn't yet seen the light of the day, the broad framework has been laid down by the legislature and given to the executive to frame the details under delegated legislation. It was initiated to provide for 'total ban on the publication of surrogate advertisements showing substitutes of products, particularly of liquor and tobacco products by magazines, newspapers, etc. and telecasting of surrogate advertisements so as to protect the Indian culture and values'. Although it was not enacted into an act, it manifestly expressed the government's intention to ban such advertisements in public media.

Besides this, even the I&B's guidelines clearly mention that none of the advertisements shall make a direct or indirect reference to the prohibited products in any form or manner. Also, the advertisement must not make any direct or indirect reference to the prohibited products and must not contain any nuances or phrases promoting prohibited products²⁹. Recently, in 2010 itself, the ministry of information and broadcasting had issued an advisory to television channels asking them to immediately take off air surrogate advertisements of brands that manufacture cigarettes, liquor, tobacco

²⁸ *Mr. Mahesh Bhatt and Kasturi and Sons v. Union of India*, 147 (2008) DLT 561.

²⁹ *Supra* note 8.

products and other intoxicants. The ministry has also been responsible for serving many show cause notices to a number of companies prohibiting them to either discontinue their advertisements or the product itself³⁰. The board had not only warned the companies but also the broadcasters against such advertisements³¹ and therefore, it has been dispensing all its duties with utmost efficiency and with an aim to preserve public health and well being.

Role of the Judiciary

Apart from these laws and other regulatory bodies, the judiciary has also played a significant role in this area of concern. In 2009, the Delhi High Court had warned the publisher of weekly news magazine 'Outlook' against publishing the commercials of Royal Challenge whiskey. The court's warning came over a petition filed by a NGO 'Nirmal Sahara', which alleged that the magazine published direct and surrogate advertisements of Royal Challenge. A Division bench headed by Chief Justice A P Shah observed that any direct advertisement of liquor would invite prosecution. The NGO alleged that it was violation of law. It also added that the advertisements did not give any statutory warnings³². Yet again in 2009, the Delhi Government informed the Delhi High Court on October 29, 2009, that the publisher of a surrogate advertisement on liquor would be slapped with a fine of Rs 10 lakh and a jail term of six months as per the amended Delhi Excise Act, 2009³³. According to media reports standing counsel Najmi Wajiri, appearing for the city government, submitted before the Division Bench of Chief Justice AP Shah and Justice S Muralidhar that the State Government's proposed Excise Bill had been approved by the Centre and that the same would be finally placed before the Delhi Cabinet for approval. As per the Act, a steep hike has been made in the fine for violators, from Rs. 200 to Rs. 10 lakh

³⁰ *Supra* note 14

³¹ *Supra* note 28.

³² *Press Trust of India*, New Delhi, May 24, 2009; see <http://www.business-standard.com/India/news/delhi-hc-warns-outlook-against-publishing-liquor-ads/62662/on>

³³ Available at <http://www.exchange4media.com> last visited on October 24, 2009.

or a jail term of six month or both against the publisher of surrogate liquor ads.

Another writ petition filed by Mr. Mahesh Bhatt, the Delhi High Court challenged the legality and validity of some of the provisions of the Cigarette and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, and the Cigarettes and Other Tobacco Products (Prevention of Advertisements and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2005, which prohibited any smoking scenes in the movies³⁴. It was argued that it violated the right to freedom of speech and expression and that such a law is not reasonable. Section 5 of the act explicitly prohibits any display/promotion on cigarette or tobacco products either in advertisements or in films. The Court had rightly held that in media, surrogate advertisement or indirect advertisement is often resorted to and to leave out indirect advertisements would in fact make the legislation toothless and capable of avoidance at will. These rules ensure proper implementation and are necessary to prevent any such situation. The court further stated that restrictions imposed on electronic media and cinematographic films are reasonable and justified. The Delhi High Court has also banned smoking in public places and has declared a sumptuous fine for doing the same.

Ironically, even with such restrictions, the country is still standing fourth in place in terms of alcohol consumption in the world which speaks volumes about the market potential. For the market players in India, still there are many avenues to reach the target group. Posters and Billboards are allowed inside Hotels and Bars. This has a chance of tapping the potential future drinkers who come to these places for different purposes. Sponsorship is proven to be one of the effective avenues. Sony Entertainment Television (SET) and movie channel HBO have taken the safer route by adhering to the Government diktat³⁵. These are welcome steps, but the key point lies in enforcement. All the regulatory bodies have taken a number of steps to give effect to ban and the prohibitions as contained under various acts,

³⁴ *Supra* note 28.

³⁵ "Channels Air Surrogate Ads Despite Ban", *Business Line*, May 20, 2005.

however, the attempts seemed to be futile. Moreover, the companies have been coming up with varied defenses in their interest which worsens the situation and makes it nearly impossible to enforce the ban.

Not only our national laws and rules and regulations have lived up to this cause, the international bodies such as WHO has also made a number of efforts in this field. FCTC (Framework Convention on Tobacco Control), a convention developed by World Health Organization (WHO) as a model to be adopted by any country desirous of enforcing strict anti-tobacco rules within its domain. Article 13 of the convention talks about tobacco advertising, promotion and sponsorship: It provides that even if the constitution doesn't permit a comprehensive ban on tobacco advertising, it can resort to other ways too like:

- o Prohibiting advertisements which create an erroneous impression on consumers.
- o Restrict use of direct/indirect incentives encouraging public use of tobacco.
- o Restrict media advertising in a period.
- o Restrict tobacco sponsorships of public events.

Freedom of Speech and Expression *versus* ban on Surrogate Advertisement

The first and the foremost defence stated by any company with respect to the ban on liquor or tobacco advertisement is that of violation of their right to freedom of speech and expression and that of freedom of trade and commerce. Commercial advertisements have been held to be a part of freedom of speech and expression by a full bench decision of the Hon'ble Supreme Court in *Tata Press Limited v. Mahanagar Telephone Nigam Ltd.*³⁶. However, the same Bench stated conversely as well and held that such freedoms could be restricted on the grounds specified in Article 19(2) such as in the interest of the security of the state, friendly relation with foreign states, public order, decency or morality or in relation to contempt of court.

³⁶ 1995 (5) SCC 139.

Moreover, freedom of speech and expression is not an absolute right and can be curbed when it is used in violation of the exceptions as laid down under Article 19(2). Liquor or tobacco advertisements are indeed against public order, decency and morality and thus, any government is justified in curbing such advertisements in the interest of the public as it disseminates immoral and anti social tendencies in the society. Advertisements have also been claimed to be a quintessential element of freedom of trade and commerce and the same freedom has been alleged to be violated if freedom of advertisement is curbed in any what way.³⁷ However, this freedom could also be restricted in the interest of general public.

Loopholes in the Law and Why the Ban is not Working?

Even in spite of all these laws, the government has not been successful in prohibiting such advertisements and the companies continue to achieve their aims without much of a loss caused to them. All this information shows the loopholes in the current legal system which has been successfully exploited by the industry in its favour. All the laws pertaining to this subject are in place however, the enforcement of these laws is not in place. Although there is a near unanimity to take steps to put a halt all such advertisements, it has not been given a concrete form. According to Amrit Kiran Singh, Vice-President, Brown-Forman, the American liquor company with brands such as Jack Daniels and Glenmorangie, "The reason why the ban has not worked is mainly because the policy with respect to liquor still remains rather confusing. On one hand, liquor continues to be one of highest revenue earners for the State, while on the other hand, there is the ban on advertising. Either there should be a blanket ban on the sale of alcohol or no ban at all."³⁸ Nonetheless, India has not been able to come up with any blanket ban on either sale or advertisements of alcohol.

More or less all the companies have raised the same set of defenses to their acts surrogate advertising which prevents the ban to implement effectively. Usually all companies continue to harp upon the fact that

³⁷ *Hamdard Dawakhana v. Union of India*, AIR.1960 SC 554.

³⁸ *Supra* note 8.

the advertisements they seek to broadcast are indeed for the legitimate products and not for any of their alcohol/liquor/cigarette brands and interestingly, none of the liquor companies are ready to admit that their new launches are surrogate. To add on Mr. Vijay Mallya, chairman, UB group stated, "Prohibition has never worked anywhere, it is a well-known fact that even in Islamic states, where there is a total ban on alcohol, liquor is available and is widely consumed at home. Prohibition always creates more problems than it solves."³⁹

Doordarshan, a government owned channel was also openly showing surrogate advertisements resulting in promotion of tobacco brands. Sometime back Doordarshan was transmitting the "Gold Flake Expressions Greetings" advertisement for promoting "Gold Flake" brand⁴⁰. To bring a point home Mr. Hemant Goswami, Chairperson, Burning Brain Society said, "We have seen Doordarshan blotting/censoring certain words which the committee finds offensive or deleterious to the minds of the youngsters or for family viewing. We appreciate the high standards Doordarshan is trying to maintain but remember that no one will die by hearing a few uncensored words but many youngsters and people will definitely die"⁴¹. Therefore, if the enforcers of law themselves are breaking the law, there can possibly be no end to a problem.

Many people have also expressed their extremely amusing and varied concerns with regard to such bans and have stated that tobacco and alcohol advertising should not be banned as it will affect those people, including farmers, who are employed in these industries. However, one cannot support improper and illegal acts only due to the reason that it has certain consequential interests attached to itself. One cannot support arms trade, which is yet another anti-social element, because it gives occupation to a number of people.

Moreover, even the public is to be blamed for the situation as it remains, due to the acceptance and forbearance of the public there is nothing much done to prevent this nuisance of surrogate

³⁹ Available at <http://www.outlookindia.com/article>

⁴⁰ Letter by Mr. Hemant Goswami, Chairperson, Burning Brain Society to Dr. Anbumani Ramadoss, Minister of Health & Family Welfare dated April 26, 2005.

⁴¹ *Ibid.*

advertisement. Had there been a stronger pressure from the public's side, the issue would have been dealt with much more seriousness. If the people in general have not conveyed any uneasiness or discomfort due to such advertisements, there is definitely going to be a lesser effort made by the government in curbing this situation.

The industry segment has its own standpoint in defense. The liquor lobby claims that everything is in accordance to the government regulations. They clarify that they have stopped showing liquor advertisements and they are free to use the brand name for any other products. Even the Confederation of Indian Alcoholic Beverages Companies (CIABC) advertising code maintains that advertisement of products (real brand extensions) by the liquor industry must be allowed⁴².

Nonetheless, in case of *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*⁴³ the Supreme Court held that commercial advertisement no doubt is a form of speech but its true character is reflected by the object for promotion of which it is employed. When propagation of ideas and thoughts is inconsequential, but the real purpose and object is promotion of sales of goods and services and personal benefit without any social purpose, commercial advertisement cannot have the same degree of constitutional protection as in case of social or political speeches.

What can be done?

At the individual level, consumers need to realize that they are living in a world where they have to be careful of what they read, whom they listen to, and whom they believe. Secondly, if some advertisements discomfort them, they must express it to the government or the non-governmental organizations, silence will in turn prove acceptance⁴⁴.

1. Asking the electronic and print media to adhere to the advertisement codes and not encourage surrogate advertisements and requiring advertising agencies to have full knowledge of the

⁴² *Supra* note 2.

⁴³ (1995) 5 SCC 161.

⁴⁴ EM Nicosia, *Advertising Management and Society - A Business Point of View* (McGraw Hill Book Co., New York, 1974).

products under the same brand for which they are promoting advertisements, and taking legal actions against those agencies which design surrogate advertisements.

2. Consumer awareness is a vital necessity and a mandatory prerequisite to deal with the menace of surrogate advertisements. Therefore, consumer awareness programs must be initiated to help people understand the consequences of surrogate advertisement.
3. At present there are many other alternatives to advertise one's liquor/tobacco products other than radio or television. There can be many events which a company can organize in the name of its brand etc, therefore, apart from supervising these advertisements on TV or radio all such events or activities shall also be regularly monitored and any such event must not be allowed to take place. Punishments for violations of the laws shall also be increased.
4. Strict penalizing laws not only for the companies but also for the advertising agencies.
5. Even though all these rules, regulations, laws and regulatory bodies exist, surrogate advertisement is at its peak and there seems no stringent check on the same. The laws of the land are in place but the regulatory bodies constituted to ensure the enforceability of these laws are not functioning as efficiently as required in the present scenario. The companies are undoubtedly ready to invest any amount of money for surrogate advertisements for the revenue/profits they receive after such advertisements is many times more than the cost of advertisements. Thus, there is a necessity to set up a separate body which deals only with supervision of such advertisements and preventing their broadcasting.
6. Limit exposure to R-rated movies, which show higher amounts of smoking than movies rated in other categories. Systematic studies have proven that if any popular hero is shown smoking a cigarette or bidi then it can have a very negative influence on the adolescents. "Since direct advertising was banned the tobacco companies have been using films as the medium. Therefore, no such display of smoking or drinking shall be allowed in movies. Moreover, the actors must not be allowed to endorse any liquor/tobacco brand, whether surrogate or not. The leading example is of Ajay Devgan in Bagpiper 'Soda' advertisement

promoting his movie 'once upon a time in mumbai'. Previously, Shah Rukh Khan did direct advertising for Marlboro cigarettes in Swades, John Abraham in 'dhoom', Ranbir Kapoor in 'Rajneeti' and the list is endless. The aim is not to decrease the sale of these products but to prevent the ill effects of broadcasting these advertisements in public forums. A well defined definition must be given to surrogate advertisement. It must be treated not merely as an offence under certain acts or rules and regulations, but must be redefined as a crime.

7. As per the facts the issue has not yet been dealt with by the WHO, therefore the countries shall make a serious recommendation to the Organization to take up this utmost important issue on its agenda and recommend the necessary measures.
8. Counter-advertising - it is commonly used strategy to balance the effects that alcohol advertising may have on alcohol consumption and alcohol-related problems. Such measures can take the form of print or broadcast advertisements (e.g., public service announcements [PSAs]) as well as product warning labels. It is especially important to counter the potential effects of advertising on young people as these age groups are more susceptible to those effects. Counter-advertisements that recommend responsible alcohol use generally are conveyed to the public through television, radio, outdoor, or print media⁴⁵. These messages can be either produced by government agencies or community action groups, or they can be industry-sponsored. A remarkable decline in the number of U.S. alcohol-related traffic deaths occurred between 1982 and 1996 due to counter advertisement⁴⁶.
9. Any movie which shows an actor smoking or using a tobacco product must be given "A" certificate and any such movie should at no time be shown on any of the satellite channels. Also, strict vigil at various theatres shall be made to prohibit children below 18 to view such movies.

⁴⁵ "Alcohol Counter-Advertising and the Media", *National Institute on Alcohol Abuse & Alcoholism's Alcohol Research & Health*, August 2002.

⁴⁶ Survey by Dejong and Hingson, 1998.

10. The government can ask the Registrar of Companies to refuse registration and un-register the existing companies practicing surrogate advertisement of any other product bearing the same name as that of a tobacco and/or alcoholic drinks trade mark/name.
11. NGOs play a crucial role in creating a supportive environment, NGOs must continue to take initiative in these issues and stand against such advertisements or promotions in any form. Youth led campaigns appealing the government for a comprehensive ban on tobacco advertising through NGOs such as HRIDAY (Health Related Information Dissemination Amongst Youth)-SHAN (Student Health Action Network), created a supportive environment to enforce tobacco control measures⁴⁷.
12. The regulatory bodies that already exist must be directed to adopt much more stringent methods in violation of existing laws by the companies or the broadcasters.
13. To uphold the right to freedom of trade and commerce, the government can allow such advertisements in places where in all such products are sold openly, such bars, liquor shops, discotheques etc. that is all such places where the liquor or cigarettes are openly sold as well as consumed. This will not only allow the companies to have their say but also keep the people away from such advertisements on any public media such as television or radio or hoardings etc. Main point behind this being, that where it is already legal to consume a particular product, it might not be damaging to advertise the same in order to satisfy the companies and make the public aware of the options available.

Comparative Analysis

In the European Union, the statutory restrictions on alcohol advertisement are beyond discussion, save to mention 'Loi Evin' in France, which imposes a near total ban on alcohol advertising in that country. The primary aim of the legal restriction on the use of the designation 'spirits', contained in the Alcoholic Liquor Act, Section 71⁴⁸ is to ensure the collection of appropriate duties on such drinks by the

⁴⁷ "International Marketing Conference on Marketing & Society", IIMK, 8-10 April, 2007.

⁴⁸ Giles Crown, *Advertising Law and Regulation* (Butterworths)

government. The Food Labelling and Regulation Act, 1996, makes sure that the use of terms, 'wine', 'alcohol', 'low-alcohol', 'tonic wine' etc is restricted in any advertisement.⁴⁹ The Portman Group⁵⁰ was founded by the major UK drinks producers and is responsible for the naming, advertisements, merchandise and packaging of various alcohol drinks. The rules laid down in the code complement and are consistent with those concerning the advertising of alcohol. There is no compulsion on the companies to join the group and be bound by the Code. However, action of this group against any complaint depends upon the company and its stature.

Further, all non-broadcasting advertisements must comply with the Committee of Advertising Practice's Codes of Advertising Standards Authority. The code states that the advertisements should be socially responsible and should not encourage excessive drinking and should not suggest that regular solitary drinking is advisable. Care should be taken not to exploit the young generation. They should not be directed to children under the age of 18. The Independent Television Commission also lays down similar provisions⁵¹.

Cigarette advertisements are banned from public broadcast television in all media in Norway, Thailand, Finland and Singapore⁵².

The subject of effects of advertisements on children is also hotly disputed everywhere in the world and all the countries are taking initiatives to prevent their children from being exposed to such advertisements which might lead them to the wrong way. In US Hilary Clinton, as a senator had expressed her views that she "wants to introduce a bill empowering America's Federal Trade Commission to stop unfair marketing to children." National surveys in US indicate that 67 percent of adults in the United States support banning liquor advertisements on television and 61 percent favor banning beer and wine advertisements in any medium⁵³. Italy, Belgium, China and

⁴⁹ *Ibid*

⁵⁰ The Portman Group, 2d Wimpole Street, London.

⁵¹ P Kotler, G H McDougall, and G Armstrong, *Marketing* (Prentice Hall, New Jersey: 1987)

⁵² *Ibid*

⁵³ Wagenaar *et al* (2000).

Ireland are also heading towards introducing such similar reforms⁵⁴. Similarly, public health advocates routinely call for the strict regulation or even elimination of alcohol advertising, and initiatives at the community level frequently focus on reducing local alcohol advertising. In part, concerns about alcohol advertising result from its pervasiveness.

In Malaysia, alcohol advertising on radio and televisions was outlawed in 1995. On Malaysian television, alcohol advertising is not shown before 10:00 pm and during Malay-language programs. Supermarkets and hypermarkets are also criticized for advertising alcohol products on trolley, which is a disappointment for Muslims⁵⁵. In Singapore, also, alcohol advertisement is not allowed to be shown during programs intended for children and young persons; similar is the scenario in Hong-Kong⁵⁶.

According to Swedish law, advertisements for alcohol are generally forbidden. However, advertisement is permitted for beverages identified as "class 1" or "light beer."⁵⁷ These advertisements contain warnings which are worded less strongly than the warnings on tobacco products - for example, "Avoid drinking while pregnant," as opposed to "smoking kills." The Kenyan government says it will soon ban alcohol and tobacco advertisements from television and billboards⁵⁸. Tobacco advertisements are also set to be banned. In February, tobacco and liquor advertisements were outlawed near schools.

In case of India, Gujarat is the only state with a prohibition policy which bans sale or consumption of alcohol and special 'health permits' have to be issued if locals want to consume alcohol. Gujarat government had decided to relax its prohibition policy to attract tourists. In Maharashtra, surrogate advertising for alcohol has already been banned. The Maharashtra government is just a step away from passing an order that will make it illegal for anyone below 25 years of

⁵⁴ "Pressure growing to ban ads", *The Times of India*, January 17, 2003.

⁵⁵ Belch George E & Belch Michael A, *Advertising And Promotion: An Integrated Marketing Communications Perspective* (6th Edition, Tata Macgraw Hill).

⁵⁶ *Ibid.*

⁵⁷ Available at http://janda.org/b20/News%20articles/alcohol_in_sweden.htm.

⁵⁸ Available at <http://news.bbc.co.uk/2/hi/africa/4080074.stm>.

age to drink or purchase alcohol. As of now, the legal drinking age in the state is 21.

Conclusion and Suggestions

A question which concerns the society and consumers at large is whether advertisements published by or on behalf of manufacturers and marketing bodies really need to be reined in and if so to what extent. The concern has its root in the advertisements having the capacity to construct certain impressions in the mind of the public that could be misleading with possible pernicious consequences of loss and damage to them. However, there is clearly no single policy measure that is able to combat and reduce the problem.

Banning advertisements cannot be an enduring solution; youngsters must be educated about the ill-effects of these habits. Advertisements induce only those with weak convictions. Only proper education will help make a difference. One needs to consider the remarks made by certain eminent people in this respect such as, Srinivasan K Swamy, CEO of RKSswamy/BBDO who states, "When you block conventional means of advertising, companies cannot be faulted for trying alternative below-the-line promotional schemes. MG Parameswaran, executive director of FCB-Ulka Advertising says, "If liquor brands are legally permitted to be sold in India, you must allow them all forms of advertising, so long as it is not targeted at children. Otherwise, you only end up pushing the sale of illicit brands," he reasoned. In my opinion all these remarks somewhere make sense with respect to the rationality behind them, one must understand that if on one hand the government allows sale, production and consumption of alcohol and tobacco, prohibiting all forms of advertising it in a way violates the right to freedom of trade as well as freedom of speech and expression. Had there been a blanket ban on all these then it would still have been a logical attempt to prohibit the advertising but if there can be liquor and cigarettes sold openly everywhere in the country then it seems a little illogical to ban its advertising alone.

The government had explicitly banned any liquor advertisement by enacting various laws and the regulatory bodies along with the judiciary ensured its compliance. However, as the trends in India keep changing with the change in political figures and so do the laws and

rules and regulations, the Government of India decided to permit, in principle, non-liquor and non-tobacco advertisement of Kingfisher and Wills brands on television channels even after so much hue and cry over the surrogate advertisement issue. The government contradicted its own rules and the I&B Ministry on August 9, 2006 in a notification clarified that a product that uses a brand name or logo, which is also used for cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants, may be advertised on cable service subject to the following conditions:

- o Storyboard or visual of the advertisement must depict only the product being advertised and not the prohibited products in any form of manner.
- o The advertisement must not make any direct or indirect reference to the prohibited products.
- o The advertisement must not contain any nuances or phrases promoting prohibited products.
- o The advertisement must not use particular colours and layout or presentations associated with prohibited products.
- o The advertisement must not use situations typical for promotion of prohibited products when advertising the other products.
- o All such ads shall be previewed and certified by the Central Board of Film Certification suitable for unrestricted public exhibition prior to telecast or transmission or retransmission.

But this in itself was an absolute violation of the laws laid down and a silent approval of surrogate advertisement. It was a well recognized and deeply understood fact that the only way by which surrogate advertisement could be dealt with was to prohibit every advertisement in which there could be any comparison drawn between the liquor brand and the legitimate product being advertised. However, in spite of these certainties and well recognized facts, the government chose to reduce the burden on the alcohol companies and in a way gave a green signal to more number of surrogate advertisements. It is difficult to determine that these contradictory steps are taken by the government due to the reason that it is deriving huge revenue from the liquor/alcohol industry or due to the fact that it seriously 'assumes'

that all these above laid conditions will not lead to any further surrogate advertising.

All things said and done, it is an individual who finally decides what has to be done and what should influence him, no advertisement or hoarding can make much difference, the companies at the end of the day have to do their business and ensure that their product is marketed well. In my opinion the area of concern is not advertisements but the products which are advertised, that is, the problem does not lie with advertising these products but their consumption. However, I strongly feel that the solution is to prohibit/ban the sale and consumption of alcohol or tobacco rather than meandering about the issues on the periphery of the main problem. If the issue concerns the government to such an extent then why ban the advertisement, there shall be a halt to the root cause itself. But as it is practically impossible to put a ban on the consumption of these products, government should continue with the stringent laws as regards to advertisements on television, radio, hoardings etc, that is, the media which is easily accessible to all age groups to prevent its adverse consequences. But as stated previously the ban shall be released in the areas wherein drinking and smoking is legally allowed.

Ultimately the reality remains that the government has been deriving huge amount of revenue from the liquor industry. For that reason, even though the government might have enacted innumerable laws on the prohibition of liquor advertisements in any form and the judiciary might have given lengthy judgments in this regard, ultimately it has become a game of politics and all the rules, regulations, laws change with the changing parties. All this essentially proved to be only a matter of perception/thinking of a particular political leader who is given the authority to take decisions in a particular area and at times it is just about the money involved!

Critical Analysis of Breeders' and Farmers' Rights under UPOV and PPVFR Act

*Vaishali Kant**

Introduction

The ever growing concept of Intellectual Property Rights has showed greater purview for private rights, even in the agricultural sector. These rights are usually recognized only when knowledge clubbed with innovations generates huge profits and not when it meets social needs of the people. Moreover, the Agreement on Trade Related Intellectual Property Rights (TRIPS Agreement)¹ stressed that an innovation capable of industrial application can be only recognized as an Intellectual Property. Under IP regime, the creativity of the human mind is understood mainly in terms of profits and capital accumulation. Most importantly, the prefix "trade related" used in TRIPS has somehow diluted the public innovation taking place for domestic, local and public use and converting them in more exclusive rights to monopolize all production, distribution and profits. Today, it can be seen that multinational Corporations (MNCs) are continuously increasing their share in agricultural markets at the cost of poor farmers.

It is important to understand the vital role of agriculture and farming activities in the Indian economy. Moreover, this sector employs around 60% of the total workforce in India. The contribution of this sector including forestry, logging and fishing to the gross domestic product (GDP) is estimated 213343 crores for the year 2009-2010. But it has constantly declined from the previous estimate which was 861753

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¹ Article 27.1 of TRIPS

crores for the year 2008-2009.² The agricultural sector which has contributed around 22.3% in Indian GDP during 2000 has downfall to only 16.3% in the year of 2008.

The country's foodgrain production in 2009-10 has declined by 7.51% to 216.85 million tonnes as compared to 234.47 million tonnes in 2008-09. This situation can be improved by facilitating our farmers and ensuring them full benefits for maintaining and promoting genetic diversity in the food supply and for conserving environment.

In India, farmers have primarily been considered as the conservers and developers of seeds and other plant varieties. They not only plant and harvest but also breed and improve their own crops through traditional or sustainable farming practices. They acquire unique knowledge about the different varieties of plants. In the process, farmers also help in conserving and protecting biodiversity. But this is unfortunate that the push towards industrial agriculture and high yielding plant varieties and the emergence of exclusive rights in plant varieties has suppressing the position of farmers.

India looked into the matter of recognizing farmers' rights, especially in response to inequitable IPR regime when being negotiated under TRIPS. The changes as proposed by the Dunkel draft have raised significant issues regarding protection of farmers' interest. In protest, Indian farmers have raised their voice. The rally called "seed satyagraha" was launched by the Karnataka Rajya Ryota Sangha for claiming the right of farmers to save and reproduce seeds and to avoid the situation of seed monopoly by the entry of MNCs and seed companies in the Indian agricultural sector. With this, it becomes much essential to strengthen farmers' rights and their significant role as a seed supplier, conserver and developer.

In this paper, the author would be looking into the concern for the promotion of farmers' rights which are suspected to be suppressed by the grant of extra attention to breeders' rights under IPR regime. With the evolution of new genetic technology and having different genetically modified crops around, the private sector is especially making attempts to turn into a dominant player in the agricultural

² Central Statistical Organisation

market by actually forcing the farmer to buy the seed afresh for sowing every time. The farmers in large parts of India mainly prefer to retain a part of their produce for sowing and to further exchange their seeds with other farmers. The reasons for the same are very obvious: (a) genetic technology destructs the self producing character and genetic diversity of seed (b) the land gets degraded with chemicals (c) it poses threat to our biodiversity (d) cost factors. Hence, this paper mainly emphasis on the concern to protect and develop farmers' rights in India for these plant genetic resources. The author would be analyzing the rights of farmer in comparison with breeders' rights. Here, the author has adopted analytical and critical approach. The issues that are mainly addressed in this paper are:

- o Whether UPOV fails to strike any balance between the breeders' rights and farmers' rights or the breeders' rights overshadow the farmers' rights as a whole?
- o Whether the farmers' rights are well recognized or better served under the sui generis model adopted in India?
- o Whether the benefit sharing expressed under the Act is sufficient in helping farmers to have control over genetic resources?

Controversy between Breeders' Rights and Farmers' Rights under UPOV and PPVFR Act

The slippery platform of patenting life forms under Article 27.3(b)³ of the TRIPS incorporated in the year 1994 has negative impact on agricultural growth in India and jeopardizes the rights of farmers to have control over their produce. Here, farmers or group of farmers are informally involved in producing, selecting, improving and breeding diverse crop varieties. Moreover, farmers have less knowledge and understanding for the application of IPR protection over their plant varieties. At the same time, it is important to note that TRIPS stresses on the protection and enforcement of IPR in a manner conducive to

³ Article 27(3)(b) of TRIPs states that "Members may also exclude from patentability: plants and animals other than microorganisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by a combination thereof."

social and economic welfare and to a balance of rights and obligations.⁴ It further permits to adopt measures necessary to promote the public interest in sectors of vital importance to their socioeconomic and technological development.⁵ With these in the background, certain flexibilities can be allowed in the required system.

By looking at the social and economic condition of India, the patent system for the protection of plant varieties is unsuitable as a whole. Moreover, the suggested patent protection will actually aim to make farmer totally dependent on the industrial supplies for further sowing of seeds. It would restrict the rights of farmers to have free access on seeds. Under the patent regime, there is the possibility to create more monopolistic situation with no consideration or privileges for protecting rights of poor and marginalized farmers. Although India's patent law has been amended to allow for process patents in the case of plants but not plants *per se*.⁶ Protection can be granted for treatment of plants, which renders them free of disease or increases their economic value.

The adoption of sui generis model provides certain flexibilities in support of the farmers. The phrase "sui generis" denotes that each country is free to set up its own IPR system, but the expression "effective" as such is undefined and no parameters are laid down yet. Although the inference can be taken from the International Convention for the Protection of New Varieties of Plants (UPOV) existing in the international platform. UPOV was adopted on December 2, 1961 to provide and promote an effective system of plant variety protection for the benefit of society. It further has been revised on 1972, 1978 and 1991 but it is found to be unsuitable for developing countries. It does not address or recognize farmers' rights. It is a matter of fortune that India has not opted to become the member of UPOV convention so far and has also not exactly copied its provisions into the required domestic legislation.

⁴ Article 7 of TRIPS.

⁵ Article 8 of TRIPS.

⁶ Section 3(j) of Patent Act provides that plants and animals in whole or any part thereof other than microorganisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals are out of the purview of patents.

UPOV fails to recognize the contribution of farmers as a whole. The exemption for farmers to have the right to save their own seeds has also been diluted. The amended version of UPOV recognizes as an option to member countries, the farmers' privilege to save seed, although only 'within reasonable limits and subject to safeguarding of the legitimate interests of the breeder. Farmers have to pay heavy royalties for saving seed on their own farms. Moreover, it would be very expansive affair for the farmers to have the registration done in accordance of UPOV structure. UPOV narrowly define the expression "breeder" as the person who bred or discovered and developed a variety.⁷ The authorization of the breeder shall require for the production or reproduction, conditioning for the purpose of propagation, offering for sale, selling or other marketing, exporting, importing or even stocking of protected varieties for above purposes. UPOV largely provide expanded scope to protect the interest of the breeders which will directly harm the farmers' rights.

Now, it becomes essential to determine whether a sui generis system adopted by India is centered on farmers' rights arising from their role in protecting and improving plant genetic resources? Whether the rights of farmers are kept on par with the breeders' rights? Implications of such IPR protection on our farmers require great analysis. India designed a unique legislation for incorporating the concept of farmers' rights and attempted to protect farmers' varieties and other varieties. It grants formal rights to farmers and open possibilities for them to have their contributions acknowledged and protected as well.

The need to recognize farmers' rights becomes essential to consider the contributions that the farmers have made for the preservation and improvement of plant genetic resources. Moreover, livelihood of farmers depends solely on farming. Fundamentally speaking, they have a right to seed. The enormous contribution of farmers for the conservation and development of plant genetic resources has been recognized by the ITPGR (International Treaty on Plant Genetic Resources for Food and Agriculture) under FAO platform. It urges for having such national framework which comprehensively protect and

⁷ Article 1(iv) of UPOV.

promote farmers' rights. The measures as to protection of traditional knowledge relevant to plant genetic resources for food and agriculture, the right to equitably and fairly participate in sharing benefits arising from the utilization of plant genetic resources and the right to participate in making decisions on matters related to the conservation and sustainable use of plant genetic resources should be considered in the interest of farmers.⁸ PPVFR do not expressly define the term "farmers' rights" as such. For reference, farmers' rights⁹ means the "rights arising from the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources, particularly those in centres of origin/diversity."

In furtherance of the objective of recognizing farmers' rights, the expression "farmer" has been clearly defined under section 2(k) of the PPVFR Act.¹⁰ The farmers are mainly considered as primary producer who not only depend on agriculture for sustaining livelihood but also has exhaustive understanding of the nature of agricultural products, growing conditions and pesticide treatment and has brought recognizable changes in the plant varieties. They acquire immense knowledge through the activities of organic farming, reforestation practices, pastoralism, rotational grazing, and rehabilitation of degraded lands, which cannot be acquired through artificial laboratories.

India has attempted to expand the scope of defining breeders in order to recognize even a farmer or group of farmers as a breeder when they bred, evolved or developed any variety.¹¹ Any farmer or group of farmers or community of farmers claiming to be the breeder of the variety can make an application for registration of plant variety under section 14 of the Act.¹² Further, PPVFR Act has covered various plant

⁸ Article 9 of ITPGR.

⁹ FAO Resolution 5/89.

¹⁰ Accordingly "farmer" means any person who (i) cultivates crops by cultivating the land himself; or (ii) cultivates crops by directly supervising the cultivation of land through any other person; or (iii) conserves and preserves, severally or jointly, with any person any wild species or traditional varieties, or adds value to such wild species or traditional varieties through selection and identification of their useful properties.

¹¹ Section 2(c) of PPVFR Act, 2001.

¹² Section 16(d) of PPVFR Act, 2001.

varieties and included extant variety, transgenic variety, farmers' variety and essentially derived variety.¹³ In order to conserve and prevent its rapid disappearance, the expression "farmers' variety"¹⁴ is well defined and farmers are given large opportunity to protect or conserve them in their own name. Moreover, the variety already existing under public domain is recognized as extant variety and can also be protected by the public corporations to protect them from getting extinct, even though it do not qualify the novelty criteria. Its registration remains valid till fifteen years from the date of the notification of that variety by the central Government under section 5 of seed Act, 1996.¹⁵ Well, it is to encourage public sector which only have this obligation of notification, can as soon after notification, register such varieties for common good.

The farmer who has bred or developed a new variety is allowed to register the same in his/her name as a breeder.¹⁶ Further, a farmer shall be entitled to save, use, sow, resow, exchange, share or sell his unbranded farm produce.¹⁷ It allows the farmer to sell seed with only restriction that this seed cannot be branded with the Breeder's registered name in any way. Here, an attempt is made to equally protect and balance the farmers' and breeders' rights by making farmers to sell his produce and to stand in market. Moreover, the role of rural communities as contributors of landraces and farmer varieties

¹³ The expression "variety" is defined under Article 1(iv) of UPOV in a narrow sense. As per the definition, variety is "a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of PBRs are fully met, can be (i) defined by the expression of the characteristics resulting from a given genotype or combination of genotypes, (ii) distinguished from any other plant grouping by the expression of at least one of the said characteristics and (iii) considered as a unit with regard to its suitability for being propagated unchanged."

¹⁴ As per section 2(l) of PPVFR Act, 2001, farmers variety means "variety which has been traditionally cultivated and evolved by the farmers in their fields; or is a wild relative or land race of a variety about which the farmers possess the common knowledge."

¹⁵ Section 24 (6) of PPVFR Act, 2001.

¹⁶ Section 39 of PPVFR Act, 2001.

¹⁷ Section 39(iv) of PPVFR Act, 2001, Further, Explanation to Section 39 of PPVFR Act, 2001 defines branded seed as any seed put in a package or any other container and labeled in a manner indicating that such seed is of a variety protected under this Act.

in the breeding of new plant varieties is acknowledged.¹⁸ Breeders wanting to use farmers' varieties for creating EDVs cannot do so without taking express permission of the farmers involved in the conservation of such varieties.¹⁹ The breeder is required to disclose and deposit seeds or propagating material including the parental line seeds of registered variety with the National Gene Bank.²⁰ In the interest of farmers in India, the breeders are prohibited from using sterile seed technologies.²¹

The farmers are protected from innocent infringement of Breeders rights for the simple reason of ignorance.²² Although, this is not a right per se but actually is a defence available to the farmers to escape from any serious liability. But how this element of innocence will be proved in the court of law is still a big controversial and unresolved issue. Further, they are exempted from paying any fee in any proceeding under this act.²³ This will encourage them to bring the matter of their rights violation before court without bearing much expense. The failure to supply adequate material to farmers at a reasonable price is also made a ground for providing compulsory license.²⁴ Further when the registered variety is sold to a farmer fails to perform as expected; the farmer becomes entitled to claim compensation in the prescribed manner.²⁵ Although the amount of compensation is left to the discretion of the Authority to decide. There is no criteria laid down under the Act which can measure the losses suffered by the farmer due to crop failure, sometimes losses are irrecoverable and lead to tragic consequences of committing suicide. The act of selling bad quality seeds should be considered as a punishable offence.

The PPVFR Act, 2001 came into force from October 19, 2006. The applications for the registration of plant varieties have been accepted only from May 20, 2007. The below mentioned table shows the data

¹⁸ Section 41 of PPVFR Act, 2001.

¹⁹ Section 43 of PPVFR Act, 2001.

²⁰ Section 27 of PPVFR Act, 2001.

²¹ Section 29(3) of PPVFR Act, 2001.

²² Section 42 of PPVFR Act, 2001.

²³ Section 44 of PPVFR Act, 2001.

²⁴ Section 47 of PPVFR Act, 2001.

²⁵ Section 39(2) of PPVFR Act, 2001.

representing the number of applications received for registration of different plant varieties at Registrar's office of the Authority for which acknowledgement has been issued (as on 31st March, 2010) and their present status.

Plant Variety	Applications Filed	Registered	Rejected	In process
Extant	1133	112	7	1014
New	470	2	0	468
Farmers'	51	3	0	48

By looking and analyzing this data, it is quite apparent that although the farmers' rights are well incorporated in the Act, but still is not effectively exercised. This Act is at very nascent stage, hence the adequacy of the Authority constituted to oversee the implementation of the Act is still left to be tested.

Plant variety and Plant Genetic Resource Protection in Other Countries

United States has widened the scope of patent law by allowing the patenting of plant and plant varieties. Previously, the American Patent law did not allow patenting the products of nature.²⁶ There was no protection for plant varieties. Only in the year 1930, the Plant Patent Act (PPA) created a comprehensive statutory scheme for establishing patent rights for developers of new and distinct plant varieties that are asexually reproduced, for example rose bushes that are propagated by cutting pieces of the stem rather than by germinating seeds. Thus, PPA grants the patentee the right to exclude third parties from asexually reproducing the patented plant or from selling and using, offering for sale and importing the plant when it is asexually reproduced. In order to provide protection to the new varieties of seed-propagated or sexually reproduced plants which are distinct, uniform and stable, the Plant Variety Protection Act, 1970 (PVPA) was adopted. Although under this Act, the protected variety is allowed to be used for bonafide research purposes. Further, farmers were allowed to save patented seeds for use on their own farms and could sell patented seeds to other farmers.

²⁶ The United States Supreme Court decision *Le Roy v. Tatham*, 55 US (14 How.) 156, (1852) confirmed that no power of nature is patentable.

In *Hibberd* case²⁷, it was held that the plants can also constitute a patentable subject matter under US Patent Act which relates to protection by allowing the grant of US utility patent and reaffirms that such material was within the §101's scope. Indeed, utility patents can consequently be granted in US for any new plant for whose creation man has contributed.

In contrast with the United States patent legislation, the European Patent Convention (EPC) does not allow *prima facie* the patenting of the plant varieties.²⁸ The following are some of the countries which are protecting their plant varieties by the help of UPOV model.

Country	Plant Variety Protection	UPOV Membership
US	Plant Patent Act, 1930 confers the exclusive right to the asexual reproduction of the plant such as budding, grafting, layering etc. Plant Variety Protection Act, 1970 applies to sexually reproduced plants. Under this Act, the protected variety is allowed to be used for bonafide research purposes. Further, farmers were allowed to save patented seeds for use on their own farms and could sell patented seeds to other farmers. Concurrent protection under this law and a utility patent is allowed. (double protection)	November 8, 1981 and also ratified the UPOV 1991 in February 22, 1999
Japan	New plant varieties can be protected either under the patent law or under the plant variety protection law. The farmers' privilege, while permitted, does not extend to 23 vegetatively propagating plants, thus restricting it to hybrids where future generations are typically of poorer quality.	Joined UPOV in Sept 3, 1982 and now follows the revised version of 1991.
New Zealand	Plant variety protection Act, 1975. It was extended to cover all plant species in 1981.	November 8, 1981 and not yet a member of UPOV 1991.

²⁷ *Ex parte Hibberd*, *United States Patents Quarterly*, 443 (1985).

²⁸ EPC was entered into force on 7 October, 1973 in Munich. Article 53(b) of the EPC states that patents are NOT available for plants and animal varieties or essentially biological processes for the production of plants and animal. This provision does not apply to microbiological processes or the products thereof. This article clearly states that plant varieties, their seeds and the process to make them are not patentable.

Country	Plant Variety Protection	UPOV Membership
Australia	Earlier passed a Plant Variety Rights Act, 1987. In 1994, this Act was replaced by the Plant Breeders Rights Act. It opts to retain the farmers' privilege to save seed.	March 1, 1989 and ratified UPOV 1991 in Jan 20, 2000.
Korea	Under Korea's Patent law, sexually reproduced plants remain unpatentable. However, the patenting of sexually reproducible plants has been allowed. It enacted the sui generis seed industry law in 1995 which include exceptions such as use for self consumption, non-commercial, experimental or research purposes and for further breeding.	January 07, 2002

Case Study: Bt Cotton in India

Cotton is a leading commercial crop grown for its valuable fibre. At present, India is the third largest producer of cotton in the world after China and USA accounting for about 14% of the world cotton production. It has the distinction of having the largest area under cotton cultivation in the world ranging between 8.00 million to 9.00 million hectares and constituting about 26% of the world area under cotton cultivation.

The cotton crop is often infested with insect pests such as cotton bollworm and tobacco budworm. Larvae of Lepidopteran pests are the most harmful insect pests that destroy the successful cotton production. Cotton typically requires numerous chemical insecticide treatments for Lepidoptera control. One of the ways to control these insect pests is to introduce the Bt gene which produces insecticidal proteins that are toxic to the insect pests. Hence, the use of Bt cotton significantly reduce chemical insecticide use in cotton.

Questions Which are Still Left Unanswered

1. What factors influence Indian policy makers while deciding on adoption of GM crops?
2. What is the system in place to certify fitness and subsequent adoption of GM crops in India? Is this system sound?

3. Whether Bt Cotton has provided a major benefit to cotton growers and the environment? If no, then who would be accountable for that?

Main producers of Bt Cotton: Monsanto Company, America and Maharashtra Hybrid Seeds Company Limited (MAHYCO), Mumbai, India

Sequence of events: A Department of Biotechnology (DBT) Committee set up under the Ministry of Science and Technology evaluated and rejected an application from Monsanto for permission to test Bollgard Cotton in India in 1990. Later, Mahyco, a seed company in Maharashtra applied for permission during 1996 to import seeds of Bollgard cotton from Monsanto in order to back cross that variety into local varieties and then to test the efficacy of this Bt Cotton in India. The permission was granted by the Genetic Engineering Approval Committee (GEAC) constituted in the Ministry of environment and forests under "Rules for manufacture, use, import, export and storage of hazardous microorganisms/genetically engineered organisms or cells 1989" under the Environment Protection Act, 1986. Monsanto acquired 26% of stake in Mahyco in May 1998. Subsequently, Mahyco was given permission to plant Bt Cotton in states like Andhra Pradesh, Karnataka, Haryana, Punjab, Maharashtra in July 1998.

Effect of Bt Cotton farming in India: In the technical sense, Bt cotton can help farmers to control pests and avoid crop losses, if properly managed. It may help to improve cotton productivity in India. But the impact of Bt cotton has shown us the worst side of technology as well. Some farmers had the negative experiences and some are unable to plant it at all because of high cost and other constraints. The Andhra Pradesh Coalition in Defence of Diversity (APCID), and the Deccan Development Society²⁹, has conducted a systematic study on "Did Bt Cotton save farmers in Warangal? A season long impact study of Bt Cotton - kharif 2002 in Warangal District of Andhra Pradesh" in order to understand the situation of the

²⁹ Andhra Pradesh Coalition in Defence of Diversity [APCID] is a four year old network of over 140 civil society groups in Andhra Pradesh that promotes agrobiodiversity and ecological agriculture. Available at <http://www.ddsindia.com/www/BTCOTTON.HTM>.

Warangal district of Andhra Pradesh, a major cotton district, which grabbed the attention of all as over 150 cotton farmers chose to commit suicide when they unable to come out of the debt trap.

Bt cotton sold in Andhra Pradesh as "Bollgard" was marketed by Mahyco-Monsanto. It was sown approximately in 9500 acres in the state of Andhra Pradesh, which stands third in cotton cultivation in the country, with an area of 8,87,000 ha under cotton. The State also stands first in pesticide-use on cotton crop. Following the GEAC approval for commercial cultivation of Bt cotton, approximately 1200 farmers of Warangal district planted Bt cotton over 1500 acres in Kharif 2002-03.

The results of the study indicated that

- o The cost of cultivation for Bt cotton was ₹1,092/- more than that for non-Bt cotton because there was only a meager reduction in the pesticides consumption on Bt crop.
- o On an average, there was a significant reduction (35%) in the total yield of Bt cotton, while there was a net loss of ₹1,295/- in Bt cultivation in comparison with non-Bt cotton, where the net profit was ₹5,368/-
- o The survey also reveals that 71 per cent of the Bt farmers incurred loss at the end of the season, whereas only 18 per cent of the non-Bt farmers had to face this unfortunate situation.
- o The study also points to the deep disappointment of farmers over the performance of Bt cotton, and that too in the very first year of its commercial cultivation.
- o The current yields for both Bt and non-Bt cotton are same at 4-5 quintals per acre. But non-Bt plants have a life of 2-3 months more and are expected to yield another 3-4 quintals. Therefore, non-Bt cotton will produce at least 30 per cent more cotton.
- o The price of Bt cotton is 10 per cent less than the non-Bt cotton in the local market as the size of its bolls and staple length is smaller than the conventional cotton hybrids under cultivation. As a result, in terms of total earning at the end of the cotton season, a non-Bt farmer is estimated to earn around ₹6,000/- more per acre than a Bt farmer

The findings completely shattered the expectations and hype raised by the Bt cotton industry. Bt cotton was expected to reduce pesticide

usage, increase the crop yields and enhance the earnings of the farmers. However, it had failed on all three counts and disheartened the cotton farmers of Warangal district. In fact, Bt cotton farming brought only discomforts among poor farmers and increased genetic pollution, destruction of biodiversity, and perpetual dependence of farmers on transnational agrochemical and seed companies for seeds to sow again. It was reported that in North Telengana region, the net income from Bt varieties was five times less than the yield from local non-Bt varieties.

The serious environmental risks that Bt crops entail like as cross pollination with nearby plant species, harmful effects on soil ecosystems and bad impact on multiple layers of the food web can never be ignored. As we know, the plants are the primary producers to be eaten by primary consumers or herbivores which are, in turn, consumed by the secondary consumers, or carnivores. The use of Bt gene in food stuffs will slowly leads to spread of slow poison in the whole metabolism system.

Measures for Farmers' to have Control over Genetic Resources

The object behind promoting farmers' rights is to help and encourage farmers to improve their current practices, while ensuring they can sustain their families and remain competitive in the markets. But there are still certain grey areas in the Act which need consideration. This Act is fundamentally lacking to provide basic needs to farmers' for understanding the importance of providing protection of plant varieties. They are very ignorant and reluctant at present. They need proper training, positive incentives for further encouragement and appropriate funding. This Act should aim to improve economic and social status of all farmers' (especially small and medium) and promote their well being.

The provisions related to benefit sharing are very unclear and doubtful. It is mentioned that the registrar shall send a copy of registration certificate to the Authority for determination of benefit sharing and to such other Authority, as may be prescribed, for

information.³⁰ It becomes important to clear about the purpose, composition and function of that other Authority. It mainly deals with monetary benefit sharing. The amount of benefit sharing payable to farmers will be calculated on the basis of its genetic material of claimant/farmer used in the development of variety and commercial utility of the variety and be recoverable as an arrears of land revenue by the District Magistrate within whose local limits of jurisdiction the breeder liable for such benefit sharing resides.³¹ It does not answer the situation when the registered breeder is a foreign company or located in foreign land. Well, at such time, it will become more difficult to recover the required benefits for the farmers. Moreover, there is no emphasize on the requirement of sharing non monetary benefits as such like sharing of technology, knowledge etc.

Reference can be taken of ITPGR that entail to establish a multilateral system to facilitate access to plant genetic resources and to share the benefits arising from the utilization of these resources in fair and equitable way. It has clearly explicated that access shall be provided solely for the purpose of utilization and conservation for research, breeding and training for food and agriculture. Such purpose does not include chemical, pharmaceutical and/or other non-food/feed industrial uses.³² In other words, there should not be any commercial intention behind claiming access. Further, it has taken a step forward by allowing sharing through exchange of information, access to and transfer of technology, capacity building and sharing of the benefits arising from commercialization. This treaty stresses on the furtherance of access and transfer of technology to developing countries through a set of measures such as establishment and participation in crop based thematic groups on utilization of plant genetic resources for food and agriculture, partnership in research and development or having special joint ventures.³³

Further, the Act has provided extraneous protection to the breeders' rights. The Act has conferred exclusive right to produce, sell, market,

³⁰ Section 24 (2) of PPVFR Act, 2001.

³¹ Section 26 of PPVFR Act, 2001.

³² Article 12 of ITPGR.

³³ Article 13 (b) (ii) of ITPGR.

distribute, import or export a variety.³⁴ In case of any prosecution for falsely using a denomination, the burden of proof is incumbent on the alleged violator to prove that the consent of the breeder was obtained.³⁵ Even the onus of proving the adverse effects on environment is on the person opposing the concerned registration.³⁶ Further, no parameters have been defined to prove such adverse effect. Whether the biosafety clearance issued by Review Committee on Genetic Manipulation (RCGM) under Department of Biotechnology (DBT) and Ministry of science and technology and Genetic Engineering Approval Committee (GEAC) under Ministry of Environment be sufficient. The legitimate rights of the breeders are highly protected by placing stiff punishments and penalties. Further, the proposal of having separate Appellate Tribunal under this Act would be a clear waste of resources and time. Instead the working structure already existing in the form of Intellectual Property Appellate Board (IPAB) can be easily approached for dealing the cases related to protection of plant varieties.

In India, we need to identify and set up effective centers and laboratory to carry out required DUS testing with adequate results. Crop-wise standardization of field testing parameters and table of characteristics for DUS testing needs to be worked out. A database for different plant species for the different characteristics must be properly developed and maintained. The proper storage facilities will have to be created for storing the specified quantity of plant varieties and in suitable conditions.

Conclusion and Suggestions

For a country like India whose major economy is based on agriculture, the protection of farmers' rights is a vital issue to tackle. PPVFR Act has well recognized the farmers' rights in India and has tries to strengthen their position, but still there are certain areas of concern that need to be considered and demands further improvement. The author believes that the farming without using any chemicals and GM seeds

³⁴ Section 28(1) of PPVFR Act, 2001.

³⁵ Section 69(3) of PPVFR Act, 2001.

³⁶ Section 21(3)(d) of PPVFR Act, 2001.

should be encouraged and facilitated. It is a right time to demand suitable action against the erring regulatory bodies and the scientific institutions/ agricultural scientists. They seem to work mainly to promote corporate agenda, and not for the interest of poor farmers. There is an urgent demand for shifting the focus from technology oriented crop varieties to develop integrate farming systems for the farmers in a sustainable and economically viable manner. We need to seriously think over the major issue of whether GM food crops are really desired in Indian atmosphere?

What has been the advantage of passing on this risky and expensive technology to farmers, and at what cost? Why do we need the help of any technology for farming activities when the traditional practices of cultivation have sufficient capacity to produce enough food for consumption as well as to export? Isn't it a fact that the entire gain has been to the seed industry, which has walked away with huge profits, leaving the farmers and the environment in deep crisis? Cotton farmers were simply assaulted by the seed industries which were luring them to purchase expensive seed that is increasingly squeezing them into bankruptcy and ultimately leading them to commit suicide.

The interaction between Bt crops and the surrounding ecosystems has raised additional concerns on the farming practices. The use of GM crops has increased the incidence of fungus and other secondary pests that were not a major problem earlier. Strangely, even after suffering the disastrous impact of Bt cotton on our farmers, there were no serious studies done to understand consequences towards the failure of regulatory system that allows unhindered multiplication and selling of seeds of inferior Bt cotton varieties.

The matter of concern for us is that even today, certain Bt crops like as GM maize, Bt corn, Bt brinjal and several other crops are under field trials which is nothing but only promoting artificial farming on the cost of poor farmers and public health. How can we allow any technology to cause destruction largely?

In India, we cannot allow GEAC (Genetic Engineering Approval Committee) to walk free. The GEAC which accorded environmental clearance to the controversial Bt cotton and Bt brinjal needs to be held accountable for its scandalous role that ultimately leads over many

cotton farmers to commit suicide and also lead to endanger environment. Even the GM food products act as slow poison for the human health. The liability of GEAC is sought to ensure proper compliance with rules and regulations. Crucially, there is no liability law in India which can book them for damages caused due to Bt cotton. The issues related to environmental impact, threat to biodiversity, health safety, farmers' seed rights, consumer choice should be properly analyzed. At this point of time, the reference can be taken of the precautionary approach adopted in the Cartagena protocol on Biosafety under CBD platform to which India is also a signatory. On realizing the potential adverse effects on biological diversity, this protocol stresses on ensuring adequate level of protection for the safe transfer, handling and use of modern biotechnology. We really need adequate monitoring and liability mechanisms in place.

The IPR structure should be carefully tailored so that it does not stifle the further research and development. The farmers or local communities or small scale food producers should be well trained, guided and supported. Sometimes it becomes difficult for farmers to understand the requirement of any sort of protection for their plant resources. Even farmers not able to realize the new characteristics of any improved plant varieties, which are necessary for DUS testing. It is a suggestion to have certain research centres or caring houses, especially to provide any kind of support (technical, financial or moral) to farmers for undergoing and clearing DUS testing for the required registration of their plant variety. Moreover, registration procedure is also not a mandatory requirement to follow as per the TRIPS obligations. So can we think of any other alternative that provide adequate protection but do not grant any monopoly rights over the plant genetic resources? Ultimately, the aim should be to encourage and support farmers in the whole process.

The breeders and farmers should work jointly for the conservation of plant genetic resources and biodiversity. Farmers have traditional farming understanding and breeders like seed companies have advanced technology or complete labs and equipments for experimentation. If they work in cooperation like entering for the partnership or any joint venture, that would be beneficial for both of

them in terms of money and technology. Moreover, in Indian scenario, there is more public research happening for agricultural advancement. But there is not much huge investment done for these activities; hence there is less intention by public authorities or institutions to secure any return by using IPR strategy. This trend should be changed and public bodies should come forward to register their plant varieties and conserve them for common good.

The author would further suggest for establishing decentralized seed industry in rural areas. Such regional seed producing units will be able to produce region specific seeds far more effectively keeping in mind the interest of our farmers. Moreover, the seeds should be easily available to the farmers in subsidized rate or as per the yield.

The farmers' in India are not properly made aware of their rights protected under the Act and further, they feel reluctant to take any initiative for the protection of their rights, may be due to illiteracy or ignorance or lack of financial power. They need support and cooperation from the society and deserve large amount of care. They are the primary producers of food and have contributed to the conservation of agro-biodiversity, on which all of us are highly dependent. It becomes our prime duty to promote their strength and means of livelihood to great extent possible and to make them self reliable in agriculture.

Development Policy of Central and State Governments Becoming a Problem for Land Rights of Scheduled Tribes

Gaurav Arora and Vinayak Gupta*

Introduction

*"Once upon a time 'the temples of modern India reduced millions of tribal people to ecological refugees'; now 'the minerals seen as the building blocks of modern India' are putting them 'at risk of losing their land through acquisition and further disruption of their societies and economies'."*¹

—Smita Gupta

*"The forest, rivers and land are ours. We don't want factories, steel or iron. Arcelor Mittal Go Back."*²

—Slogan for protest against Arcelor Mittal

*"People have to be 'educated' into supporting gradual industrialization including the need to build new steel plants on agricultural land."*³

—L. N. Mittal

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¹ Smita Gupta, *Mind the Drill*, available at <http://www.outlookindia.com/article.aspx?262704> retrieved on 8th May, 2010.

² Available at <http://www.corpwatch.org/article.php?id=15544> retrieved on 2nd May, 2010.

³ An interpretation of the wordings of steel King L.N. Mittal referred in Moushami Basu, *Protesters in Eastern India against Mining Giant Arcelor Mittal*, available at <http://sanhati.com/articles/2192/> retrieved on 2nd May, 2010.

These lines in themselves establishes the violation of the sacred constitutional promise provided under Schedule V of the Constitution and explains the controversies to be discussed in the upcoming white pages. The problem is a sociological problem which has shocked the constitutional echoes and raised several important questions regarding the Constitution. The Constitution tried to provide a promise to these Schedule Tribes under Schedule V of the Constitution regarding their land rights being a matter of non-transfer. However it is sad to notice that these rights were never "forcefully substantiated" by the subsequent policies and presently these rights are being violated on the name of the dream of constructing a new economic superpower. The land is being acquired at several places and it also includes the land of Scheduled Tribes. Hence the question is that what should be done in this case.

Globalisation as Phenomenon Against the Land Rights of the Schedule Tribes

Until 1990, about 85.39 lakh tribals have reportedly been displaced due to industrialization and development projects like dams, power projects, nature conservation but their rehabilitation and resettlement always remained a neglected subject.⁴ These statistics has put the problem of the land acquisition for industrial development before globalization. After 1990 the land Acquisition has taken the shape of monster. This globalization has led to the more requirement of the land for the development of industries and has further added a new reason for the violation of the land rights of poor tribals and making this promise of Schedule V a farce.

It is pertinent fact to note that for any indigenous tribe, land is the most important issue.⁵ The issue to be settled is whether Schedule Tribes are really indigenous people in India. This question has been left unanswered by the largest Constitution of this world. Article 342 contains a provision in the Constitution regarding the inclusion of the

⁴ Asian Center for Human Rights, "Atrocities at Singur, India: A matter of rights of disposed", *ACHR Rev.*: 144/06, available at <http://achrweb.org/Review/2006/144-06.htm> retrieved on May 1, 2010.

⁵ Hari Mohan Mathur, "Communal Management, Rights and Displacement", *Tribal Land Issues in India*, available at <http://www.adb.org/Documents/Books/Land-Cultural-Survival/chap06.pdf> retrieved on May 5, 2010.

Schedule Tribes which does not speak about any criteria or definition for the inclusion of a tribe under Scheduled Tribe. The indigenous people are repositories of the distinct cultural traits, customs and ethnicity.⁶ In spite of their distinct cultural traits, they are the classes experiencing common problems to retain their identity. In reference to this particular definition, the attention should be given toward the term "adivasi". The term *adivasi* which connotes one who is residing (*vasi*) from the old times (*adi*). These *adivasis* have been mostly covered under the Schedule Tribes. Hence the linkage exists between the concept of Schedule Tribes and Indigenous People.⁷ Even Article 1(1)(b) of Indigenous and Tribal Population Convention, 1957⁸ defines the indigenous tribes in the light of their relationship with land which is established before settlers came from anywhere. The earth belong to the indigenous people although everywhere they are exterminated or are on the retreat, denied basic rights and equal status and treated as human curiosities who have outlined the time.⁹ Such an attitude is blister, not culture and a deprivation of equal human status to those for whom humanity of today owes much.¹⁰ Further the Schedule tribals

⁶ Stuti Deka, "Indigenous People and protection of Human Rights", Subhram Peykhowa & Manik Choudhary, eds., *Indigineous People and Human Rights* 306 (R. Camber & Co., Kolkata, 2009).

⁷ *Supra* note 5.

⁸ Article 1 of the Indigenous and Tribal Population Convention, 1957 reads: "This Convention applies to-

(a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong." Also see O.H. Magga, "Indigenous Peoples and Development", *United Nations Development Programme, Human Development Report 2004 Cultural Liberty in Today's Diverse World* (Oxford University Press, New York, 2004).

⁹ V.R. Krishna Iyer, *The Dialects and Dynamism of Human Rights* 234 (Eastern Law House Calcutta, 1999) cited in Shachi Chakrabarty, "Rights of Indigenous people over forests in India: Rhetorics and Reality in Peykhowa", *Supra* note 6.

¹⁰ *Ibid.*

also had a strong feeling toward their land. This strong feeling can be understood in the following words of Dayamani Barla, superhead of *Adivasi Moolvaasi Asthitva Raksha Manch*:

"For instance, the place of our worship or, *Sarna Sthal*, consists of groves of trees that we consider sacred, *sasandari*, and the site in our village that bears stones erected in memory of the ancestors of our clan....Is it possible to rehabilitate or compensate for such land?"¹¹

It is clear from these lines that the connection of these tribes with their land is not only of livelihood but also of great emotional attachments which they share with these lands. With regard to the same, a promise was given in Schedule V of the Constitution. The reference should be made to Clause 5 (2) and (3) of the Schedule V of the Constitution¹² which provides a power to the governor to take care of their land rights by making regulations and further even amend the central legislation for defending their land Rights. However these powers are discretionary which is a problem in itself. This criticism of it cannot debar it to be called as a golden promise to these deprived tribes.

Governmental Policies with reference to the Constitutional Promise of Schedule V

It can be easily noted from Indian Legislative Acts that the performance of this abovementioned promise was adverse of what is

¹¹ *Supra* note 3.

¹² Clause 5 (2) and (3) of the Schedule V of the Constitution reads:

5. Law applicable to Scheduled Areas:

2) The Governor may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area.

In particular and without prejudice to the generality of the foregoing power, such regulations may

- (a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area;
- (b) regulate the allotment of land to members of the Scheduled Tribes in such area;
- (c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.

(3) In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question."

promised. State has legislated various statutes for the same like the *Andhra Pradesh Schedule Areas Land Transfer Regulation, 1959*, the *Assam Land Revenue Regulation Act, 1886*, the *Chotanagpur Tenancy Act, 1908*, the *Santhal Parganas Tenancy Act, 1949*, the *Maharashtra Land Revenue Code, 1966*, the *Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974*, and the *Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974*. The central government is ahead of state governments in drafting anti-Schedule Tribes policies. The forest conservation was taken as a reason to frustrate this promise by making it impossible. The illustration should be taken of Section 2 of the *Forest (Conservation) Act, 1980*¹³ which rely on the bad face of human interference in the forest areas and forgot the emotional relation of these tribes with these lands.

Somehow, government later on justified its mistake with National Forest Policy, 1988. Finally this promise was given a shape of reality with the unanimous passing of the *Schedule Tribes and Other Traditional Forest Dwellers (Recognition of Forest Dwellers) Act, 2006*. The achievement of the right was quite late as the giant problem of the compulsory acquisition of their lands has initiated in the mean time. Hence the promise remained a promise not furnished till date awaiting fulfillment. Development and globalization has posed a challenge to their rights. These recent developments on this issue have also

13. Section 2 of the Forest (Conservation) Act, 1980 reads:

2. Restriction on the dereservation of forests or use of forest land for non-forest purpose: Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing:
 - (i) that any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;
 - (ii) that any forest land or any portion thereof may be used for any non-forest purpose;
 - (iii) that any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organisation not owned, managed or controlled by Government;
 - (iv) that any forest land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for re-forestation."

highlighted two legal defects in the concept of compulsory acquisition i.e. the concept of public purpose for exercising the power of "Eminent Domain" and faulty displacement policy which can be attributed a major part to the problems of the tribals.

Public Purpose:

A New Phase as the Personal Gain of Private Players

Explaining this faulty concept of Public Purpose, it is once stated by the Hon'ble Apex Court in *Charanjit Lal v. Union of India*¹⁴ that Eminent Domain is a right inherent in every sovereign to take and appropriate private property belonging to individual citizen for public use. The concept in itself is silent on the issue of consent of the owner. Further the conditions for the use of this doctrine was described later in *State of Bihar v. Kameshwar Singh*¹⁵ upholding that the power to acquire property compulsorily meant power bestowed upon the government to take away the property for a public purpose but followed by an adequate compensation. This judgment is always remembered for recognizing a policy of compensation at the time of the acquisition first time by Indian Judiciary. Simplifying the *ratio* of this judgment, it can be stated that the acquisition of the land depends upon two conditions i.e. public purpose and compensation. In the instant case of Indian legal system, the problem lies in both the concept of public purpose and the rehabilitation policy of the country.

This concept is of wide amplitude¹⁶ and a time changing concept¹⁷. It is a recent question under consideration whether giving land to these private players is satisfying the need of the concept or not. It was held in the classical case of the *Rindge Co. v. Country of Los Angeles*¹⁸ that the taking away of private property not for public use, but to be leased out to private occupants, for the purpose of raising money would be an

¹⁴ *Charanjit Lal v. Union of India*, AIR 1951 SC 41. Also See *Jilubhai Nanbhai Khachar v. State of Gujarat*, AIR 1995 SC 142.

¹⁵ *State of Bihar v. Kameshwar Singh*, 1952 1 SCR 889.

¹⁶ See *Somavanti v. State of Punjab*, 1963 SCR (3) 774 at 794; *Jilubhai Nanbhai Khachar v. State of Gujarat*, AIR 1995 SC 142.

¹⁷ See *State of Bihar v. Kameshwar Singh*, AIR 1956 SC 294. Also see Sanjiva Row, *Law of Land Acquisition and Compensation* 113 (Buttersworth, New Delhi, 2001).

¹⁸ *Rindge Co. v. Country of Los Angeles*, 67 L ed 1186.

abuse of the power of Doctrine of Eminent Domain and may be redressed by an action at law like any other illegal trespass done under an assumed authority. Undergoing the same ideology, it was also stated by the Hon'ble Madras High Court in *Veeraraghavachariar v. Secretary of State*¹⁹ that where the primary object is a personal gain whether of a private individual or of a company and the public benefit resulting from the action of the company or the company is too remote, the purpose cannot be said to be public purpose. The same is in the case of the land being acquired for establishing Companies by these private players and companies. It seems to be a direct interest of the company and a distant vision of government for public purpose at the rate of environmental pollution and violation of land rights of these indigenous tribes. However the difference between the acquisition for public purpose and acquisition for company has got blurred with the decision in *R.L. Arora v. State of U.P.*²⁰. The final death nail was put in coffin by the recent decision in *Joydeep Mukharjee v. Union of India*²¹ where a public purpose has been found in acquiring farming land for establishing small car manufacturing plant of Tata industry in Singur. However the vision of public purpose from the acquisition of these lands is a far one and seems to be violation of land rights of these tribal peoples.

Now the question arises whether land should be acquired for these projects at the cost of the violation of Tribal's land rights. Any day, the answer would come in negative. It is hard to detect any link with the acquisition for private player. The employment generation and development seems to be secondary and profit making or personal gain of these private companies is primary objective. Hence the inclusion of this purpose of development of personal gain should not be considered as a part of the wide concept of "public purpose". Such a defective concept of "public purpose" makes the process of Land Acquisition worse than that in the British era. In British India, the *Land Acquisition Act, 1894* differentiates between acquisition for public purpose and for companies and consists two separate chapter for

¹⁹ *Veeraraghavachariar v. Secretary of State*, AIR 1925 Mad 837.

²⁰ *R.L. Arora v. State of U.P.*, MANU/SC/0295/1961.

²¹ *Joydeep Mukharjee v. Union of India*, W.P. No. 28304 (W) of 2006.

"acquisition for public purpose" and "acquisition for companies".²² Presently, the acquisition for these private players is also being done under the tag of public purpose. This defective inclusion has not only created a defect in land acquisition policy but also led to the violation of the land rights of the Schedule tribes and making the promise of Schedule V unenforceable and farce.

The National Rehabilitation and Resettlement Policy, 2007: A Pseudo-Favour to Schedule Tribes

The story of the violation of the tribals rights does not end with the defective concept of "public purpose" being followed in India but it further extends itself to the defect in policy of rehabilitation. A proper rehabilitation policy with regard to the Tribal people is always needed. Recognizing the same demand, the government first time framed the National Policy on Resettlement and Rehabilitation for Project Affected Families of 2004. However the policy was defective which was tried to be redressed with a draft policy on this issue in 2006. In 2007, the government came up with this recent policy titled "National Rehabilitation and Resettlement Policy, 2007". The abovementioned policy has been framed so that the land required for the development can be easily acquired and displaced people can be ensured of minimum rights. It is also tried that a special care should be taken of rights provided to these tribals under Schedule V. However in real terms, this policy fails to provide such rights and does not consist much for the displaced tribal people. The policy seems to provide adequate relief to the Schedule Tribes in case of land acquisition with the proposal for collecting disaggregated data about the number of Scheduled Tribe (ST) and the Scheduled Caste (SC) families affected by the project in the survey to be conducted by the Administrator of Resettlement and Rehabilitation²³. In case if project includes

²² Sudha Bharadawaj, "Gravest Displacement, Bravest Resistance: The struggle of Adivasis of Bastar, Chhattisgarh against imperialist Corporate landgrab", available at <http://sanhati.com/excerpted/1545/> retrieved on May 20, 2010.

²³ Clause 4.1. of the National Rehabilitation and Resettlement Policy, 2007 reads: "Whenever it is desired to undertake a new project or expansion of an existing project, which involves involuntary displacement of four hundred or more families *en masse* in plain areas, or two hundred or more families *en masse* in tribal or hilly areas, DDP blocks or areas mentioned in the Schedule V or Schedule VI to the

contd...

displacement of 200 or more schedule tribes, then policy provides preparing tribal development plan for the rehabilitation.

It would be wrong to appreciate this policy and tag it as "pro-STs policy". This policy turns to be defective and "anti-STs" from the very definition of "affected family" provided in Clause 3.1. (b). This provision of the policy only considers the case of family "residing or engaged in any trade, business, occupation or vocation continuously for a period of not less than three years". It is well known fact that most schedule tribes still live as nomads in these forests which are being acquired. Hence it is a sheer violation of the rights of these tribal people. However it cannot be denied that the policy provides for certain positive stimulants toward the rights of scheduled tribes. Further it also provides for the consultation to the village councils under Schedule VI and *gramshabha* under Schedule V²⁴. However it should be kept into mind that it is consultation and not the consent.²⁵ Further the policy negates the right of the tribal people from initial provision when defining "affected families". Hence, the policy can be declared as a policy against the sacred constitutional promise without going into further details. The policy does not aim to stop displacement of these tribes. However it further promotes displacement in the form of rehabilitation. Hence this policy is nothing more than a cushion for state governments to acquire land on the ground of public purpose which is not at all public purpose from any angle.

A Treasure of Natural Resources: Land of STs for Development

It is an evident fact that most of these tribal people live in the mineral rich states i.e. Orissa, Chhattisgarh and Jharkhand. According to a recent survey conducted by Action Aid and Indian Social Institute,

Constitution, the appropriate Government shall ensure that a Social Impact Assessment (SIA) study is carried out in the proposed affected areas in such manner as may be prescribed."

²⁴ See Clause 5 of the National Rehabilitation and Resettlement Policy, 2007.

²⁵ See Asian Centre for Human Rights, "India's failed Rehabilitation and Resettlement Policy", 2007, available at <http://achrweb.org/Review/2007/198-07.html> retrieved on May 3, 2010.

over 1.4 million people have been displaced from their homes in the four states of Andhra Pradesh, Chhattisgarh, Orissa and Jharkhand where a total of 10.2 million acres have been acquired for setting up of development projects such as mines, industrial plants and dams in the last decade.²⁶ Out of the 1.4 million displaced persons in these four states, 79% were tribals.²⁷ This "mineral richness" of these forest land pieces become a problem for them as these lands become an eye catch for these private players. A reference should be drawn toward the Asian Center of Human Right's Review No. 114/06 which described the condition of the state of Jharkhand and Orissa in following words:

"The Jharkhand government reportedly signed over 42 MoUs with investors including Mital Steel, Tata Steel, Jindal Steel and Power Company Limited worth about Rs 1,69,198.26 crores since Jharkhand became a state in 2000. Approximately 47,445 acres of land would be required for the projects in mineral-rich Kolhan Region, which was likely to affect about 10,000 families and cause deforestation of 57,15 kms land...Out of them, only 18.45 lakhs displaced tribals were rehabilitated....During 2002-2005 alone, the Orissa government signed 42 MoUs with companies for proposed steel and other plants in the state. The MoU with Korean steel major Pohang Steel Company (POSCO) signed on 22 June 2005 for setting up a steel plant at Paradeep in Jagatsinghpur district in Orissa with a total investment of \$12 billion was the biggest foreign direct investment so far in India. The project would displace around 4,000 tribal families. About 1.4 million people, most of them tribals, have been reportedly displaced in Orissa between 1951 and 1995 due to dams, canals, mines and other industries. Majority of the IDPs have not received compensation and rehabilitation...."²⁸

This personal gain of private players seems to the state government as an option for the development in the state. Hence the government starts acquiring lands for such project. However the thing which is

²⁶ "Asian Indigenous and Tribal People Network, The State of India's Indigenous and Tribal Peoples", *Asian Indigenous and Tribal People Network 21* (2009).

²⁷ *Ibid.*

²⁸ *Supra* note 4.

neglected in the whole series of transaction for development is the land rights of the indigenous people and promise made under the Schedule V of the Constitution. This is the reason that the frustrated Indigenous people have to come on the roads and have raised their voices on this serious issue of pseudo-development. This also leads to the slow development of the project which also puts multinational private players and hunk investors on the hidden mineral resources of India into a problem. However the favourable fact regarding the future investment by the multinational is that the attraction to invest in the future potential of India remains untouched.²⁹ The point to be noted is the violation of the land rights and Fundamental Right of livelihood under Article 21 of the Constitution of the Indigenous people which constituted 8 % of the total population as per 1991 census. However the problem of the development induced displacement is not a new one. It was stated in the Ministry of Tribal Affairs in its Draft National Policy on the Tribals that nearly 85.39 lakh tribals had been displaced until 1990 on account of mega developmental projects like dams, mining, industries and conservation of nature etc.³⁰ The change in the story is that these tribals are now contesting for their rights. These facts and whole concept can be substantiated with the two recent case studies which are also historical on this aspect.

The rich iron ore of Jharkhand became a part of the dream of L.N. Mittal's long standing plans to expand steel production the country in his birth land. After some time, the company acquired its rival and titled as Arcelor Mittal which claimed itself to be the world's largest steel manufacturing Company. The steel major had signed an Memorandum of Understanding with the Jharkhand government in 2005 to set up a 12 million ton Greenfield steel plant with an investment of Rs.40,000 Crore. This step is being interpreted as an step towards the "Indian presence" of the Arcelor Mittal, the world's largest Steel manufacturing company whose majority stakes is also in the hand of World's Richest person and Indian born, L.N. Mittal. Further the required land for the project has been recognised for the

²⁹ Prasenjit Bhattacharya, "Violence in India not to deter investors", available at <http://online.wsj.com/article/SB10001424052702303720604575169381222567188.html#articleTabs%3Darticle> retrieved on May 14, 2010.

³⁰ *Supra* note 26 at 33.

allotment in Gumla and Khunti district. The district has Munda tribes in good quantity. Hence the question framed was the same that whether land should be acquired for the public purpose. The Tribals come on the roads against this acquisition under the banner of "Adroasi Moolvasi Astitva Raksha Manch".³¹ It was also put forth as a plea by the protestants the 11,000 Acre land which is to be acquired for this project has a good amount of land patches owed by tribals and hence non transferrable under Schedule V of the Constitution. However the plan to establish Greenfield steel project is currently facing a rough weather as it got involved in certain controversies. The project even seems to be a case of excess land acquisition because 2,400 acre out of this 11,000 acre is to be given for establishing a township which looks inadequate *prima facie*. At the same time, the steel giant is also looking for certain land in Bokaro district of Jharkhand where farmer has also agreed to sell their lands for such a developmental project.³² The verdict of this story if comes in the favour of these tribals, it would be a huge success from the prospective of saving their land rights from the name of "pseudo-development".

The government of Orissa signed a Memorandum of Understanding with the Korean company named "Pohng Steel Company" (hereinafter referred as POSCO) to set up a steel plant at on 22nd June, 2005 which consists of investment of \$12 billion, the largest ever foreign direct investment in India³³. The site recognised for developing this steel plant was Paradeep in Jagatsinghpur district of Orissa. It was calculated through unofficial sources that the project will displace around 4,000 indigenous/tribal families³⁴. These tribal peoples have come together under POSCO *Pratirodh Sangram Samiti* to oppose the POSCO steel plant.³⁵ The interesting thing to note down in whole

³¹ "Jharkhand villagers protest transfer of land to Arcelor Mittal", available at http://www.thaindian.com/newsportal/business/jharkhand-villagers-protest-transfer-of-land-to-arcelormittal_100198706.html retrieved on May 25, 2010.

³² "Arcelor Mittal may shift plant to another site in Jharkhand", available at http://www.thaindian.com/newsportal/business/arcelormittal-may-shift-plant-to-another-site-injharkhand_100336093.html retrieved on May 20, 2010.

³³ Asian Centre of Human Rights, "The other side of India's boom: 1000 conflicts now", ACHR Review No. 197/07, available at <http://achrweb.org/Review/2007/197-07.html> retrieved on May 20, 2010.

³⁴ *Supra* note 4.

³⁵ *Supra* note 26 at 33.

sequence is the role of state government. Section 144 of the *Criminal Procedure Code, 1973* was brought into force. The real concern in the instant case is not the use of this provision. However the real concern was the reports of violent acts by certain supporters of the project.³⁶ The study first time highlighted the conflict between the need of development and interests of indigenous in straight forward manner. It is also pertinent to note that even the matter was taken till the court where the matter was decided in favour of acquiring the lands by the state government.³⁷ This incident is an illustration of constitutional promise of Schedule V to be kept aside for the dream of economic empowerment of country.

Conclusion and Recommendations

Every dream has a price attached with it. India has started seeing a dream of being an Economic Superpower till the year 2020. It is a fact beyond any kind of doubt that this dream of developed India cannot be accomplished without a fruitful contribution from the land of these mineral rich states. In the instant case, the cost to be paid is of the land of these Schedule Tribes. Hence it is to be decided that whether this cost is to be paid or not for development! The above realization is needed on the part of the government that the real public purpose lies in the right of indigenous people which are facing challenge of the world rather than establishing the industries of rich industrialists to earn more profit. These are the people who are deprived of their rights from the years. Moreover, the land for them is not only a source of livelihood but also a part emotionally attached with them. Hence government should consider the rights of these people to whom they had made a promise sixty years ago.

On the other hand, it is also a universal truth that the huge industrial projects like POSCO should be established as early as possible if India has to convert its dream of economic superpower into reality. The establishment of these lands will need huge land pieces that may also

³⁶ "Anti POSCO Activist Dies", *The Hindu*, available at <http://www.thehindu.com/2008/06/22/stories/2008062260311000.htm>, retrieved on May 11, 2010.

³⁷ *Supra* note 26 at 33.

include the land pieces of the Schedule Tribes. These tribes are not only culturally weak but also economically backward. The industries will not only boost our economy but also provide employment to the unemployed. In the light of this argument, the acquisition of the land is justified. The land pieces which do not include the pieces of the Schedule Tribe should be given to the industries so that both cultural and economic development of these tribes can be done. This kind of balance would lead India to the position of Economic Superpower without losing the tag of rich cultural heritage which includes culture of these tribes as an indivisible part of it.

Moreover, there is need to revive our concept of "public purpose". The land should not be acquired for the profits of the private players on the name of the public purpose. The establishment of the Company leads to the personal gain for the company. The profits to the common man by the Industry in the form of employment, products etc. are secondary from the establishment of these industries. The definition of the "affected people" should be reframed and drafted in such a manner that it will include Schedule Tribes which do not have the ownership on the records but residing there for a long time. It is necessary because some of them are nomads and do not have ownership on the lands so that they can utilize the benefits conferred on them by the policy in case of displacement.

It is well said that dreams seen virtually is called fiction and dream seen actually is called vision. The dream of building India a superpower is a dream which is virtual and hence will fail in a long run. It is recommended that the rights of the Schedule Tribes should be taken into consideration so that it will become "dream seen actually". As A.P.J. Abdul Kalam, ex-President of India, has called his dream "Vision 2020" and not a "Fiction 2020". Now it is upon the government policies toward the development that this vision will not transform into a fiction leading to the joke of a dream of such a great human being.

Surrogacy Arrangements Legal and Social Issues

*Kush Kalra**

Introduction

Technological breakthroughs in the field of science and medicine have reintroduced the ancient practice of surrogate motherhood into the modern age. However, immense controversy surrounds it. Thus this paper is an effort to throw light on this issue from various angles to find out whether or not there is need for recognition of surrogacy agreements in India.

Jeremy Bentham looked upon 'law' as an instrument for securing the "greatest good of the greatest number" and correctly so.¹ Law, at a particular time, showcases the societal mindset and undergoes radical metamorphosis to align itself with social change. The question of 'when to' employ this instrument for addressing social issues is beset with many conceptual uncertainties. This article seeks to address one such question with regard to the issue of surrogacy in India and, in the process, analyzes its various dimensions in order to ascertain the basis which makes it imperative for the legislature to pass a law to explicitly address the issue.² In recent times, the advent of new scientific reproductive technologies has conjured up novel and seemingly intractable normative debates about bioethics and contemporary values in the field of family law. Infertility of couples strips them of their essential 'right to procreate' and have genetically related offspring. A new promise has flowered for them with the advent of

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¹ Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997923&download=yes

² Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997923&download=yes

new reproductive technologies like artificial insemination, donor egg transplantation, and surrogacy. Surrogacy, incontrovertibly, is the most controversial of them all.

The literal meaning of 'surrogate' is 'substitute'. Surrogacy arrangements are motivated by a desire for a genetically related child and the disincentive arising out of the prolix adoption procedures coupled with difficulty in finding suitable child for adoption. A standard definition of 'surrogacy' is offered by the American Law Reports³ in the following manner:

"...a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's birth."

The essential elements are child-bearing by a surrogate mother, termination of her parental rights after his birth and payment of money by the genetic parents. If the money paid is merely to recompense the surrogate for the pain undertaken by her and includes reimbursement of medical and other expenses, then it is 'non-commercial' surrogacy. In contrast thereto, 'commercial' surrogacy involves payment of hefty sum of money as income to the surrogate for the service offered by her and surrogacy is thereby looked upon as a business opportunity. According to another classification, surrogacy can be *traditional*, *gestational* and *donor* surrogacy. Traditional surrogacy involves the artificial insemination of the surrogate mother by using the sperm of the intended father. Gestational surrogacy, on the other hand, involves the creation of an embryo in a Petri dish and its implantation into the womb of the surrogate who carries it to the term. Lastly, in donor surrogacy there is no genetic relationship between the child and the intended parents as the surrogate is inseminated with the sperm, not of the intended father, but of an outside donor.

³ *Validity and Construction of Surrogate Parenting Agreement*, 77 ALR 470. (1989).

Surrogacy Arrangements: Indian Perspective

Legal provisions presently regulating surrogacy

In India, the law regulating Surrogacy is on its anvil and the present regulations are in the form of guidelines issued by the Indian Council of Medical Research (ICMR) and the National Academy of Medical Sciences (NAMC), who have released certain criteria for grant of accreditation to Assisted Reproductive Technologies (ART) clinics.⁴

These guidelines define surrogacy as "an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate"⁵. The children born through these arrangements are considered those of the genetic parents and the surrogate mother must relinquish, in writing, all parental rights concerning the offspring⁶. Already through media reports and articles one gets a preview of how rural women are lined up to become surrogate mothers to earn for their families.⁷

Absence of Legal Framework to Regulate Surrogacy Agreements

As has been already discussed that there are only guidelines regulating surrogacy in India thus it is clear that there is an absence of legal framework in this area. Quite recently there has been a lot of controversy over this issue of commercial surrogacy agreements in India. The recent case of *Baby Manaji Yamada's*⁸ is of particular

⁴ *National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India* (Guidelines for ART Clinics), available at http://icmr.nic.in/art_clinic/art_clinic.htm last visited on 28th July, 2009.

⁵ *Id*, Chapter 1, Para. 1.2.33.

⁶ *Id*, at Chapter 3, Para 3.10.1; also see Para 3.5.5 of the Guidelines for ART Clinics.

⁷ See articles by Soumitra Trivedi/ Hasmukh Adukha, "In milk-rich Anand, women bear NRI babies for a living", available at <http://www.dnaindia.com/report.asp?NewsID=1016271>; and NDTV Correspondent, "Surrogate mothers flourish in Gujarat" available at <http://www.ndtv.com/morenews/showmorestory.asp?id=85086&frmsrch=1&txtsrch=surrogacy> last visited on August 28, 2009.

⁸ *Baby Yamaji Manada v. Union of India and others*, 2008 INDLAW SC 1554; In this case, A Japanese couple had hired a surrogate mother in Anand, Gujarat in India as commercial surrogacy arrangements are banned in Japan. The egg was did not belonged to the wife and were sourced from a donor outside The biological father of the infant, Mr A, who was a orthopedic surgeon in Tokyo, had developed cross
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importance in relation to highlighting the grey areas of law regarding commercial surrogacy agreements in India. This case has exposed the lacuna that exists in the current legal framework in India regarding commercial surrogacy. To regulate the mushrooming growth of these ART clinics and surrogacy arrangements, the need was felt to have a legislation of some sort which will deal with the various grey areas of law regarding the surrogacy agreements and also to ensure that any of the party in the agreement is not cheated and the middlemen doesn't end up duping both the parties and specially the generally naïve and gullible surrogate mother. There are the ICMR (Indian Council for Medical Research) guidelines of 2002⁹ in place. But one has to understand that these are merely guidelines and have very little or no legal implications. The need of the hour is a strong and efficient legislation to fill the lacuna created and to cater to the needs of the parties involved. The legislature has thus hurriedly tabled a bill to get the situation under control.

relationship with his wife. She divorced him. In between their baby was conceived by the surrogate mother in Gujarat. Mr. A requested his wife to co-operate with him, and help in carrying out the legal formalities in India. As until now the biological parents have to adopt the child from the surrogate mother in India. But unfortunately, the wife refused to help in this regard. The father, legally under the Indian Laws couldn't adopt the baby, since under the Guardians and Wards Act of 1890, A single father cannot adopt a girl child. There fore the fate of young Yamaji hung and was uncertain. The desperate father sent her mother, i.e. the grandmother of her to take custody of the child and bring her back to Japan. As she moved for obtaining her custody in India in the High Court, her petition was opposed by an NGO based In Jaipur. The government also seemed to be helpless in this matter as there were no laws governing the effect of surrogacy in India at that time. What we had were some guidelines by the ICMR, which couldn't take the place of a law. The Rajasthan high court decided against the grandmother of the child and debarred her from taking the custody of the child. But the petitioner ultimately moved to the Apex Court. The bench consisting of Arjit Parsayad and Mukudam Sharma heard the matter and instructed the government that the Commission to be formed under the Protection of Child's Act, 2005 has the appropriate authority to inquire into these kinds of complaints and take notice of the same. In the absence o any complaint filed by anyone before the commission the writ petition stands disposed off and the decision of the High court was overruled. The government instructed to issue the passport to Yamaji Manda and she flew back along with her grandmother to Japan.

⁹ Guidelines for ART clinics in India, available at icmr.nic.in/art/art_clinics.htm - 6k

The Draft Assisted Reproduction Technologies (Regulation) Bill, 2008¹⁰ of India and its brief analysis with regard to the Commercial Surrogacy Arrangements

According to the provisions of this bill genetic parents are to adopt a child born through surrogacy.¹¹ Surrogacy has been recommended for patients for whom it is medically impossible/ undesirable to carry a baby to term. Payment to surrogate mothers should cover all pregnancy-related expenses. ART clinic must not advertise surrogacy arrangements. The responsibility should rest with the couple or a semen bank.¹² A surrogate mother should not be over 45 years of age¹³ provided that no woman may act as a surrogate more than thrice in her lifetime. ART clinic must ensure (and document) that the surrogate woman satisfies all the testable criteria (sexually transmitted or communicable diseases that may endanger the pregnancy). A prospective surrogate mother be tested for HIV and shown to be negative for this virus just before embryo transfer.¹⁴ A foreigner or foreign couple not resident in India, or a non-resident Indian individual or couple seeking surrogacy in India shall appoint a local guardian who will be responsible for taking care of the surrogate during and after the pregnancy.¹⁵

Legal Enforceability of Surrogacy Agreements in India

Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents". The contract is to be entered into by the free consent of both the parties and both the parties shall be competent to contract. Thus, as far as free consent and competency to contract, are concerned, the contract stands valid as is evident from the facts of the case. To examine whether the consideration and object of the contract was lawful, reference is made to section 23 of the Contract Act.

¹⁰ Here in after referred to as The 'Act'. Available at [www.icmr.nic.in/art/Draft%20ART%20\(Regulation\)%20Bill%20&%20Rules%20](http://www.icmr.nic.in/art/Draft%20ART%20(Regulation)%20Bill%20&%20Rules%20) (Last visited on 10-09-2009).

¹¹ Chapter vii, Section 34(10).

¹² *Id*, section 33(3).

¹³ *Id*, section 34(5).

¹⁴ *Id*, section 34(6).

¹⁵ *Id*, Section 34(19).

It is submitted that in order to determine whether the contract of surrogacy stands violative of section 23¹⁶ of the Indian Contract Act, an examination of what the court has regarded as immoral or opposed to public policy, must be made. The Indian Court's have limited the interpretation of 'immorality' to sexual immorality as held in *Gherulal Parakh v. Mahadeodas Maiya*¹⁷. In this case, the Court in fact observed that precedents, English as well as Indian limited the concept of immorality to sexual immorality. We would like to point out here that wherein conception of the child took place through in vitro¹⁸ fertilization, the aspect of sexual immorality does not arise. But contradictory to this the Apex Court in *Central Inland Water Transport Corpn Ltd. v. Brojo Nath Ganguly*,¹⁹ has stated that public policy connotes some matter concerning public good and public interest. In another case concerning public policy,²⁰ the Bombay High Court stated that a contract that has a tendency to injure public interest or public welfare is one against public policy.. This view was also held in *Evanturel v. Evanturel*²¹ and in *Maxim-Nordenfeldt Co v. Nordenfeldt*²². In *Egerton v. Brownlow*²³, the Court had held that it is not to shrink from applying precedents on public policy, with firmness and caution to any new and extra ordinary case that may arise. As a matter of fact the fundamental right to procreation implicit in *Mr. X v. Hospital Z*²⁴ is furthered through contracts of gestational surrogacy. That if medical technology advances sufficiently enough to artificially further one's fundamental right to procreate; the evolution of such an extraordinary situation must be addressed by the law. The surrogacy contracts have been blamed of being against public policy as they might lead to a plethora

¹⁶ The consideration or object of an agreement is lawful, unless—...the Court regards as immoral, or opposed to public policy..."

¹⁷ AIR 1959 SC 781.

¹⁸ In vitro fertilization or IVF is the fertilization of the human egg outside the human body in a laboratory. Children that have been conceived this way are often called test tube babies because their actual conception took place in a Petri dish. See *Anna Johnson v. Mark Calvert*, (1993) 5 C4th 84.

¹⁹ AIR 1986 SC 1571

²⁰ *Bhugwant Genuji Girne v. Gangabisan Ramgopal*, AIR 1940 Bom 369.

²¹ (1874) L.R. 6 PC 1.

²² [1893]1 Ch.630

²³ (1853)4 H.L.C. 149, see also *Montefiore v. Manday Motor Components Company Ltd*, [1918] 2 KB 241.

²⁴ (1998) 8 SCC 296.

of problems in society, but this will only happen if a balanced law is not made in regard to balancing the interests of both the surrogate mother and intending parents.

Surrogacy only furthers Right to Life under Article 21 of the Constitution

The relation of the surrogate mother to the child she is carrying is nothing, but womb leasing or womb for rent. After the child is born she has no right to keep the child because she is neither the mother (where both ova and sperm are from different persons) nor the owner of the genetic material. She is only a contractor who is willing to give the end product once the contract between her and the person is fulfilled.²⁵

The word "personal liberty" in Article 21²⁶ is of the widest amplitude and it includes the "right to socialize" with members of family and friends, subject of course, to any valid prison regulations which must be reasonable and non-arbitrary.²⁷ It has been held in a plethora of cases that right to life does not mean a mere animal existence and includes right to live with human dignity²⁸. Judicial activism has expanded the scope of Article 21, which has in turn received the widest possible interpretation. In *Kharak Singh v. State of Uttar Pradesh*,²⁹ the Hon'ble Supreme Court held that, "personal liberty is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1)." In another case the court held that, "the expression 'personal liberty' is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man."³⁰

In the matter of *R.Rajagoopal v. State of Tamil Nadu*³¹, after referring to *Kharak Singh* and American decisions, the learned Judge stated the law in the following words: Any right to privacy must

²⁵ Anita Rao, *Surrogate Motherhood- Legal Perspective*.

²⁶ Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to the procedure established by law.

²⁷ *Francis Coralie v. Union Territory of Delhi*, AIR 1981 SC 746.

²⁸ *Maneka Gandhi v. U.O.I.*, AIR 1978 SC 597.

²⁹ AIR 1963 SC 1295.

³⁰ *Supra* note 28.

³¹ AIR 1995 SC 264.

encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. Furthermore the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters.³² The right to privacy has been read into the right to life under Article 21 of the Constitution.³³ Thus it can be said that surrogacy might just further the right to procreation and to have a family that is implicit under Article 21.

International Perspective on Surrogacy

Position in United States of America

In USA different state legislatures have made different laws regarding surrogacy. In Arizona, New York, North Dakota and Utah, the legislatures have taken a blanket approach, deeming all surrogacy contracts to be void and unenforceable. Kentucky, Louisiana, Nebraska, and Washington, on the other hand, have taken a less restrictive approach, passing legislation that voids only those surrogacy contracts that provide for compensation to the surrogate. In contrast, Florida, New Hampshire, and Virginia have adopted the minority approach by making them legal and enforceable but they prohibit commercial surrogacy, with an exception of expenses incurred as a result of pregnancy and childbirth. They also allow the surrogate an opportunity to rescind the contract. Surrogacy legislation in New Hampshire requires judicial preauthorization of all surrogacy contracts subject to three conditions *viz.* informed consent by parties, completion of psychological counselling and evaluation, absence of unconscionable terms in the contract and orientation towards best interests of child.³⁴

³² R. Rajagopal alias R.R. Gopal v. State of Tamil Nadu, AIR 1995 SC 264.

³³ Unni Krishnan v. State of A.P., AIR 1993 SC 2178, See also, Gobind v. State of M.P., AIR 1975 SC 1378.

³⁴ Raghav Sharma, "An International, Moral & Legal Perspective: The Call for Legalization of Surrogacy in India" (July 2, 2009). Available at SSRN: <http://ssrn.com/abstract=997923>

contd...

This brings us to another major important issue which is the interpretation given by the various Supreme Courts of these states regarding surrogacy. The Oregon Court of Appeals found that the state's adoption laws do not apply to surrogacy contracts. The California Supreme Court permitted the compensation to the surrogate mother in *Johnson v. Calvert*. In *Johnson v. Calvert*,³⁵ the intended parents created an embryo from the intended mother's egg and the intended father's sperm. The embryo was then implanted into the surrogate mother, who agreed to relinquish her parental rights upon the birth of the child. There, the court found that surrogacy situations differ "in crucial respects" from adoptions. The New Jersey Superior Court found that a person's desire to procreate was intense, fundamental, and "within the soul of all men and women." For these reasons, it recognized the importance of enforcing surrogacy contracts and manifesting the parties' intentions.³⁶ In *Re Baby M*³⁷, the New Jersey Superior Court found that no state interest existed into surrogacy contracts. Further, the court found that a surrogate mother had the "constitutionally protected right to perform services" by voluntarily entering into surrogacy contracts. Under this analysis, any legislation placing a complete ban on surrogacy contracts would be unconstitutional because it would violate an individual's protected right to procreate and thus, the individual's right to privacy.

In *Smith v. Jones*,³⁸ the court ruled that surrogacy constituted an exception to the presumptions of biology and paternity. Once blood tests were performed to verify the identity of the genetic mother, the surrogate was denied any parental rights. The surrogate was considered, in effect, a "human incubator", and the judge recognized no contribution to the development of the child other than providing the gestational environment for the child's physical development. This decision set a precedent for the enforcement of surrogacy contracts since the gestational "mother" could not make any valid claim to

<http://ssrn.com/abstract=997923>

³⁵ In a surrogacy contract, the intended parents compensate the surrogate for "her services in gestating the fetus and undergoing labor, rather than for giving up 'parental' rights to the child", 851 P.2d 776 (Cal.1993).

³⁶ *Id.*, para 107.

³⁷ 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988).

³⁸ Mich. Comp. Laws Ann. s 711, 722 (West 1992).

parental rights due to her lack of legal connection to the child. In *Surrogate Parenting Associates v. Kentucky ex rel. Armstrong*,³⁹ the court addressed the legality of surrogate parenting under a Kentucky statute that prohibited the purchase or sale of a child. In upholding the validity of surrogacy contracts, the court held that surrogacy did not constitute "baby selling" under the statute.⁴⁰ The court determined that unlike adoption, surrogacy contracts are arranged before conception, and are, therefore, based on rational, well-reasoned decisions. In *Johnson v. Calvert*,⁴¹ the California Supreme Court held gestational surrogacy contracts did not violate the United States Constitution, state law, or public policy. Further the court held that the "intent test" or the creation of a child being a mental concept which is a controlling factor of its birth merits full consideration. Furthermore the court held that the custodial rights of the child was to be conferred to the woman who first intended to bring about the birth of the child and intended to raise as her own. The court further held that preferring the intending mother serves the child's interest because the intending parents wanted to have the child and went to immeasurable lengths to get it. This view was also reiterated by the Supreme Court of California in *Re Marriage of Buzzanca*.⁴²

Position in United Kingdom

If one have a bird's eye view of the legislation and the judicial pronouncements in the U.K., one would find that there has been a lot of debate over this issue. The Warnock committee was formed which recommended to make commercial surrogacy arrangements to be criminally punishable⁴³ and to punish professionals engaged in this process. Based on the recommendations of this committee The Surrogacy Arrangement Act, 1985 was passed and further the Human Fertilization and Embryology Act, 1990 was passed. The earliest example regarding Surrogacy in the Judiciary is to be found in *A v.*

³⁹ 704 S.W.2d 209 (Ky. Ct. App. 1986).

⁴⁰ *Id* at 211.

⁴¹ *Supra* note 35.

⁴² 61 Cal.App. 4th 1410 (1998)

⁴³ Report of the Committee of Inquiry into Human Fertilization and Embryology (Chairman:-Dame Mary Warnock) Her Majesty's stationery office, (1984) at 103.

*C*⁴⁴case. Further, *Re C* (a minor)⁴⁵ was also a very important case, though it was essentially a matter of ward ship. But for the present purposes, the most important aspect of this case was that the judge rejected suggestions that the commissioning couple were unfit parents because they had entertained a commercial surrogacy arrangement.. Surrogacy itself and particularly the process between the process and the adoption were more directly considered in *Re an adoption application* (surrogacy)⁴⁶. Another important case to be mentioned here would be the *C v. S*⁴⁷ case of Scotland. Therefore, in a nutshell, one can say that the govt. of U.K does not allow commercial surrogacy arrangements to take place.

Feminist Perspective on Surrogacy

The preliminary argument given by a majority of feminist thinkers in the area of surrogacy is that it is used against women of colour and disproportionately poorer women who are thus exploited by richer white women. A great deal of discussion has centered on *Johnson v. Calvert*⁴⁸, in which a black woman was hired to bear a child for a woman who was unable to carry a child to term. The egg of the genetic mother was combined with the sperm of the genetic father. The resulting zygote was then placed in the womb of Anna Johnson, the black surrogate. After the birth of the child, Johnson re-fused to relinquish her parental rights. The court eventually granted custody to the genetic parents; the surrogate mother was denied even visitation rights. Because the genetic father was white, the case is usually analyzed as a racist privileging of a white patriarch. Lisa Ikemoto⁴⁹ describes the case as "selectively applying the parental status laws to maintain white fatherhood" and as "erasing black woman's status as wife and mother."⁵⁰ This argument may be partially applicable to Indian conditions, which is the part of these theories stating that

⁴⁴ (1985) 8 Fam Law 170.

⁴⁵ (1985) FLR 846

⁴⁶ (1987) Fam 81, (1987) 2 ALL ER 826.

⁴⁷ 1996 SLT 1387.

⁴⁸ *Supra* note 35.

⁴⁹ Ikemoto C Lisa, "The Infertile, The too fertile, and the infertile, Fertilé" 47 *Hastings L.J.* 1007 (1996)

⁵⁰ 5 *Mich. J. Gender & L.* 163

women of deprived sections may be exploited and this is already happening in our country which seems to have become new cheap destination⁵¹ for surrogacy services for couples from other developed nations, thus there is a need to protect the rights of the surrogate mothers available in such vast numbers in our country, as their vulnerability will be exploited if nothing is done. The fear of the feminist thinkers (as has already been discussed) has taken reality's form in our country. Currently, there is a great potential for exploitation of poor women. Thus to protect these vulnerable women it is important for the surrogate-for-money arrangements are limited to non-compensation voluntary arrangements in the view of a few thinkers, there would be no question as to exploitation. Couples who desire children would not have to be the highest bidder, and the child would not be a commodity.⁵² The limit to be put on the amount of consideration to be only that of the medical requirements and well being of the surrogate and the mother has to be made by the legislature itself.

Another argument put forth by the feminists against surrogacy agreements is the commodification of child theory. As stated by Katy Ruth⁵³ in her article on the controversial Baby M case that there are moral and constitutional reasons behind the child commoditization theory. In *Runkles v. Maryland*,⁵⁴ the court addressed the issue of baby selling. Although the court did not find the appellant guilty of selling the child, Judge Davis did address the slavery issue in relation to the sale of a child. Judge Davis stated, "The Thirteenth Amendment to the United States Constitution, ratified on December 6, 1865, abolished involuntary servitude and the corresponding commercial buying and selling of people as chattel."⁵⁵ Thus this is another view that some feminists hold as their argument against surrogacy arrangements, but this argument seems very one sided. The child may be commoditized if there is no proper law that regulates these arrangements, thus there

⁵¹ Available at <http://www.thehindubusinessline.com/life/2009/01/02/stories/2009010250110400.htm>

⁵² Klinker Ruth Katy, "The Baby M Controversy: A Class Distinction", 18 *OKCULR* 113 (1993).

⁵³ *Ibid.*

⁵⁴ 590 A.2d 552 (Md. 1991).

⁵⁵ *Ibid.*

is need for legislation so that surrogacy does not turn into a baby selling market, instead it should act as a boon for the unfortunate couples who cannot bear children or other single parents who want children in their lives (and cannot adopt as it is difficult for single parents to adopt due to stringent provisions).

Further the feminists antagonistic of surrogacy contracts believe that there is a threat to the health of the surrogate who is being used as a child making machine and might be unaware of the risks to her health and also the pain of giving away the child at the time of making the agreement. The infertile woman may be devastated by her inability to become pregnant; on the other hand, the fertile woman may be devastated as a result of relinquishment of her child.⁵⁶ Development of legislation aimed at preventing harm to both women will be a monumental task. There are also several physical changes in normal pregnancy that may be potentially harmful to the woman. Some of the more common underlying occurrences include low blood pressure, high blood pressure, skin changes, swelling in the extremities, anemia and problems with the digestive system.⁵⁷ Many of the surrogate mothers are poor and thus not very highly educated and thus might not know of the abovementioned risks to their physical health and it is also asserted by certain thinkers that women cannot judge the emotional loss they might feel while parting with the child at such an early stage thus it is important that laws are made in our country to make counseling sessions compulsory for surrogate mothers before they make uniformed decisions which might affect them adversely later.

Commercial surrogacy though has been viewed as a means of providing women with greater control over their bodies, it has also been argued to prove as how it does not empower women. Instead it provides an opportunity for women to sign away their rights.⁵⁸ Until the twentieth century, women lacked many rights, including the right to legal custody of their children thus no need for commercial

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Vossmeier M Celeste Schejbal, "What Money cannot Buy: Commercial Surrogacy and The Doctrine of Illegal Contracts", 32 *STLULJ* 1171(1988).

surrogacy arose because the father already owned the child, and commercial surrogacy now provides a convenient vehicle with which to step back in time. Thus as can be seen feminists in totality are divided on their views on surrogacy, but the criticisms of surrogacy put forth by them to a large extent probable and should be considered while making laws regarding surrogacy.

Critical Analysis of Surrogacy Arrangements

The law regarding surrogacy as we know is characterized by confusion and uncertainty. This is further hampered by a complex set of moral and ethical issues regarding commercialization of birth, renting of wombs, women's rights, child as chattel etc. No doubt, a significant number of people who oppose surrogate motherhood, even for couples who cannot otherwise have children, think of it as unnatural and for that reason wrong. Our conclusion is that the naturalness or unnaturalness of a new procedure is not the real issue: the crucial question is *whether the procedure is likely to do more good than harm.*

Following the birth of Britain's first baby (Baby Cotton) by a commercial surrogate mother on 14 Jan, 1985, considerable controversy has arisen.⁵⁹ The New South Wales Law Reform Committee in its December, 1988 Report said that the process is open to serious objection because the body of the surrogate mother is simply used as an incubator by the commissioning couple. The woman is subjected to an invasive procedure for which she has no need and the natural child carrying process is distorted by the fact that the surrogate mother is counseled against bonding, as she is to part the child after birth.⁶⁰ It was felt that even in altruistic surrogacy there can be no guarantee that both the women have exercised true freedom of choice, and that the practice of surrogacy 'should be by all practicable legal and social means'. Another Australian Report⁶¹ stated that institutionalization of surrogacy would serve to promote "a risky and undesirable means of

⁵⁹ Ian Kennedy and Andrew Grubb, *Medical Law Text and Material* 713 (Butterworths, London, 1989).

⁶⁰ Elizabeth A. Erickson, "Contracts to Bear a Child", 66 *California Law Review* 611 (1978).

⁶¹ Waller Louis, "Surrogate Parenting", *Report of the National Bioethics Consultative Committee*, 5-7 (April 1990).

family formation" and that "surrogacy is a practice which involves real risk of harm to parties who may become involved".

This moral stand is rebutted by people pro surrogacy by saying that with the advancement in innovation, our society has invented the pacemaker and can transplant kidneys, so why should law step in to prevent childless couples from obtaining children. Using the libertarian Harm Principle, or the Principle of autonomy, this would be violative of the individual's right to choose in situations where others will not be harmed by that choice. The "naturalness" of the bond between the gestational mother and the child and the traditional notion of family are strongly contested by both feminist and critical legal studies. Applying the same arguments, the "natural", biologically imperative female desire of the surrogate to grow a baby inside her body (which is now the surrogate's motives are often explained) is seen as a socially reinforced patriarchal myth. While we are not morally against surrogacy *per se*, we do have problems with the glorification of the act of the surrogate⁶² as it reiterates the traditional focus on procreation as the essential function of marriage which is not necessarily an enabling construct. Women acting in ways that current gender ideology characterize as empowering might in fact be disempowering. Surrogates may feel that they are fulfilling their womanhood by producing a baby for someone else, although they may be actually reinforcing gender roles.⁶³ Infertile mothers, believing it to be their duty to raise their partners' genetic children, could be caught in the same kind of powerlessness as surrogates who feel called upon to produce children for others. Some women might have conflicts with their partners that they cannot acknowledge, either,

⁶² "Surrogacy is one of the most generous and kind acts that a woman can carry out to help others. Pregnancy requires emotional and physical strength, tolerance and fortitude to endure for someone else. In the sense of giving and self-sacrifice it is one of the most ethical one human can achieve", cited in Carl Wood, "Artificial Procreation" *First World Congress on Family Law and Children's Rights* 8 (Sydney, 1993).

⁶³ Margaret Jane Radin, "Market-Inalienability" 100 *Harvard Law Review* 1849 (1987) at 1932. Some feminist however, oppose surrogacy (and all forms of reproductive technology) not on the grounds of reinforcement of gender roles but on the premise that control over procreation belongs to women and should be restored to them, Watkins, Susan Alice et al, *Feminism for Beginners*, 161 (Icon Books, Cambridge, 1992).

about raising children under these circumstances instead of adopting unrelated children,⁶⁴ or about having children at all. The potential of commodification of women itself is deeper because paid surrogacy within the current gender structure may symbolize that women are fungible baby-makers for men whose seed must be carried on.

The procedure amounts to dehumanization and degradation of women. Surrogacy in many ways is felt to be a form of ultra or bio prostitution in which more than mere a sexual act is involved and the woman's body is used to incubate a foreign embryo in exchange of money or substitutes. It goes one step further than common prostitution as the former involves only sex without obligation to bear a child, but surrogacy puts the woman even under such an obligation. They feel that now not only the woman's sex but also her womb can be purchased and can even be classified as disguised rape.⁶⁵ The latter concept is based on the principle that no more is force a necessary constituent of rape but consent is the most important and so even if the woman has given her consent it is under duress or factors which are beyond her control and therefore it can be termed so. The argument of it being constituted as prostitution does not hold because there is no question of any sex involved and it can only be equated to the amount that the choice is not really a free choice but may be due to compulsion.

Those against surrogacy insist it amounts to commercialisation which becomes a tool in the hands of the wealthy, to tempt and manipulate the weaker sections of society into selling their organs for monetary benefits ignoring their human emotions, physical comfort etc, as has already been discussed from the point of view of feminist jurisprudence. It places dangerous pressures on surrogate mothers. In a move to prove that commercial surrogacy does not exploit the poor, studies have been conducted in Australia which shows that surrogates

⁶⁴ In the case of genetic surrogacy most people feel that surrogacy is better in the sense that at least one spouse is genetically related to the child but forget to consider that the woman is then in a disadvantaged position all her life and might probably run into problems in the case separation and the question of custody. This arrangement is then seen as very non-ideal.

⁶⁵ Hari Swarup, "Surrogate Motherhood: A New Woman Rights Problem", *World Congress on Law and Medicine*, held on 22-25 Feb. 1985 at New Delhi.

are of the same age and income status as other women having children.⁶⁶

As regards the claimed ill-effects on the child, studies in Australia have shown that there is nothing remarkable about the intellectual, social or physical status of the child born of such arrangements. The possible ill-effects include emotional disturbances when they become aware of their mode of conception and discrimination by other children. However, it was found that rather than the news evoking an adverse reaction, children are often pleased with their "special status" and are interested in the biology of their conception. The situation is very different from adoption since in the case the social parents are usually the biological parents also. Additionally, they have prepared themselves more carefully for parenthood than most fertile couples.⁶⁷

Pro-surrogates argue that the contract of surrogacy is not one of purchase of a child but should be seen in the light of aiding a childless couple who have no other hope. Opponents argue that it is not in the best interests of the child as it is treated as chattel for use in the interests of others. No matter how well the child is looked after, the woman will be creating a child not for its own sake but because it will result for her in money or perceived satisfaction of giving someone else happiness. It is said that the creation without desiring it fundamentally changes the way we look at children-instead of viewing them as individuals in their own capacities we start seeing them as commodities or items to be manufactured because of their utility. Finally, the commercial system threatens the child by taking it away from its mother not because it is unsuited to rear her child but because the childless couple is willing to buy the privilege.⁶⁸

Many people argue that surrogacy agreements, commercial or otherwise should not attract the protection of, or be enforceable by, the law. They argue that such agreements are contrary to the best interests

⁶⁶ *Supra* note 62.

⁶⁷ Avi Katz, "Surrogate motherhood and the Baby-Selling Laws" 20 *Columbia Journal of Law and Social Problems* 1 (1986).

⁶⁸ Ateeque Khan, "Artificial Insemination and Surrogate Parenthood - An Indian Socio-Legal Perspective" *World Congress on Law and Medicine*, *supra* note 65.

of women and children in general and so the State should prohibit them or atleast not uphold them.

Alternative Choices for Government Action

There are several approaches the government can take on the practice of surrogacy:

Total Prohibition

This raises tremendous practical difficulties. Firstly, it is quite possible that couples may be sufficiently determined to have children by surrogacy and that they will opt for the practice regardless of whether or not it is prohibited. Secondly, if the law were to make all surrogacy criminally unlawful, it might find it difficult to uncover underground surrogacy and regulate its abuse. With people willing to pay anyway, the fines will not have the desired effect. Also it goes against the constitutional Right to Privacy. As established by the US Supreme Court in *Roe v. Wade*,⁶⁹ fundamental rights of privacy govern a woman's ability to control her reproductive freedom and hence, her pregnancy even in the case of surrogacy.

Prohibition of Commercial Surrogacy will effect the role of—

Intermediaries: Prohibition of commercial agencies would mean that no person or organization is to initiate, take part in negotiations or compile information for use in surrogacy arrangements in return for payment. The distinctively counter productive feature of this move would be the effective exclusion of professionals such as doctors, solicitors etc. from surrogacy arrangements. The couples and potential surrogates would not, for e.g., be able to consult their physicians for genetic testing and solicitors would not be allowed to assist in facilitating the legal adoption of children born through surrogates. Prohibition on professional assistance adds to, rather than detracts from, the difficulties associated with surrogacy and might be prejudicial to the interests of all concerned especially the child.

⁶⁹ 410 U.S. 113 (1973).

Surrogates: The result of such a prohibition would limit the participants of the surrogacy arrangements to friends and relatives seeking a child as ban on advertising would limit the involvement of strangers. The presence of a friend or relative as third party may present a considerable amount of tension. A similar intrusion by a stranger may be less problematical. The over-solicitous interference from a surrogate who is a close relative or friend may cause confusion for the child as to which woman is his real mother.⁷⁰

Rendering such Agreements Legally Unenforceable

Thus, surrogacy agreements would not be illegal but there would be no legal remedy for the commissioning couple in the case of non-performance after payment, refusal to give up the child or negligence on the part of the surrogate. The economically disadvantaged surrogate with no bargaining power will be exploited even more without the legal requirement for just and equitable terms and free consent in the contract.

Licensing and Regulation

By this we mean that the government should lay down certain rules and regulations which will monitor surrogate activities. (This includes the requirement of contracts, a certain minimum standard of medical care and counseling for both parties.) Surrogacy must then be allowed only through registered hospitals and clinics which have agreed to conform to the rules. It is a waste of precious capital and time of the government if we insist that they set up the clinics and monitor everything themselves. It is debatable whether so much of the exchequer's money should be spent on practice which, owing to our higher rate of fertility, is relatively rarer in India.

Conclusion

The question of surrogacy presented us with some of the most difficult legal and moral problems. In the first place the other views that surrogacy for convenience alone is too large a price to pay for the problems encountered and that it is totally ethically unacceptable. However, due to possibility that commercial surrogacy be exploited,

⁷⁰ *Re C (a Minor)* [1985] FLR 846.

we must have a law regulating such agreements. As medical science and awareness of the technique advance more and more, couples will resort to this device and thus banning such practices will only result in toothless legislation, the need of the hour is to that what cannot be stopped *defacto* should be regulated and regularized *de jure* in the interest of all the parties and especially in the interest of the child who in the absence of such regulation might suffer as an innocent victim of the self centered interests of the adults involved. In order to mitigate the risk of trading and commercialization it is therefore essential that suitable provisions should be statutorily made to regulate the practice.

The required law should provide for protecting the surrogate mother's interest such as there should be proper counseling provided to her before entering any such agreement and the counseling should involve informing her of the consequences of the process on her health, the psychological trauma that she might face and the legal consequences of such an agreement. The law should provide for the right to termination of the pregnancy for the surrogate mother in case of any mental or physical trauma that she may experience during the pregnancy. Further the consent of both the intending parents should be made compulsory and there should be legal implications for intending parents or parent in case of breach of agreement so that the surrogate mother might have rights enforceable against them. The procedure for legal adoption of the child after birth must be laid down. With regard to the monitoring of the child there should be an authority assigned to review the treatment of the child upto a certain stipulated period of time and if the treatment is found adversary then legal steps should be taken to put an end to such ill treatment. Further the minimum time up to which the surrogate mother should be allowed to nurse the child should be laid down as without such a provision, the health of the child may suffer. The Indian legislators should keep in mind the models followed in different countries and mould them to suit the Indian conditions.

Biotechnology Regulation The Evolving Legal Framework in India

L. Pushpa Kumar*

Introduction

India was one of the few countries that put in place a regulatory mechanism for biotechnological products at a very early stage, even before the Convention on Biological Diversity, 1992 and the Cartagena Protocol on Biosafety, 2000 mandated the member countries to take necessary legal, administrative and policy measures to regulate biotechnology. The Rules for the Manufacture, Use/Import/Export and Storage of Hazardous Micro-organisms/Genetically Engineered Organisms or Cells, 1989 issued under the Environment (Protection) Act, 1986 was the cornerstone regulatory chapter for the whole of Asia with regard to the regulation of modern biotechnology and biosafety. These rules have been regulating the biotechnological products. Now there is a move to bring about a comprehensive legislation, the National Biotechnology Regulatory Authority Bill, 2010 to regulate the whole range of biotech research and products.

The Union Cabinet has approved the National Biotechnology Regulatory Authority Bill, 2010 on 16 August 2010.¹ This Bill is listed for introduction in the ongoing monsoon session of Parliament.² Establishment of the Biotechnology Regulatory Authority of India

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¹ See Prashant, *Cabinet approves Biotechnology Regulatory Authority of India Bill*, August 17, 2010, available at <http://stockmarkettoday.in/2010/08/17/cabinet-approves-biotechnology-regulatory-authority-of-india-bill/> (last visited 02 March 2011).

² See Parliament Session Alert, Winter Session 2010, PRS Legislative Research, available at http://www.prsindia.org/print.php?bill_id=1357&category=1 (last visited 02 March 2011).

which will replace the Genetic Engineering Approval Authority (GEAC) functioning under the Ministry of Environment and Forests, Government of India. This article traces the two decade old regulatory system in India and its latest developments.

Biotechnology and Biosafety Regulation in India

The Environment (Protection) Act, 1986 enabled the Government of India to tackle the regulation of hazardous micro-organisms and genetically engineered organisms formulating the Rules for the Manufacture, Use/Import/Export and Storage of Hazardous Micro-organisms/ Genetically Engineered Organisms or Cells, 1989³ under the Act instead of enacting a new legislation. The Ministry of Environment and Forests (MoEF), Government of India is the nodal agency for implementing both the Convention on Biological Diversity and the Cartagena Protocol. The DBT, functioning under the Ministry of Science and Technology, coordinates with the MoEF in risk assessment, monitoring and approval of biotech products under the Rules. Besides MoEF and DBT, other Ministries such as the Ministry of Agriculture (MoA), the Ministry of Health and Family Welfare (MoH&FW), the Ministry of Commerce and the Ministry of Industry, and the government body, the Indian Council for Medical Research (ICMR) are also involved in regulation of different aspects of biotechnology. The MoEF deals with the national and international introduction of LMOs into environment by according commercial approvals. It also regulates export or import or national release of generically modified micro-organisms and the recombinant products taking into consideration the environmental aspects of those products through GEAC.

The Rules, 1989 were made with a view to protecting the environment and health in connection with the application of gene technology and micro-organisms. The Rules are applicable to the whole of India. These Rules were made applicable to a wide variety of activities such as manufacture, import and storage of micro-organisms and gene technological products.⁴ The Rules cover all the genetically engineered

³ Hereinafter "the Rules, 1989".

⁴ Rule 2(1).

organisms, micro-organisms, cells and any substances, products or food stuffs, etc. of which such cells, organisms or tissues find a place.⁵ The Rules function with the help of expert committees and implemented by the Ministry of Environment & Forests and the Department of Biotechnology, Government of India. The regulatory system and assessment mechanism is heavily depended on scientific inputs. According to experts, "[t]he assessment is based on objective science and expert guidance, using the best experimental and monitoring information available. It is a 'technocratic' system *par excellence*."⁶

Scope of the Rules, 1989

According to Rule 2(4), the Rules, 1989 applies to (i) sale, offers for sale, storage for the purpose of sale, offers of any kind of handling over with or without a consideration; (ii) exportation and importation of genetically engineered cells or organisms; (iii) production, manufacturing, processing, storage, import, drawing off, packaging and repackaging of the genetically engineered products; and (iv) production, manufacture, etc. of drugs and pharmaceuticals and food stuffs, distilleries, tanneries etc. which make use of micro-organisms/genetically engineered micro-organisms one way or another.

For the purpose of these rules, micro-organisms or genetically engineered organisms; products or cells are classified into two heads such as animal pathogen and plant pests. These will be classified in the manner provided in the Schedule. If any of the micro-organism, genetically engineered organisms or cells found within the limits of more than one risk class as specified in the Schedule, it will be deemed to belong exclusively to the last in number of such classes.⁷ The Rules define "micro-organisms" as to include all the bacteria, virus, fungi, mycoplasma, cell lines, algae, protodans and nematodes indicated in the Schedule of the Rules. The reach of the Rules is very wide as it includes those micro-organisms that have not been presently known to

⁵ Rule 2(2).

⁶ Ian Scoones, *Science, Agriculture and Politics of Policy: The Case of Biotechnology in India* (Orient Blackswan, Delhi 2005), p. 247.

⁷ Rule 5.

exist in the country or have been discovered so far.⁸ Micro-organisms are divided into bacterial agents, fungal agents, parasites agents, viral rickettsial and chlamydial agent's special category micro-organisms in the Schedule appended to the Rules.⁹

The Committees

Rule 4 provides for six competent authorities for implementing the Rules. These competent authorities are constituted as committees consisting of scientific experts and bureaucratic representatives from different Ministries and departments. Two committees—the Review Committee on Genetic Manipulation and the Recombinant DNA Advisory Committee—function in the Department of Biotechnology. The Genetic Engineering Approval Committee functions under the Ministry of Environment and Forests. The Institutional Biosafety Committee is set up in each research institution dealing with genetically engineered organisms. The other two committees—the State Biotechnology Coordination Committee and the District Level Committees—have to be constituted at the state and district levels, respectively, wherever necessary.

Review committee on genetic manipulation (RCGM)

The RCGM is constituted with the representatives from the Department of Biotechnology, Indian Council of Medical Research, Indian Council of Agricultural Research, Council of Scientific and Industrial Research and other subject experts. It can constitute sub groups for working on specific issues. The Monitoring and Evaluation Committee (MEC) established by the RCGM monitors the safety aspects in respect of the ongoing research projects and activities involving genetically engineered organisms or hazardous organisms. The RCGM brings out manuals of guidelines specifying procedures for regulatory process and lays down procedures for restricting or prohibiting production, sale, importation and use of genetically engineered organisms or cells. It accords the short term approvals for confined field trials of transgenic varieties.

⁸ Rule 3(v).

⁹ Rule 6.

Genetic Engineering Approval Committee (GEAC)

The GEAC is the most important committee which is responsible for the approval of large scale field trials and proposals for the release of genetically engineered organisms into the environment. It takes care of approval of activities involving large scale use of hazardous micro-organisms and recombinants in research and industrial production from the environmental angle.

Without the approval of GEAC, no person shall import, export, transport, manufacture, process, use or sell any hazardous micro-organisms or genetically engineered organisms / substances or cells.¹⁰ The GEAC may give direction to the occupier of any institution to determine or take measures concerning the discharge of micro-organisms / genetically engineered organisms or cells mentioned in the Schedule from the laboratories, hospitals and other areas including prohibition of such discharges. The GEAC may also lay down measures to be taken to prevent such discharges.¹¹

Any person operating or using genetically engineered organisms or micro-organisms mentioned in the Schedule for scale up or pilot operation should have to obtain a licence from the GEAC for such activities.¹² Consent of the GEAC for discharge of genetically engineered organisms or cells into the environment is required for any production activity in which genetically engineered organisms, cells or micro-organisms are generated or used. This will also apply to the production taking place in connection with development, testing and experiments where such production etc. is not subject to Rule 7.¹³ Deliberate or unintentional release of genetically engineered organisms/ hazardous micro-organisms or cells, including deliberate release for the purpose of experiment is prohibited under the Rules.¹⁴

¹⁰ Rule 7(1).

¹¹ Rule 7(3).

¹² Rule 7(4).

¹³ Rule 8.

¹⁴ Rule 9(1). Deliberate release means any intentional transfer of genetically engineered organisms/hazardous micro organisms or cells to the environment or nature, irrespective of the way in which it is done.

However, in special cases, the GEAC may give approval for deliberate release.¹⁵

The approval of the GEAC is mandatory for production, sale, import or use of any substance or products that contain genetically engineered organisms or cells or micro-organisms.¹⁶ Its approval is also required for the production, sale, import or use of any food stuffs, ingredients in food stuffs and additives including processing aids containing or consisting of genetically engineered organisms or cells.¹⁷ The Ministry of Environment and Forest has the powers to exempt an occupier handling a particular organism and GM organisms from the purview of Rules 7 to 11.

While granting the approval, the GEAC will stipulate terms and conditions for the approval, controls to be exercised by the applicant, supervision, restrictions on use, the layout of enterprise, submission of information to the State Biotechnology Coordination Committee (SBCC) or the District Level Committee (DLC), etc. Any person to whom an approval has been granted under Rules 8 to 11 should notify to the GEAC of any change in or addition to the information already submitted.

The GEAC is empowered to supervise the implementation of the terms and conditions laid down by it while granting the approvals. The supervision may be carried out through the State Biotechnology Coordination Committee / District Level Committee or through any of its authorised personnel. All approvals will be given by the GEAC for a period of not exceeding four years at the first instance and can be renewable for two years at a time.

The GEAC may revoke such approvals if there is any new information as to the harmful effects of genetically engineered or cells; or if the GM organisms or cells cause damage to the environment, nature or health; or on the ground of non compliance of any conditions stipulated by the GEAC. This committee also has the power to take punitive action under the Environment (Protection) Act, 1986. Any person aggrieved

¹⁵ Rule 9(2)

¹⁶ Rule 10

¹⁷ Rule 11

by the decision of the GEAC / SBCC may prefer an appeal to the Appellate Authority appointed by the Ministry of Environment and Forests within the prescribed time period.¹⁸

Recombinant DNA Advisory Committee (RDAC)

RDAC is the advisor to the Government. The mandate of this committee is to review the developments in biotechnology at national and international levels and recommend suitable and appropriate measures for adopting new safety regulations in the recombinant research, use and applications from time to time.

Institutional Biosafety Committee (IBSC)

IBSC is the institutional advisory body. Any person or any research institution, handling with micro-organism/genetically engineered organism should constitute an IBSC in the institution. The head of the research institution, the scientists engaged in DNA work, a medical expert and a nominee of the DBT will form part of the IBSC. With the assistance of IBSC, the occupier or any person handling micro-organisms or genetically engineered organisms should prepare an up-to-date on site emergency plan as prescribed in the manuals or guidelines of the RCGM. The copy of the emergency plan should be made available to the State Biotechnology Coordination Committee or the District Level Committee and the GEAC.

State Biotechnology Coordination Committee (SBCC)

The Rules provide for setting up of an SBCC in the States wherever necessary. It is the monitoring and prosecuting committee. The SBCCs are empowered to inspect, investigate or take punitive actions in case of violations of statutory provisions through the Nodal Department and the State Pollution Control Board/Directorate of Health/Medical Services. It will also review periodically safety and control measures to be observed in industries / institutions handling genetically engineered organisms / hazardous micro-organisms. However, it is found that most of the States have not set up SBCC in their States.¹⁹

¹⁸ Rule 19.

¹⁹ See, Ian Scoones, *supra* note 12.

District Level Committee (DLC)

The Rules also provide for District Level Committees in the Districts wherever necessary under the District Collector to monitor safety regulations in installations engaged in the use of GM organisms / hazardous organisms and its application in the environment. The DLC or any of its authorised people may visit any installation engaged in activity involving genetically engineered organisms / hazardous organisms. The DLC has to regularly submit its report to the SBCC/GEAC.

As noted earlier, the MoEF is responsible for approval of activities involving large-scale use of hazardous micro-organisms and recombinant products in research and industrial production from the environmental angle through the GEAC. In addition to these six committees, the MoEF has set up a consultative group consisting of inter-ministerial representatives, subject experts and research institutions to advise the government on matters related to implementation of the provisions of these Rules.

Handling of Emergency Situations

The Rules have provisions to deal with the emergency situations. Any interruption of operations or accidents that may lead to discharge of genetically engineered organisms or cells which could be harmful to environment, nature or health should be informed by the occupier to the DLC/SBCC and the concerned State Medical Officer. However, such notification will not lessen the obligation of the person who is responsible to try effectively to minimise or prevent the effects of interruptions of operations or accidents.²⁰

If an order is not followed by an occupier, the DLC or SBCC may take measures to implement such order at the expenses of the person who is responsible. In cases, where immediate intervention is required, for preventing any damage to the environment, nature or health, the DLC or SBCC may take necessary steps without issuing any order or notice. The person responsible for such damage shall account for the expenses incurred in such situation. For this purpose, the SBCC or the DLC may take samples for testing of organisms and cells. The SBCC or DLC may

²⁰ Rule 16.

also seek the assistance of any other government authority to carry out its instructions.²¹ The DLC has to prepare an off-site emergency plan detailing how emergencies at a particular site will be dealt with.²²

Risk Assessment and Management

Article 15 of the Biosafety Protocol suggests the obligation of risk assessment by the importing Party based on a scientific manner as provided under its Annex III. Article 16 of the protocol deals with risk management and calls upon the parties to establish and maintain appropriate mechanisms to regulate, manage and control risks identified in the risk assessment. The biosafety guidelines in India fulfil the obligation of risk assessment and risk management.

The Biosafety Protocol contains provisions to deal with unintentional transboundary movement of LMOs and emergency measures. Whenever a country becomes aware of any incidents within its jurisdiction resulting in a release of an unintentional transboundary movement of an LMO, and that affects conservation and sustainable use of biological diversity and human health in such a country, the country should take necessary measures to notify the affected or potentially affected States, to the BCH and relevant international organisations. In India, the Rules, 1989 cover these aspects and there is no unintentional transboundary movement of LMOs as per the government.²³

Biosafety Clearing House

As provided in Article 20 of the Biosafety Protocol, India has established the India Biosafety Clearing House (IND-BCH) for the purpose of exchange of scientific, technical, environmental and legal information on LMOs.²⁴ The Protocol requires periodical reports from the Contracting Parties.²⁵ As regards the other information to be

²¹ Rule 15.

²² Rule 18.

²³ India's First Regular National Report on the Implementation of the Cartagena Protocol on Biosafety in February, 2008 submitted to the Conference of Parties to the Protocol. Available at <http://www.cbd.int/biosafety/parties/reports.shtml?report=NR-CPB-01>.

²⁴ See the website at www.indbch.nic.in.

²⁵ So far the Government of India has submitted two national reports to the
contd...

provided to the BCH in respect of decisions and declarations for import/export of LMOs, so far India has neither been a Party of import or export of LMOs except imports for the purpose of research and development.

The Foreign Trade Policy, 2004-09²⁶ added certain new conditions for import of GM food, feed, genetically modified organisms (GMOs) and LMOs in the country. Accordingly, any import of GMOs or LMOs for the purpose of research and development (R&D), food, feed, processing in bulk, or for environmental release will be governed by the provisions of the EPA, 1986 and the Rules, 1989. The import of any food, feed, raw or processed or any ingredient of food, food additives or any food product that contains GM material and is being used either for industrial production, environmental release, or field application will be allowed only with the approval of the GEAC. Anyone who wishes to import GM material for R&D purposes should submit their proposal to the RCGM. In the case of commercial purposes, the approval of GEAC is also required. At the time of import, all consignments containing products which have been subjected to genetic modification should carry a declaration to the effect that the product is genetically modified. If consignment does not carry such a declaration and is later found to contain GM material, the importer is liable to be punished under the Foreign Trade (Development and Regulation) Act, 1992.

The Plant Quarantine (Regulation for import into India) Order, 2003²⁷ deals with issuance of permits for import of plants, plants products, etc. No person should import any consignment of germplasm / transgenic / GMOs into India for the purpose of agricultural research or experimentation purpose without a valid permit issued by the

Conference of Parties to the Protocol (i) Interim National Report on Implementation of the Cartagena Protocol on Biosafety on 10 January, 2006 and (ii) First Regular National Report on the Implementation of the Cartagena Protocol on Biosafety in February, 2008. Available at <http://www.cbd.int/biosafety/parties/national-reports.shtml>.

²⁶ Notification No. 2(RE-2006)/2004-2009, dated 7th April, 2006. Notifications came into force since 1st April 2006.

²⁷ The Plant Quarantine (Regulation for import into India) Order, 2003 came into force on April 1, 2004.

Director of National Bureau of Plant Genetic Resources (NBPGR).²⁸ However, the terms 'purpose of agricultural research or experimentation' will not include commercial imports, which are governed by the GEAC or RCGM. Every application for import of plant germplasm / transgenic / GMOs for research or experimental purposes by any private or public organisations should be made to the Director, NBPGR for issuance of permit. The permit for the import will be issued subject to the approval of GEAC or RCGM, as the case may be under the Rules 1989.²⁹ The imported consignments of plant germplasm / transgenic / GM pests are not allowed to be opened at the point of entry, and they will be forwarded to the Director NBPGR. The Order also states that the Plant Protection Advisor (PPA)³⁰ will issue the necessary guidelines for carrying out Pest Risk Analysis (PRA) after receiving the approval of the Central Government in the Department of Agriculture and Co-operation. The PRA guidelines will be based on international standards established by the International Plant Protection Convention (IPPC). Every consignment of plant species specified in Schedule V and VI of the Order should accompany a Phytosanitary Certificate³¹ issued by the authorised officer at its country of origin.³² The Central Government may relax the requirement of import permit or Phytosanitary Certificate in the interest of public.

Regulatory Challenges

Opposition to genetically engineered crops and GM food is a global phenomenon. As the uncertainty of safety of transgenic crops and foods is still not yet settled, there is a serious polarisation among the groups supporting and opposing biotechnology in India. The non-governmental organisations (NGOs) and the environmental activists have been lodging stiff resistance to the government push and

²⁸ Para 6 (1), *Ibid*.

²⁹ Para 6 (2), *Ibid*.

³⁰ The PPA functions in the Directorate of Plant Protection Quarantine Storage, Government of India.

³¹ A phytosanitary certificate is issued by an authorized officer at the country of origin or re-export of the consignment in the model format prescribed under the IPPC.

³² Rule 10 (2)

industrial efforts to develop biotechnology in the country. The functioning of regulatory bodies and the approval system under the Rules, 1989 has also been controversial in the country.³³ The highly respected scientist and the father of green revolution in India, Prof. M.S. Swaminathan has been advising the responsible use of biotechnology and to utilize it to help the poor.³⁴ Many environmentalists, conservationists and scientists, like Dr. P.M. Bhargava,³⁵ Dr. Suman Sahai,³⁶ and Dr. Vandana Shiva³⁷ have been cautioning the government and the public on the social and environmental implications of biotechnology. The claims of advantages of Bt cotton have been refuted by Dr. Vandana Shiva and

³³ For a detailed study of the regulatory politics and the controversies that surrounds the approval of Bt cotton in India, see, Ian Scoones, *Science, Agriculture and Politics of Policy: The Case of Biotechnology in India* (Orient Blackswan, Delhi 2005), Robert L. Paarlberg, *The Politics of Precaution: Genetically modified Crops in Developing Countries*, (The John Hopkins University Press, Baltimore 2001). In addition, Ms. Kavitha Kuruganti of Coalition for a GM-Free India, Ms. Shalini Bhutani of Grain, and the organizations like Human Rights Law Network are too critical of GM crops and their regulation in the country.

³⁴ For example, see, M.S. Swaminathan, *Genetic Engineering and Food Security: Ecological and Livelihood Issues*, in G.J. Persley and M.M. Lantin, (eds) *Agricultural Biotechnology and the Poor: Proceedings of an International Conference*, Washington, DC, 21-22 October 1999. Consultative Group on International Agricultural Research, Washington, DC. (2000), pp. 37-42.

³⁵ See, P. M. Bhargava, *The Social, Moral, Ethical, Legal and Political Implications of Today's Biological Technologies: An Indian Point of View*, *Biotechnology Journal*, 2006, 1, 34-46; P. M. Bhargava, *High Stakes in Agro Research: Resisting the Push*, *Economic and Political Weekly*, 2003, 38, 3537-3542; P. M. Bhargava, *GMOs: Need for Appropriate Risk Assessment System*, *Economic and Political Weekly*, 2002, 37, 1402; P. M. Bhargava, *Ethical Issues in Modern Biological Technologies*, *Reproductive Bio Medicine Online* 2003, 7, 276-284.

³⁶ Dr. Suman Sahai is the Convenor of Gene Campaign, a grassroots level organisation, which works for food and livelihood security in the country. She has been involved in conservation of biological resources, farmers' rights, and intellectual property rights of indigenous people. Dr. Sahai has been in the forefront in fighting for an effective and transparent biotechnology regulatory policy in India and has filed cases in the Supreme Court for this purpose. All her publications and details of the cases are available at <http://www.genecampaign.org>.

³⁷ Dr. Vandana Shiva is the founder of Research Foundation for Science, Technology and Ecology (RFSTE) and Navdanya, and works on hazards of biotechnology. Her contribution to the protection of indigenous knowledge and crusade against globalization, IPR and biopiracy are world known. Dr. Shiva's publications are available at <http://www.navdanya.org>.

Dr. Suman Sahai. The level of risk assessments and transparency in the approval of Bt cotton has been another concern raised by them. Thanks to the efforts of these and other scientists, experts and activists, the government has taken the middle path and adopted a cautious and precautionary approach in its biotechnology policy and regulatory system.

Medical biotechnology has been less controversial compared to the agricultural biotechnology in India. The RCGM has approved twenty recombinant therapeutics for commercial marketing so far and recommended about fifty recombinant pharmaceutical/therapeutic products for clinical trials. The clinical trials have to be conducted with the approval of the Drugs Controller General of India.

On the agricultural front, Bt cotton (containing the *Bacillus thuringiensis* (Bt) gene) is the only transgenic variety approved commercially for environmental release. The GEAC granted approval for the commercial release of transgenic cotton in March, 2002 after about four years of consideration. This Bt cotton is resistant to bollworm, developed out of a joint venture between Monsanto (St. Louis, MO, USA) and Mahyco (Mumbai, India). Before approval, it went through two rounds of field trials.³⁸ The GEAC has accorded a conditional approval for three years and the seed company was ordered to ensure refugia around Bt-cotton fields as a natural barrier to pollen flow to non-transgenic crops, and to prevent build-up of resistance among insects. The approval of Bt cotton has been a thorny issue in India. In this instance, the critics have complained that the functioning of GEAC lacked transparency and public participation.³⁹ The occurrence of illegal plantation of Bt cotton in many states, particularly in Gujarat, is another issue.⁴⁰

³⁸ See, Nandula Raghuram, *India Joins the GM Club*, *Trends in Plant Science*, Vol. 7, Issue 7, 1 July 2002, pp. 322-323.

³⁹ *Ibid*, at 323.

⁴⁰ See, Bharat Ramaswami, *Illegal Seeds and Regulatory Costs of Bt cotton in India*, Paper presented at the Seminar on "Economic Considerations of Biosafety and Biotechnology Regulations in India: A Policy Dialogue", organized by the International Food Policy Research Institute (IFPRI) and Research and Information Systems for Developing Countries (RIS), New Delhi, 24-25 August, 2006. Available at <http://www.ris.org.in/> (last visited 30 July, 2009); and also see, K. S. Jayaraman,

Recently, the GEAC approved the Bt Brinjal developed by M/s Maharashtra Hybrid Seeds Company Private Limited (Mahyco) by inserting cry 1Ac gene from soil bacterium *Bacillus thuringiensis* into Brinjal, the first GM food crop on October 14, 2009. The Bt Brinjal is said to have resistance to insect pests like Fruit and Shoot Borer (*Leucinodes orbonalis*) and the Fruit Borer (*Helicoverpa armigera*).⁴¹ Approval of Bt Brinjal by GEAC has triggered a fresh controversy in India on various counts.⁴² The Ministry of Environment and Forests, Government of India has decided to hold national level consultations involving different stakeholders before arriving at a final decision on the commercialization of Bt Brinjal.⁴³

GM Food Safety

The MoH&FW ensures food safety in India. The Food Safety and Standards Authority constituted under the Food Standards and Safety Act, 2006 deals with safety of all food items including the GM foods. It is empowered to lay down science based standards for articles of foods and to regulate their manufacture, storage, distribution, sale and import in order to ensure availability of safe and wholesome foods for human consumption. The Act contains provisions to deal with GM foods⁴⁴/ organics foods/ functional foods/proprietary foods. No person is allowed to manufacture, distribute, sale or import any novel food,

Illegal seeds overtake India's cotton fields. Nature Biotechnology, 2004, 22, 1343-1344.

⁴¹ Aarti Dhar, Panel Approves Commercial Cultivation of Bt Brinjal, *The Hindu*, October 14, 2009.

⁴² See, Savvy Soumya Misra, How Bt Brinjal was Cleared, *Down to Earth*, December 31, 2009, Aarti Dhar, Opinion on Bt Brinjal Divided, *The Hindu*, January 06, 2010.

⁴³ Government Seeks Fresh Opinion on Bt Brinjal, *Deccan Herald*, January 05, 2010; Kirtika Suneja and Kalpana Jain, Government to Kick off Bt Brinjal Discussions on January 13, *Business Standard*, January 07, 2010. The Minister of Environment and Forests, Government of India Mr. Jairam Ramesh will chair the consultation meetings in seven cities namely, Kolkata (13 January 2010), Bhubaneswar (16 January 2010), Ahmedabad (19 January 2010), Hyderabad (22 January 2010), Bangalore (23 January 2010), Nagpur (27 January 2010) and Chandigarh (30 January 2010).

⁴⁴ According to Section 22(2), genetically engineered or modified food means food and food ingredients composed of or containing genetically modified or engineered organisms obtained through modern Biotechnology, or food and food ingredients produced from but not containing genetically modified or engineered organisms obtained through modern biotechnology.

GM food, and other types of foods except as it is provided under this Act. Section 23 of the Act makes a provision for packaging and labelling of foods. Manufacture, distribution, and sale of any packaged food should be properly marked and labelled in the manner as prescribed by the regulation.

As the scientific advisory body to the MoHFW, the ICMR has formulated the Guidelines for the Safety Assessment of Foods Derived from Genetically Engineered Plants in 2008. This Guideline sets out the safety assessment procedures for food made out of GM plants taking into consideration the International Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants issued by the Codex Alimentarius Commission. This applies to all whole foods, food products, and foods used as ingredients obtained from genetically engineered plant sources.

At the Codex Committee negotiations on labelling, India has been supporting labelling of all foods derived out of biotechnology.⁴⁵ The Health Ministry has issued Draft Prevention of Food Adulteration (Amendment) Rules, 2006 for mandatory labelling of GM food. According to the draft Rule 37-E, all the GM food⁴⁶ should be compulsorily labelled without any exception. The proposed rule says that the label of all package(s) of imported or domestically produced food should indicate if they have been subject to genetic modification. The label of the imported food or the foods derived from them should indicate that the product has been cleared for marketing and use in the country of origin to help the Indian authorities for verification.

Measures to Revamp Biosafety Regulatory System in India

The operationalization of biosafety regulatory framework in India met with several twists and turns. As it is noted earlier, there have been several criticisms about the working of the Rules, 1989. Resistance has

⁴⁵ See, Report of the Thirteenth Session of the Codex Committee on Food Labelling, 6-10, 2002, Doc. ALINORM 03/22, para 43.

⁴⁶ The draft Rule 37-E defines Genetically engineered or modified foods as "food and food ingredients composed of or containing genetically modified or engineered organisms obtained through modern biotechnology, or food and food ingredients produced, from but not containing, genetically modified or engineered organisms obtained through modern biotechnology."

been mainly towards the agricultural biotechnological products. Whereas, most of the times, the approval of transgenic healthcare products were not that much objected by the public. This may be because of high social confidence about the biosafety of GM health care products in India.⁴⁷ But, this is not the case with the transgenic plants. The Government of India has set up two Task Forces to look into the shortcomings in the regulatory system and to suggest measures for improving the regulatory framework in the country.

Task Force on Application of Agricultural Biotechnology, 2004

The Ministry of Agriculture constituted a Task Force on Application of Agricultural Biotechnology under the Chairmanship of Prof. M.S. Swaminathan in May, 2003 and it submitted its report in 2004. The Task Force was of the view that there is a greater need for streamlining the procedures for commercial release of GM crops without compromising on principles of bio and environmental safety. It found that the implementation of the procedures under the Rules, 1989 was very cumbersome and involved avoidable loss of time. It suggested appropriate review of existing procedures under the Rules so that biosafety can be assessed concurrently with agronomic performance.⁴⁸ It has recommended revamping of the whole system and suggested a single window approval process which is objective, transparent and trustworthy. It has mooted the idea of setting up of a new National Biosafety Regulatory Authority with two wings – one dealing with food and agricultural biotechnology, and another with medical and pharmaceutical biotechnology.

The Task Force observed that the present system of granting approval for contained and open field trial for biosafety may continue and vest with the RCGM. But the multi location farmers' field trials for 'Value for Cultivation and Use' (VCU) should be the sole responsibility of Indian Council of Agricultural Research (ICAR) and concerned companies/institutions. It also suggested that the Monitoring and Evaluation Committees should report to GEAC, which may continue to handle Biosafety and Environmental Safety issues of GM crop

⁴⁷ Roberg L. Paarlberg, *supra* note 40 at 105.

⁴⁸ Report of the Task Force on Application of Agricultural Biotechnology headed by Prof. M.S. Swaminathan, (2004), para 12.2.

candidates until the proposed the National Agricultural Biotechnology Regulatory Authority is set up.

According to the Constitution of India, agriculture is a State subject and the new crop varieties are allowed by the State Variety Release Committee set up in the States. Hence, the Task Force has suggested that there should be counterpart bodies in all States and Union Territories to liaise with the proposed National Biotechnology Regulatory Authority.

On following International Guidelines, the Task Force observed that the guidelines issued by the FAO-WHO Codex Commission for assessing and managing the health risks posed by GM foods should be closely followed and suggested the need for developing a well-defined national food safety guidelines.

Task Force on Recombinant Pharma, 2005

The Ministry of Environment and Forests set up a Task Force on Recombinant Pharma Sector⁴⁹ under the Chairmanship of Dr. R.A. Mashelkar in April 2004 to review the existing legal framework and recommend a transparent and streamlined regulatory mechanism and process for the use of LMOs in the pharmaceutical industry in R&D, testing, manufacture and import of LMOs as drugs.

The Mashelkar Report supported the setting up of National Biotechnology Regulatory Authority / Commission providing a professionally managed single window mechanism for giving various clearances including biosafety issues as recommended by the Task Force on Application of Agricultural Biotechnology headed by Prof. M.S. Swaminathan. However, it recommended a different model for NBRA with four wings namely: (a) Agricultural Products / Transgenic Crops; (b) Pharmaceuticals / Drugs and Industrial Products; (c) Transgenic Foods / Feed; and (d) Transgenic Animals / Aquaculture.

⁴⁹ Hereinafter called "the Mashelkar Report." The Report was submitted to the government on 13th September, 2005 and the recommendations were adopted by the Ministry of Environment and Forests, Department of Biotechnology, Drugs Controller General of India and the Ministry of Health in an inter-ministerial meeting held on 23rd January, 2006. The recommendations and procedures mooted by the Task Force have been adopted by the Government of India with effect from 1st April, 2006.

The Report suggested a number of measures for streamlining the existing regulatory mechanism for r-Pharma approvals until the NBRA is set up. Consequently, all the applicants seeking approval of IBSC/RCGM/GEAC or the Drugs Controller General of India (DCGI) have to follow the stepwise procedures provided in the five Protocols recommended by the Task Force. According to these Protocols, if in any product, where the end product is an LMO and the chance of its propagation and replication in the environment are higher, it requires a higher level of regulation. The magnitude and the probability of environment risk depend on the extent of use of LMOs within the R & D and production units. In case of imports, this risk is not present in the therapeutic proteins in finished form. To address the risks involved in the use of LMOs during R&D, manufacture and import from the environment angle, the Task Force has rationalised the regulatory process for five categories as follows:⁵⁰

Indigenous product development, manufacture and marketing of pharmaceutical products derived from LMOs but the end product is not an LMO;

Indigenous product development, manufacture and marketing of pharmaceutical products where the end product is an LMO;

Import and marketing of LMOs as Drugs/Pharmaceuticals in finished formulations where the end product is an LMO;

Import and marketing of LMOs as Drugs/Pharmaceuticals in bulk for making finished formulation where the end product is an LMO;

Import and marketing of products derived from LMOs as Drugs/Pharmaceuticals in bulk and/or finished formulations where the end product is not an LMO.

⁵⁰ Notification Regarding Adoption of the Recommendations of the Task Force on R-Pharma under the Chairmanship of Dr R A Mashelkar, DG-CSIR, with effect from 1.4.2006.

National Biotechnology Regulatory Authority: The New Proposed Law

Based on the recommendations of the two Task Forces, the Department of Biotechnology, Ministry of Science and Technology came out with the National Biotechnology Regulatory Authority (NBRA) Bill, 2010 which proposes to establish an autonomous and independent statutory agency called "National Biotechnology Regulatory Authority" that will regulate health and safety aspects of biotech products and protection of environment.

The regulatory scope of NBRA will encompass the research, manufacture, importation and use of products of biotechnology. With the help of this Act, the government proposes to consolidate the regulatory policies, rules and services in a single window system that will facilitate a more uniform and consistent approach to address the safety of biotechnology products and processes in a scientific and a transparent manner. This Act will have overriding effect over that are at present in force.⁵¹ With the enactment of the NBRA Act, the laws and the orders specified in the Second Schedule of the Act will stand repealed.⁵² However, such repeal will not affect the previous operations of the repealed laws and orders. Any right, privilege, obligation or liability acquired or incurred under any of the laws and orders under repeal will not be affected.⁵³

As per the scheme of the Bill, the Central Government will establish the Authority to exercise the powers and functions assigned to it under the Act. The Authority will consist of a Chairperson, Chief Regulatory Officer, Regulatory Branches, Risk Assessment Units and Cross-sectoral offices. The Chairperson will be supported by an Inter-Ministerial Advisory Board and a National Biotechnology Advisory Council. The Chairperson will be the Chief Executive Authority and will perform the powers and functions. A National Biotechnology Advisory Committee will provide the Authority with independent, strategic advice from various stake holders on developments in biotechnology and its impact on Indian society. This Committee might

⁵¹ Section 29 of the NBRA Bill.

⁵² Section 33 of the NBRA Bill.

⁵³ *Ibid.*

involve and encourage public participation in the decision making process. However, the NBRA is expected to function independently. The Inter-Ministerial board and the National Biotechnology Advisory Council will not have any authority to intervene on product-specific decisions made by the NBRA.⁵⁴

As per the scheme of the Act, the Authority will take appropriate measures to regulate the importation of GM organisms into India. It will also regulate the containment of GMOs; clinical study of GMOs and derived medicines; environmental release of GMOs; the use of GMOs and their by-products in food and use in human and animal health, agriculture and other implications. It is indeed a huge task. It may specify the procedures and the standards in relation to the accreditation and notification of facilities for undertaking research with GMOs. It will also provide scientific advice and technical support to the Central Government and the State Governments in the matter of framing policies and rules having direct or indirect bearing on the safety of biotech products and processes covered by the Act.

It is the mandate of the Authority to develop and implement guidelines for risk-assessment methodologies. It will also monitor and conduct studies on safety of biotech products and forward its finding to the Central Government and State Governments.

The Bill states that the Authority will have at least three regulatory branches namely, (a) Agriculture, Forest and Fisheries Branch – responsible for regulating biotechnology products and processes used in agriculture, forestry and fisheries including aquaculture; (b) Human and Animal Health Branch – for regulation of biotechnology products and processes with their application in human and veterinary health; and (c) Industrial Environmental Application Branch – dealing with regulation of biotechnology products and processes used in industrial manufacturing and environment application. The authority may set up any other regulatory branches which are required to meet specific needs and enhancing efficiency to regulate biotechnology products and processes.⁵⁵ Each branch will be headed by a Chief Regulatory

⁵⁴ Section 6 (3) of the NBRA Bill.

⁵⁵ Section 4 of the NBRA Bill.

Officer who will be an eminent scientist with subject matter expertise relevant to the branch.⁵⁶

The Authority will constitute a risk assessment unit with the involvement of scientific officers to carry out science-based risk assessment as per the rules issued under the Act.⁵⁷ It is hoped that this unit will help complying with the obligations under the Cartagena Protocol on Biosafety and the SPS Agreement.

The Authority is empowered to convene Scientific Advisory Panels whenever the need arises to provide scientific advice, information and recommendations to the Authority on Biotechnology issues that may result from regulatory actions and could have impacts on human or animal health and the environment.⁵⁸

Chapter four of the Bill deals with restrictions on GMOs and states that without the authorisation from the Chairperson of the Authority, no person shall undertake to research, import, and manufacture or use GMOs.⁵⁹ The Authority will constitute a product ruling committee which will be comprised of the Chairperson and the Chief Regulatory Officers of the Regulatory Branches.⁶⁰ The Authority will also establish cooperative mechanisms with the State Governments to facilitate the enforcement of this Act.⁶¹ In order to carry out testing and research, the Authority may notify any laboratory and research institutions.⁶²

The Bill proposes to establish a National Biotechnology Regulatory Appellate Tribunal to hear appeals from the decision of the Authority.⁶³ The Central Government will establish the Tribunal by issuing a notification in official gazette and it will consist of one judicial member and two technical members to be appointed by the Central for a term of three years.

⁵⁶ Section 6 of the NBRA Bill.

⁵⁷ Section 7 of the NBRA Bill.

⁵⁸ Section 8 of the NBRA Bill.

⁵⁹ Section 10 of the NBRA Bill.

⁶⁰ Section 11 of the NBRA Bill.

⁶¹ Section 13 of the NBRA Bill.

⁶² Section 14 of the NBRA Bill.

⁶³ Section 20 of the NBRA Bill.

The Authority will serve as the national point of contact for international activities related to establishing and implementing policies that impact the regulation of biotechnology. It will monitor, review and analyse national and international policies that may affect the priorities of the Government of India in the biotechnology sector. The Authority has to contribute to the development of international technical standards for the safety assessment of biotechnology products and processes and to promote consistency between international technical standards and domestic standards associated with biotech products and processes while ensuring that level of protection adopted in the country is not reduced.⁶⁴

Conclusion

Regulation of biotechnology involves many scientific complexities and has to address a wide range of legal, ethical, social, economic, cultural, health and environmental issues. What is required in any country is to have an efficient and trustworthy regulatory mechanism that ensures transparency and public participation. With the adoption of recommendations of the two Task Forces, biotechnology regulation and the making of Draft NBRA Bill, 2010 the biotechnology law is on the verge of transition in India. The Bill seems to be a viable step forward in achieving effective regulatory mechanism in the country. It addresses most of the concerns with the help of different branches and sectoral offices headed by a Chairperson.

The hopes are high with the NBRA. One has to wait and see how it takes shape and regulates the future challenges. There is a great need to identify right professionals for right job under the new law. Proper and impartial selection of the experts and professionals, including the Chairperson, will boost confidence on the regulatory system. At the same time, the proposed NBRA will have the responsibility of assessing the risks and approving GM varieties and products bearing in mind India's international treaty obligations and the right to life of the people as guaranteed by the Constitution of India. Ultimately, the success of this proposed Act will be judged by the independence of the Authority and the level of transparency, efficiency and public participation it involves in its functioning.

⁶⁴ Section 3 of the NBRA Bill.

Unresolved Issues in the Institution of PIL

Chanchal Kumar Singh*

Introduction

The evolution and practice of the institution of Public Interest Litigation, (PIL), is an instance of 'bridging the gap between the law and society'. Owing to historical reasons, courts have a unique place in the system and they have played crucial role¹ in bridging the gap². Judicial processes under Common law system are largely based on 'certain principles and concepts'³. The task of a higher court in 'bridging the gap', therefore, involves innovation, modification and sometimes creation of altogether new principles and concepts. Indian judiciary has performed this task very well⁴ to ensure enforcement of law, securing rule of law and protecting rights and freedoms of the people. The 'judicial creation and practice' of the institution of 'PIL' represents the most innovative example for the achievement of above purposes. The courageous creativity of Indian judiciary, however, within the institution of PIL, is beset with several problems still

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¹ For establishing PIL, the Indian Supreme Court has enunciated and subscribed primarily to 'access to justice' theory. Before bringing the theory in court practice in the form of PIL, the two proponent Judges had indicated, the need for such a practice in two reports of commissions they chaired, see, Report of The Legal Aid Committee, 1971, Chaired by P.N. Bhagwati J. appointed by state of Gujarat; Report of Committee on national judiciary: Equal Justice-Social Justice, 1977, Chaired by Krishna Iyer J. appointed by government of India.

² This Role of a higher court has been referred as 'Bridging the Gap between Law and Society'. See Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy", 116 Harv. L. Rev. 13, 28 (2002); Arthur Berridale Keith, *Constitutional History of India-1600 -1935*, 3 (1937) where the author remarks, 'it is part of the genius of the Common law (legal) system that it 'accords' with essential economic and political conditions of time'.

³ It includes doctrine of *locus standi*, *ratio decidendi*, *inches*, *res judicata*, etc.

⁴ See *Infra*, notes 5 and 6.

awaiting constitutional and jurisprudential examination. The problems can be identified in two ways explained below.

Neither a system nor a particular process within the system, however, is autonomous from attending circumstances and influences exercised by stake holders. PIL is not an exception to this proposition. The above is true to the institution of PIL in India. My concern of this paper is not to trace the evolution⁵ and impact⁶ of PIL which, by now, is well studied and documented. Here I attempt to identify and elaborate some of the problems afflicting the institution of PIL in India.

The problems in PIL can be divided under two broad heading, requiring different approaches for their identification and different exercises for their resolution. The first set of problems, which I would call *problems of principle* includes- law and policy divide; identifying or producing a coherent whole of precedent in PIL cases; established and maintaining progressive relationships between executive and judiciary; the role of public interest litigators; finding or creating remedy for what is referred in academics as rights without remedies and; role of non- government organizations. These issues invite judges and jurists alike to the daunting task of constitutional and jurisprudential enunciation not necessarily relying on Common law

⁵ S.P. Sathe, *Judicial Activism in India* (New Delhi OUP, 2002); Upendra ' Baxi, *Taking suffering seriously: Social Action Litigation in the Supreme Court of India* (1985) Third world legal studies 107; Clark D. Canniggham, "Public interest litigation in Indian Supreme Court: A study in the light of American Supreme court" *JILI* 494 (1987); Justice P.N. Bhagwati, "Judicial Activism and Public Interest litigation" 23 *Columbia Journal of Transnational Law* 561(1984); Christine M. Foster and Vedna Jivan, "Public interest litigation and Human Rights Implementation: The Indian and Australian Experience" (3)(1) *Asian Journal of comparative Law* (2008); Parmanand Singh, "Human Rights protation through public interest litigation in India" *XIV Indian Journal of Public Administration* 731 (1999).

⁶ Varun Gauri "Public Interest Litigation in India Overreaching or Underachieving?", *Policy Research Working Paper, World Bank* 5109 (November, 2009); Parmanand Singh, "Protecting the Rights of the Disadvantaged Groups through Public Interest Litigation" in Mahendra P. Singh et al (eds) *Human Rights and Basic Need: Theory and Practice* 305 (2008); Ashok H. Desai and S. Muralidhar, "Public interest litigation potential and problems" in B.N. Kirpal et al (eds) *Supreme but not Infallible* 159 (2009) ; Surya Deva, " Public Interest Litigation in India: A Critical Review" *Civil Jusitice Quarterly Issue 1*, 19 (2009); Siri Gloppen, "Public Interest Litigation, Social Rights and Social Policy" *Arusha Conference*, (December 12-15, 2005);

traditions. The second set of problems, though sometimes involve question of principles but these are primarily other than legal principles, for example principle of economics, therefore, I would call them *problems of practice*. It includes, effective judicial infrastructure to determine factual issues; efficacy of new remedies like continuing mandamus devised by Indian Judiciary; effective implementation of decision in PIL cases; problems faced by parties in PIL before the court; increasing work load on limited judicial resources; and abuse of PIL. This set of problems raises questions of institutional reform of our political system, restructuring socio-economic conditions and re-ordering power structure in society.

The lists of two sets of problems are not exhaustive and new issues and questions may be added to them. Space constraint, however, does not allow me to take up all of them; therefore, I will examine few of them from a critical point of view.

Redressing Right without Remedies

In jurisprudence 'right' means an interest protected by law. According to Black Law Dictionary 'rights are power, privilege, faculty or demand inherent in one person and incident upon another.'⁷ It is also defined as powers of 'free Action', and the principal rights pertaining to men/women are undoubtedly enjoyed by human beings, purely, as such, being grounded in personality. But leaving the abstract moral sphere and giving to the term, juristic content a 'right' is well defined as a 'capacity residing in one man of controlling with the assent or assistance of state, the actions of others. This assent and assistance is incidental upon and subsequent to recognition of a right by the state.

The ways in which this recognition takes place are several. Judicial decisions are one of them. The higher courts in India have carried out this task through purposive interpretations of bare provisions of the constitution. Most of these cases fall under PIL including the right to health⁸, livelihood,⁹ free and compulsory education up to the age of 14

⁷ Black law dictionary 9th edition; *State of Rajasthan v. Union of India*, AIR 1977 SC 1361.

⁸ *Panujanand Kataria v. Union of India*, AIR 1989 SC 2039; *Paschim Bangal Khet Mazdoor Samity v. State of West Bengal* (1996) 4 SCC 37.

years,¹⁰ unpolluted environment,¹¹ shelter,¹² clean drinking water,¹³ privacy,¹⁴ legal aid,¹⁵ speedy trial¹⁶ and various rights of under trails, convicts and prisoners,¹⁷. The judiciary has also invoked Article 21 to give directions to government on matters affecting life of general public,¹⁸ which could not have been derived by a literal or a plain reading of the constitutional provisions. But no reciprocal remedies have been found, in all these cases, either judicially or through legislative enactments. Such litigation and decisions therein result into a situation in which, an individual has a recognized right yet he/she does not have a remedy at law- *casus omissus*.

The doctrine of *casus omissus* connotes the circumstances where a court can supply clearly unintended omission by the legislature in drafting a particular provision.¹⁹ A case omitted, an event or contingency for which no provision is made, particularly a case not provided for by the statute on the general subject and which is therefore left to be governed by the Common law. In other words, the doctrine refers to two things, one, a situation for which no statutory provision is available before the court to apply, two, that a court can fill legislative omission. However, in the cases of judicially recognized rights the first point of *casus omissus* is missing. But the actual effect, from the point of view of

⁹ *Olga Tellis v. Bombay Municipal Corp.*, AIR 1986 SC 180; *DTC Corp v. DTC Mazdoor Congress*, AIR 1991 SC 101.

¹⁰ *Unni Krishnan v. State of AP*, (1993) 1 SCC 645.

¹¹ See, for example, *Indian Council for Enviro Legal Action v. Union of India*, (1996) 3 SCC 212; *M. C. Mehta v. Union of India*, (1996) 6 S.S.C. 750; *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 S.C.C. 647.

¹² *Gauri Shankar v. Union of India*, (1994) 6 SCC 62.

¹³ *A.P. Pollution Control Board v. M V Nayudu*, (2001) 2 SCC 62.

¹⁴ *Kharak Singh v. State of UP*, AIR 1963 SC 1295; *Govind v. State of MP*, AIR 1975 SC 1378; *Raj Gopal v. State of Tamil Nadu*, (1994) 6 SCC 632; *PUCI v. Union of India*, AIR 1997 SC 568; *X v. Hospital Z*, (1998) 8 SCC 296.

¹⁵ *M. H. Hoskot v. State of Maharashtra*, AIR 1978 SC 1548; *Hussaiara Khatoon v. State of Bihar* AIR 1979 SC 1369; *Khatri v. State of Bihar*, AIR 1981 SC 928; *Sukh Das v. Union Territory of Arunachal Pradesh*, AIR 1986 SC 991.

¹⁶ *Gauri Shankar v. Union of India*, (1994) 6 SCC 349.

¹⁷ *Sunil Batra v. Delhi Administration* AIR 1978 SC 1675; *Prem Shankar v. Delhi Administration*, AIR 1980 SC 1535;

¹⁸ See, for example, *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802; *Upendra Baxi v. State of UP*, (1983) 2 SCC 308; (1986) 4 SCC106; *Visakha v. State of Rajasthan*, AIR 1997 SC 3011; *D. K. Basu v. State of West Bengal*, AIR 1997 SC 610.

¹⁹ Law Lexicon 1997 edition.

"aggrieved", in both the cases, is that he goes without a remedy. Such a situation demands a greater degree of progressive co-operation and commitment between and on the part of all organs of state for the realization of the objectives of PIL.

A remedy is anything a court can do for a litigant who has been wronged or is about to be wronged. The two most common remedies are judgment that a plaintiff is entitled to collect sums of money from the defendant and an order to defendant to refrain from his wrongful conduct or to undo its consequences. The court decides whether the litigant has been wronged under the substantive law. It conducts its inquiry in accordance with the procedural law. The law of remedy falls, somewhere, between substantive and procedural laws but is distinct from both,²⁰ and overlapping with them. In other words, remedy may be defined to be the right of action, or the means given by the law for the recovery or assertion of a right. 'If a man has a right, he must of necessity have a means to vindicate and maintain the same and a remedy if he is injured in the exercise or enjoyment of it. It is a vain thing to imagine a right without a remedy. Want of remedy and want of right are reciprocal'.²¹ This is the meaning of the Latin maxim, *ubi jus ibi remedium*. Remedy is the means of enforcing or preventing or redressing a wrong. At common law, in principle, there is little bar in the way of judiciary for recognizing new remedies.²² "In India, however, the absence of effective remedies, in cases of judicially created rights, in PIL has sometimes, overburdens the political executive and undermines the reputation of rights and the courts both.

"The attenuation of remedies from right seems to find its corollary in a set of cases where rights are declared but no remedy is available. In the *Bombay Pavement Dwellers* case, the Supreme Court found that the inability of low-wage workers in Bombay to obtain legal housing within a reasonable distance of their work place "will lead to deprivation of their livelihood and consequently to the

²⁰ Douglas Laycock *Modern American Remedies* 1(3 ed. 2002).

²¹ Holt, C.J., in *Ashby v. White* (1703) 2 LD Raym 938 at 953.

²² Lord SCARMAN in *McLoughlin v. O' Brian*, (1982) 2 All ER 298 (310) HL; and the speech of Lord GOFF in *Woolwich Building Society v. Inland Revenue commissioners* (No. 2) (1992) 3 All ER 737 HL at 760-763.

deprivation of the right to life.²³ Yet the only remedy provided by the court for the deprivation of the article 21 right to life caused by eviction from the only available housing in Bombay pavements and slums encroaching on public land, was a prior warning before eviction. Despite the petitioners' pleas that the state be ordered to undertake a massive low-income housing programme in Bombay, the court limited itself to the unenforceable suggestion that such programmes "be pursued earnestly" and "implemented without delay" without making the provision of legal and affordable housing a pre-condition to the clearing pavements and slums of Bombay.²⁴

In starvation cases²⁵ the court affirmed the right to food as necessary to uphold Article 21 of the Constitution of India, which guarantees the fundamental right to "life with human dignity." More than two dozen Orders have been issued by the Court till date but almost all of these relate to voluntary state schemes²⁶ in the form of governmental *largesse* or *charity*. None of the Orders creates or purports to create a remedy corresponding to the right to food as part of Article 21 of the constitution²⁷.

To similar effect is the judgment in Narmada²⁸. The court referring to Articles 21 of the constitution of India and Article 12 of the ILO Convention No. 107, with respect to the 'right against displacement' observed, that "The displacement of the Tribals and other persons would not *per se* result in the violation of their fundamental or other

²³ *Supra* note 8 at 200.

²⁴ Clark D. Cunningham "Public Interest Litigation in Indian Supreme court: A study in the light of American Experience", 29 *JILJ* 494 (1987).

²⁵ *PUCL v. Union of India and others*, (2001) 9 SCC 181; *Kishen Pattnayak & Anr v. State of Orissa*, AIR 1989 SC 677.

²⁶ For instance, the Supreme Court has passed orders directing the Indian government to: (1) introduce cooked mid-day meals in all primary schools, (2) provide 35 kgs of grain per month at highly subsidized prices to 15 million destitute households under the Antyodaya component of the PDS, (3) double resource allocations for Sampoorna Grameen Rozgar Yojana (India's largest rural employment programme at that time, now superseded by the Employment Guarantee Act), and (4) to universalize the Integrated Child Development Services (ICDS).

²⁷ The National Food Security Bill, 2010 is pending in the Parliament.

²⁸ *Narmada Bachao Andolan v. Union of India and others*, AIR 2000 SC 3751.

rights. The effect is to see that their rehabilitation at new locations they are better off than what they were. At the rehabilitation sites they will have more and better amenities than which they enjoyed in their Tribal hamlets. The gradual assimilation in the mainstream of the society will lead to betterment and progress²⁹.

The above narrative of judicial recognition, however, is simplistic and the process is not uniform. It ranges from 'minimal affirmation', merely requiring the state to respect a right in the negative sense of non-interference; via rulings requiring the state to protect individual rights against encroachment by others; to judgments ordering the state to actively promote particular rights by developing policies to that effect; or making concrete orders for state agencies to fulfill the individual claimants' claim. Often court orders are declaratory, stating that laws or actions are in breach of an obligation, but leaving to the state to devise a remedy, in other cases they are mandatory, requiring specific actions to be taken. In some cases courts have also taken on a supervisory role, requiring the relevant agency to report back within a set time-frame. This nature of judicial process in PIL is problematic, particularly, for the construction of a set of judicial precedent, discussed below.

The Problem of Law and Policy Divide

Practice of PIL as a tool of judicial activism by Indian High Courts and the Supreme Court, with the help of persons acting *pro-bono publico* and *actio-popularis*, raises very often, the question of respecting and preserving the doctrine of 'separation of power' which has now been well established as part of basic structure of the constitution.³⁰ This respect and commitment to preservation has been emphasized by Supreme Court from time to time³¹.

²⁹ *Id.* at 3787, Para- 91.

³⁰ *Rai Shahib Ram Jawaya Kapur v. State of Punjab* AIR 1955 SC 549; *His Holiness Keshwananda Bharati Sripadgavaru v. State of Kerala & Anr.* (1973) 4 SCC 225; *Indira Neharu Gandhi v. Raj Narain*, AIR 1975 SCC 2299; *State of Bihar v. Balmukund* AIR 2000 SC 1296.

³¹ *Asif Hameed v. State of J& K* AIR 1989 SC 1899; *Divisional Manager, Aravali Golf Course & Anr. v. Chander Hnss*, 2008 (3) SC 221;

Despite such observations, the Court has not adopted a uniform and consistent approach in dealing with its emerging role as a policymaker. While in some cases, the court has expressed its reluctance to step into the legislative field, in others it has laid down detailed guidelines and explicitly formulated policy. The former approach was taken by the Court when dealing with the question of ragging of students in medical colleges. The court overturned the high court's direction to the state government to introduce anti-raging legislation. In this case a parent of a student addressed a letter to the Chief Justice of the High Court complaining about ragging of freshers by senior students of the college. The Supreme Court held³² that "the direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging. It is entirely a matter for the executive branch of the Government to decide whether or not to introduce any particular legislation. If the executive is not carrying out any duties laid upon it by the Constitution or the law, the court can certainly require the executive to carry out such duty and this is precisely what the Court does when it entertains public interest litigation. But at the same time the Court cannot usurp the functions assigned to the executive and the legislature under the constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law making activities of the executive and the legislature". In recent ragging, student election, and forest cases³³, the court has adopted an

³² *State of HP v. A Parent of a Student of Medical College* (1985) 3 SCC 169 at 174-5; Problems under section III further complicate this issue, see *infra*.

³³ In Special Leave Petition No. 24295 of 2006. *University of Kerala v. Council of Principals of Colleges* with SLP (C) No. 24296-24299 of 2004. In 2005, under the orders issued by the court in this judgment, the government appointed the Raghavan Committee, it submitted its report to the Court in May 2007 which has now force of law in the form of circular of University Grant Commission; Special Leave Petition (civil) No. 24295 of 2004. The Lyngdoh Committee was constituted by the ministry of Human Resource Development, as per the order issued by the Supreme Court on 12 December 2005, to streamline student union election; since 1996, the Supreme Court of India has assumed the role of the principal decision maker so far as issues relating to forests and wildlife are concerned. This has been due to Supreme Court's intervention through the following cases, see the proceedings and court order in the cases of, *T.N. Godavarman Thirumulkpad v. Union of India and Ors* (WP no 202 of 1995), for the implementation of the Forest

contd...

activist attitude. This activist disposition of court has its critiques. Jurisprudence of PIL has been challenged on the ground of constitutional value of separation of power and overstepping by judiciary in the domain of executive as well as legislature³⁴. This view notwithstanding, the more recent trend, however, is for the Court to assert its new role as policy-maker, as the decision in *Vishakha*³⁵ demonstrates.

In the cases of adoption of children by foreign nationals³⁶ and custodial torture³⁷ similar guidelines were laid down. In a case dealing with vehicular pollution too, the Court stipulated the time-frame for enforcement of international pollution norms³⁸. In the *Hawala Case* (*Vineet Narain* case), the Court concerned itself with establishing a mechanism for the supervision of the CBI and the grant of statutory status to the office of the Central Vigilance commissioner.

The most significant problem in this controversy is the respective obligation of government and the judiciary under the constitution. It is the omission on the part of government to carry out its constitutional obligation or failure to secure the rights and liberties to the people, which provides occasion to the higher courts for judicial activism. There has been resistance to judicial activism, both from the executive and legislature. But neither the controversy nor the resistance augers well for the achievement of constitutional goals or the purpose of PIL which is integral part of the former. The solution lies in establishing a harmonious and progressive relationship amongst all the three organs of the state.

Conservation Act, 1980; *Centre for Environmental Law (CEL), WWF v. Union of India and Ors* (WP No 337 of 1995) for the issue of settlement of Right in National Parks and Sanctuaries and other issues under the Wildlife (Protection) Act, 1972.

³⁴ T.R. Andhyarjina *Judicial Activism and Constitutional Democracy in India* (1992); S.P. Sathe, "Judicial activism: The Indian Experience", 29 *Journal of Law and Policy* (Washington University, 2001).

³⁵ *Vishaka & other v. State of Rajasthan & other*, AIR 1997 SC 3011.

³⁶ *Lakshmi kanti Pandey v. Union of India*, (1985) Supp SCC 701.

³⁷ *D.K. Basu v. Union of India*, (1997) 1 SCC 416.

³⁸ *M.C. Mehta v. Union of India*, 1996 (2) SCALE 92.

Identifying and Constructing a Coherent Set of Precedents

Given the scope and coverage of issues in PIL cases and nature of judicial process, it often becomes difficult to identify, construct and derive a consistent and coherent set of precedents which is regarded binding, having force of law. As indicated above, judgments *declarative* of right to food, right to education, health, and right against trafficking PIL cases, whatever compulsions of the state actors might have been, left the issue of remedy to the prospective voluntary state actions. This category of cases raises doubts on the very essence and existence of such rights in our legal system. Can one assert that these claims, (properly 'wants') are rights in the same way as freedom of right to speech and right to equality are? Latter are designated as civil and political rights and the former social and economic rights. An interesting, but more problematic question arises in respect of the fact that against whom the former is being claimed. When social and economic rights are claimed against the state the court finds itself helpless and leaves remedy to state convenience, but where violations of the same is alleged by a private individual or body, the court does not have difficulty in ordering the state to provide protection. This is a chronic paradox that the Common law right jurisprudence has yet to resolve.

The next set of judgments, for example, environmental cases³⁹, involves exhortation to the government and legislature for developing policies. Critiques say that policies, environmental or social, must emerge from the political process and must be considered in a legitimate forum and not by courts. The question arises, what is the status of directions given or guidelines formulate by the court? Is the court or High Courts in a subsequent case involving similar facts, obliged to issue the same directions or guidelines? In short, what is their precedential value?

There is set of cases⁴⁰, and the trend is increasing, where the courts have assumed supervisory role over the government and executive

³⁹ *M. C. Mehta v. Union of India* AIR 1998 SC 296; *Almitra Patel v. Union of India* AIR 1998SC 99; (1998) 2 SCC 416; *M. C. Mehta v. Union of India (Calcutta Tanneries Case)*, (1997) 2 SCC 411; *M. C. Mehta v. Union of India*, (1998) 1 SCC 471.

⁴⁰ *Vineet Narain v. Union of India*, AIR 1996 SC 3386.

agencies. To critics, this might suggest that there is something amiss with the whole political system. Whatever merits of such suggestion may be, the question involved herein is a different one. When the court hears a case and delivers a judgment, it expounds and applies existing laws and the ratio forms part of the corpus of precedent. Even guidelines issued in PIL cases allegedly, forming part of judicial activism has its base in the constitutional and statutory laws of the legal system. But the assumption of supervisory role cannot be explained in the above sense. What is involved here is expansion of the space of judicial maneuverability, not necessarily of jurisdiction, drawing upon some sort of philosophical speculations about rights.

Efficacy of Creative Remedies

Under the jurisprudence of PIL and drawing upon constitutional provisions, especially Articles 32 and 226, courts in India do not regard themselves bound by the rigors of common law processual technicalities. The Indian Supreme Court, therefore, has created several new remedies which are unknown to the common law. It includes continuing mandamus⁴¹ injunctions⁴² interim order⁴³ etc. in public law litigation.

Traditional remedies are tied with the rights a litigant has under the provisions of a statute. In traditional litigation which is adversarial in nature the right and remedy are closely related. It is also retrospective in nature. If the remedy is not provided by statutory provisions the court will not grant the same even if it finds or records infraction of right of the litigant in a case before it. In other words rights and remedy are interdependent⁴⁴. But the reach of PIL goes beyond the substantive remedies provided under the constitution and statutory laws. If the court chooses to confine itself to the traditional remedies then the purpose of the PIL or the "theory of access to justice" will fail.

⁴¹ *Ibid*; see also cases mentioned at notes 17 and 32, *Supra*.

⁴² *Rural Litigation Kendra v. State of U.P* AIR 1989 SC 544: 1989 Supp(1) SCC 537; *M. C. Mehta, Petitioner v. Kamal Nath and others* AIR 2002 SC 1515.

⁴³ *Rural litigation Kendra v. State of U.P* AIR 1989 SC 544: 1989 Supp(1) SCC 537; *PUCL v. Union of India and others* (2001) 9 SCC 181.

⁴⁴ Abram Chayes, "The role of the Judge in Public Law Litigation", 39 *Harvard Law Review* 1283 (1976); G. Paton, "A Text Book of Jurisprudence" 487 3rd ed. (1972).

The philosophy of PIL and the objects underlying it demands the expansion of categories of remedies irrespective of the statutory provisions regarding status of remedies. The reliefs which are generally required under PIL are affirmative and prospective in nature. It demands creativity on the part of the court. This creativity need not be dependent on the provisions of the statute but it must have the necessary connection with the rights or legal claims of the litigants before the court. The constitutional provisions under Articles 32, 136, 142, 226 and 227 afford ample space for the creation of the new remedies by the court. The Constitutional basis for the creation of such remedies is provided by Article 32 which⁴⁵ reads-

"(1) the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part...."

Continuous mandamus has been evolved to check the arbitrary, non-enforcement of PIL decisions. This tool helps the court in monitoring the process of implementation of its decisions. Under this process the court puts time limitation for enforcement of its decisions. Such continuing mandamus is a writ of Mandamus issued to a lower authority by the higher authority in general public interest asking the officer or the authority to perform its task expeditiously within a stipulated period of time for preventing miscarriage of justice. The concept of continuing mandamus has been discussed and dealt with in the respective cases of *Vineet Narain*, *Forest* and *Bandhua*⁴⁶. In the former case the court observed, "the procedure adopted was one of 'continuing mandamus'. The continuing inertia of the agencies to even commence a proper investigation could not be tolerated any longer. Mere issuance of a mandamus directing the agencies to perform their task would have been futile. This necessitated issuance of directions

⁴⁵ The Constitution of India, 1950.

⁴⁶ *Supra* notes 17, 39, and 32.

from time to time, keeping the matter pending and requiring the agencies to report the progress of investigation so that monitoring by the court could ensure continuance of the investigation."⁴⁷ The concept of "continuing mandamus" is an admission of the fact that controversial socio-economic issues need constant monitoring over intricate details to be sustained over a considerable period of time⁴⁸.

However, frequent resort to such orders, which the courts have neither the time nor institutional mechanism to ensure to their ultimate conclusion, eventually erodes the credibility of the judicial institution. Despite the acclaim showered on *Bandhua* orders, as pointed out in Courts and their Judgments, the results came to naught⁴⁹. The ineffectiveness of such remedies is obvious from the fact that even after a dozen orders of the apex court in *hunger death cases*⁵⁰ the fact of hunger deaths still persist in the KBK district of Orissa⁵¹. It often put extra burden on the court and thereby compels the court to give its valuable time to the mechanism of enforcement of its orders. It also negatively affects the court of being over activist. Such supervision is criticized as violative of separation of power, and being unfeasible.

Effective implementation of PIL Decision/Orders etc. and the Role of the Executive

Owing to socio-economic and political factors, that is often involved in the resolution of large number of issues, brought before the court, in PIL, executive indifference, and sometimes, inability to take full responsibility for the implementation of the court decisions, directions etc. has proved to be prohibitive in the way of the institution and practice of PIL to achieve its objectives. Other times institutional structure of governance and availability of legitimate and justifiable excuses, for the executive, may prove to be an obstacle in implementing directions and orders in a PIL. This has been the most vulnerable aspect of PIL. But the executive cannot be blamed squarely

⁴⁷ *Supra* note 39.

⁴⁸ Justice B.N. Srikrishna "Skinning a Cat", (2005) 8 SCC (J) 3.

⁴⁹ Arun Shourie *Courts and Their Judgments: Premises, Prerequisites and Consequences* 238 (Rupa, New Delhi, 2001).

⁵⁰ *Supra* note 24.

⁵¹ *Ibid.*

without qualification. For example, in cases like *Unni Krishnan*⁵², the issue of implementation involves large fiscal and infrastructural recourses. And the government may have practical, legitimate excuses. In some of the cases implementation of court decisions requires legislative action. Till the appropriate statute is enacted by the legislature the effectuation of decision, practically, has to wait⁵³.

Non-implementation of orders and decisions in some of PIL decisions, on the other hand, is result of executive apathy and democratic maladministration and corruption. *Yamuna* and *Ganga Cleaning Cases* are examples of it⁵⁴.

Apart from the above two factors, there may arise situations in which it become difficult to fix liability/accountability for non-implementation of orders of the court in a PIL for example in *Monkey Capering case*. Criticizing such orders, in *Chander Hass*⁵⁵, Justice Katju remarked:

"Unfortunately, despite these observations in the above mentioned decisions of this Court, some courts are still violating the high constitutional principle of separation of powers as laid down by Montesquieu. As pointed out by Honorable Mr. Justice J. S. Verma, the former CJI, in his Dr. K.L. Dubey Lecture: Judiciary has entertained questions of mysterious car racing down the Tughlaq Road in Delhi, allotment of a particular bungalow to a Judge, specific bungalows for the Judges pool, stray cattle on the streets, clearing public conveniences, levying congestion charges at peak hours at airports with heavy traffic etc. under the threat of use of contempt power to enforce compliance of its orders. Misuse of the contempt power to force railway authorities to give reservation in a train is an extreme instance".

These situations, it appears, do arise not because of the fact that the courts are violating limitations imposed by separation of power but

⁵² *Supra* note 9.

⁵³ The Right to Education Act, 2005, which was enacted 12 years after the decision in *Unni Krishnan* judgement.

⁵⁴ *Supra* note 24; *PUCI v. Union of India and others Writ Petition(civil)196 of 2001*; *M.C. Mehta v. Union of India & ors.*, (1987) 4 SCC 463.

⁵⁵ *Divisional Manager, Aravali Golf Club & Anr. v. Chander Hass & anr.*, (2008) 1 SCC683.

because of unique nature of the case, which are best tackled outside the court.

Procedural Problems

Procedural problems faced by both, parties to PIL and the court itself, are in fact most urgent and important. It includes the following -

- (a) What is evidentiary value of report(s) of commission(s) appointed by judiciary as part of investigative aspect of PIL in pursuit of the theory of "Access to Justice" which provides the jurisprudential basis for the institution and practice of PIL?
- (b) What is the evidentiary value of various affidavits and other documents filed without verifications such as news paper reports.
- (c) The limited but critical question arises about the relaxation of 'internal' procedure of the court.

Order XXVI of the Code of Civil Procedure and Order XLVI of the Supreme Court Rules 1966 makes provisions regarding the appointment of commission for the purpose of examining witnesses, making legal investigations and examining accounts etc. Order XLVI of the Supreme Court Rules 1966 makes the provisions of Order XXVI of the Code of Civil Procedure, except Rules 13, 14, 19, 20, 21 and 22 applicable to the Supreme Court and lays down the procedure for an application for issue of a commission. But according to the court,⁵⁶ Order XXVI is not exhaustive and does not detract from the *inherent* power of the Supreme. Order XLVI of the Supreme Court Rules 1966 cannot in any way militate against the power of the Supreme Court under Article 32 and in fact Rule 6 of Order XLVII of the Supreme Court Rules 1966 provides that nothing in those Rules "shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice".

It must be noted here that in *Bandhua*⁵⁷, the apex court made it abundantly clear that 'what we have said above in regard to the exercise of jurisdiction by the Supreme Court under Article 32 must apply equally in relation to the exercise of jurisdiction by High Courts

⁵⁶ *Supra* note 17..

⁵⁷ *Ibid.*

under Article 226, for the latter jurisdiction is also a new constitutional jurisdiction and it is conferred in the same wide terms as the jurisdiction under Article 32. The same powers can and must therefore be exercised by High Courts while exercising jurisdiction under Article 226.

In *Bandhua*, the Court appointed⁵⁸ Dr. Patwardhan of Indian Institute of Technology to carry out a socio-legal investigation with the terms that "it is necessary that a socio-legal investigation should be carried out for the purpose of determining what are the conditions prevailing in the various quarries.....and whether there are any workmen in those quarries against their will or without their consent and what are the conditions in which they are living and whether any of the provisions of the Bonded Labour System (Abolition) Act and Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act is being violated". The court also clarified that "when we are directing a socio-legal investigation of these matters ... with a view to find out the correctness of the state of affairs so that the State Government and its officers could take necessary steps for remedying the situation if a state of affairs exists which is contrary to the provisions of law and the basic human norms. The Court can take action only after the socio-legal investigation is carried out by some responsible person and a copy of the report of the socio-legal investigation is made available to the parties". On the question of validity of appointment of such commission,⁵⁹ and all the issues pertaining to it the court laid down that 'in our opinion [such contention] not well founded and must be rejected'.

Interpreting word used in Article 32 court held that 'if we look at the language of this Article uninfluenced and uninhibited by any pre-conceptions and prejudices or any pre-conceived notions....' and 'guided not by any verbal or formalistic canons of construction but by the paramount object and purpose for which this article has been enacted as a Fundamental Right in the Constitution and its

⁵⁸ For an excellent analysis of this aspect of PIL See Clark D. Cunningham, "Public Interest Litigation In Indian Supreme Court: A Study in the Light of American Supreme Court", 29 *JILI* 506 (1987).

⁵⁹ Order XLVI of the Supreme Court Rules 1966, deals with Appointment of Commissions.

interpretation must receive illumination from the trinity of provisions which permeate and energise the entire Constitution namely, the Preamble, the Fundamental Rights and the Directive Principles of State Policy. Clause (1) of Article 32 confers the right to move the Supreme Court for enforcement of any of the fundamental rights, but it does not say as to who shall have this right to move the Supreme Court nor does it say by what proceedings the Supreme Court may be so moved. There is no limitation in the words of Clause (1) of Article 32 that the fundamental right which is sought to be enforced by moving the Supreme Court should be one belonging to the person who moves the Supreme Court nor does it say that the Supreme Court should be moved only by a particular kind of proceeding'. Court clarified that "again Cl. (1) of Article 32 says that the Supreme Court can be moved for enforcement of a fundamental right by any 'appropriate' proceeding. There is no limitation in regard to the kind of proceeding envisaged in Clause (1) of Article 32 except that the proceeding must be 'appropriate' and this requirement of appropriateness must be judged in the light of the purpose for which the proceeding is to be taken, namely, enforcement of a fundamental right".

The Commissioners are empowered to enquire into any violations of the interim orders and to demand redressal, with the full authority of the Supreme Court. They are expected to report to the Court from time to time, and may seek interventions going beyond existing orders if required. Further, the Court clarified that the mandate of the Commissioners included "monitoring and reporting to this Court of the implementation by the respondents of the various welfare measures and schemes." Thus the Commissioners may scrutinise any aspect of food-related "measures and schemes", even if they are not the object of any specific order.⁶⁰

Amicus curiae or *amicus curiae* (plural *amici curiae*?) is a Latin phrase, and literally means "friend of the court". It refers to someone, not a party to a case, who volunteers to offer information on a point of law or some other aspect of the case to assist the court in deciding a matter before it.

⁶⁰ *M. C. Mehta v. State of Tamil Nadu*, (1996) 6 SCC 772.

The PIL jurisprudence has been devised to help the poor, ignorant and underprivileged who have no access to justice for the redressal of their problems. They are not in position to take help of qualified and high-paid lawyer. The adversarial procedure is, in fact, contrary to and ineffective when third person files petition *pro-bono-publico*. Here PIL jurisprudence becomes innovative in appointing *amicus-curiae* for the assistance of court into bringing effective and meaningful redressal of people's grievances.

In many case such as *Bandhua Mukti Morcha* case,⁶¹ *Rudal Shah* case,⁶² *Neerja Chaudhary*⁶³, *S. P. Gupta*⁶⁴ etc this mechanism has been used by the court.

The reports of the commissions primarily serves three functions- one, it may propose remedial measures and relief that the court may provide in the case before it⁶⁵. Two, the report of the commissions would furnish prima facie evidence of the facts and data related to the case⁶⁶. And the third, these commissions, sometimes, actually decide factual issues under the authority of court⁶⁷. But so far it has not been established, conclusively, as to what is the evidentiary value of reports and findings of the various commissions appointed by the court. This proposition finds enough support in the recent cases *Vedanta*⁶⁸ and *Common Wealth Games cases*⁶⁹. In the former case which involves rights of Tribals and Forest dwellers, the Supreme Court, on the basis of the Report of N. C. Saxena Committee, appointed by it, gave green signal to the Indian arm of Sterlite MNC group. Paradoxically the Central government on the basis of The Forest Advisory Committee (FAC) Report⁷⁰ rejected Vedanta's Niyamgiri mining proposal. The Common

⁶¹ *Supra* note 17.

⁶² *Rudal Shah v. State of Bihar*, (1983) 4 SCC 141.

⁶³ *Neerja Chaudhari v. State of M. P.*, AIR 1984 SC 1099.

⁶⁴ *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

⁶⁵ *Supra* note 57.

⁶⁶ *Supra* note 17.

⁶⁷ *Supra* note 8; where the supreme court appointed a high court official to determine whether specific dwellings were obstructing traffic or were built after the effective date of court's interim order on demolition.

⁶⁸ <http://sanhati.com/literature/1040/> Accessed on 13.2.2011.

⁶⁹ *PUDR v. Union of India*, WPC 524/2010, Delhi high Court.

⁷⁰ <http://timesofindia.indiatimes.com> accessed on 12.2.2011.

Wealth Games Case concerns the rights of workers under Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, the Minimum Wages Act 1948. The issue boiled down to the issuance of work identity/passport to the workers by respective government bodies and construction companies, to facilitate the enjoyment of rights under the above statute. The High Court of Delhi appointed by its Order Dated 03.02.2010 a four member Committee⁷¹ to look onto it. The committee gave its report on 16th March 2010. However, nothing substantial could be achieved, Even after the games are over.

Conclusion

The institution of PIL makes a partial departure from the adversarial system of dispute resolution—a basic feature of Common law system. Above narratives, however, shows that even a partial shift towards inquisitorial method, in public law litigation, is not an easy task. Systemic constraints have shaped the path and ability of this institution to achieve its originally proclaimed ends. Whatever motivations, for the original creativity of the court have been, this so called innovative judicial process operates within the constraints of the received Common law system. There is inevitable problem of compatibility of the new with the old. The old continue to shape the content of objectives achieved by the new. This problem of consistency between the two will take some time to be resolved.

⁷¹ Consisting of the Secretary (Labour), Commissioner (Labour), Ms. Arundhati Ghose, Former Indian Ambassador to the United Nations and Dr. Lakshmidhar Mishra, Special Rapporteur, National Human Rights Commission.

Anti-Conversion Laws The Conflict Zone of Freedom of Religion

Abhishek Dubey*

Whereof one cannot speak, thereof one must be silent.

—Ludwig Wittgenstein

In some systems of thought a distinction is made between two orders of being, metaphysical and empirical. Ludwig Wittgenstein, a great linguistic philosopher is very correct in his assertion of metaphysical world, but it is an irony that our religions are not product of silence but of propagation. Buddha once said that better than a thousand hollow words, is one word that brings peace, but due to different and sometimes antagonistic views of various religious philosophies, religion is more a matter of struggle than peace. With the growth of fundamentalism in the world, a conflict is going on, and religion is one of the important aspects of that conflict.

Introduction

The Supreme Court of India on 21 January, 2011 upheld the life sentence awarded to Dara Singh and Mahendra Hembram by the Orissa High Court¹. In the wake of criticism over its remarks on conversion, the apex court bench of Justice Sathasivam and Justice B.S. Chauhan expunged and replaced its observations on Dara Singh's motive for killing Graham Staines and his two minor sons in Orissa in 1999. The court expunged the sentence - "In the case on hand, though Graham Staines and his two minor sons were burnt to death while they were sleeping inside a station wagon at Manoharpur, the intention was to teach a lesson to Graham Staines about his religious activities, namely, converting poor". The statement was replaced

with— "However, more than 12 years have elapsed since the act was committed, we are of the opinion that the life sentence awarded by the High Court need not be expanded." It also expunged the portion of a sentence that read— "It is undisputed that there is no justification for interfering in someone's belief by way of 'use of force', provocation, conversion and incitement or upon a flawed premise that one religion is better than the other." The sentence has now been replaced by - "It is undisputed that there is no justification for interfering in someone's belief by any means."²

This is clear evidence that religious conversions are thorny issues which must be handled carefully. Recent Kandhmal violence also shows that religious conversion is an issue which should be analyzed properly. In a democracy, political considerations provide justifications. Different ideologies give different opinions. But it is indispensable to analyze that whether anti-conversion laws as legal mechanism is working for the purpose of harmony or, increasing the conflict within the society.

Religious Conversions: Issues and Problems

Religious and ideological conversion has become an important topic for anthropologists, psychologists, theologians and legal fraternity. Conversion from one religion to another is a phenomenon that has been associated with the human history from its very inception and it is as old as religion. The history known to us connotes that it was used primarily in Judaism and Christianity and is associated with personal and communal metamorphosis.³ It has always attracted the curiosity of scholars due to its controversial and sensitive nature. Conversion has been solution to so many problems and also cause for some controversies. It leads to divorce controversies involving issues from matrimonial fields. Courts and matrimonial laws have attempted to provide solution to such problems. However, these solutions do not help beyond a certain point because every legal system tends to be biased towards one and partly to another.⁴ The conflicting principles of

² *Ibid.*

³ Mircea Eliade, *The Encyclopedia of Religion*, Vol. IV (Macmillan, New York, 1987).

⁴ Shahnaz Noor, *Law relating to conversion in Islam : Towards harmony of conflicting*
contd...

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¹ *The Hindu*, January 22, 2011 at 1.

the religions in India and the absence of any statutory provisions in the matter have resulted into the divergent opinions of the Indian Courts on the topic.

Like other terms conversion comes from outside and therefore bears the baggage of popular associations. For example, some scholars of South Asia would recognize Christianity or even Buddhism as a religion, but would refuse to accord Hinduism the status, referring to its loose structure and its location as a "way of life" rather than a set of tenets. For the debate on conversion these theoretical differences are extremely relevant as they explain why typically conversion comprehended as such, when spoken of in relation to Islam or Christian, but seems irrelevant in the context of South Asian religions particularly Hinduism, or even Sikhism. Some religious traditions are said to be proselytizing or evangelizing by character, intrinsic to their system of belief is the desire and need to bring the unbeliever into the fold. So it becomes necessary that our understanding of the processes of conversion should be broad enough to capture such variations across time and complexities and across denomination and religion. Restricting it only for use in relation to one or other religious tradition has its own problems. The real problem of conversion arises when there is no restriction upon any person to apostate the religion which he professes and to adopt any other religion of his choice. The personal laws relating to the matters concerning, marriage and divorce, adoption, inheritance of property etc. are governed by the religion which one professes at the time of seeking relief.⁵ If there is uniformity in all the laws, there is hardly any problem and if there is it is sociological. But in India many systems of marriage i.e. monogamous and polygamous are running concurrently. Whenever, there is a change from one religion which mandates monogamy to another religion, which permits bigamy, there is a problem so far the right of the converted spouse to marry another wife is concerned.

Apart from this aspect, there is another aspect of law and order problem as recent kandhmal violence suggests. In several quarters in India, it is feared that cultural minorities are converting the Indian

matrimonial laws in India (Kitab Bhawan, New Delhi, 2003).

⁵ *Khambata v. Khambata*, AIR 1935 Bombay 278.

majority to their own religions in order to seek recognition and protection of their distinctive identities, claim autonomy and self governance and demand segregation and sometimes secession too, which normally leads to eruption of violence. Religious conversions in India are thus a big and sensitive issue. According to D.E. Smith conversions are opposed because they are seen to be disruptive of family, caste and village social life and also as an abandonment of Indian culture; they are also seen as motivated by political considerations and promoted by unethical and questionable methods; most importantly they are opposed to universalism as expressed by Gandhi and Radhakrishna.⁶

Concept of Secularism and Freedom of religion

According to Encyclopedia of Religion and Ethics,⁷ Secularism may be described as a movement, intentionally ethical and negatively religious with political and philosophical antecedents. The Encyclopedia Americana International⁸ defines 'secularism' as an ethical system founded on the principles of natural morality and independent of revealed religion or supernaturalism. Its first postulate is freedom of thought i.e. the right of every man to think for himself. In another sense, it refers to a belief that human activities and decisions especially political ones should be based on evidence and fact unbiased by religious influence.⁹ In its most prominent form, secularism is critical of religious orthodoxy and asserts that religion impedes human progress because of its focus on superstition and dogma as against reason and scientific method. The purposes and arguments in support of secularism vary widely. In European Laicism, it has been argued that secularism is a movement towards modernization, and away from traditional religious values. This type of secularism, on a social and philosophical level, has often occurred while maintaining an official state church or other state support of religion.¹⁰ In the United States,

⁶ Donald Eugene Smith, *India as Secular State* 165-168 (Princeton, 1963).

⁷ Eric S. Waterhouse, *Secularism* in James Hastings (ed.) Vol. II 348 (1958).

⁸ 1969 ed. Vol. 24 (American Corporation, New York)

⁹ Kosmin Barry A., "Contemporary Secularity and Secularism". in Barry A. Kosmin and Aniel Keyser (Institute for the Study of Secularism in Society and Culture, 2007).

¹⁰ Yavuz, Hakan M., and John L. Esposito, *Turkish Islam and the Secular State: The Gulen* contd...

some argue that state secularism has served to a greater extent to protect religion from governmental influence, while secularism on social level is less prevalent.¹¹ A secular state is not an atheistic state (e.g. Albania under Envel Hoxha), in which the state officially opposes all religious beliefs and practices. In some secular states there can be a huge majority religion in the population (e.g. Turkey, Thailand, India, etc.) and in others there may be great religious diversity (e.g. India, Lebanon) etc. Some may have de-facto official religions, in which even though a government doesn't support or deny religion, it may require some members of its government to be a certain religion (e.g. Philippines, Indonesia, Peru).¹² In France Laicite is a French concept of a secular society, connoting the absence of religious involvement in government affairs as well as absence of government involvement in religious affairs.¹³ Although, during the twentieth century, it evolved to mean equal treatment of all religions, more restrictive interpretation of the term is being witnessed since 2004.¹⁴

Concept of Indian Secularism

India is a secular but not an anti-religious state¹⁵. Our constitution guarantees the Freedom of conscience and Religion. Secularism is implicit in the preamble of the constitution of India which declares the resolve of the people to secure to all its citizens "liberty of thought, belief, faith, and worship".¹⁶ The 42nd Amendment¹⁷ has inserted the word 'Secular' in the preamble to spell out clearly its commitment to 'Secularism'. In India, a Secular State was never considered as an irreligious or atheistic state. It only means that in matters of religion it is neutral. It is an ancient doctrine in India that the state protects all

Movement xv-xvii (Syracuse University, 2003)

¹¹ Noah Feldman, *Divided by God. Farrar, Straus and Giroux* 147 (2005).

¹² D.L. Munby, *The Idea Of A Secular Society* 34 (Oxford University Press, London, 1963).

¹³ Evelyn M. Acomb, *The French Laic Laws, 1879-1889 : The First Anti-Clerical Campaign of the Third French republic* (New York : Columbia University Press, 1941).

¹⁴ Available at <http://news.bbc.co.uk/1/hi/world/europe/3325285.htm>, visited on January 15, 2011.

¹⁵ H.M. Seervai, *Constitutional Law of India Vol-2* (4th ed., 2002).

¹⁶ See Preamble to the Constitution of India, 1950.

¹⁷ See The Constitution (42nd Amendment) Act, 1976.

religions but interferes with none¹⁸. Explaining the secular character of the Indian constitution the Supreme Court said, "There is no mysticism in the secular character of the state. Secularism is neither anti-God nor pro-God; it treats alike the devout, the antagonistic and the atheist. It eliminates God from the matters of the state and ensures that no one shall be discriminated against on the ground of religion."¹⁹ With similar approach in *Downes v. Bindwell*,²⁰ the United State Supreme Court said "The state can have no religion of its own. It should treat all religions equally. The state must extend similar treatment to the church, the mosque and the Temple. In a secular state, the state is only concerned with the relation between man and man. It is not concerned with the relation of man-with God. It is left to the individual's conscience. Every man should be allowed to go to Heaven in his own way. Worshiping God should be according to the dictates of one's own conscience." In *Ayodhya case*²¹ the Supreme court, after a detailed discussion has summarized the true concept of secularism under the constitution as follows. "It is clear from the constitutional scheme that it guarantees equality to all individuals and groups irrespective of their faith and emphasizing that there is no religion of the state itself. The concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our constitution". The Supreme Court in *S.R. Bommai v. Union of India*²² held that Secularism is part of the basic structure of the constitution."

The expression 'religion' has not been defined anywhere in the constitution, even though it has been used in various articles. Religious practices or performances of acts in pursuance of religious belief are treated, as much a part of religion as faith or belief, a particular doctrine.²³ The well established ingredients of religion are: (1) A spiritual ideal; (2) A set of concepts or precepts on God-man relationship underlying the ideal; (3) A methodology given or evolved

¹⁸ *Vasudev v. Vamanji*, ILR 1881 Bom 80.

¹⁹ *St. Xavier's college v. State of Gujrat*, AIR 1974 SC 1389 at 1414.

²⁰ (1901) 182 US 244.

²¹ *M. Ismail Faruqui v. Union of India*, AIR 1994 SC 360.

²² AIR 1994 SC 1918.

²³ *Ratilal Panachand Gandhi v. State of Bombay*, (1954) SCR 1055.

by the founder or follower of the religion to achieve the ideal; and (4) A definite following of persons having common faith in the precepts and concepts.²⁴ Article 25(1) guarantees to every person the freedom of conscience and the right to profess practice and propagate religion. But right guaranteed under Article 25(1), like other constitutional rights, is not absolute. It is subject to public order, morality and health and to the other provisions of Part-III of the constitution. Under sub-clauses (a) and (b) of clause (2) of Article 25 the state is empowered by law (a) to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice; (b) to provide for (i) social welfare and reform, and (ii) to throw open Hindu religious institutions of a public character to all classes and sections of Hindus. Article 26 is a corollary to Article 25 in that the freedom to profess, practice and propagate the religion would be an empty one unless there is further freedom to establish and maintain institutions for religious and charitable purposes and to manage its own affairs in the matter of religion. The freedom of 'conscience' is absolute inner freedom of the citizen to mould his own relation with God in whatever manner he likes. When the freedom of conscience becomes articulate and expressed in outward form it is 'to profess and practice religion'. To 'profess' a religion means to declare freely and openly one's faith and belief. He has right to practice his belief by practical expression in any manner he likes. To 'Practice' religion is to perform the prescribed religious duties, rites and rituals, and to exhibit his religious beliefs and ideas by such acts as prescribed by religious order in which he believes. To 'propagate' means to spread and publicize his religious view for the edification of others. But the word "propagation" only indicates persuasion and exposition without any element of coercion. From the discussion it can be concluded that religion is a matter of faith with individuals or communities and it is not necessarily theistic.²⁵

²⁴ *S.P. Mittal v. Union of India* (1983) 1 SCC 51 at 92.

²⁵ J.N. Pandey, *Constitutional law of India* 261-262 (33rd ed., Allahbad Law Agency, 1998).

Anti-Conversion Laws in India

Conversion in its very process involves an act of undermining another's faith. The process becomes all the more objectionable when this is brought about by recourse to methods like force, fraud, material inducements and exploitation of one's poverty, simplicity and ignorance. Conversion or attempt at conversion in the above manner, besides creating various maladjustments in social life, also give rise to problems of law and order. It is therefore important to provide measures to check such activities which also directly impinge on the freedom of religion.²⁶ The former Chief Justice P.B. Gajendragadkar on the constitutional right to propagate religion observed "Apropos this right to propagate, I would like to suggest that since conversion leads to complaints about the adoption of unfair, illegal or unworthy means or methods in bringing about conversion, it is desirable that the appropriate legislators may consider the reasonableness and the feasibility of requiring all conversions to be registered before political authorities. Speaking for myself I am inclined to think that converted and deliberate attempts at conversion inappropriate in a truly secular society".²⁷

Conversion Laws during Colonial Period

The British rulers in India never imposed any restriction on the right to propagate one's religion and converting others. But outside the British India, number of princely-states did enact anti-conversion laws.

The first anti-conversion law was the Rajgarh State conversion Act which was enacted in 1936. That enactment banned the preaching of Christianity and prohibited the entry of Christian missionaries in to the former Kingdom of Rajgarh, Jashpur, Surguja etc. of Chhotanagpur areas.²⁸ Surguja State Hindu Apostasy Act, 1945 was the second enactment to conversion from Hinduism to Islam and Christianity by vesting the power to allow or disallow conversion from Hinduism to Islam and Christianity in the durbar of rajas under the guise of maintaining law and order and establishing public peace.²⁹ Udaipur

²⁶ Lalit Mohan Suri, (ed.) *The Current Indian Statutes* 5 (Chandigarh, 1968).

²⁷ P.B. Gajendragadkar, *Secularism and the Constitution of India* 72 (Bombay, 1971).

²⁸ *Ibid.*

²⁹ *Ibid.*

State Conversion Act, 1946 required all conversions from Hindu religion to other faiths to be registered officially.³⁰ Similar legislations were also promulgated in Bikaner, Jodhpur, Kalahandi and Kota³¹. The known purpose of all these local laws was to protect Hindus against the Christian missionary activities. All they required individual converts to register their conversion with specified government agencies by filling an application or affidavit. Those agencies were legally empowered to ascertain the bonafide or malafide of such conversions. Those who secured conversion of a person by fraud, misrepresentation, coercion, intimidation, undue influence or the like, were made liable to punishment. Minors (those under the age of 21 years) could not convert and children of converts would not automatically get their parent's new faith. Conversion to Christianity (and by implication to Islam) was thus legally sought to be regulated by the Hindu rulers of princely states.

Constitution Assembly Debates on conversion

During Constituent Assembly Debates attention was paid to the issue of religious freedom, including the right to expression. The Advisory Committee on Minorities and Fundamental Rights in reviewing the draft the recommendations of the Subcommittee on Minorities paid considerable attention to the word "propagation."³² R.V. Dhulekar asserted that conversions lead to separatist tendencies and diminish the numerical strength of Hindus and other communities. He went so far as to imply that all conversions of Hindus to other religion had been conversions by fraud or coercion and not conversions based on reason.³³ Tajainul Husain argued that religion as a private affair ought not to be disturbed through propagation in a secular state.

"Supposing I honestly believe that I will attain salvation according to my way of thinking, and according to my religion, and you, Sir, honestly believe that you will attain salvation according to your way, then why should I ask you to attain salvation according to my way, or

³⁰ *Ibid.*

³¹ Dr. Faizan Mustafa, "Forcible conversion constitutional & Islamic Perspectives," 10 *Kashmir University Law Review* (2003).

³² *The Framing of India's Constitution, Select Documents*, Vol. II, 3-4 (New Delhi, 1967).

³³ See *Debates of the Constituent Assembly of India*, Vol. V, 1947, at 364-365. (hereinafter referred to as "Debates")

why should you ask me to attain salvation according to your way? If you accept this proposition, then, why propagate religion? As I said, religion is between oneself and his God. Thus honestly profess religion and practice it at home. Do not demonstrate it for the sake of propagating... If you start propagating you will become a nuisance to others. So far it has been a nuisance".³⁴

The Constituent Assembly devoted considerable time to the issues of conversions of minors and conversions brought about by undue influence, coercion, and fraud. But later in final drafts, these clauses relating to conversion were deleted and it effectively died at this point, so far as the Constitution was concerned.³⁵ However attempts have been made in the Lok Sabha to reintroduce forms of these Clauses through private members bills but have been largely unsuccessful.

State Laws in Independent India

In 1967, the State of Orissa enacted the Orissa Freedom of Religion Act, as a pioneer step. Explanation for the Act appeals to maladjustments in social life and to law and order and interference in the right to propagate. While the Act, at first glance appears to be directed simply to conversions by force, fraud, material inducements, exploitation, the punishments under the Act make it clear that the law makers had in mind conversions of minors and others who were thought to need special protection. The penalty for unlawful conversion of a minor, a woman and a member of a scheduled caste was much more severe than the penalty for the unlawful conversion of an adult.³⁶

A similar Act was passed by the Madhya Pradesh Legislature in 1968, called the Madhya Pradesh Dharma Swatantrya Adhiniyam, prohibiting conversions by "force or allurement or by fraudulent means, and matters incidental thereto".³⁷ It also required registering conversions with the District Magistrate.³⁸ The Act appears to be the culmination of two previous events, (the appointment of the Niyogi

³⁴ *Debates*, Vol. VII, 1998, at 817-818.

³⁵ *Debates*, Vol. IV, 1948, at 758.

³⁶ *Supra* note 28.

³⁷ *The Yearly Digest of Indian and Select English Cases 2092* (Madras, 1977).

³⁸ Brojendra Nath Banerjee, *Religious Conversions in India* New Delhi, 246 (Harnam Publications).

Commission in 1954 to enquire into Christian missionary activity in Madhya Pradesh and the Madhya Pradesh Conversion Bill of 1963, a private Member's Bill, which raised some of the concerns expressed in the Niyogi Commission Report. The report tended to question the sincerity of conversions and to see conversions as contributing to undermining traditional values and structures and to the denationalization of Indians.³⁹

In 1978, an Act was passed by the Arunachal Pradesh State Legislature. Originally labeled as 'the Arunachal Pradesh Freedom of Indigenous Faith Bill' was renamed as 'Freedom of Religion Act' on the advice of the President, who recommended that the protection sought by the Bill be afforded to persons of any faith.⁴⁰ In some aspects this Act is similar to the Orissa and Madhya Pradesh Acts, but in important ways it goes considerably beyond those Acts in certain other important matters. The Bill provides prohibition of conversion from indigenous faith of Arunachal Pradesh to any other faith or religion by use of force or inducement or by fraudulent means and for such matters connected therewith.⁴¹ Conversion is defined as "renouncing an indigenous faith and adopting another faith or religion."⁴² Indigenous is defined as such religious beliefs and practices including rites, rituals, festivals, observances, performances, abstinence, customs, as have been found sanctioned, approved, performed by the indigenous communities of Arunachal Pradesh from the time these communities have been known and includes Buddhism..., Vaishnavism..., and Nature worship.⁴³ Force includes "show of force or a threat of injury of any kind including threat of divine displeasure or social excommunication."⁴⁴ Finally the Act required that conversions from indigenous faith be registered with the District Deputy Commissioner by the convert⁴⁵. The architects of the Act cited the issue of public order, morality and health as the

³⁹ For a description of the Report see Moin Shakir, (ed.), *Religion, State and Politics in India* 281-282 (Delhi, 1989); D. E. Smith, *India as a Secular State*, 208-214.

⁴⁰ *Lok Sabha Debates*, Vol. XXII 115 (February 29, 1979).

⁴¹ *Supra* note 38, at 261.

⁴² *Id* at 262.

⁴³ *Ibid*

⁴⁴ *Ibid*

⁴⁵ *Id* at 263.

primary concern behind the Act. Non-indigenous faiths are regarded as alien and therefore as endangering national interests.⁴⁶

Recently, some states like Chattisgarh, Himachal Pradesh, Rajasthan etc. have also passed Anti conversion legislations. The basic ingredients are similar to that of previously discussed Anti conversions legislations.

The Tamil Nadu Prohibition of Forcible conversion of Religion Act, 2002 bans use of allurements, inducement etc. for the purposes of conversion.⁴⁷ It states that anyone contravening section 3 shall⁴⁸ without prejudice to any civil liability, be punished with imprisonment for a term, which may extend to three years and also liable to fine, extending upto Rs. 50,000. There is also a provision for an enhanced punishment of four years and fine upto Rs. 100,000 if the conversion relates to women, minors, or Scheduled castes and scheduled Tribes. The Act also makes the Priests liable who presided over the conversion with an imprisonment of one year if they fail to report such incidents to the District Administration. The governmental press release justifying the Act said that the legislation would have a deterrent effect on anti-social and vested interest groups, and prevent them from exploiting innocent people belonging to depressed classes.

The anti-conversion movement is in progress not only in India but also in other countries. On April 13, 2005 the Sri Lanka's Government proposed Anti-conversion law at United Nations.⁴⁹ Bhutan in July 2010 passed anti conversion laws.⁵⁰

Central legislations on conversion

Bills, similar to the State Acts have been attempted in the Lok Sabha from time to time, but without any success. As early as 1954, Jethalal Joshi, a member of parliament from the Congress Party, introduced the

⁴⁶ *Id* at 264.

⁴⁷ *The Hindu*, December 17, 2002 at 1.

⁴⁸ Section 3 of The Tamil Nadu Prohibition of Forcible Conversion of Religion Act, 2002 provides for prohibiting the conversion or attempt to convert from one religion to another.

⁴⁹ Sri Lanka's Proposed Anti-conversion Law, <http://jmm.999.net.Au/articles/1489.htm>.

⁵⁰ Available at <http://www.religionnewsblog.com/> visited on Jan. 21 2011

Indian Converts (Regulation and Registration) Bill. Had the Bill been passed it would have required licensing those engaged in converting, registering converts, and a declaration of intent by prospective converts.⁵¹ In 1960 Prakash Vir Shastri of the Swantantra Party moved the Backward Communities (Religious Protection) Bill aimed at regulating conversions from backward communities to Christianity, Islam, Judaism, and Zoroastrianism.⁵² In 1978 O.P. Tyagi, a member of parliament from the Janata Party, introduced the Freedom of Religion Bill designed to prohibit conversions by force, inducement, or fraud in order to protect scheduled castes, tribes, minors, and women.⁵³ The meaning of the words "force, fraud and inducement has been stretched beyond their normal meaning and included any charitable act done in the perseverance or benefiting the members of any other religious community resulting in a change of religion."⁵⁴

Another important question was that whether re-conversion in Hinduism also comes within the ambit of inducement or not?⁵⁵ In 1981 two further Bills were introduced, both of which received scathing criticism. On September 4, B. V. Desai, member from Kaichur, introduced a Bill to prohibit all foreign missionaries from functioning in India on a religious basis. Clause 3 of the Bill aimed specifically at preaching: "Preaching of all religions and helping in conversion of the poor from one religion to another shall be banned."⁵⁶ Some members argued that mass conversions occur because the poor want to get away from the social disadvantages inherent in Hinduism, but that this does not necessarily result in material gain since the benefits of reservations are frequently lost.⁵⁷ It should be noted that the appeal to law and order made in objections to the Bill are similar to appeals made in support of the State Acts. In 1999, Gujarat Bill⁵⁸ was aimed at prohibiting conversion from one religion to another by use of force or

⁵¹ *Supra* note 6 at 184.

⁵² *Id* at 186.

⁵³ *Supra* note 39 at 283.

⁵⁴ *Id* at 286.

⁵⁵ *Id* at 286-287.

⁵⁶ *Lok Sabha Debates* Vol. XIX, 364 (September 4, 1981)

⁵⁷ *Id* at 367-368.

⁵⁸ The Gujrat Freedom of Religion Bill, 1999.

allurement. In 2000, Mr. G.M. Banatwala introduced a Bill⁵⁹ as a private member Bill on religious freedom which provided for widening of religious freedom which has been restrained by anti-conversion laws of Orissa Madhya Pradesh and Arunachal Pradesh. The Bill sought to repeal these local legislations which had placed undue restriction on the right to freely profess, practice and propagate religion. On December 11, 1981, Vasant Kumar Pandit, member from Rajgarh introduced a Bill asking for compulsory registration of conversions. Eduardo Faleiro compared the requirements of the Bill as analogous to Hitler's requirements.⁶⁰

It thus emerges from the above discussion that both in pre-independence as well as post-independence India, there have been several attempts to curb religious conversions. But still the conversion continues.⁶¹ Instead of framing an anti-conversion law, better conditions of life and equality is to be created in the Hindu society which will put an automatic ban on conversion. While the Constitution guarantees right to freedom of religion,⁶² but it also denies constitutional amenities to those 'Harijans' who abandon Hinduism and embrace Islam or Christianity. As soon as a SC/ST converts to another religion, he/she loses his/her SC/ST status and also the benefit of reservation. This in fact operates as a major deterrent for forced or lured conversion from Hinduism to other religions.

Judicial response to conversion laws

Rev. Stanislaus of Raipur, Madhya Pradesh had chosen to challenge the Dharma swatantrya Adhinayam through refusing to register conversions. In his arguments, before the High Court, he had challenged the Act on two points. The first was that Parliament, and not the Madhya Pradesh Legislature had the power to make the law.

⁵⁹ Titled as Freedom of Religion (Removal of Restriction) Bill, 2000.

⁶⁰ *Id*, Vol. XXII, December 11, 1981, pp. 402-404.

⁶¹ News reports reveal only 10,000 or so actual converts in the Delhi event of Nov. 4, 2001, though the claims of its organizers, the All India confederation of Scheduled caste and Scheduled Tribe Organisation, is that active government obstruction is the reason for not reaching the one million projected earlier in the year.

⁶² Articles 25 to 28 of the Constitution of India., 1950

The second was that the Act violates Article 25 of the Constitution.⁶³ The High Court upholding the Act responded as follows:

What is penalized is conversion by force, fraud or by allurement. The other element is that every person has the right to profess his own religion and to act according to it. Any other interference with that right of the person by resorting to conversion by force, fraud or allurement cannot, in our opinion, be said to contravene Article 25(b) of the Constitution of India as the Article guarantees religious freedom subject to public health.⁶⁴

The High Court of Orissa, in a challenge to the Orissa Freedom of Religion Act ruled in the opposite direction. It held that Article 25(1) guarantees the right to conversion, that the prohibition is covered by limitations placed on Article 25(1), that the definition of inducement is too wide to be covered by the limitations to Article 25(1), and that the State has no power to enact the legislation since the power to do so belongs to Parliament.⁶⁵ Both cases went to the Supreme Court and, since both Acts were similar, the Court commonly decided that the Acts fell within the purview of the State and the object of the Acts is to prohibit forcible conversion in order to avoid disturbances to public order.⁶⁶ In delivering the judgment of the court, Chief Justice Ray argued that Article 25(1) guarantees the right to propagate, but not to convert because to convert other impinge on the freedom of conscience also guaranteed by the Constitution. What the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets.⁶⁷ Individuals have the right to propagation "for the edification of others." One has the right to propagate, but not to propagate in order to convert another.⁶⁸

⁶³ *Rev. Stanislaus v. State of M.P.*, AIR1977 SC 909.

⁶⁴ *Id* at 910.

⁶⁵ *Ibid.*

⁶⁶ *Id* at 908.

⁶⁷ *Id* at 911.

⁶⁸ *Ibid.*

Conclusion

Anti conversion laws are constitutionally valid but its application is complex in nature. Problem arises due to different religious concepts. For example, if the concept of propagation for the purpose of conversion is in the very nature of religion than it is very difficult to define the thin boundary between edification and conversion. Most of the powers in anti conversion laws are given to the district magistrate who provides ample scope for political interference. Political parties take the issue according to vote bank politics and it is notable that religious conversion are not simple legal phenomenon like breach of contract but, it has a demographical factor involved. Apart from this there is an aspect of economy also. It is understandable that people from elite society are not converting, for whom daily bread and butter is not issue. But those people are converting who are living below poverty line. It is questionable that why religion is becoming an issue in tribal areas where development should be an issue instead of religion. However it is suggested that in spite of anti conversion laws it is more recommendable to go for developmental strategies including plans for social harmony and eliminating casteism from the society. Law is not a satisfactory instrument for creation of social harmony and Anti conversion laws are double edged weapons capable of being misused by political ideologies. In the words of Mahatma Gandhi, faith is not something to grasp, but a state to grow into. Purpose of anti conversion laws is to protect faith but it can be argued that which needs protection can not be faith.

Telecom Regulatory Authority of India Act, 1997

An Overview

Varun Chhachhar

Introduction

The Telecommunications Regulatory Authority of India (TRAI) established in 1997¹ is an independent regulator established by the Government of India to regulate the telecommunications business in India. The TRAI acts as an independent regulator of the business of telecommunications in the country. It issues huge numbers of directives, regulations, and orders that deal with various subjects such as interconnection, service quality and tariffs. The TRAI promotes efficiency and encourage competition in the telecommunication operation services in order to encourage growth in the telecommunication services, protect the consumer's interest, and lay down the period of time for providing long distance and local telecommunication circuits between different service providers. The powers and functions of TRAI is to make an inspection of the various equipments that are being used in the network, recommend the kind of equipments that the service providers must use, monitor the service quality, and also conduct survey periodically of the service that is being provided by the service providers. The TRAI has been set up by the government of India in order to ensure the growth of the telecommunications sector in the country.

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² Telecom Regulatory Authority of India Act, 1997.

National Telecom Policy

The National Telecom Policy of 1994 recognized the need for private investment and the association of the private sector to bridge the resource gap as also to meet the rapidly growing demand for telecommunication service. The policy also recognized that in order to implement the new telecom policy, suitable arrangements would have to be made to protect and promote the interests of consumers and ensure fair competition.² The New Telecom Policy, 1999 went further and provided a framework for increased competition. With the opening up of telecom sector, licenses for a number of services are granted and the sector has shown a tremendous growth in the recent past both in terms of number of operators and subscriber base. Along with the growth, there are, of course, problems for the stakeholders, including the consumers³.

Establishment of TRAI

It is, therefore, evident that, there is a need to establish an ombudsman to deal with the individual consumer and service provider grievances. One way of doing this is through establishment of an office of ombudsman for the telecom sector also, where consumers can of course, go to the consumer court if he is not satisfied by the redressal given by the Industry Ombudsman. Initially this situation was caused by the failure of Parliament to create an independent regulatory authority with power to set tariffs and decide as to who should be given a license. After several failed attempts the government was successful in enacting Telecom Regulatory Authority of India (TRAI) Act 1997 in March, 1997. It gave the TRAI the authority to set tariff and resolve disputes, consistent with the Indian Telegraph Act, 1885, the actual authority to issue or revoke licenses and to make policies remained with the Department of Telecommunication. By then license for private provision for basic and cellular services have already been issued. A common view in 1997 was that TRAI should have been established earlier, that is, prior to opening of the sector. This was for

² Available at <http://www.dot.gov.in/osp/Brochure/Brochure.htm>, last visited on 12.02.2011.

³ Available at http://www.trai.gov.in/TelecomPolicy_ntp99.asp, last visited on 12.02.2011.

several reasons. Firstly, winner of the license already issued for the cellular services through what has appeared to be a successful round of bids found that their winning bids were based on overestimated revenue assumptions. These same bidders realized that their bids have been more realistic if a regulatory agency has existed at that time, since the regulator would have been a source of scarce information on the potential of the Indian telecommunication market. Secondly, unlike China, where there is no separate regulator and it had been the prerogative of state owned agencies only. There is a greater need in the countries like India for a regulator to prepare groundwork for liberalization through initiatives that address interconnection, a level playing field for various service providers, provisions of universal service, tariff rebalancing, quality of service and other condition under which various services would be open to entry by the private sector. Third a need has also been felt for the forum at which disputes among other service could be settled. TRAI is fulfilling all these needs.

TRAI and Competition in Telecom Sector

The earliest step been taken by TRAI was to initiate tariff rebalancing for basic service and to issue regulation on interconnection. The groundwork was initiated also in a number of other areas such as evolving quality of service parameter, funding of universal service obligation, development of number policy, maintenance of register on interconnection and basic terms of license for different telecom services.

In this regard TRAI process established high standard of transparency in public policy, which will be emulated over time in other by regulatory bodies as well. Not surprisingly for a democracy the intervention of judiciary was sought in order to determine the limits of TRAI powers. The Delhi High Court ruled against TRAI on the grounds that the government to determine the powers of TRAI, and since the Licensor (Department of Telecommunication) was an arm of the government, it was the government's (DoT) to set limits on its own

power since DoT has sought the courts intervention, it followed that DoT should prevail in such a situation⁴.

However, the government remedied the situation substantially by passing an amendment to TRAI Act in 2000, that clarified the TRAI's overriding powers in the respect of interconnections and also provided for setting up a separate telecom dispute tribunal with power to decide the settlement between the licensor and licensees. The new TRAI became functional in March 2000 and has addressed number of issues, including opening up of long distance service to private operators and issuing license to additional cellular mobile and fixed service providers under the new Telecom Policy of the government in 1999. Most recently in the last quarter of 2000 following the due process of consultative process and open house discussions, TRAI provided its recommendation on public mobile radio trunking services (PMRTS) and very small aperture terminal (VSAT) services and issues relating to licenses thereof relating to Telecom policy of 1999⁵.

National Telecom Policy 1999

New Telecom Policy, 1999 laid down a clear roadmap for future reforms, contemplating the opening of all the segments of the telecom sector for private participation. It clearly recognized need for strengthening the regulatory regime as well as restructuring the departmental telecom services to that of a public sector corporation so as to separate the licensing and policy functions of the Government from that of being an operator. The key features were; Strengthening the Regulator; International and National long distance services opened to private operators; Private telecom operators licensed on a revenue sharing basis, plus a one-time entry fee. Resolution of problems of existing operators envisaged and direct interconnectivity and sharing of network with other telecom operators within the service area was permitted; Department of Telecommunication Services (DTS)

⁴ 1998 VAD Delhi 209, 74 (1998) DLT 282, 1998 (46) DRJ 557.

⁵ TRAI Recommendation on VSAT & PMRTS issued in 2002, available at www.trai.gov.in, last visited on 23.02.2011.

corporatized in 2000; spectrum Management made transparent and more efficient.

All the commitments made under NTP 99 have been fulfilled in letter and spirit even ahead of schedule and the reform process is now complete.

Role of TRAI as Regulator

The functions of Telecom Regulatory Authority of India (TRAI) are enumerated under the TRAI Act. It includes role of TRAI in licensing policy, ability to adjudicate on matters between the licensor and licensee. The Government is committed for a strong and independent regulator with comprehensive powers and clear authority to effectively perform its functions for rapid development and enhancement in the communication sector. For this the government proposes to implement that:-

The TRAI Act shall be suitably modified to cover adjudication of disputes between the Licensor and service provider, in addition to its existing powers to adjudicate disputes amongst service providers or between service provider and consumers. The government would mandatorily seek the recommendations of the TRAI on various issues of policy and matters related to development of the telecom industry. The recommendations of the TRAI shall not be binding on the government.

As at present, TRAI would continue to monitor and determine the appropriate tariff structure on an ongoing basis to equitably protect the interest of consumers and industry. However, on a progressive basis, with the opening up of the communications sector and the proposed policies on interconnection amongst various service providers, it is expected that the commercial arrangements will be determined based on bilateral arrangements. The TRAI would also ensure availability of interconnect on a non-discriminatory basis.

⁶ National Telecom Policy 1999, by Department of Telecommunication, Government of India.

Functions of TRAI under 1997 Act

The functions are described in s 11 of the Act which reads: Notwithstanding anything contained in the Indian Telegraph Act, 1885, the functions of the Authority shall be⁷:

- a) to Recommend the need and timing for introduction of new service provider;
- b) to recommend the terms and conditions of license to a service provider;
- c) to ensure technical compatibility and effective inter-connection between different service providers;
- d) to regulate arrangement amongst service providers for sharing their revenue derived from providing telecom services;
- e) to ensure compliance of terms and conditions of license;
- f) to recommend revocation of license for non-compliance of terms and conditions of license;
- g) to lay down and ensure the time period for providing local and long distance circuits of telecom services between different service providers;
- h) to facilitate competition and promote efficiency in the operation of telecom services so as to facilitate growth in such services;
- i) to protect the interest of the consumers of telecom service;
- j) to monitor the quality of service and conduct the periodical survey of services provided by the service providers;
- k) to inspect the equipment used in the network and recommend the type of equipment to be used by the service providers;
- l) to maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;
- m) to keep register maintained under clause (l) open for inspection to any member of public on payment of such fee and compliance of such other requirements as may be provided in the regulations;
- n) to settle disputes between service providers;
- o) to render advice to the Central Government in the matters relating to the development of telecom technology and any other matter relating to telecom industry in general;

⁷ S. 11, Telecom Regulatory Authority of India Act, 1997.

- p) to levy fees and other charges at such rates and in respect of such services as may be determined by regulations;
- q) to ensure effective compliance of universal service obligations;
- r) to perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act.

Settlement of Disputes

If a dispute arises, in respect of matters among service providers or between service providers and a group of consumers, such disputes shall be adjudicated by a bench constituted by the Chairperson and such bench shall consist of two members:⁸

Provided that if the members of the bench differ on any point or points they shall state the point or points on which they differ and refer the same to a third member for hearing on such point or points and such point or points shall be decided according to the opinion of that member.

The bench constituted under sub-section (1) shall exercise, on and from the appointed day all such jurisdiction, powers and authority as were exercisable immediately before that date by any civil court on any matter relating to-

- i) technical compatibility and inter-connections between service providers;
- ii) revenue sharing arrangements between different service providers;
- iii) quality of telecommunication services and interest of consumers;

Provided that nothing in this sub-section shall apply in respect of matters relating to-

- a) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969;

⁸ *Id.*, s. 14.

- b) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under section 9 of the Consumer Protection Act, 1986;
- c) dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian telegraph Act, 1885.

This shows how disputes can be settled by TRAI through the Act and its enabling provisions.

Conclusion

TRAI, in its first avatar, gave many independent decisions. However, TRAI has worked mostly as a recommendatory agency with TDSAT, an appellate tribunal that would sit in judgment on its decisions. In the event, the appellate tribunal has been of little use in bringing about speed or even technical competence. The large number of members in TRAI have failed to help matters. The TRAI appears to have served as useful tool to retiring bureaucrats. Their DoT background makes them play a subservient role. It is amazing that the telecommunications industry has made the progress that it has, despite vacillation and interference by the ministry. The government has gone back on many of its commitments; and TRAI has not intervened. Perhaps it should have expressed its inability to intervene and correct the situation. At least the publicly voiced dissent might have increased its credibility. TRAI was structured with authority and penal powers, and it was to be independent and effective instrumentality of the State. In its second incarnation, as an emasculated regulator, it has done its best despite internal difficulties and frequent government flip-flops. Let us hope for the best that TRAI lives upto its objectives and contributes to competition and is able to avoid disruptive policies so as to justify its burden on exchequer.

GM Foods, Health and Environmental Hazards Legal Regulation to Combat Them

Vijay Kr Himanshu*

Introduction

The application of modern biotechnology to the food production presents opportunity and challenges for the human health and development. Food produced through the modern biotechnology may consist of living and viable organism e.g., corns; ingredients derived from Genetically Modified Organism (hereinafter called GMO'S) e.g. oil from GM soybean; additives produced by GMO, such as, colours, vitamins etc. and the food containing ingredients produced through enzymes of GMO'S¹.

Recombinant gene technology enables plants, animals and micro organisms to be genetically modified with novel traits. The inclusion of novel trait potentially increases the agricultural productivity; improve quality and their nutritional value. However the novel trait in genetically modified organism carries potential risk to human health and environment. This has been exacerbated by the conflicting assessments and incomplete substantiation by scientific community, public organisation and the groups representing the consumer interest².

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¹ *Modern Food Biotechnology, Human Health and Development: an Evidence based Study*, Food and Safety Department, WHO, Geneva, 2005 available at http://www.who.int/foodsafety/publications/biotech/biotech_en.pdf

² *Id.* at 1

The recent controversy regarding Bt-Brinjal in India has brought to the centre stage the national and international concern for the safe use of GMO food and their safe release in the environment.

GM Food: Benefits and Risks

For hundreds of years, traditional breeding techniques have been used to add resistance to disease, enhance nutritional value and increase production yields of plants used for food. With the development of recombinant genetic technologies, genetic information can be transferred between different genuses through a process called gene stacking. Thus, a desirable trait from any source can be added to a plant used for food.

Benefits

The benefits of each new GM food are varied in their type and advantages. The year 2008 brought a new global awareness of food shortages. In the next fifty years, the planet's population will increase from six billion to nine billion. The environmental stress resulting into shortage of water and arable land is a matter of international concern. The plants and animals are being genetically engineered to meet these new population and environmental demands. A wide variety of plants and animals are being modified to provide greater nutritional value, enhance crop production, and provide pest resistance³.

Risks

The two major types of risks most often discussed in the literature are physical harm to humans and environmental harm. The risk of physical harm from the ingestion of GM food is related to the real possibility, that genetic modification will produce novel allergens and toxins with the potential to produce serious injury or death. The risks to the ecosystem appear to focus on three major areas. First, there is the risk that the insect population will adapt to the plants engineered to pest resistance. Second, there is the risk that GM plants with herbicide

³ Katharine A. Van Tassel, "Genetically Modified Plants used for food, Risk Assessment and Uncertainty Principles: Does the Transition from Ignorance to the Indeterminacy trigger the need for post-market surveillance", 15 *Boston University Journal of Science and Technology Law* 2(2009).

resistance may allow farmers to use more than normal amounts of herbicides to control weeds as there will be no damage to the GM plant. This could ultimately increase the amount of toxic chemicals introduced into the environment. Finally, there is a risk that containment efforts will continue to be ineffective as the numbers of incidents where GM crops have contaminated non-GM crops are increasing every year. In addition, there have been multiple incidents where GM plants and animals not approved for human consumption have inadvertently slipped into the human food supply⁴.

GMO Food and Environment: Regulation of Harmful Effect

The biotechnologies such as GMOs or other genetically engineered plants or animals may pose threat to environment. The TRIPS agreement contains several provisions which protect the environment from the deleterious effect. In this regard the provision of TRIPS⁵ may be stated as follow:

"members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the Public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with provisions of this agreement."⁶

The provision of the TRIPS⁷ enables member to exclude those inventions whose use would seriously prejudice the environment.

Living Modified Organism and the Environmental regime

In the field of the environmental conservation, earliest recognition of the deleterious effects of the invasive alien species in form of weed and the subsequent development in the environmental regime leading to evolution of broader application have been negotiated by both the International Union for Conservation of Nature (IUCN) and the CBD by way of the IUCN guiding principles. These instruments maintain

⁴ Katharine A. Van Tassel, *op.cit* at 2

⁵ Article 8.1 of the TRIPS.

⁶ *Id.*

⁷ Article 27.2 of the TRIPS.

three-tiered approach: prevention followed by eradication and control, with monitoring comprising an important component at each state. Additionally, both the IUCN and the CBD endorse the use of precautionary principle as an appropriate standard in administration of the alien and altered organisms⁸. The basis of the precautionary principle is set out in the preamble to the CBD 1992:

"Noting also that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such threat."⁹

It is a concept designed to deal with gaps in scientific knowledge with regard to the impacts of ill-protected environment, thereby ensure that unexpected risks are diminished. The later point is especially significant to genetically altered or alien organism where scientific knowledge is often incomplete and the effects of a wrong assessment may be catastrophic and irreversible. The CBD guidelines further mandated the use of ecosystem approach¹⁰. Although both the IUCN and CBD instruments provide some detail to the framework provisions of Article 8(j), neither instrument is binding. Nor do they directly tackle important points such as relationship of trade to the alien and genetically altered element and their management¹¹.

More recently, the Cartagena Protocol on Bio safety to the Convention on Biological Diversity (the Cartagena Protocol) was negotiated to deal with the genetically modified species referred to as living modified organism(LMO), with the focus on the protocol aimed at limiting the potential adverse effects of these organisms on the sustainable use of biological diversity

International Standard

The use of international standards is encouraged by the Agreement on Sanitary and Phytosanitary Measures (hereinafter called SPSA), with

⁸ *Ibid.*

⁹ Preamble to the Convention of Biological Diversity, 1992.

¹⁰ Principle 3 of the CBD guiding principles. In addition the IUCN Guidelines refer to the need to manage Alien system along the ecosystem lines in principles 4.2,6,5.1,6.3,10.8 and Appendix A dealing with environmental impact.

¹¹ *Ibid.*

recognised standards currently set by three international organisations: the Codex Alimentarius Commission that set standards for food safety, the IPPC that sets standards for plant health and OIE that sets standards is underscored by the fact that conformity with them amounts to a presumption in favour of compliance with both the SPSA and GATT, 1994. If national measure does not conform to the international standards, then they at least should be based on international standards¹². Moreover, if the national measures neither conform to nor are based on the international standards, they require scientific justification, where they result in a level of protection higher than that afforded by international standards where no standard exist the corollary is that no presumption of compliance with the SPSA can exist and nations that refuse entry to actual or potential alien element will need to undertake a risk assessment process.

Risk Assessment and Scientific Certainty

Risk assessment based on the scientific evidence represents a core motif of the SPSA, and has been discussed in two WTO decisions: *Australian-Salmon*¹³ and *Japan-Apples*¹⁴. Both cases involved situations where nations were seeking to deny entry to potentially destructive species – a situation entirely analogous to the alien or the altered organism. The cases have confirmed that there are three elements to proper risk assessment;

- o The assessment must identify the diseases whose entry, establishment or spread a member wants to prevent and also identify the potential biological and economic consequences associated with the entry, establishment or spread of the disease.
- o The assessment must evaluate the likelihood of entry, establishment or spread of the disease.

The assessment must evaluate the likelihood of the entry, establishment or spread of diseases according the SPS measures which might be applied.

¹² Art. 3.1, SPSA.

¹³ WT/DS18/9

¹⁴ WT/DS245/45/AB/R

A nation may find difficult to implement the preventive measures without proof of the invasive alien characteristics and if this proof were not available, it would render preventive quarantine measure invalid. This requirement to deal with known elements and base measures on the scientific certainty spills into the WTO'S interpretation of the precautionary principles.

Precautionary Principles

The provision of the SPSA¹⁵ relating to the precautionary principle states that members may adopt provisional measures, where scientific evidence is insufficient, although such measures must still be based on whatever information is available

GMO'S and Quarantine Regime: Indian Perspective

The guidelines in India for transgenic/GMO'S crops are:

The EPA Act 1986 and Rules of Ministry of Environment and Forests, 1989

These are rules and procedures for handling GMOs and hazardous organisms. The Genetic Engineering Approval Committee (GEAC) established by the Ministry acts as a statutory body for review and approval from environmental angle of activities involving large scale use of GMOs and their products in R&D, industrial production, environmental release and field application. The Ministries of Environment and Forests have issued a draft notification in July 2001 as an amendment regarding the permission and approval of foodstuffs. This notification restricts a person from importing, manufacture transport, store, distribute or sale of any food, feed, raw or processed or any ingredient of food, food additives or any food product that contains GM material, without the approval of the GEAC. A Biotechnology Coordination Committee under the GEAC functions as the legal and statutory body with judicial powers to inspect, investigate and take punitive action in case of violation of statutory

The Provision under EPA addresses the issue for action which includes review and control, monitoring of large scale use of GMOs in R&D and

¹⁵ Article 5.7

industrial production. It also addresses the issue of environmental release and experimental field trials of the GMO'S¹⁶.

Recombinant DNA Safety Guidelines, 1992 and Revised Guidelines in Transgenic Plants, 1998

The Review Committee on Genetic Manipulation (RCGM) under the Department of Biotechnology (DBT), Ministry of Science and Technology, monitors the safety related aspects of ongoing research projects involving GMOs. It brings out manuals of guidelines specifying procedures for regulatory process, activities involving GMOs in research, use and application from environmental safety angle.¹⁷

Conclusion

The discussion has surveyed the environmental hazards arising out of GMO'S and the legal regulations to protect them right from quarantine measures starting from the municipal level to the WTO, wherein the provisions of photo-sanitary measures and cross border protection were discussed. Centre to discussion was the evolution of risk assessment of environmental hazards arising out of GMO'S and choice between scientific certainty and precautionary principle majority of opinion favoured the later. Still miles have to be travelled before effective protection against the health hazards arising out of GMO's is to be taken.

¹⁶ EPA Act,1986 and Rules of 1989

¹⁷ Recombinant DNA Safety Guidelines 1992 and Revised Guidelines for Research in Transgenic Plants 1998.

The Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005 Issues and Concern

*Om Prakash**

Introduction

After the great divide in 1947 on communal line and beginning of the fresh spate of sectarian violence since 1970s a serious need was felt for such a piece of legislation which can ensure mechanism for prevention of riots and could take serious concern and methods to compensate the riots victim financially and psychologically. There were instances of serious lapse of political will to protect minority in the wake of communal conflagration, unholy nexus between state government and bureaucracy with communal elements against minorities; omission and commission and lack of impartial investigation. Despite having an average seven to eight hundred communal incidents and related violence and killings of hundreds of people every year there has been a serious gap in justice system to provide a piece of legislation for the affected individuals and groups.¹

Immediate reason, which made the Bill to come to fore by the government on the demand of the civil society was the Gujarat riot 2002, which shocked the humanity and maligned the image of India in the world for serious human rights violation. In 2004, United Progressive Alliance (UPA) in its Common Minimum Program (CMP) promised for a comprehensive legislation on the same and in 2005, they introduced a Bill in Rajya Sabha. The Bill was summarily rejected

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¹ Annual Reports of the Ministry of Home Affairs, Government of India (2001-09)

by the civil society due to a number of objections and ambiguities. The Bill was sent to the Parliamentary Standing Committee on Home Affairs for its review and recommendations, but the Committee, which submitted its final report in December 2006 made no significant changes. In the last months of 2009, Cabinet cleared the Bill with so called 59 amendments.

Issues and Concerns

Following are some of the issues and concern under the Bill which has generated debate between the Government and the civil society:

There are concerns regarding various *definitions under the Bill* such as Communal Violence, Sexual Violence, Victim's Rights, etc. The definition of communal violence given under the Bill is not comprehensive.² Instead of the word communal, 'sectarian' can be more vivid and comprehensive. The 'Schedule' only list out a number of IPC Sections and few Sections of other Acts.³ There are inherent limitations of the existing Acts.⁴ Communal violence need to be defined. The Bill should exclusively define crimes/ offences, and new rules of procedure and evidence to adequately and appropriately reflect the realities of the crimes experienced by victims and survivors of communal violence.

As far as role of police in various context under the Bill is concerned the Bill seeks to give more power to the police. The role of the police

² Section 19 of the Bill is not specific and includes any scheduled offence. Section 2(c) "Communal violence means any act of omission or commission which constitutes a scheduled offence and which is punishable under section 19.

³ The Sections 6(3) and 8(2) of the Explosives Act, 1884 listed in the schedule is obsolete. Such colonial legislations need a fresh look keeping the contemporary reality in consideration.

⁴ Section 6 of the Places of Worship (Special Provision) Act, 1991 has not defined an offence. It prohibits conversion of any place of worship and to provide for the maintenance of the religious character of any place of worship as it existed on the 15th day of August, 1947. Section 7 of the Religious Institutions (Prevention of Misuse) Act, 1988 Act reads, "Where any religious institution or manager thereof contravenes the provisions of section 3, section 4, section 5 or section 6, the manager and every person connected with such contravention shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to ten thousand rupees."

had been always questioned as per the various post-riot commission reports are concerned.⁵ Human Rights Watch report made the submission that on various instances police gun fire paved way for the violent mobs.⁶ Had police been fair and impartial, no communal riot can last for more than 24 hours. All those who have investigated communal riots know what role police plays in communal riots from remaining spectators to actively helping the rioters. In all major riots police have played openly partisan role.⁷ In some cases they have even led rioting mobs. Those governments which have intended to control communal violence controlled the same within 24 hours.⁸

Chapter II of the Bill envisages the declaration of certain areas as *communally disturbed areas*, and gives greater power to the state in these areas, runs entirely counter to the purpose of the proposed law. This will give the government the opportunity to use the draconian Armed Forces Special Powers Act (AFSPA). The government's argument is that this provision has nothing to do with the Disturbed Areas Act, which allows the use of the AFSPA.⁹ The phrase "disturbed areas"

⁵ Various Commissions of Enquiry including the Justice Ranganath Mishra Commission (Delhi riots), the Justice Raghuvir Dayal Commission (Ahmednagar riots), the Justice Jagmohan Reddy Commission (Ahmedabad riots), the Justice D.P. Madan Commission (Bhiwandi riots), the Justice Joseph Vithayathil Commission (Tellichery riots), the Justice J. Narain, S.K. Ghosh and S.Q. Rizvi Commission (Jamshedpur riots), the Justice R.C.P. Sinha and S.S. Hasan Commission (Bhagalpore riots), and the Justice Srikrishna Commission (Bombay riots) has noted such lapses. National Human Rights Commission Report 2002 on Gujarat riot underlines the fact that FIRs in various instances were distorted or poorly recorded. Several political personalities were seeking to influence the working of police by their presence in various police stations.

⁶ *Human Rights Watch Report on Gujarat Violence* (2002).

⁷ *Justice Madon Report on Bhiwandi Riots* (1974)

⁸ Best example can be cited for Lala Prasad Yadav's rule in Bihar. During more than ten years of his rule not a single major riots happened and in case of small incidents it was controlled within few hours time.

⁹ Under this Act, all security forces are given unrestricted and unaccounted power to carry out their operations, once an area is declared disturbed. Even a non-commissioned officer is granted the right to shoot to kill based on mere suspicion that it is necessary to do so in order to "maintain the public order." Section 3 defines "disturbed area" by stating how an area can be declared disturbed. It grants the power to declare an area disturbed to the Central Government and the Governor of the State, but does not describe the circumstances under which the authority would be justified in making such a declaration. Rather, the AFSPA only requires that such authority be "of the opinion that whole or parts of the area are in

contd...

having an unpleasant connotation need to be substituted with "protected areas." If an area is declared communally disturbed police will have powers to shoot anyone at its will. In Kashmir and in North Eastern states people have demanded repeal of Disturbed Areas Act. The victims, instead of getting relief, would feel totally helpless. Any law which gives police more powers without making it accountable is like placing grenade in the hand of a child.

Section 55 empowers the Central Government to give directions to the States to take immediate measures to curb communal violence. If such directions are not followed, the Central Government may declare any area within the State as a 'communally disturbed area' by a notification. It may also deploy Armed forces on a request from State Government. But the Bill is ambiguous on what would be done if the State Government does not request the Central Government to deploy the Armed forces or opposes such deployment in the State. No immediate relief is provided in these situations. There would be considerable lapse of time in the issuing of directions by the Central Government to the State, which would affect damage control adversely.

The Special courts may be established or abolished by the states in any communally disturbed area. The states have wide jurisdiction in this regard. It may prove detrimental to national interest as happened in Gujarat riots and Bhagalpur Case. To avoid such situations, these courts should be made subservient to National Human Rights Commission (NHRC). NHRC may instruct these courts to deliver decision on limited time and should also ensure that the public prosecutor to be appointed must not belong to the state in which communal violence has taken place.

The lack of an accountability clause in the Bill to make administration, police or politicians accountable for their failure to control communal violence is another serious lapse. Human rights activists have always

a dangerous or disturbed condition such that the use of the Armed Forces in aid of civil powers is necessary." The vagueness of this definition was challenged in *Indrajit Barua v. State of Assam*, AIR1981Gau 6. The court decided that the lack of precision to the definition of a disturbed area was not an issue because the government and people of India understand its meaning.

maintained that present laws, if enforced sincerely, can very well take care of any situation. After all the Left Front Government in West Bengal and the Rastriya Janta Dal (RJD) in Bihar successfully prevented and controlled communal riots. Command/ superior responsibility implies that persons in positions of official power (civil or military) or senior/high officials of non-state structures and organizations, by reason of their position, have effective control and knowledge or ought to have knowledge of the acts or omissions of their subordinates that causes the violence. This doctrine must be incorporated into the Bill. A good faith clause under sec. 57 has no place in a law that seeks to prevent and control communal violence.

The district administration's acts of omission, possibly because of political pressure also lead to prolonged violence. There has to be "common and collective responsibility," that those in charge of law and order must be held accountable and punished, if they fail. The district magistrate and the chief secretary may be held accountable. The political leadership should also be punished since bureaucracy takes command from them. Forms of punishment may be - disqualification from public office, debarring from professional associations or running from public office. If the Special Court observes that the concerned authorities could have prevented such situation by taking an advance action, they should be held responsible. If media is found irresponsible or misreporting a fine must be imposed on the news agency. Public recognition must be given to people who help in the relief measures.

No standard and objective method has been laid down for working out reparations and relief measures. It all depends on the whims of chief minister. Narendra Modi Government offered ridiculous amounts of ₹500/- and ₹300/- for houses completely damaged and defying public opinion closed down relief camps much before any concrete measures to rehabilitate the victims were made. Thanks to the private agencies that these camps could be run for a longer period. The Bill must include the concept of reparations as an inviolable, legally enforceable right of the victim-survivor, and according to objective norms and scales that are binding on all governments. The law must specify criteria for identifying who is a victim/survivor and standards which

will be applicable to all victims and survivors of communal violence, and not leave it to discretion at the state level.

"The prior sanction clause" under section 17(2) in the Bill is controversial. The Bill requires sanction from the State government in order to initiate prosecution against any officer for acts of omission or commission. This defeats the purpose of the proposed law and perpetuates impunity. Instead of the requirement of prior sanction, this should be a matter for judicial determination at the commencement of the trial.

The Bill must recognize comprehensive rights of victims and survivors. They must be provided a right to information of the proceeding including copies of FIRs and other legal documents, right to participate and be heard at all stages of the trial, right to legal representation of their choice at state costs and right to appeal in the event the state does not do it on their behalf. Victims need to be empowered. The inclusion of sexual crimes—like rape, forced pregnancy and enforced sterilisation—in the Bill is necessary. Since such acts were committed with the intent of intimidating, humiliating and degrading the dignity of the victim, such offences should be clearly defined. Further, the Bill must recognise the comprehensive rights of victims and survivors. As Asghar Ali Engineer put it, "Relief is not charity. It is the right of the victim."

Although the punishment for offences related to communal violence has been enhanced under section 19 offences are restricted to penal statutes only. It doesn't include provisions related to sexual violence, social and economic boycott, segregation, discrimination and communal writing in textbooks. Moreover the fines enumerated in most of these acts are considerably low and even twice the amount may not serve the purpose. It must define these offences and punishments vividly.

It does provide compensation to the victims on the basis of the nature of the offence, the motive, the economic status of the offender and the claimant but there is no uniform scale of compensation for death, injury, rape and destruction of individual and religious properties during communal riots. The state holds no responsibility or liability in cases of destruction of religious properties. There is no provision

granting ex-gratia payments to the victims. The right of reparation must be clearly stated and must not be left on the discretion of state governments.

The Bill also states that Women police officers must be provided by state to record any information relating to the commission of a scheduled offence committed against women or children. However it is silent on sexual offences, which form a major portion of communal offences. It also contains no provisions related to compulsory inclusion of at least two women members in the state, national and district council

The Government's Draft Bill, section 45 suggests a Union Home Minister-headed 11-member National Council to oversee relief and the rehabilitation of victims. This has been rejected by civil society activists, which have, instead, proposed a Communal Harmony Justice and Reparation Commission (CHJRC), with national, State and district councils, and a mandate that goes beyond responsibility for relief, compensation and rehabilitation.

Public comments

The proposed Communal Violence (Prevention, Control & Rehabilitation of Victims) Bill has generated serious debate and controversy. A statement signed by Justice K K Usha, Justice Rajinder Sachar (retd), Justice Sardar Ali (retd.), Harsh Mander, Prof. Rooprekha Verma, Advocate Colin Gonzalves of Supreme Court of India and many others reads, "This Communal Violence Bill, 2009, if passed, will not only be weak, it will be dangerous. It will not only fail to secure justice for communal crimes, but will actually strengthen the shield of protection enjoyed by those who plan and sponsor these crimes. Further, it continues to perpetuate the silence around gender-based sexual crimes."¹⁰

In a press conference writer Irfan Engineer and lawyers Vaheeda Nainar and Saumya Uma sought amendments for better protection of victims as the Bill does not incorporate any of the suggestions of the various commissions formed after the riots and does not reflect

¹⁰ PUCL Bulletin, Vol. 30, No. 3 (March, 2010).

victim's concerns.¹¹ The Bill must ensure that the State governments and the Central government take measures to provide for the prevention and control of communal violence, which threatens the physical, social, economic, cultural, political and human security of the citizens.

Shabnam Hashmi, member of National Integration Council said, "The Bill is not acceptable in its present form as it is not going to help the victims of communal violence in any way." Advocate Vrinda Grover of Supreme Court of India also had the opinion that accountability part must be ensured.

Eminent jurists, legal experts, activists who worked with survivors, and prominent minority groups rejected the Bill and urged the Government to make serious changes in it. The Bill will now be redrafted by the National Advisory Council (NAC) sub-group headed by Farah Naqvi and Harsh Mandar along with senior legal luminaries in next few months' time.

Conclusion

It is, therefore, highly necessary to make drastic changes in the present Bill before it is discussed in the Parliament. Veteran social activist, Asghar Ali Engineer, who has investigated numerous cases of Communal Violence from Jabalpur to Gujarat said, "No preventive measures has been incorporated in this Bill." "This Bill is only going to aggravate the problem", he added. Social Activist Farha Naqvi reiterated, "The proposed Bill is not acceptable at all in its current form."

The District Magistrate and competent authority may take preventive measures. They can order to deposit, search, detain and seize of arms and ammunition in communally disturbed areas. They may even prohibit certain acts or even control the conduct of persons in such areas. A person may also be punished for being in possession of arms without license, assisting offenders, giving financial aid for the commission of certain offence or even for threatening witnesses. Even public servants can be punished if they act in a *malafide* manner.

¹¹ UNI (March 6, 2010).

NAC agreed that the current draft didn't fulfill the objectives of the Bill including the setting up of a national authority. The question of who in the bureaucratic or political chain should be held responsible and penalized for failure to maintain harmony has dogged the Bill for a while. Let us hope after the redrafting the Bill would be able to address the concern of the interested party and groups.

Protection of Childhood by the Prohibition of Child Marriage Act, 2006

Alok Sharma

Introduction

The Prohibition of Child Marriage Act, 2006¹ (PCMA) prohibiting solemnization of child marriages and for the connected matters came into force on 1st November 2007. It applies to all citizens of India without and beyond India: provided that nothing contained in this Act shall apply to the Renoncants of the Union territory of Pondicherry.² Child marriage is a child abuse and a violation of the human rights of the child. It has an entirely deleterious effect on the health and well-being of the child.

It is a denial of childhood and adolescence; it is a curtailment of personal freedom and opportunity to develop to a full sense of selfhood as well as a denial of psycho-social and emotional well being and it is a denial of reproductive health and education opportunities. The girl child is thus most affected and suffers irreparable damage to her physical, mental, psychological and emotional development.

Concept of Child Marriage

In India for the purpose of marriage the bride must be at least 18 years old and the bridegroom must be at least 21 years of age. Marriages below the specified ages are known as child marriages which used to lead to penal consequences under the Child Marriage Restraint Act, 1929. The said Act applied to all communities and prohibited child marriages. But the Act did not affect the validity of child marriage,

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¹ Passed in Rajya Sabha on 14th December, 2006 and in Lok Sabha on 19th December, 2006 and assented to by the President of India on 10th January, 2007.

² Section 1, PCMA.

which was governed by the personal law of the parties to marriage. The Act was a penal legislation and provided for punishment for the violation of the provisions of the Act.

Legal Validity of Child Marriage

Validity of Child Marriage under Hindu Law

Marriages and their legal requirements for Hindus are governed by the Hindu Marriage Act, 1955. The preamble of the Act says that it is an Act to amend and codify the law relating to marriages among Hindus. It is well settled law that old Hindu law, as it prevailed prior to the enactment of the Hindu Marriage Act is to continue in force except to the extent to which that law was altered by the provisions of the Hindu Marriage Act, 1955.³

Section 5 of the said Act lays down the conditions for a Hindu marriage.⁴ Section 5(iii) specifically provides for the marriageable age of bride and bridegroom. Section 11 of the said Act, lays down as to when marriages governed by the Act are to be considered void marriages.⁵ It is clear that, by virtue of Section 11, any marriage which is solemnized in contravention of any of the conditions specified in Section 5(i), (iv) and (v) is null and void and if a Court of competent

³ Section 4 of the Hindu Marriage Act, 1955.

⁴ Section 5. **Conditions for a Hindu marriage** – A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party-(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (c) has been subject to recurrent attacks of insanity.

(iii) the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other unless the custom or usage governing each of them permits of a marriage between the two;

⁵ Section 11. **Void Marriage**- Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any of the conditions specified in clauses (i), (iv) and (v) of Section 5.

jurisdiction is called upon to make a pronouncement, the court may, on an application presented by either party to the marriage, declare such a marriage to be null and void. Thus out of the five clauses of Section 5, it is only in connection with clauses (i), (iv) and (v) that the Legislature has declared that the contravention of any of them will render the marriage null and void. It is applicable only if the marriage solemnized after the commencement of the Hindu Marriage Act, 1955.

Section 12 of the Act is related to voidable marriages.⁶ It is important to note that there are certain points of distinction between Sections 11 and 12 that are as follows:

- (i) Section 11 applies only to marriages solemnized after the commencement of the Hindu Marriage Act, 1955: whereas Section 12(1) applies to any marriage whether solemnized before or after the commencement of the Act, and
- (ii) Whereas violation of the provisions of Clauses (i), (iv) and (v) of Section 5 renders the marriage null and void, violation of Clause (ii) of Section 5 mentioned in Section 12(1) renders the marriage voidable and not null and void and if the requirement of one or the other clauses of Section 12 are satisfied, the marriage may be annulled by a decree of nullity of a Court of competent jurisdiction.

It is thus clear that neither in Section 11 nor in Section 12 is there any provision for what is to happen if the condition regarding ages of the parties to the marriage, by Section 5(iii) is violated in any particular

⁶ Section 12. Voidable marriages- (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely-

- (a) that the marriage has not been consummated owing to the impotence of the respondent; or
- (b) that the marriage is in contravention of the conditions specified in clause (ii) of Section 5; or
- (c) that the consent of the petitioner or, where the consent of the guardian in marriage of the petitioner was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978), the consent of such petitioner was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent;
- (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

case that is a marriage is solemnized in violation of the provisions of Section 5(iii). The law is silent on non compliance of this clause.

It is true that the opening words of Section 5 would indicate that all the Clauses can be construed as laying down a condition precedent for solemnization of marriage. However, the Legislature has given an indication in Section 11 that it is only contravention of Section 5(i), (iv) and (v) that renders the marriage void *ab initio*, i.e., null and void and the Court may subsequently declare the marriage null and void by a decree of nullity if either party chooses to present a petition in that behalf. The Legislature has also indicated that a marriage solemnized in contravention of Section 5(ii) does not render the marriage null and void but renders it voidable and liable to be annulled by a decree of nullity. Thus the scheme of the Act is that it is not the violation of any of the five conditions in Section 5 that renders the marriage null and void or voidable. As far as Section 5(iii) is concerned the only indication that is to be found in the Hindu Marriage Act, 1955 is in Section 18⁷ which provides punishment for the contravention of certain conditions.⁸

This analysis of different provisions of the Hindu Marriage Act, 1955 clearly brings out the fact that the Legislature itself has made a distinction between contravention of one or the other Clauses of Section 5 and such contravention is to be visited with different consequences. In case of contravention of some clauses, the marriage is null and void and in cases of contravention of some other Clause, it becomes voidable but the Legislature, in terms, has not provided except by way of punishment in Section 18 for violation of Section 5(iii).⁹

Hence we can conclude that the marriage solemnized in contravention of Section 5(iii) would remain valid, enforceable and recognizable in Courts of Law.

⁷ Section 18(a): Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (iii) of Section 5 shall be punishable with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both.

⁸ *Pinninti venkataramana v. State of Andhra Pradesh*, AIR 1977 AP 43.

⁹ *Ibid.*

It may be pointed out that, under the Child Marriage Restraint Act, 1929 which was in force prior to the enactment of the Hindu Marriage Act, 1955 the legal position was that though the persons connected with the solemnization of the marriage in contravention of the provisions of the said Act were liable for punishment, the marriage itself was not rendered null and void or invalid as the validity of the marriage is a subject beyond the scope of the said Act.¹⁰

This Clause (iv) inserted in Section 13(2) clearly indicates the mind of the Legislature that the violation of Section 5(iii) is not to render the marriage either void or voidable; but in case the bride was below the age of fifteen years at the time of solemnization of marriage and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years, a decree for divorce can be obtained, whether the marriage was consummated or not. It may be pointed out that, by insertion of the said clause, the Legislature has given to Hindus an Option of Puberty what is known in Muslim Law as *Khyar-ul-bulugh*. The Legislature has not proceeded on the footing that the marriage between the spouses, when it is performed in violation of Section 5(iii), is void *ab initio*.

Validity of Child Marriage under PCMA

Now after the enforcement of the Act to prohibit the child marriages the earlier legal position has been changed completely. Under the Act every child marriage¹¹, whether solemnized before or after the commencement of it, shall be voidable at the option of the contracting party¹² by himself or herself who was a child¹³ at the time of the marriage¹⁴. If at the time of filing a petition, the petitioner is a minor¹⁵, the petition may be filed through his or her guardian or next friend

¹⁰ *Ibid.*

¹¹ Section 2(b) – “child marriage” means a marriage to which either of the contracting parties is a child.

¹² Section 2(c) – “contracting party”, in relation to a marriage, means either of the parties whose marriage is or about to be thereby solemnized.

¹³ Section 2(a) – “child” means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age.

¹⁴ Section 3(1), PCMA

¹⁵ Section 2(f) of PCMA says, “minor” means a person who, under the provisions of the Majority Act, 1875 is to be deemed not to have attained his majority.

along with the Child Marriage Prohibition Officer.¹⁶ The petition may be filed under Section 3 at any time but before the child filing the petition completes two years of attaining majority.¹⁷ While granting a decree of nullity under Section 3, the District Court shall make an order directing both the parties to the marriage and their parents or guardians to return to the other party, his or her parents or guardians, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments or other gifts and money provided that no order under Section 3 shall be passed unless the concerned parties have been given notices to appear before the District Court and show cause why such order should not be passed.¹⁸

Another important aspect of the Act is that while granting a decree under Section 3, the District Court may also make an interim or final order directing the male contracting party to the child marriage, and in case the male contracting party to such marriage is a minor, his parent or guardian to pay maintenance to the female contracting party to the marriage until her remarriage.¹⁹ The quantum of maintenance payable shall be determined by the District Court having regards to the needs of the child, the lifestyle enjoyed by such child during her marriage and the means of income of the paying party.²⁰ The amount of maintenance may be directed to be paid monthly or in lump sum.²¹ Further in case the party making the petition under Section 3 is the female contracting party, the District Court may also make a suitable order as to her residence until her remarriage.²²

It is important to note that the Act also takes care of the children born of the child marriage. It says that every child begotten or conceived of such marriage before the decree of nullity under Section 3 is made, whether born before or after the commencement of the Act, shall be

¹⁶ Section 3(2), PCMA

¹⁷ Section 3(3), PCMA

¹⁸ Section 3(4), PCMA.

¹⁹ Section 4(1), PCMA.

²⁰ Section 4(2), PCMA.

²¹ Section 4(3), PCMA.

²² Section 4 (4), PCMA.

deemed to be a legitimate child for all purposes.²³ It further provides that where there are children born of the child marriage, the District Court shall make an appropriate order for the custody of such children.²⁴ While making an order for the custody of a child under Section 5, the welfare and the best interests of the child shall be the paramount consideration to be given by the District Court.²⁵ An order for custody of a child may also include appropriate directions for giving to the other party access to the child in such a manner as may best serve the interests of the child, and such other orders can also be passed by the District Court which are in the interests of the child.²⁶ The District Court may also make an appropriate order for providing maintenance to the child by a party to the marriage or their parents or guardians.²⁷

The District Court shall have the power to add to, modify or revoke any order made under Section 4 or Section 5 if there is any change in the circumstances at any time during the pendency of the petition and even after the disposal of the petition.²⁸

Punishments

The Act provides various punishments for the persons related to the solemnization of child marriage in different capacities. It provides punishment for male adult marrying a child²⁹, punishment for solemnizing a child marriage³⁰ and punishment for promoting or permitting solemnization of child marriages.³¹ Section 9 provides that whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both. Section 10 provides that whoever performs, conducts, directs or abets any child marriage shall be punishable with

²³ Section 6, PCMA.

²⁴ Section 5(1), PCMA.

²⁵ Section 5(2), PCMA.

²⁶ Section 5(3), PCMA.

²⁷ Section 5(4), PCMA.

²⁸ Section 7, PCMA.

²⁹ Section 9, PCMA.

³⁰ Section 10, PCMA.

³¹ Section 11, PCMA.

rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage. Section 11 provides that where a child contracts a child marriage, any person having the charge of the child, whether as parent or guardian or any other person or in any other capacity, lawful or unlawful, including any member of an organization or association of persons who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees provided that no woman shall be punishable with imprisonment. Section 11 also provides for the presumption, in respect of the person having charge of such minor child, to negligently fail to prevent the marriage from being solemnized unless contrary is proved.

The offences under the Act shall be cognizable and non-bailable.³² Only the Courts of Metropolitan Magistrate or a Judicial Magistrate of the first class are competent to take cognizance of the offence under the Act.³³

Injunction to restrain Child Marriage

Under Section 13 of the Act the Courts have, in the interest of the child, power to issue an injunction to prohibit a child marriage from being performed. Such an injunction may be issued if the Court is satisfied, on an application of the Child Marriage Prohibition Officer or on receipt of information through a complaint or otherwise from any person that a child marriage in contravention of this Act has been arranged or is about to be solemnized.³⁴ The Court may also take *suo motu* cognizance on the basis of any reliable report or information.³⁵ But no such injunction will be issued against any person unless such person has been afforded an opportunity to show cause against the issue of injunction provided that in the case of any urgency, the Court

³² Section 15, PCMA.

³³ Section 13, PCMA.

³⁴ Section 13(1), PCMA.

³⁵ Section 13(3), PCMA.

shall have the power to issue an interim injunction without giving any notice under Section 13.³⁶

An injunction may be confirmed or vacated after giving notice and hearing the party against whom the injunction was issued.³⁷ The Court also has the power on its own motion or on the application of any person aggrieved to rescind or alter any order passed by it.³⁸ Disobedience to an injunction entails imprisonment of either description for a term which may extend to two years or with fine which may extend to one lakh rupees or with both provided that no woman shall be punishable with imprisonment.³⁹

Null and Void Marriage

The Act provides certain circumstances under which the marriage of a minor child is null and void. Section 12 provides that where a child, being a minor is taken or enticed out of the keeping of the lawful guardian or by force compelled or by any deceitful means induced to go from any place or is sold for the purpose of the marriage and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void. Further Section 14 provides that any child marriage solemnized in contravention of an injunction order issued under Section 13, whether interim or final, shall be void *ab initio*.

Consequent changes in Other Laws

The Act has modified some of the existing laws. In the Hindu Marriage Act, 1955 in Section 18, for *Clause (a)*, the following clause shall be substituted, namely:-

- (a) in the case of contravention of the condition specified in Section 5(iii), with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both.⁴⁰

Another effect of the Act is the repeal of the Child Marriage Restraint Act, 1929 but all the cases pending or continued under the said Act at

³⁶ Section 13(6), PCMA.

³⁷ Section 13(7), PCMA.

³⁸ Section 13(8), PCMA.

³⁹ Section 13(10), PCMA.

⁴⁰ Section 20, PCMA.

the commencement of PCMA shall be continued and disposed of in accordance with the provisions of the repealed Act, as if PCMA had not been notified.⁴¹

205th Report of the Law Commission of India

The Supreme Court has requested the assistance of the Law Commission on certain legal issues relating to child marriage, and the ages at which a person is defined as a child in different laws. The Supreme Court has also noted that different laws specify different ages while defining a child and there are various contradictions between these legislations.

In the meantime, however, PCMA was enforced on 1st November 2007 giving certain important rights to victims of child marriage and children born from these marriages. The Commission took these changes into account and further examined whether the new Act addressed all the concerns relating to the child abuse, health and human rights which are an inevitable consequences of child marriage. Thereafter, the Commission forwarded its suggestions to the Supreme Court in December 2007. Later on in February 2008 the 18th Law Commission of India submitted its 205th Report regarding the Proposal to Amend PCMA and Other Allied Laws. In the said, Report after discussing the concerned issues in detail the Law Commission has made certain recommendations.⁴² The following are the relevant recommendations for our present purpose:

- (i) That child marriage below a certain age, i.e. 16 years of age be made void. However, all the Sections relating to maintenance in Section 4 of the PCMA 2006 regarding maintenance to the female party to the marriage till her remarriage and the provisions relating to child custody and legitimacy of children in Sections 5 and 6 of the PCMA 2006 be made applicable to cases of void marriage also.
- (ii) All marriages between 16 and 18 should be made voidable at the option of either party. The Sections relating to maintenance, child

⁴¹ Section 21, PCMA.

⁴² 205th Report of the Law Commission of India, Pp. 43-45.

custody and legitimacy in Sections 4, 5 and 6 should be applicable to voidable marriages as they are at present.

(iii) Consequently Sections 3(1) and 3(3) of the PCMA 2006 should be amended to incorporate the changes outlined in paras (i) and (ii) above.⁴³ Further Section 3(3) should be amended to read as under:-

“(3) The petition under Sections 3(1)(ii) may be filed at any time till the person contracting a child marriage attains 20 years of age.”

(iv) The age of marriage for both boys and girls should be 18 years as there is no scientific reason why this should be different. Consequently the present Section 2(a) of the PCMA should be deleted and replaced by the following Section 2(a):-

“(a) ‘Child’ means a person who has not completed 18 years of age.”

Conclusion

However, the Parliament has passed this Act to prohibit the child marriages but the question arises whether the new law on child marriage takes into account and seeks to redress the disastrous effects of child marriage in a holistic manner. We see that there are many welcome changes in the Act but there are certain important criticisms that have been leveled against the said Act.

It does not invalidate a marriage even before a certain age but only makes it voidable at the option of the spouses and not void *ab initio*. Barring few circumstances it resembles with the concept of option of puberty of Muslim Law with a difference that here the relevant age to rectify or repudiate the child marriage is the age of majority. There is no provision in law to stop a child bride from living with her husband and from being sexually abused apart from other forms of abuse. The Act, in fact lays the foundation for such an abuse by not invalidating

⁴³ “3(1)(i) Any marriage of a child below 16 years of age solemnized after the commencement of this Act will be null and void and may, on a petition be presented by either party thereto against the other party be so declared by a decree of nullity.

(ii) Every marriage of a child between the ages of 16 and 18, whether solemnized before or after the commencement of this Act, shall be voidable at the option of the contacting party who was a child at the time of marriage.”

any child marriage. The adverse health consequences and the violence faced by the child bride below a certain age are factors which outweigh certain social considerations in not invalidating the marriage.

It is further pointed out that it stipulates different minimum ages for a girl and a boy to get married. Though a boy can opt out of the marriage till the age of 23 years, a girl can only do so till the age of 20 years (2 years after reaching the age of majority). It is discriminatory, biased and based on patriarchal notions of marriage.

Despite this fact we can say that at least the Parliament has given the children the opportunity to take decision on their future as far as their marriage is concerned. This decision is very important as it affects the whole life of a person concerned.

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I, Prof Ashwani Kumar Bansal, Chief Editor, hereby declare that the particulars given above are true to the best of my knowledge and belief.

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Sd/-
Ashwani Kumar Bansal