

LAW JOURNAL

The legal Voice of India



Volume - 4 | Year - 2015-16

ISSN No. 22778454

An Initiative By
INDORE INSTITUTE OF LAW

www.indoreinstituteoflaw.org

LAW JOURNAL

The legal Voice of India



Volume - 4 | Year - 2015-16

An Initiative By
INDORE INSTITUTE OF LAW

DISCLAMER

The author (s) of articles of The Legal Voice of India are solely responsible for the contents therein. The Editors hold no liability or representation by the process of publication. The facts, opinions, judgments, comments, views and other related contents are solely of the author. the editors, Publishers, Printers shall not be held liable for any violation of third party rights.

FOREWORD

It gives me great pleasure to introduce this year's issue of the Indore Institute of Law's annual journal, "*The Legal Voice of India*". Since its inception, the journal has grown from strength to strength with each passing day and has seen an increase in submissions even from academics and graduate students not affiliated with the Institute, thus showcasing the tremendous popularity and excellent reputation it has achieved so far.

The aim of the journal should be to continue to build a platform in order to encourage and facilitate the sharing of ideas and opinions on as wide a range of topics as possible. This issue contains a compilation of student-authored articles over a diverse range of legal topics, as well as by noted academics from across the country. The authors have extensively researched their topics, and the result is a comprehensive and thought provoking edition which is sure to stimulate further discussion over these subjects.

Juris Legal has always encouraged and emphasized the importance of developing critical legal thinking. This has helped graduate students in fostering a sense of professional responsibility towards the community. The ability to objectively approach legal issues, engage in reasoned analysis and find appropriate solutions is the cornerstone of developmental education as well as promotes the ends of justice.

The entire editorial team deserves huge credit for bringing together such a diverse range of viewpoints and for continually encouraging students as well as academics to engage in further discourse over such a wide variety of issues. By doing so, students are schooled not only in the knowledge of legal principles, but are also provided with a firm foundation which enables them to make informed and independent decisions in whatever roles they choose after graduating, whether in the legal fraternity or elsewhere.

I am confident that "*The Legal Voice of India*" will receive widespread support from legal scholars, academics and professionals, and that contributions will multiply in the years to come. My sincere hope is that the journal continues to be a source of new ideas and inspirations in the best academic traditions, thereby serving as an invaluable reference in the field of legal literature.

I extend my best wishes to everyone involved in producing this journal, and wish you good luck for the future.



Rupin Pawha

LETTER OF APPRECIATION

My compliments, on the publication of "*Legal Voice of India*", a law journal published by Indore Institute of Law, a premier law college in the State with affiliation to DAVV. I read all the articles in the Journal and was so impressed that I wanted to thank the Editorial team personally for accumulation of all the thought-provoking, yet practical, insights and bringing them in form of a compendium. I have read articles on similar subjects, but none were as clear or as relevant as in the Journal.

I look forward to reading your next Journal. Best wishes in your work to improve the Legal acumen of the masses. It takes special dedication and perseverance to get to publish such a Journal on legal issues which are pertinent to current scenarios.

Congratulations to the Editorial Board and Associate Editors for such a superb Journal. You all are a good example of how commitment and hard work pays off. May your future efforts be equally successful and rewarding.

A handwritten signature in cursive script, appearing to read 'Anas', with a horizontal line underneath it.

Mohammed Anas Riyaz

Message from the Patron's Desk

It gives me immense pleasure to pen a few words as initial remarks to the Law journal "*The Legal Voice of India*". A journal is a link between the past and the future. This platform shall also boost the initiative and aspiration of law scholars to contribute in the field of law. The scholarly response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of ever changing, social, economical and technical scenario. I congratulate the team of LVI for introducing its 4th issue successfully.

Mr. Akshay Kanti Bam

Chairman

Indore Institute of Law

Message from the Principal's Desk

The Legal Voice of India is a peer reviewed, yearly, law journal which publishes review articles, research papers and case notes. This journal is dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. The valuable contributions of the Authors is worth noting. I am extremely proud to witness the journal continuing its legacy for the 4th time in a row. It is a bridge between generations and across cultures. With a view to enumerating its many benefits, I look forward to more enriched saga of *"The Legal Voice of India."*

With best wishes to the Editorial Team

Dr. Vinod Patidar

Principal

Indore Institute of Law

Message from the Editor-in-Chief's Desk

One of the key objectives of research should be its usability and application. This journal sparks a debate on the research focused on law in context of emerging issues. It is a force for creating and sharing wisdom and knowledge.

This platform shall also ignite the initiative and aspiration of law scholars to contribute in the field of law. I would like to thank Indore Institute of Law and the entire editorial team of The Legal Voice of India as well as reviewers who have helped in making this journal a huge success. Wish you all the very best of luck for future endeavours.

Dr. Manpreet Kaur Rajpal

*Head of Department
Indore Institute of Law*

Message from the Editorial Desk

Over the years, research has unfolded as an emergent criteria for professionals all over the world. In the midst of cut throat competition, it becomes an extremely challenging task to stand up to the ever growing expectations of the legal fraternity. We, the editors of the journal, would like to take this opportunity to thank the management of Indore Institute of Law for believing in us and trusting us to make this venture, “*The Legal Voice of India*”, a grand success.

We also take this platform to acknowledge the hard work and relentless pursuit put in by our extravagant team of Associate Editors, without whom the journal would not have been possible. Our special thanks to Lokesh Malik, Chief Associate Editor, whose uphill struggle has brought an ember to the journal. We would also like to thank our Associate Editors, Himanshi Thakur, Adya Aishwary, Shikha Thakkar, Dharmanshu Jain and Tushar Kumrawat for their incessant effort through all the rough and even of the journal. Also, we would like to extend a special word of gratitude to all the revered dignitaries for their kind support and cooperation.

Dr. Pooja Dasgupta

Ms. Khushbu Dubey

Ms. Mahasweta Sengupta

Editors,

“The Legal Voice of India”

Editorial Board

Patron:

Mr. Akshay Kanti Bam

Editor in Chief:

Dr. Manpreet Kaur Rajpal

Editors:

Dr. Pooja Dasgupta

Ms. Khushbu Dubey

Ms. Mahasweta Sengupta

Chief Associate Editor:

Lokesh Malik

Associate Editors:

Himanshi Thakur

Adya Aishwary

Shikha Thakkar

Dharmanshu Singh

Tushar Kumrawat

TABLE OF CONTENT

Title	Page No.
The International Patent System <i>Dr. Vinod Patidar, Principal, Indore Institute of Law</i>	01
Baby Farming: Gainsay to Indian Dogmas and Social Norms <i>Dr. Manpreet Kaur Rajpal, Associate Professor and Head of Department, Indore Institute of Law</i>	07
An overview of Womens' Rights in a Secular / Religious Nigeria State: The Human Rights Perspective <i>Mahmud Adebayo, Senior Lecturer, Faculty of Law, University of Ilorin, Nigeria</i> <i>Abdulrazaq Daibu, LL.B, B.L, LL.M, Lecturer, University of Ilorin</i>	28
Feminism in Crime <i>Sonal Dass, Asst. Professor, Hidayatullah National Law University, Raipur</i>	51
A Glimpse of Venality in India <i>Dr. Pooja Dasgupta & Ms. Khushbu Dubey, Asst. Professor, Indore Institute of Law</i>	61
Ecology and Air Pollution as a part of Article 21 <i>Dr. Varsha Upadhyay & Mr. Vivek Wilson, Asst. Professor, Indore Institute of Law</i>	66
Is Guarantee for Past Debit Valid-An Analysis of the Conflict Between SECTION 127 of The Indian Contract Act, 1872 And Its Third Illustration <i>Nitya Jain, NLU, Jodhpur</i>	71
Right to Education for Transgender Children: A route towards unprejudiced Human Rights <i>Navshesh Kshetri, GNLU, Gandhinagar</i>	79
Tax Incentive and their Role in Research and Development <i>Nivruthi Tumu Reddy, Jindal Global University</i>	91
Backwardness in India with Reference to Madhya Pradesh <i>Pranay Joshi, Institute of Law, Nirma University</i>	104

Title	Page No.
Transcending from Positivism towards Natural Justice: Journey of Indian Judiciary <i>Aman Aditya and Shreya Sinha, Symbiosis Law School, Noida</i>	119
Preservation of Women's Rights under Penal Law: In this Era of Globalisation, do women stand at Par? <i>Kajal Verma, KIIT University, School of Law, Bhubaneswar</i>	128
Women Empowerment in Post Independent India with Special Emphasis through case laws <i>Bandita Sengupta, Research Scholar, Dept. of Law, Tripura University</i>	138
Sedition Charges Constantly Evoked but Hardly Stick <i>Pearl Maheshwari, Indore Institute of Law</i>	144
Res Judicata: History and Shaping of the Concept through Foreign Judgments <i>Samarth Chaddha and Himanshu Chauhan, Jindal Global Law School</i>	155

THE INTERNATIONAL PATENT SYSTEM

- Dr. Vinod Patidar

Principal, Indore Institute of Law

Abstract

The international patent system evolved and developed to govern relations between states and deal with the difficulties arising from the territoriality of patents. The system includes international legal instruments as well as organizations entrusted with the administration of these instruments. The international patent legal regime consists of multilateral agreements, international organizations, regional conventions, treaties or protocols as well as bilateral agreements. The international patent institutional or administrative framework mainly involves organizations established to administer the multilateral patent agreements. This includes the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO) and Regional patent organizations such as the European Patent Office (EPO), the African Intellectual Property Organization (OAPI) and the African Industrial Property Organization (ARIPO). The purpose of this paper is not to deal with each of the constituent elements of the international patent system but to examine existing major multilateral patent agreements concluded at the international level that may have an impact on the developing countries.

Rationale and Nature of The International Patent System

The reasons behind the conclusion of international patent agreements lie in the nature of inventions in the sense that inventions protected by patents do not know borders. However, patent protection is territorial in nature. As a result, various difficulties arise that may defeat the purpose of patents and affect the relation between states. If an invention is not protected under national law then it will constitute a public domain and can be freely used in the country concerned. Seeking patent protection in a foreign country could be difficult for a number of reasons such as possible discriminatory treatment, the variation between national laws, the problem of cost, time and distance relating to the filing and processing of patent applications etc. In order to avoid unwanted results that may arise in such circumstances and to mitigate the difficulties in securing a patent in a foreign country, international agreements were concluded.

The multilateral treaties concluded in the field of patents and are effective to-date include the 1883 Paris Convention on Industrial Property; the 1970 Patent Cooperation Treaty (PCT); the 1971 Strasbourg Agreement concerning International Patent Classification; the 1979 Budapest Treaty on the Deposit of Micro-organism and the 1994 Agreement on Trade Related Aspects of Intellectual Property (TRIPS). These international undertakings may be classified as substantive and procedural. International agreements that deal with substantive issues include the Paris Industrial Property Convention and the TRIPS Agreement. The PCT and the Strasbourg Agreement intend to harmonize formal standards and procedures.

In spite of the fact that the above agreements try to harmonize national patent systems by setting standards and common requirements, patents are still governed by national laws and where appropriate by regional agreements. There is no international patent law that provides for a world patent. The international patent agreements are not meant to replace national patent regimes, but facilitate the protection of the interests of nationals or residents of a member state in another member state.

The international agreements that deal with substantive issues such as the Paris Convention and the TRIPS Agreement merely set the minimum requirements. Countries that desire to go beyond the minimum standards are free to do so, as far as the step would not defeat the underlying objectives of the international agreements. There are, thus, variations among national laws. That is why the effort to harmonize national laws is going on. The discussion in this Chapter is limited to the existing international patent legal regimes. Furthermore, it is limited to briefly explaining the main agreements that deal with procedural and substantive issues. As a result, the Strasbourg Agreement and the Budapest Treaty are not considered for the purpose of this paper.

Major Multilateral Patent Agreements

The Paris Industrial Property Convention

The Paris Convention, that was concluded in 1883 and amended in 1900, 1911, 1925, 1934, 1956, 1967 and 1993, is considered as the first multilateral agreement in the field of patents. From historical perspective, the 19th century, among other things, was characterized by the unprecedented expansion of trade across national boundaries. Thus, this new development required close international cooperation among nations with respect to various economic matters including patents. To be sure, the patent system is one of the factors that tie the economic and political sub-systems of nations to each other. Moreover, it was during this period than ever before that the centrality of

patent to inventive activities was recognized. At the same time two developments took place, which tend to oppose each other (Davis, 1989). On the one hand, there was a growing demand, particularly from inventors and manufacturers for strong patent protection. On the other hand, advocates of free trade, particularly trade associations came on the scene to challenge the patent system.

By 1873, a propitious condition was created in favour of patent proponents. The international exhibition held in Austria in 1873, was considered as an important landmark towards the establishment of an international mechanism for the protection of intellectual property. It was the reluctance of the manufacturers, because of the fear that their ideas would be stolen, to participate in the Vienna Exhibition that eventually led to the conclusion of the Paris Convention on the protection of industrial property in 1883.

The Convention could be described as the institutionalization of the patent system at the international level for the first time and signaled a more global concern for the protection of the intangible assets. Although, only a few countries signed the Convention, it laid down the fundamental principles of international patent protection. The basic principles and rules as stipulated in the Convention include the principle of national treatment, the right of priority and common rules.

The first signatories of the Paris Convention were the major advanced countries including Brazil and Tunisia from the developing countries. However, after the Second World War, a number of developing countries that enacted patent laws or inherited from their colonial masters joined the Convention. The number of developing countries joining the Convention has increased particularly in the 1990s and the reason is attributable to the TRIPS Agreement.

On 15 January 2002, 164 countries, of which the majorities are developing countries, are party to the Paris Convention. Some argue that the Paris Convention, which was first signed and concluded mainly by developed countries to reflect their conditions and to cater their needs, is inappropriate to and disadvantageous to the interests of developing countries. In this regard, it has been noted that:

“Developing countries, such as Kenya, which have acceded to the Paris Convention, have joined a regime of obligations that was not originally designed for their present condition. With the protection provided for by the Convention, the new states have in effect committed themselves to give a one sided advantage to foreigners who operate

from their land, as these have a much larger technological base than their own nationals. Under these obligations the developing countries adhering to the Paris Convention have restricted their own direction to make such policy or legislation, as they deem best to enhance local priorities regarding inventions and patenting. Since the commitments already assumed by these countries are binding and ought, in principle to be complied with, the only respectable open course is for the countries to seek appropriate international negotiations leading to adjustments in the world regimes of patents. Indeed the developing countries have been calling for revisions in the Paris Conventions but no such changes have been made”

It has, however, been argued that the Paris Convention gives rooms to accommodate the needs and interests of developing countries regarding the requirements and standards for patents. The Convention is said to be weak compared to the patent requirements and standards in the developed economies. Moreover, it allows wide discretion to national laws as far as compulsory license, patentability, and setting opposition procedures are concerned.

The Patent Cooperation Treaty (PCT)

The Patent Cooperation Treaty was concluded in 1970, amended in 1979 and further modified in 1984. The PCT was adopted mainly to deal with the problem of filing several applications in several countries within the period of time prescribed by the Paris Industrial Property Convention and overcome the duplication of effort by national patent offices. This is made possible by streamlining pre-patent granting procedures and requirements such as filing, search and examination. It provides for filing a single application, performing international prior art search and international publication. The Treaty also provides for international preliminary examination that is made optional to member countries.

Membership of the Treaty, in particular those of the developing countries, has increased in the 1990s mainly due to the benefits the system gives to applicants, the patent offices as well as countries. Nationals or residents of member states, among other things, have the opportunity to file international application with their national patent offices and receive international prior art search report from an international searching authority to decide to continue or not with their application. This would save considerable cost for the applicant. The availability of prior art search, international publication and examination facility would lessen the burden of national offices of developing countries, which often lack the requisite qualified manpower, information and

documentation as well as financial resource the tasks require. The PCT aims at assisting the economic development of the developing countries by providing easily accessible information on the availability of technological solutions applicable to their special needs as well as build their capacity through the technical assistance that may be obtained under the treaty.

PCT is considered as the most advanced mechanism in international cooperation in the field of patents since the conclusion of the Paris Convention. The PCT does not grant patent, but facilitates obtaining national patents in several countries. The patent granting procedure under the PCT system consists of two phases: an international phase and a national phase. The international phase deals with a centralized filing and searching procedure and optional international preliminary examination. The national and where appropriate the regional, phase is concerned with the final patent granting procedure by the national and regional industrial property offices. The filing of only one international application has the same effect as if separate national or regional applications have been filed in all the countries which the applicant designates in his international application.

Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)
The TRIPS Agreement that forms part of the WTO regime was signed on April 15, 1994 in Marrakech, Morocco, and came in to effect on January 1, 1995. Before the TRIPS Agreement, intellectual property was not part of a multilateral trade agreement.

When the developed countries led mainly by the USA and Japan tried to bring the intellectual property (IP) protection issues, during the Uruguay Round, under the frame work of the General Agreement on Tariffs and Trade (GATT), developing countries strongly opposed the idea saying that GATT is not the appropriate forum. However, the opposition was ignored and the effort to force some of the developing countries to revise their IP system and provide with stronger protection was successful before the formal linkage of intellectual property protection to international trade.

Conclusion

The role of patents in technological progress and economic development is well recognized. Almost all developing countries have national patent systems. The majority of developing countries are also party to the major multilateral agreements concluded at the international level. The reason for the existence of the national patent system in developing countries as well as their membership to international patent system lies in the belief that such a system contributes to national socio-economic development. The

experience of some developing countries shows how useful the patent system is in the creation of wealth. In others, where the impact is not big, the reason could be attributed to the low level of importance given to patents as well as other factors such as weak indigenous technological base, inadequate R&D funding and facility. In this regard, it may be plausible to note that the patent system by itself does not ensure success in technology development. In order to benefit from the patent system national technological capacity is of critical importance.

The belief and the role that patents may play in wealth creation are shared among writers. The patent debate now is not the same like the debate in the nineteenth century between the proponents and opponents of patents. The debate now is on whether strong or weak patent helps to stimulate inventive and innovative activity, encourage transfer of technology and FDI.

References

- Blakeney, M.. (1989) *Legal Aspects of the Transfer of Technology to Developing Countries*.
- CIPR (2002), Commission on Intellectual Property Rights: *Integrating Intellectual Property Rights and Development Policy, Report of the CIPR*.
- CIPR: Press Release, September 12, 2002, Available at, http://www.biotec-info.net/independent_Commission.html
- Correa, C: (a) *Beyond TRIPS: Protecting Communities knowledge*, available at <http://csf.colorado.edu/mail/elan/sep97/0047.html>.
- Correa, C. (2001). *Traditional Knowledge and Intellectual Property: Issues surrounding the Protection of traditional knowledge*. <http://www.quno.org>
- Correa, C. and Musungu, F. (2002) *The WIPO Agenda: The Risks For Developing Countries*, South Center, 2002
- Kumar, N: *Intellectual Property Rights, Technology and Economic Development: Experience of Asian Countries*, study paper 1B. Prepared for the work of the Commission on Intellectual Property Right.

BABY FARMING GAINSAY TO INDIAN DOGMAS AND SOCIAL NORMS

- Dr. Manpreet Kaur Rajpal

*Associate Professor and Head of Department,
Indore Institute of Law*

Abstract

BABY FARMING a Synonym of Surrogacy, Rented womb and Outsourcing pregnancy. Strange isn't it? Surrogacy means the process of carrying and delivering a child for another person. The **New Encyclopedia Britannica** defines 'Surrogate Motherhood' as the practice in which a woman bears a child for a couple unable to produce children in the usual way. Surrogacy is not a new concept: indeed, traditional Surrogacy Arrangements can be traced back to Biblical times. However, the booming global Surrogacy "business" we see today appears to have evolved rapidly within the last decade or so. This can be attributed to a convergence of scientific, demographic, legal and social developments.

In India the concept of Surrogacy was ushered two decades ago. With the march of time and progress of society, India has now turned into the main destination for Surrogacy and is considered as the "Hub of Surrogacy". The primary reason of its rapid growth in India is its low cost and the lack of Legislation. At the outset it marked its existence only in metros like Delhi, Bombay etc. But with the lapse of time it has now reached to small towns like Badwani, Ujjain etc. And this displays the change in people's mindset, a move from Conservative to Progressive outlook. Surrogacy had become a booming business in India. In our country where people considered marriage a sacred sacrament and child the result of marriage, has now been changing to a progressive outlook where a third party is involved in reproducing a child. The child has turned into a commodity and the motherhood is fragmented. The Concept of Surrogacy results in dilapidation of the Social Structure of India. It deteriorates motherhood and degrades the institution of marriage. My Research paper focuses on the darker sides of Surrogacy. It throws light on the adverse impact of Surrogacy on the Indian Society and its religious dogmas as it is one of the emerging social issues in India.

Keywords: Baby Farming, Surrogacy, Rented womb, Outsourcing pregnancy, Fragmented Motherhood.

Introduction

In the Indian social context specially, Children are also a kind of old age insurance. If marriage is a personal choice monitored by social practices and obligations in India, so is motherhood; to not become a mother is rarely a matter of personal choice and in the least, encouraged. In the conundrum of familial pressure, concerns over genetic progeny and continuation of property rights of a group of persons who are genetically related to each other, not having a 'next generation' has made persons look to alternative remedies for continuation of the bloodline.

And here, Surrogacy springs in as a savior to the Childless Couple.

The desire to procreate is a very fundamental attribute of the Human race. Sadly though, many are denied the joy of Parenthood due to several reasons, biological or otherwise. With the developments in Reproductive Sciences and Technologies the barriers to Parenthood are no longer as formidable as they once were. Advances in Assisted Reproductive Techniques such as donor insemination and, embryo transfer methods, have revolutionized the reproductive environment, resulting in Surrogacy, as the most desirable option. The system of Surrogacy has given hope to many infertile couples, who long to have a child of their own. Taking advantage of the advanced medical facilities, they seek alternative solutions like Artificial Reproductive Technology (ART), In-Vitro Fertilization (IVF) and, Intra-Uterine Injections (IUI), in the hope of having a child of their own. Infertile women, homosexual couples and singles desiring to become parents may seek surrogacy as a simpler route to do so.

In India, Surrogacy has marked its inception in late 90's. At the outset it marked its existence in metros only. But with march of time & progress of society it has become a booming business in India. You can easily find news pertaining to Surrogacy in Print & Electronic media very often. **Commercial Surrogacy in India is legal.**¹ The availability of medical infrastructure and potential surrogates, combined with international demand, has fueled the growth of the Baby Farming industry.²

What Is Baby Farming?

Baby farming is the business of cultivation of Babies for sell. In layman's language, baby farming is the synonym of the term Surrogacy. Surrogacy is a reproductive technique that attempts to obtain pregnancy by means other than by intercourse. Surrogacy is a form of assisted reproduction and a "Surrogate Mother" is a woman who

bears a child on behalf of other parents. In other words, Surrogacy refers to an arrangement whereby a woman agrees to become pregnant for the purposes of gestating and giving birth to a child for others to raise. She may be the child's Genetic Mother or not, depending on the type of arrangement agreed to. In my words, when a woman is unable to carry a child, whether due to medical, genetic or social reasons, the couple or single woman or man may choose to find a Surrogate Mother who can carry the baby. *Thus we can say that Surrogacy is the act of a woman, altruistic by nature, to gestate a child for another individual or couple, with the intent to give said child back to his parents at birth. It's as simple as that.* A Surrogate Mother volunteers to carry an unborn child that is not her own for another family. This can happen in one of the two ways of arrangement.

Altruistic Surrogacy

Altruistic Surrogacy is a situation where the Surrogate receives no financial reward for her pregnancy or the relinquishment of the child although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, accommodation, diet and other related expenses.

Commercial Surrogacy

Commercial Surrogacy is a form of Surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by higher income infertile couples who can afford the cost involved or people who save or borrow in order to complete their dream of being parents. This procedure is legal in several countries including India. Commercial Surrogacy is also known as 'Wombs for Rent', Outsourced Pregnancies' or 'Baby Farms'.

Backwash of Surrogacy

Surrogacy is a ray of hope to millions of infertile Couples but at the same time this new reproductive technology is a gainsay to the Indian dogmas and virtues. The introduction of Contraceptive Technologies has resulted in the separation of sex and procreation. The introduction of New Reproductive Technology mainly Surrogacy via IVF & Embryo Transfer has led not only to the separation of procreation and sex, but also to the redefinition of the terms mother and family. Surrogacy distinguishes between:

- The Genetic Mother - the donor of the egg;
- The Gestational Mother - she who bears and gives birth to the baby;
- The Social Mother - the woman who raises the child.

Surrogacy has also divided feminists. Since the mid-1980s, with the case of 'Baby M', liberal feminists took a positive stance, stressing the right of women to determine their reproductive rights and be perfectly capable of entering legal contracts as they please, whereas socialist and radical feminists were against Surrogacy using the commodification argument. What made feminists uncomfortable with the whole debate is that on the one hand some of the arguments against Surrogacy are overlapping with conservative approaches to the 'unique experience of Motherhood' e.g. of Catholics and pro-life activists, while on the other the arguments in favor seemed to be endorsing market arrangements.³

Surrogate Motherhood; one of the latest Reproductive Technologies, has raised complex ethical and legal Issues, and lawsuits over custody after the Child's birth have resulted from both types of Surrogacy.

In the highly publicized **Baby M case (1986-88)**, Mary Beth Whitehead, the Surrogate and Biological Mother, sued William and Elizabeth Stern, the Baby's Father and his Wife, for custody of the child. Although, the Surrogate Mother was not awarded custody in the Baby M case, she was granted visitation rights. Several European countries and a number of states have passed laws banning paid Surrogacy.

These New Reproductive Technologies raise complicated issues, not only for the law, but also for morality. What is society to say to these technologies that, in many cases, redefine the family and turn traditional notions of reproduction upside down? In addition, since many of these issues are not directly addressed in Scripture, in what way does the Bible speak to these issues? So here are some ethical and social concerns with Surrogacy.

Ethical & Social Concerns

We have entered a new age. Now it is scientifically possible for a baby to be created in a Petri dish from the sperm of a man and the eggs of a woman, and the resulting embryos can be transferred into a second woman to gestate. Through the use of fertility drugs and

Surrogacy industry a return to the dark days



Melinda Tankard Reist

A decade ago Mark and Matt, both 29, have acquired Thai-born surrogate mother Tara and finally through commercial surrogacy means. According to Adelaide's Sunday Mail, the dual-bag-delivery on her report by customer written to separate surrogate women for gay parents is believed to be an Australian first.

There have been a complex genealogical history.

They were recruited from eggs extracted from a single Caucasian donor woman (country not identified), separately fertilized with the men's sperm, then implanted

via surrogacy. This latest case highlights the mother's disappearance. There is no mother in the story. A graph shows the men as 'The Big Two' (the women as 'Surrogate 1' and 'Surrogate 2'). Elsewhere they are 'Mum' and 'Dad'.

The birth stories were never even considered or shared in photos, even though it was their wives the babies' and responded to in them, their bodies who nurtured and sustained them and prepared for their arrival.

The mothers who have Tara and Matt are eliminated from the children's history, treated as nothing more than disposable uteruses.

The physical, emotional, spiritual bonds that develop between mother and child during pregnancy are rendered void by transaction.

Previously popular for surrogacy with Australian citizenship requests for children born there increasing from 100 per cent over five years, according to an expert, India is now apparently excluding gay couples, singles and de facto partners from the practice.

Thailand is looking like the new popular destination, with surrogacy help-seeking rings springing up. Baby M was shot down in 1988, with 11 Vietnamese women, half of them pregnant, freed, Australian citizenship requests for children

born there have risen 14 per cent. In Thailand, the local surrogacy required take single but with previous children. Visited her being single with children had her name vulnerable to exploitation? Could she work and a contract and provide informed consent?

Today we have a lot of more humane laws and protocols around

“THE HIRED MOTHER IS REQUIRED TO BE SINGLE BUT WITH PREVIOUS CHILDREN.”

and distorted about about the right of women to child in ending their judgment and sensible policy making in today's surrogacy business.

Instead of young, single women in the mothers' homes of the 1950s, today it is Thai and Indian mothers who give birth to babies who are immediately taken from them. They will, most likely, have no knowledge of the far away life of the child.

A new documentary, *Forever A Mother of Women*, produced by the USC Centre for Bioethics and Culture Network, explains some of the horrors of surrogacy with women feeling exploited and unable to forget the children they birthed in this global baby production industry.

Australian women have also spoken out about their damaging experiences of surrogacy. Sydney surrogate Shona Fry told at a Canberra conference: "My subconscious, my body, my emotions, leave it to god. Birth and were screaming out for that baby. I kept the children the urge to tell people. 'You had a baby'."

The Family Law Council is about to release a review of legal issues of parenthood, including children born through surrogacy. Despite this report will not create the motherhood right of any children born their mothers.

careful monitoring, these embryos can grow to full term babies, which are then given back to the persons who commissioned the process, which are not necessarily those who originally donated the eggs and sperm for the event. So I ask you, Is Surrogacy right? We know this Scientific Procedure is more than possible; in fact, it's quite common.

But is Surrogacy right?

What are the Ethics of Surrogacy?

On an Ethical basis, there are different viewpoints on Surrogacy, Genetic (Traditional) or Gestational, Altruistic or Commercial. Most Religions and Relevant Organizations are against Surrogacy, particularly its commercial aspects, since they see it as immoral, against the unity of marriage and procreation, or against the dignity or the child to be carried by their Biological Mother; as a result, they call upon the law to maintain Surrogacy as illegal.

Liberal approaches, however, emphasize the need for the state and the law to stay neutral towards competing moral standards, drawing, among else, on *John Stuart Mill's Principle that only harmful practices should be prohibited by law and that one is ultimately sovereign over one's body and mind.*⁴ Legal arrangements seem to be struggling to cope with on the one hand these various moral views, and on the other a number of ethical issues involved in the idea and the procedures of Surrogacy, which touch upon family structure and welfare of Children, the nature of Motherhood, and opposing views of politicians, feminists and pro-life activists.

Let's examine the common complaints, social issues, and ethics of Surrogacy under different heads which are as following:

- Commoditization of Child
- Degrades Motherhood
- Reproductive Labor: An Unethical Practice
- Challenges the Religious Dogmas
- Science Babies: Designer Babies

Commoditization of Child

Surrogacy involves the Sale of Children. While Surrogate mothering allows a woman to receive monetary compensation for carrying another person's baby and allows childless couples to experience parenthood, opponents debate the issue of whether a baby is being purchased. Nevertheless, the baby is genetically a product of the parents. Certainly, the most serious objection to Commercial Surrogacy is that it reduces Children to objects of

barter by putting a price on them. Most of the arguments in favor of Surrogacy are attempts to avoid this problem. Opponents of Surrogacy insist that any attempt to deny or minimize the charge of baby selling fails, and thus Surrogacy involves the Sale of Children. This violates the *Twenty-Third article of INDIAN CONSTITUTION*, which prohibits the Sale of Human Beings. It also violates commonly and widely held moral principles that safeguard Human Rights and the Dignity

of Human persons, namely that human beings are made in God's image and are his unique creations. Persons are not fundamentally things that can be purchased and sold for a price. The fact that proponents of Surrogacy try so hard to get around the charge of baby selling indicates their acceptance of these moral principles as well. Rather than the debate being over whether human beings should be bought and sold, it is over whether Commercial Surrogacy constitutes such a sale of children. If it does, most people would agree that the case against Surrogacy is quite strong. *As the New Jersey Supreme Court put it in the Baby M case*, "There are, in a civilized society, some things that money cannot buy....there are Values that society deems more important than granting to wealth whatever it can buy, be it labor, love or life". The sale of children, which normally results from a Surrogacy transaction, the only exception being cases of Altruistic Surrogacy, is inherently problematic. This is so irrespective of the other good consequences the arrangement produces, in the same way that slavery is inherently troubling, because Human Beings are not objects for sale.

According to **Elisabeth S. Anderson**, Commercial Surrogacy treats children as commodities because, according to the legal contract, they are essentially the "Product" that comes from the paid labor of the Surrogate Mother. This is ethically questionable because it distorts traditional parental concerns with financial concerns. The rights of the child, Anderson argues, who has basically been used as an object of barter between two parties, are automatically called into question.⁵ An important moral objection to Commercial Surrogacy derives from the commodification argument which targets the idea of compensation for relinquishing the Surrogate's parental right to the child she has borne. For Burr, this argument reinforces the public/private divide, where private is the

SURROGACY treats children as PRODUCTS

**by planning, before they
exist, to remove them from
their birth mothers and
hand them over to the
people who ordered them.**

feminine sphere, characterized by nurturing and loving, while public is the masculine terrain which is defined by commercialization of the labor power.⁶ Contrast, others view the commoditization that emerges when families are constructed through the marketplace as disruptive of the dichotomy between private and public spheres, or between reproduction and production.⁷ Moreover, Surrogacy raises ethical issues about the Dignity of the Child as it turns it into the product of a market relation. A well-known feminist⁸ argument condemns '**Baby Selling**', referring mainly to Traditional Surrogacy, which involves relinquishing not only the Babies Surrogates carry, but also their genetic material. This negative stance has, however, been mitigated since the 1990s with technological developments enabling Gestational Surrogacy.

Other authors take a different stance. **Radin**⁹ raises the issue of Surrogacy in fact being Baby Selling. She states: 'if it were okay to think of Children as Property, then it would be okay to buy and sell them; and if it is not done to buy and sell them, then maybe it's not done to think of children as property. *A New Hampshire judge ruled the following in a custody case: —At birth the father does not purchase the child. It is his biological genetically related child. He cannot purchase what is already his.*

Authors like **Roberts and Field**¹⁰ acknowledge that through this form of relationship Surrogates form kinship ties that disturb the sanctity of biology and genes within a system that might well be the pinnacle of the commoditization of the genetic tie. They argue that with the entry of financial arrangements in exchange of the Surrogate child, the Child becomes a saleable commodity and Surrogacy Commercialized. Hiring couples no longer have to cross borders: the child born would carry its parent's genes and subsequently their race, caste and religion.

Radin,¹¹ however, believes that even if there is a genetic relationship between the adopters and the child this does not necessarily make it a non-sale. If Surrogate children are conceived as market commodities because there is a practice of paying money for relinquishing parental rights, then every child can be considered a commodity. As a matter of fact, we all are commodities, because we used to be children ourselves. If children are viewed as exchangeable market commodities, it might make the self-conception of those children as persons impossible. Therefore, if conceiving children as commodities has a negative effect on personhood, it means that baby selling, and Surrogacy for that reason, is **wrong**.¹² Hence, it is appropriate here to say that the Commercialization of Surrogacy has raised fears of a black market and of baby selling

and breeding farms; turning impoverished women into baby producers and the possibility of selective breeding at a price. Surrogacy degrades a pregnancy to a service and a baby to a product. Experience shows that as with any other commercial dealing, the customer lays down his/ her conditions before purchasing the goods. Slowly but steadily India is emerging as a popular destination for Surrogacy arrangements for many rich foreigners as the Indian Surrogacy Industry is unregulated. It's high time that the Indian government shall take a stand and ban Commercial Surrogacy and safeguard the children's from becoming a property of purchase and sale and stop this unethical practice.

Degrades Motherhood

Who helped you tie your shoes or learn a new piece on the piano? When you forgot your science project was due the next day, who made a late-night run for poster board and glue? **It was Mom.**

Every Christmas, even though money was always tight, who consistently pulled off a miracle and made Christmas morning magical and memorable? **It was Mom.**

Now that you're a parent, you may scratch your head wondering how she did it all. Each day is filled with toys to put away and noses to wipe, dinners to make and work to squeeze in. You can't remember when—if ever—she took time for herself. But now you feel what your mom must have felt as you watch your toddler fall asleep and listen to his giggles in the other room. Motherhood is the highest, holiest service assumed by Humankind. It's the definition of selfless service. It's both a daunting responsibility and a glorious opportunity. The divine role of Motherhood is a Gift from God, and key to His plan of happiness for all His Children.¹³ But unfortunately and at times deliberately women are not able to enjoy the Motherhood and so they look forward to the Neo Reproductive technique Surrogacy. Surrogacy is a "*Womb for Rent.*" No Doubt it's the hope of infertile but still there are many who criticize Surrogacy claiming that it involves sale of Children as well as the sale of Motherhood. God chose Mothers to bear the responsibility of providing physical bodies for His children through the miraculous process of pregnancy and birth. Being a Mother means participating in the miracle that is God's greatest work.

Thomas S. Monson, a modern-day prophet, said, "One cannot remember mother and forget God. Why? Because these two sacred persons, God and Mother, partners in creation, in love, in sacrifice, in service, are as one." In India, symbolically woman is

worshipped as Goddess in the popular mythology! As per Vedic Dharma, the first and foremost criteria for success of a society are that women are accorded the high respect that they rightly deserve. Without that even the otherwise noble deeds would be fruitless. The Vedic Woman has to be respected as a Mother.



But the question here is that does a Surrogate mother shall be paid that respect—

In India, the relationship between the Surrogate child and Mother has become commercial rather than emotional one. Now is that what women are made for, selling Motherhood? This is the biggest irony and the saddest part of the story. Motherhood is not about having the child for 9 months in the womb and then selling it for some bucks to the rich. It's much more than that. It is not like donating a kidney. Bearing a child is an emotional issue. It is hard to force nine-month-pregnancy on any woman. **Elizabeth Kane, the first Commercial Surrogate in the United States**, now active in the National Coalition against Surrogacy writes, "A woman, Surrogate Mother feels like a flesh covered test tube during the entire experience. As the foetus grows, the woman is depersonalized; she becomes fragmented from the whole person – merely a vehicle for breeding babies." "The Surrogacy Contract," the Baby M court found, "is based on principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and maternal fitness."¹⁴

Various Scholars believe that Surrogacy has degraded Motherhood as it encourages woman to sell her child in exchange of money. It involves sale of Motherhood. This derogates the dignity of a mother in a society. It's the commercialization of emotions. This will make money bigger than everything. People will become more selfish. It will degrade the value system of the society. Whether such children will be able to respect their Surrogate Mothers who actually sold them for money? The answer is No for sure. Thus, surrogacy is leading Motherhood to disrespect. Motherhood which is being seen as a divinely act is converted into a flourishing Baby Selling Business and this is the one of the biggest demerit of Surrogacy.

Reproductive Labor: an Unethical Practice

Women's Reproductive Labor is performed within the institutional settings of the family and marriage within which it is granted legitimacy and recognition. Nevertheless, it occupies an invisible and unacknowledged place in our society, being excluded from the formal economy and not considered as a productive social activity. Instead, it is couched in terms of familial bonding and caring. These notions persist in the perception of Surrogacy as a 'non-legitimate' option of work for women. The transgression of the prescribed norms through which reproduction is constructed, regulated otherwise, lead to the depiction of Surrogacy as undignified and stigmatized work. The form of labor in a Surrogacy arrangement, such as that of 'distancing' oneself from the child, also referred to as the '**Emotional Labor of Estrangement**',¹⁵ and the invisibilizing of the pregnancy in response to the existing stigma, also remains unacknowledged. Debates on the commodification and use of women's bodies must take into account these constructions as well.

Here, we can say that it is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else's child. These words of the Warnock Committee reporting to the British Government in 1984 remain unanswerable even today. *The proposed Bill, however, legalizes not only Surrogacy per se but even Commercial Surrogacy or Surrogacy "For Monetary Compensation" or "on Mutually Agreed Financial Terms"*. Whatever the intentions, it's inevitable consequence would be the creation of a market specializing in the sale and purchase of babies, or as the Many Scholars agree to the statement given by Court of appeal and believes that Surrogacy contracts constitute baby selling; others believe that Surrogate Mothers are selling their reproductive and/or gestational services.

Court of Appeal in England put it in 1985, it as "it's a kind of baby-farming operation of a wholly distasteful and lamentable kind".

Some probably believe it is both. To say, however, that a woman is being paid for her gestational services indicates that a market price can be put on a female's reproductive services. This is problematic because of the belief that women's reproductive services should not be for sale and that to do so would be either immoral, illegal, or both. As has already been noted many times, there is an open and largely unregulated market where gametes, both sperm and egg, are for sale. Surrogacy, though, further develops that market by putting a price on female fertility—and the creation of a market in which female reproduction is put up for sale is something that many scholars, especially

feminists, have serious concerns about. The discussion among scholars on this topic is very heated. Scott Rae harshly criticizes the idea that women should be allowed to sell their gestational services, saying, “there is a substantial difference between selling one’s labor in most other areas and selling one’s reproductive capacities”.¹⁶ He continues, “Though the right to contract gives on the right to sell one’s services, there are certain services that cannot be for sale without violating human dignity,” and according to Rae, surrogacy contracts constitute a violation of human dignity under this principle. Rae contends that that it is immoral and unethical to allow for the sale of reproductive capabilities.

Damielo and Sorenson concur, arguing that Surrogacy can be likened to prostitution in many ways. The authors explain that, “Prostitution consists in the selling of women’s bodies for sexual satisfaction” and that “Surrogacy contracts require a woman to perform nine months of gestational labor... the woman in effect sells her womb and relinquishes all control of her body”.¹⁷ The renowned scholar **Anderson** attempts a more in-depth discussion of the objection that Surrogacy is wrong because it commodifies women’s reproductive labor. She writes that the application of economic norms to the sphere of women’s labor violates their claim to respect and consideration. “First, ‘by requiring the Surrogate Mother to repress whatever parental love she feels for the child, these norms convert women’s labor into a form of alienated labor’.¹⁸ Secondly, Anderson continues, ‘by manipulating and denying legitimacy to the Surrogate Mother’s evolving perspective on her own pregnancy, the norms of the market degrade her.’”

Further **Niekerk and Zylsays**, “Anderson’s point is not that Surrogacy is immoral because it is a form of alienated labor, but because pregnancy should not become an act of alienated labor. Being denied the legitimacy of one’s perspective on one’s labor, being alienated from one’s feelings, and having to act against one’s emotions is not wrong per se, but is wrong only if the labor in question is women’s reproductive labor or another special form of labor. It is in this sense that Surrogacy is similar to prostitution, not in the sense that both are forms of alienated labor, but in the sense that in both cases a physical capacity, sexual intercourse and gestation, that should be afforded special respect is degraded to a form of alienated labor. What lies at the heart of the objection that Surrogacy is similar to prostitution is that women’s reproductive labor, like their sexuality, should not be compared to, and be treated in the same way as, other forms of physical labor.”¹⁹

Here, **Shah** pertinently points out, “Control of sexual and reproductive labor primarily in the service of the patriarchal, monogamous, heterosexual family has meant its total devaluation in the market. Along with the notions of chastity and naturalness associated with the domestication of all such labor has meant a complete stigmatization of it when done anywhere outside of marriage”.²⁰

There are some feminists who view Gestational Surrogacy as a form of prostitution or slavery and compare it to organ transplant marketing. Once upon a time, organ transplant was considered science fiction. Now it is commonplace, so commonplace that one is asked to designate on their driver's license if they would like to donate their organs at death. Surrogacy is similar to organ donation, except it is more like organ borrowing. One woman assists another woman, through scientific and medical means, to carry and birth her child. It's as simple as that.

But I believe to denounce the commercial exploitation of a kidney and accept the exploitation of the womb constitutes a moral dichotomy of patriarchal society. The mere fact that a woman rents her body opens the road to exploitation, particularly since the logic of Surrogacy is to fulfill the desire of a couple at any cost. **Kimbrell** draws parallels between Surrogacy and Slavery, since slave women were often used as birth mothers without any legal rights. Fears are expressed that poor women might be transformed into an army of Surrogate labor or a caste of pregnancy carriers.²¹

Kimbrell goes even further saying: ? the practice of Surrogacy represents a new and unique form of slavery of women. This a view supported by Davis. During times of slavery, slave women were often used as Birth or Genetic Mothers and as Surrogate Mothers nowadays, who possessed no legal rights as Mothers. In light of the commoditisation of the children, and actually also of themselves, they have the same status as Surrogate Mothers have in contemporary times. Another similarity is that Slave Mothers could not speak freely about their pregnancy and the children they carried; an aspect that is also present in Surrogacy as a result of social stigma.

Davis is worried that, given this history, poor women may be transformed into a special caste of hired pregnancy carriers. She believes that with the commoditisation of labor services of pregnant Surrogate Mothers, money is being made, which implies that someone is being exploited. Davis continues by saying that Surrogacy appears as a procedure generative of life, what is really generated seems to be sexism and profits.

In the words of **Anderson**, ‘when market norms are applied to the ways we allocate and understand parental rights and responsibilities over children, children are reduced from subjects of love to objects of use. When market norms are applied to the ways we treat and understand women’s reproductive labor women are reduced from subjects of respect and consideration to objects of use.’²² Following this argument, Surrogacy, because it too involves the sale of sexual reproduction which the researcher firmly believes is degradation of womanhood, should also be outlawed.

Science Babies : DESIGNER BABIES

The entire idea of a child created in a test tube and carried by an unrelated woman is enough to drive fear into the hearts of many while questioning the ethics of Surrogacy. The very thought conjures up visions of science fiction movies gone bad, or thoughts of the privileged few genetically creating the perfect child. Is Surrogacy right?

It is true that reproductive scientists are able to accurately tell if a created embryo might carry a specific disease, or even to tell its gender. Soon we may have the technology to determine hair and eye color, or even skills or hobbies of our potential children. We may see in our lifetimes that scientists are able to successfully clone a human being. But we are not talking about science fiction here, or extreme reproductive selection, with the ethics of Surrogacy. We are simply talking about a woman and a man who are unable to carry their own children. We are talking about helping regular people become parents, not have a super-child created with super-genes. The lack of genetic link between the Surrogate and the Baby, together with the shift of emphasis to Surrogacy as service, have rendered Surrogacy more socially acceptable, but have also paved the way to new risks.

As Commissioning Couples are often wealthy and prepared to spend large amounts of money their high expectations might include good appearance or specific physical attributes, **Designer Babies**, raising thus serious bio-ethical issues. It is docile here to say that Surrogacy allows the creation of a eugenics market, allowing parents to hand select the characteristics that they would like their children to have.²³ The basic premise of the argument is that men and women who want to have children would have access to Surrogacy and would use it as a way to select the most desirable characteristics for their child. Men and women employing the use of a Surrogate mother would have the ability to control for certain physical characteristics, levels of intelligence, athletic or musical abilities, and etcetera.

Such high expectations have also an impact on the autonomy of the Surrogate, as they may involve asking for detailed and often private information about herself and her family in an attempt to create as full a profile as possible. They might also generate segmentation in the Surrogate market, with respect to caste, skin colour, appearance etc., with younger, higher educated, attract or brighter Surrogates being in higher demand.²⁴ Thus, Surrogacy paves the way to Designer babies which is absolutely unethical and unnatural practice.

Challenges to Religious Dogmas

The entire thought of a woman carrying a child for another woman and her husband sounds a little fishy.

How does the Surrogate Mother get pregnant?

Is there something immoral or illicit going on between the Surrogate Mother and the Intended Father—

As silly as this scenario sounds to those involved in the Surrogacy community, it is actually a common misconception, and one of the main arguments against Surrogacy. Most people, regardless of age, profession, education level, or gender, think that some sort of affair is how Surrogate Mothers become impregnated. The truth is, no Surrogacy, let me repeat *No Surrogacy arrangement, involves sexual relations of any sort*. That's not Surrogacy; it's swinging. Surrogacy does not in any way, shape or form have anything to do with sex. So this Surrogacy issue can be completely laid to rest. But still it is considered to be against God.

Surrogacy: Against God

Religion and science have often been opponents in the past, and with the topic of ethical issues of Surrogacy, many are against Surrogacy for religious reasons. The Catholic Church, for example, has been quite clear on its stance on "**Science Babies**" for decades. But then again, the Catholic Church is also against birth control pills.

The BIBLE does not forbid the use of a Surrogate Parent but raises questions as to whether or not it is ethical. Marriage is designed to be between two people, and children are to be born of that union.²⁵ To bring in a third party means that the child will have a third parent. Then there may arise difficult questions, such as will the baby know its Surrogate Mother? Will there be visitation? How will the child be expected to feel about the Surrogate Mother, and will there be jealousy? Couples who use a family member as

Surrogate can often head off problems before they arise if the Surrogate has a strong bond with the couple and has their welfare and that of their child at heart. The Bible says that children are a Gift, not a right. Just as God blesses some people with wealth and success, He blesses some with children and others not.²⁶

Using a Surrogate out of arrogant defiance of God would be a sin. In all we do, we must examine our Hearts and the Holy Spirit for truth. “Whatever you eat or drink or whatever you do, you must do all for the glory of God”.²⁷ Of course, Scripture could not directly address situations in which these reproductive technologies were available. But even though techniques like AID are not the subject of direct Biblical teaching, there are Biblical Principles that can be applied to these different methods of alleviating infertility. Christian traditions on the family, for example, has always assumed that children will be born into a stable family setting of monogamous marriage in which sexual relations between father and mother result in the child’s birth. The Principles underlying such an assumption are the integrity of the family and the continuity between procreation and parenthood. Adoption is widely recognized as an exception to the general rule, or an emergency solution to the tragic situation of an unwanted pregnancy. Just because the exceptional case is allowed, however, that does not justify it as the norm.

Further, a renowned Scholar **Qadeer** discusses several ethical issues that pertain to surrogacy. Technologies of selection, including ARTs, have made it possible to eliminate female and/or disabled fetuses. Yet if gender, disability, and infertility are all social constructs, then how can **The Pre-Conception and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse)** Act give parents the absolute right to abort a disabled foetus?²⁸ Isn’t that against God? She also raises ethical questions relating to compensation, health rights, and legal assistance for the Surrogate.

Catholicism and Natural Law

The Catholic tradition of Natural Law i.e., basing morality on the natural tendencies or function of a thing has also emphasized the continuity between procreation and parenthood, even to the point of denying the moral legitimacy of contraception, something that clearly interrupts that process.

This is also the basis for Catholic opposition to abortion and most reproductive technologies. If everything progresses as God designed it, sexual relations result in

conception and childbirth. In the same way that God designed an acorn to grow into an oak tree, He likewise designed sexual relations to come to fruition in the birth of a child. Thus there is a God-Designed, natural continuity between sex in marriage and parenthood. Every sexual encounter has the potential for conception, and every conception has the potential for childbirth and parenthood. This is why sex is reserved for marriage, and why catholic tradition makes little room for any reproductive technology that would interfere with a natural process that is the result of creation. It also rules out any third party involvement that would replace one of the partners in the married couple.

The most recent Vatican statement on Reproductive Technology put it this way: “The procreation of a new person, whereby the man and the woman collaborate with the power of the Creator, must be the fruit and the sign of the mutual self-giving of the spouses, of their love and fidelity....marriage and its indissoluble unity (provide) the only setting worthy of truly responsible procreation. In other words, only in Marriage is it morally legitimate to procreate children. A further statement clarifies the unity of sex and procreation, thereby ruling out most technological interventions for infertile couples: “But from a moral point of view procreation is deprived of its proper perfection when it is not desired as the fruit of the conjugal act, that is to say, of the specific act of the spouses’ union the procreation of a human person (is to be) brought about as the fruit of the conjugal act specific to the love between persons.” In other words, there is unity between sexual relations and procreation. Procreation cannot occur apart from marital sexual intercourse, and every conjugal act in marriage must be open to procreation as the natural result of God’s creation design.

For non-Catholics it may be problematic to assume that what is natural is also what is moral. This is what is known as the “**Naturalistic Fallacy**”. One cannot necessarily make the leap from the natural to the moral. As the **British intuitionist philosopher G.E. Moore** has suggested, what’s natural is natural; nothing more and nothing less. A further problem with restrictions on reproductive technologies is that such restrictions may not be consistent with God’s creation mandate given to mankind to exercise dominion over the earth. God gave mankind the ability to discover and apply all kinds of technological innovations. It does not follow, of course, that mankind has the responsibility to use every bit of technology that has been discovered e.g. Certain types of genetic engineering, Nuclear weapons technology. But for the most part, technological innovations that clearly improve the lot of mankind are considered a part

of God's common grace, or His general blessings on creation, as opposed to His blessings that are restricted to those who know Christ personally. It would appear that many of the reproductive technologies in question fit under the heading of common grace, and whether or not they should be used depends on whether such use violates a Biblical text or principle.

Thus, not only do scholars raise serious concerns about the morality and legality of Surrogacy, but many religious denominations have reservations about the use of many Assisted Reproductive Technologies like egg donation, sperm donation, artificial insemination, in vitro fertilization, and of course, Surrogacy, like the Roman Catholic Church condemns the use of all Assisted Reproductive Technologies because the official position of the Church is that procreation should not occur in the absence of sexual intercourse.²⁹ The Church also condemns sexual intercourse when it does not have clear reproductive purposes.³⁰ Beyond the objections of the Roman Catholic Church, it has been noted that many other religions shun Assisted Reproductive Technologies for many of the same reasons that scholars object to them; they, too, believe that Surrogacy and other Assisted Reproductive Technologies objectify women and men and are exploitive and claim that Surrogacy is against God, that it is going too far with science, and should not be allowed.

Embryos and Personhood

Many people have ethical problems with IVF for whatever reason, primarily because the treatment often results in extra embryos that may or may not be transferred back into the mother at any point. In-Vitro Fertilization generally involves the creation of multiple embryos which are not all implanted in a woman's uterus, bringing up ethical issues involving the sanctity of life for the additional embryos that are not implanted. For those who consider the embryo to be a human life, it is unethical to destroy the extra embryos for the same reason that these people believe abortion is wrong. The Catholic Church, for example, frowns on In-Vitro Fertilization because it views an embryo as a human life with rights.⁴¹ Yet the fact of extra embryos may be a benefit for some couples who prefer to undergo the embryo creation procedure only once and then save the extra embryos for an attempt to have a second child or to repeat the IVF procedure in the event that the first transfer is not successful. Still, the Pro-life advocates staunchly decry this fact as a waste of life, viewing frozen embryos as being equivalent to children.

Conclusion

Surrogate Pregnancy and Surrogate Motherhood are a topic of great debate worldwide. Thousands of people support Surrogacy and consider it as a boon to the hopeless. But, at the same time many groups of people would like to see an end to the practice of Commercial Surrogacy and cite ethical, social, economical, etc. issues as the cause. Surrogate motherhood has come a long way in the history of Surrogacy. From rarely spoken of Traditional Surrogacy's of centuries past, to family members acting as Surrogate carriers and Commercial Surrogacy of today, the road has been long, and many miracles and hardships have been faced along the way. It will be interesting to see what will happen to the history of Surrogacy in the next 20, 50 or 100 years.

But as per my vista, which is being grounded on the in-depth study of all the relevant social and ethical aspects of Surrogacy, the researcher very firmly believes that, Government shall promote "*ADOPTION*" as the option to infertile couples for two reasons:

- Firstly, the statistics reveal that there are many unfortunate babies in this world who has lost their parents and are orphans, due to mishaps and various other reasons, instead of bringing more children into this already overcrowded and difficult world, adoption shall be promoted. According to estimates, there are approximately 20 lakhs street children's in India and if each of the childless couple adopts one of them, there would be a few left on the streets.
- Secondly, Surrogacy converts a child into a product. It fragments motherhood and promotes detachment between a mother and the child. It dilapidates the institution of marriage. In India marriage is considered to be a sacrament and child the result of a marriage. This definition of marriage is distorted by the baby farming industry. And therefore I sternly contend that Surrogacy should be completely banned in India else it will deteriorate the Indian religious dogmas and virtues.

Here, I will conclude with a humble request to all those who are thinking to opt for Surrogacy, please adopt orphans and give them a family and shelter. It shall be very brutal on my part to say that it is the duty of infertile couples to adopt the orphans but no doubt your one decision to adopt an unfortunate baby can change their life.

Endnotes

1. The Associated Press (2007-12-30). *"India's surrogate mother business raises questions of global ethics"*. Daily News. Retrieved at July 07, 2010

2. "India's baby farm".The Sun-Herald. 2008-01-06. Retrieved 2010-01-06., Indian women carrying babies for well-off buyers, 'Wombs for rent' pleases women and customers, but raises ethical questions; Monday, December 31, 2011; The Associated Press; CBC News; Canadian Broadcasting Corporation, "Business is booming for India commercial surrogacy program" by Associated Press, Dated: Monday, December 31, 2010; The Albuquerque Tribune, NM, USA, Paid surrogacy driven underground in Canada: CBC report; Wednesday, May 2, 2010; CBC News; Canadian Broadcasting Corporation
3. Scott, E. '*Surrogacy and the Politics of Commodification*', 72 Law & Contemp. Probs. 109 (2009)
4. Hatzis, A. '*Just the oven: a law & economics approach to gestational surrogacy contracts*', (2003)available at:www.ssrn.com/sol3/papers.cfm?abstract.id=381621
5. Anderson, E.S. *Is Women's Labor a Commodity*—Vol.19, 71-92. Philosophy and Public Affairs, (1990).
6. Burr, J. '*Repellent to proper ideas about the procreation of children: Procreation and motherhood in the legal and ethical treatment of the surrogate mother*', 2:115-117 Psychology, Education and Gender (2000)
7. Pande, A. '*Transnational commercial surrogacy in India: gifts for global sisters*—23:618-625, Reproductive Medicine (2011)
8. McDermott, H. '*Surrogacy policy in the United States and Germany: comparing the historical, economic and social context of two opposing policies*' Senior Capstone Projects, Paper 137, (2012)
9. Radin, Margaret Jane, 1988, ? Market Inalienability, *Harvard Law Review*, 100: 1849–1937.
10. Field, Martha A, *Surrogate Motherhood*, 1988. 224p. Harvard University Press. As Field explains so vividly, the problem is not an absence of law but an excess of available law including contract law, criminal laws against baby selling, adoption laws, laws governing the rights of sperm donors, or those establishing the rights of unmarried biological parents. Given the flexibility of those various bodies of law, Field notes that any result could be supported depending upon the desires of society.

She, however, would propose that such surrogacy contracts be legal but unenforceable. That is, should the surrogate mother decide to keep the child, she would have the option of withdrawing from the contract. In this excellent work Field suggests the panoply of responses from which we as a society will choose, and she proposes a solution that seems to make a great deal of sense. Excellent notes and bibliography. — M.W. Bowers, Choice. Copyright 1983 The H.W. Wilson Company. All rights reserved.

11. Radin, Margaret Jane, *Contested Commodities* 136–39 (1996) (defending the ban against baby selling and arguing that "[c] onceiving of any child in market rhetoric wrongs personhood").
12. Radin, Margaret Jane, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (2001)
13. <http://www.motherhood.mormon.org>
14. <http://www.firstmotherforum.com/2009/12/surrogate-mother-wins-right-to-sue-for.html>
15. Hochschild, A., *The Back Stage of a Global Free Market*. (2009). Retrieved on Sep 15, 2011 from <http://www.havenscenter.org/files/backstage.global.free.market.pdf>.
16. Rae, Scott B., *The Ethics of Commercial Surrogate Motherhood*, Westport, Connecticut: Praeger (1994)
17. Damelio, Jennifer and Kelly Sorensen., "Enhancing Autonomy in Paid Surrogacy." *Bioethics* 22(5): 269-277 (2008)
18. Anderson, E.S., Is Women's Labor a Commodity? *Philosophy and Public Affairs*, Vol. 19, 71-92 (1990). She explains 'Alienated labor' in the twofold Hegelian sense, that is, as a situation in which (1) the product of labor is separated from its producer, but (2) in which it is separated from the producer precisely because the producer surrendered it to someone else and, more generally, to the market.
19. Niekerk, A.v. & Zyl, L.v., *The Ethics of Surrogacy: Women's Reproductive Labour*. *Journal of Medical Ethics*, 345–349 (1995)

20. Shah, C., *Surrogate Motherhood and Women's Sexual and Reproductive Rights*. My Body, My Life, My Rights: Addressing Violations of Women's Sexual and Reproductive Rights. Bangkok: Asia Pacific Forum on Women, Law and Development (2009)
21. See <http://www.andrewkimbrell.org/andrewkimbrell/doc/surrogacy.pdf>. [Last accessed on 2012 Nov 4].
22. Anderson, E. *Values in Ethics and Economics*, Cambridge, MA: Harvard University Press (1993)
23. Ertman, Martha. "What's Wrong with a Parenthood Market—A New and Improved Theory of Commodification." In *The Reproductive Rights Reader: Law, Medicine, and the Construction of Motherhood*, ed. Nancy Ehrenreich. New York: New York University Press 2008.
24. Iona Institute, *The Ethical Case Against Surrogate Motherhood: What We Can Learn From the Law of Other European Countries*, Dublin: Iona Institute (2012)
25. BOOK OF GENESIS, Chapter 1, pg 28, Chapter 2, pg 24
26. THE BIBLE, Psalm 127:3
27. THE BIBLE, Corinthians 10:31
28. Qadeer, I., *Social and Ethical Basis of Legislation on Surrogacy: Need for Debate*. Indian Journal of Medical Ethics, 28–31 (2009)
29. Brittany Cravens, "Surrogacy Law—The Unparalleled Social Utility of Surrogacy and The Need for Federal Legislation", Honors requirements, Department of Political Science at Wittenberg University, April 2010
30. Steinbock, Bonnie., "Payment for Egg Donation and Surrogacy." *The Mount Sinai Journal of Medicine* 71 (4): 255-265 (2004)

AN OVERVIEW OF WOMENS' RIGHTS IN A SECULAR / RELIGIOUS NIGERIA STATE: THE HUMAN RIGHTS PERSPECTIVE

- Mahmud Adebayo

*Senior Lecturer, Faculty of Law,
University of Ilorin, Nigeria*

- Abdulrazaq Daibu

*LL.B, B.L, LL.M
Lecturer, University of Ilorin*

Introduction

Both men and women are entitled on equal footing to the full protection of their rights and freedoms because they are human beings. Concern for the protection of individual human welfare is what human rights discourse is all about and human rights standards and procedures have been evolved at the international, regional, and domestic levels as a concrete expression and concern.¹

International human rights standards are generally couched in gender neutral terms. The term human is inclusive of both men and women and it often therefore assumed that these standards provide automatic protection for women in the same way that they do for men. However, this neutrality often amounts in practice to a disregard of women and a failure to respond to women's distinct experiences of injustice.²

The issue is not so much that there is a distinct category of women's rights warranting special treatment, as much as that human rights norm must be made fully applicable to women as human beings. What is desired is a critical re-characterization of international human rights so that women's distinctive concerns are not marginalized and the implementation of the human rights of women becomes part of the central agenda of human rights framework. Most African states including Nigeria have agreed in principle to these sets of human rights documents and many African constitutions made specific reference to it. These rights are too numerous to be listed, but they include protection against state abuses of a citizen's physical integrity, personal freedom, privacy, right to food, livelihood and adequate standard of living, right to cultural life, reproductive rights, and so on.

¹ Ladan, T. M 'Women's Rights and Access to Justice Under Shariah in Northern Nigeria' In: Shariah & Women's Human Rights in Nigeria: Strategies for Action. Being Proceedings of a Two Days Strategic Conference on Islamic Legal System and Women's Rights in Northern Nigeria, organized by WARDC, Lagos and WACOL Enugu, at Rockview Hotel, Abuja, 27-30th October 2002. P.38.

² Ladan, T. M (n 1 above).

The contending issues are among others, the extent to which Nigerian women can rely on the provisions of some of these Constitutions, Documents, Instruments, and Declarations to promote and protect their rights. Many women's rights violations are grounded on cultural and religious practices. Women's right activists in a number of national settings have stressed that the need to transform religious law and practice, not only as a means of ending gender –based restrictions on specific human rights, but also as an essential step towards dismantling systemic gender inequality.³

Secularization of the society on the other hand grew out of the realization of modern processes and modernity of religion. It tilts toward the development of greater independence from religious influence. A secular society is a society where options of religious disbelief and doubts are freely available along with options of belief. It is a society where the right to free formation and choice of belief in matters of religion is alright for everyone, and where this right includes the right to adopt or have a view of human existence which is considered non-religious, by others or by oneself.⁴

The serights are very important in a private choice which includes the right to express any belief in public communication and the right to practice one belief in a religious ceremony. The impression about religion is that it is a personal and private affair of the individual. A secular state is one in which no religion is given official recognition or endorsement. The reality of the Nigeria's situation is that successive Nigeria governments have never made pretences about their recognition and development of two major religions. For you only have a national church and a national mosque in Abuja Federal Capital Territory and independence anniversaries are always marked officially in the church service or Juma`at prayer.

This paper therefore focus on the women's human rights under the Nigerian tripartite legal system where legal pluralism is being experienced due to the synergy of imported English law, customary law and the religiously inclined Islamic law, that many believe are irreconcilable to human right norms; with a view to identifying the problems and prospects in the promotion and protection of women's human rights in Nigeria.

³ Dahlerup, D 'Women, Quotas and Politics (London; Routlegde, 2006) p.19-21 available at <http://www.quotasProject.org/aboutQuotas.htm> accessed (27 November 2015).

⁴ Lucas, L. E 'Does Gender Specificity in Constitutions Matter' (2006)Vol.20 Duke Journal of Comparative International Law133.

Human Rights Approach To Women's Rights

Modern human rights movement championed by the United Nations started in response to gross violations of human rights perpetrated during the Second World War.⁵ Among the earlier international norms developed to protect the dignity, rights, and freedoms of women and men of the world is the Universal Declaration of Human Rights 1948; still regarded as the bedrock for the development of other international human rights instruments.

One of the striking principles of the human rights norms is the principle of equality and non-discrimination which basically reiterates the equal worth of human persons and equal rights of men and women. This principle also transcends into and formed part of customary international law for which no derogation is permissible.⁶

Human rights treaties like the Universal Declaration of Human Rights, 1948; the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic, Social and Cultural Rights, 1966; the Convention on the Elimination of All Forms of Discrimination Against Women, 1979; the Convention on the Rights of the Child, 1990; the Convention Against Torture, and many other conventions emanating from the United Nations are taken to have universal application because they are multilateral treaties.⁷

The Convention on the Elimination of All Forms of Discrimination against Women, guarantees women equality with men before the law and the legal capacity identical to that of men in civil matters, but the status of women before religious tribunals or secular courts applying religious law is not clarified by this guarantee.

The situation of women worldwide; Nigeria in particular, and elsewhere in Africa have shown the gaps between formal guarantees of human rights especially to women and what obtains in practice. Perhaps, the inherent conflict has to do with the jurisprudential definition of rights. The non-observance of human rights of women has resulted in re-echoing of the still controversial catchphrase 'women's rights are human rights'.⁸ Surprisingly, the Universal Declaration of Human Rights recognized and reiterates that

⁵ Robertson, J. G Merills International Human Rights World 3rd ed. (Manchester New York: Manchester University Press, 1989) p.3.

⁶ United Nation Charter, The First Paragraph of the preamble 1945.

⁷ Shaw, M. N International Law 3rd ed. (Cambridge University Press; 1991) p.5.

⁸ n 7 above p.5.

all human beings are born free and equal in dignity. Also the World Conference on Human Rights held in Vienna 1993, categorically provides that human rights of women and of girl child are inalienable, integral and indivisible part of universal human rights.

The issue raised here is the failure to ensure, protect, and fulfil women's human rights clustered around the universal cultural legitimacy of human rights contained in the plethora of documents/instruments; and the inability of state responsibilities to enforce human rights norms. This issue has been fuelled by the inherent contradictions between tradition, religion and human rights standards. In order words, a cross cultural approach toward human rights that fit both religious and customary law criteria. To find a solution to this issue, there must be in existence models and values that question the traditional theories, foundations and boundaries of human right norms.⁹

An analysis of the statement above, suggest that culture should be and an integral part of international human rights norms, so also is the responsibility of state to enforce human rights. For instance, the International Covenant on Civil and Political Rights provides that: in those state in which ethnic, religious or linguistic minorities exists, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.¹⁰

Equally Article 1 of the International Covenant on Economic, Social and Cultural Rights, recognised the right to self-determination of people. It thus appears that the dividing line between western concept of human rights and the African concept has always been on individual autonomy and communitarianism (that rights are culturally specific). The western concept of human rights emphasizes on individual autonomy, whereas the African concept tends towards collective rights placing the community rights before the individual.¹¹

Undoubtedly, the third and fourth generation of human rights law, has moved from the narrow conception of individual rights to recognizing community and group rights regarded as collective rights. The right to one's culture which include customary and

⁹ n 8 above p.5.

¹⁰ International Covenant on Civil and Political Rights of 1966 (CCPR), Article 27.

¹¹ CEDAW General Recommendation No.23 available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23> accessed (23 November 2015) .

religious practice and self-determination fall within the collective right category. On the other hand, the use of cultural justification, use of stereotype, customs and religious norms is one of the major challenges to women's enjoyment of equality. Notable also is the fact that women have been barely visible in systems that create, interpreted and apply laws because of their subordinate status in the society.

Nonetheless, according to Ezeilo,¹² some women's groups and activists tend to place less emphasis on collective or community rights in the belief that it undermines particularly advocacy for women's rights. This in effect implies that in international sphere, implementers of human rights will not hesitate to uphold individual human rights in cases of conflict with culture and traditional practices. Recent developments in Nigeria have also shown that some courts are willing to recognize the human rights of women even where customary practices dictate otherwise.¹³ For instance, in the cases of *MOJEKWU Vs. MOJEKWU*,¹⁴ *MUOJEKWU Vs. EJIKEME*,¹⁵ in these two cases, the courts recognized the equality of all sexes in cases of inheritance under the Igbo customary law that denies women the right to inherit.

Buttressing this argument further, it was held in the case of *USEN Vs. IRO*,¹⁶ that the rights of all sexes are protected under the constitution, which is the organic law of the land, therefore any assertion or argument that a woman cannot give evidence in relation to land matters is oblivious of the constitutional provisions which guarantee equal rights and protection of all sexes under the law. Further, the court stated that any law or custom that seeks to relegate women to the status of second class citizens thus depriving them of their invaluable and constitutionally guaranteed rights are laws and customs for the garbage and should be consigned to history.

The case of *SAFFIYATU*¹⁷ who was sentenced for stoning to death based on the offence of adultery (*Zina*) by the Sharia Court raised question about universal cultural legitimacy of human rights, the question of women's rights under a constitutional democracy and the responsibilities of the Nigeria state as a member of the international community to ensure and protect women's human rights within its borders. Furthermore, it raised doubt about

¹² Ezeilo, J. N 'Towards A Cross-Cultural Approach To Women Human Rights' In *Sharia Implementation in Nigeria: Issues & Challenges on Women's Rights and Access to Justice* Ezeilo, J.N (eds) Published by WACOL & WARDCLAGOS, 2003 p. 89.

¹³ n 12 above.

¹⁴ (1997) 7 NWLR P.238.

¹⁵ (2005) 5 NWLR P.402..

¹⁶ (2001) 11 NWLR p.19.

¹⁷ *Saffiyatu Hussaini Tudu Vs. Sokoto State* (unreported) Shariah Court of Appeal suit nos. 25/3/2002.

international human rights law, its efficacy and effectiveness in relation to women's concern, particularly in religious and customary societies.

The SAFFIYATU's case was resolved along constitutional line by the Shariah Court of Appeal who recognized her right to privacy, although this was fore grounded in Islamic tenets rather than the Nigerian constitution. Her conviction by the Upper Shariah Court Gwadabawa was quashed as being contrary to Sections 36(8) and 4(9) of the 1999 Constitution (as amended) that prohibits retrospective application of law.

The challenge of crafting human rights norms that fit international, religious, and customary law criteria has made a discussion on the need to engage in cross-cultural dialogue and understanding of human rights imperative. In an ethically and religious divided society like Nigeria, it is in the interests of the state and subjects to pursue a cross-cultural dialogue on how to use constitutional frameworks to safeguard rights of citizens irrespective of religious affiliations.¹⁸

Section 10 of the 1999 Constitution (as amended) recognized the secularity of the state while giving rule of recognition to sharia and customary law as sources of Nigerian law. The constitution contains the supremacy clause,¹⁹ meaning in effect that in cases of conflicts or incompatibility between the customary law and sharia, the constitutional provision will prevail. This position may be difficult to apply in case of women's right violation; the challenge therefore, is how to protect and enforce women's rights under a secular, yet democratic state like Nigeria where women are not treated as full citizen.

Rights of Women in Islam

When one speaks of human rights under the sharia, it is meant that the Almighty Allah has granted these rights and no one has the right or power to abrogate, suspend, or withdraw them.²⁰ They are parts and parcel of Islamic faith. Therefore every Muslim or state authorities that claim to be Muslim will have to accept, recognize and enforce them or must not violate them else the verdict of the Holy Quran for such individuals and governments is clear and unequivocal.²¹

¹⁸ Bond, J.E 'Constitutional Exclusion and Gender in Commonwealth Africa' (2007) 31 Issue 2 Fordham International Law Journal Vol. Article 1.

¹⁹ Constitution of the Federal Republic of Nigeria of 1999 (as amended), Section 1(1).

²⁰ Ladan, M. T "Women's Rights and Access to Justice Under the Sharia in Northern Nigeria" In 'Sharia & Women's Human Rights in Nigeria: Strategies for Action' by Ezeilo, J. N (ed) Being Proceedings of a Two Days Strategic Conference on Islamic Legal System and Women's Rights in Northern Nigeria, organized by WARDC & WACOL, Rockview Hotel, Abuja, 27th-30th October, 2002.

²¹ n20 above.

Women's rights sanctioned by the Almighty Allah are rooted in the sharia, which is essentially a believer law in the sense that it is primarily binding on those who believe in it. It rests therefore on faith and conviction. The sharia has two components: the divine and the human. The divine components constitute all that is contained in the Holy Quran and the Hadith. The human components constitute all the efforts of Muslim scholars and Muslim generations in finding the best means of applying the sharia according to their particular circumstances with due regards to the changing human conditions and experiences, which is called 'ijthihad'²² since ijthihadis purely human endeavour and therefore subject to error, it is not immutable and its binding nature is limited to its relevance to a particular situation or a particular generation.

The existence of the Sharia/ Islamic Legal system in the Northern part of the country has shown tremendous concern about its implications on human rights. The human rights community especially, at the international level has been much more concerned about the rights of women in particular.²³

The widespread impression of many especially, non-Muslims, is that the Sharia Legal System does not protect the human rights of women. The flogging of Bariya Magazu in Zamfara State convicted of adultery and the death sentence passed on Safiya Hussain in Tungari Tudubyya Sharia Court in Sokoto on similar charge of adultery are among cases normally cited in Nigeria.²⁴

The position of women in Islam has been among the most controversial subjects presented to the outside world with the least objectivity. As a fundamental principle of its system, Islam holds that a woman is a human being and that she has a source similar to that of men. The Holy Quran provides that:

O People! Be careful of your duty to your Lord, who has created you from a single being and created its mate of the same kind and spread from these two, many men and women.²⁵

Thus men and women are quite equal to each other in their origin, abode, as well as their

²² n 21 above.

²³ Nasir, J.M 'Women's Human Rights in Secular and Religious Legal System' In: Shariah & Women's Human Rights in Nigeria: Strategies for Action. Being Proceedings of a Two Days Strategic Conference on Islamic Legal System and Women's Rights in Northern Nigeria, organized by WARDC, Lagos and WACOL Enugu, at Rockview Hotel, Abuja, 27-30th October, 2002. P.19

²⁴ n 23 above

²⁵ Quran 4:1

place of return and as such entitled to similar equal rights; for instance right to life, honour and to property.

O ye who believe, let not some men among you laugh at others; it may be that the latter are better than the former; nor let some women laugh at others, it may be that the latter are better than the former, nor defame nor be sarcastic to each other; nor call each other by offensive nicknames, and spy not on each other, nor speak ill of each other behind their backs.²⁶

Stressing this noble and natural conception, the Quran states further that:

He (God) it is who did create you from a single soul and there from did create his mate, that he might dwell with her in love²⁷

Spiritually, the Quran provides clear cut evidence that the woman is completely equal with man in the sight of God in terms of her rights and responsibilities. In this regard, the Quran states: "Everyone will be (held) in pledge for its deed"²⁸ it also state further that:

...so their Lord accepted their prayers (saying): I will not suffer to be lost the work of any of you, whether male or female. You precede one from another...²⁹

Under the sharia every person irrespective of his country of origin, religion, race, sex, age or colour, has some basic human rights simply because he or she is human being, which should be respected by every Muslim. Equally, under the sharia women are guaranteed the following specific rights because of their special responsibilities and status in the eyes of Islam. These rights are:-

- a) Rights of Equality in status, worth and value. The Quran teaches us that women and men are all creatures of Allah, existing on a level of equal worth and value. Although their equal importance does not substantiate a claim for their equivalence or perfect identity. According to the Quran, male or female are created *min nafs wa wahidatin* (from a single soul) to complement each other.³⁰

²⁶ Quran 49:11.

²⁷ Quran 7:189.

²⁸ Quran 74:38.

²⁹ Quran 3:195.

³⁰ Quran 28:4.

Women and men are clearly equal in terms of religious and ethical obligations and rewards. The Quran provides:

And who so does good works, whether male or female, and he or she is a believer, such will enter paradise and they will not be wronged the dint in a date stone³¹

- b) Right to Education: the very first revelation to prophet Muhammed (SAW) was Concerned with knowledge. In a Quranic society, there can never be a restriction of knowledge to one sex. It is the duty of every Moslem and every woman to pursue knowledge throughout life. The prophet Muhammed (SAW) even commanded that the slave girls be educated.³²

The holy Quran, for over 14,000 years, proclaims the right of every woman to buy and sell, to contract and to earn, and to hold and manage her own property and money. The Quran provides:

unto men a fortune from that which they have earned, and unto women a fortune from that which they have earned³³

- c) Right to Inheritance and Dower: the Holy Quran grants a woman a share in the inherit of the family, warns against depriving her of that inheritance specifies that the dower of her marriage should belong to her alone and never be taken away by her husband unless offered by the woman as a free gift. The Quran reads:

o you who believe, it is not lawful for you to inherit forcibly the women of your deceased kinsmen nor that should you put constraint upon them that you may take away part of that which you have given them, unless they be guilty of flagrant lewdness'. But consort with them in kindness, for if you hate them it may happen that you hate a thing wherein Allah has placed much good³⁴

It is clear that the Quran not only recommends, but also is even insistence upon, the equality of women and men as an essential characteristic of an Islamic society.

³¹ Quran 28:5.

³² Abd al, A 'The Family Structure in Islam' Islamic' Peace Publications Bureau, Lagos.

³³ Quran 2:256.

³⁴ Quran 18:29; 14:46

- d) **Right to Maintenance:** the Quran recognizes the importance of complimentary sexual role of the couples; thus granting women the right to maintenance in exchange for her contribution to the physical and emotional well-being of the family and to the care that she provides in the rearing of children.³⁵ Despite the fact that a woman has full legal capacity in propriety matters, and the possibility that she may be wealthier than her husband the sharia provides that the husband has to maintain her to a reasonable standard taking into account her social position, the husband's means and all other relevant circumstances. This means that the husband has to provide her with all her needs; foods, clothing, shelter, and even cosmetics, as well as all other things.³⁶

The right to maintenance is absolute and does not depend on the wife's means. Even if she is the richest woman on earth, her husband must maintain her. If the husband becomes indigent and unable to maintain her, then she becomes entitled to a divorce on that ground.

- e) **Right to Custody of Children:** dissolution of marriage immediately raises the question of the right to the custody of the minor children of the marriage, if any. The rule under Islamic Law is that the right belongs to the wife, subject to certain conditions, i.e. that she is mentally and physically capable of care of the child that she is not of bad character. If the wife becomes disqualified to be given the custody of the children or if she dies, then the right is transferred to her mother, if the mother is alive and capable, and failing that, her grandmother, and so on. Only if these are not in existence or are incompetent that the husband's mother and the grandmother and so on, can be resorted to.³⁷
- f) **Right to Obtain Divorce:** Under Islamic Law a married woman can insist that the Husband's unilateral right to divorce (talaq) is shared so that she too can end the marriage at her will. The woman can obtain divorce on any of the three principal grounds: i) due to her husband's physically or mental cruelty towards her; ii) desertion from the husband or by abandoning conjugal relations with her; iii) where the husband becomes afflicted with an intolerable disease, physical or mental.³⁸

³⁵ Quran 46:15.

³⁶ Ladan, M. T (n 1 above) p. 62.

³⁷ n 36 above

³⁸ n 37 above p. 64

On a contrary view, however, there are those believe that Islam and human rights are irreconcilable. According to militant Islamism, sharia is opposed to men and women mixing up in public places, which is difficult in modern world and makes it impossible for women to have a professional job in the civil service or in private sector as well as participate in national political life.³⁹

Though, many verses in the Quran put emphasis on men and women's spiritual equality and on their duty to obey religious obligations, the Holy Quran contain categorically texts bestowing different roles and powers to men and women due to their natural differences. For instance, women's role in the domestic spheres is of utmost importance and her other activities are tolerated as long as they do not come into conflict with the family role.⁴⁰

Two important principles worthy of illustration in the Holy Quran, clearly established the differences in power of men and women. These two principles are the notion of 'qawama' and 'hijab'. The qawama is the authority or guardian that men can exercise either individually or collectively over women in respect of issues like marriage, repudiation, inheritance and so on.⁴¹ For instance, women cannot claim to have more than one husband, but men can have up to four wives. Men exercise their full authority on women and on their children, as long as they are married. Married women owe their husbands total submission and fidelity.⁴² He in return has a duty to support them.

In effect, this translate to mean that many rights namely the rights to economic, political, and social participation including the rights for physical integrity as well as reproductive and sexual rights that women gained through women's struggles, depend on men's approval. Furthermore, while acknowledging the fact that it is difficult for a manto perform his obligation to support and to be fair to all his wives, he may divorce them without having to give justification. A woman may only do so if it is notified in the marriage contract or if she gets an authorization from a court, in which case she has to produce a precise reason to a court and gibe evidence of her accusations against her husband.

³⁹ Rashis, K. S., *Islamic Law in Nigeria: its Application & Teachings* (Islamic Publication Bureau; Lagos, 1986) p.89

⁴⁰ n 39 above.

⁴¹ Quran 4:34 (Al Nisa)

⁴² Quran 4:19 & 33

Also as an illustration, another discriminating element concerns inheritance. As a general rule, women inherit only half of what men are entitled to. This rule is justified by the fact that women status is inferior and they are expected to be under the guardianship of men once married under the protection of their husband.

In case of divorce, it is to men that sharia grants the custody of the children. So, when a boy reaches his seventh year or when a girl is close to puberty they must live with their father or in their father's family. Men are the protectors and maintainers of women, because Allah has given the one more strength than the other, and because they support them from their means. Therefore the righteous women, are devoutly obedient, and guard in the husband's absence what Allah would have them guard.

Also, women should not hold a public office giving them authority over men, because men are the ones entitled to exercise authority over women and not the other way round. This position has been heavily criticised by western oriented scholars has been contrary to human rights women.

Another notion of the Islamic law containing significant implications regarding women's status and rights is the notion of hijab or veil. The confederates and the Al-Azhab Surahs contain most verses on modesty and chastity. The Holy Quran provides that O Prophet, tell the wives and daughters, and the believing women that they should cast their outer garments over their persons. This is most convenient, that they should be known and not molested. And Allah is oft-forgiving most merciful.⁴³

The interpretation of hijab in sharia means more than the act of covering one's face or body in a public place, it also require that women should be reserved and to stay at home and to avoid going out except for an urgent matter; in order words to abstain from any public life.⁴⁴

Rights of Women under the Nigerian Legal System

Nigeria is undoubtedly one of the few countries in the world which experience the juxtaposition of secular, indigenous and religious laws resulting into conflict of law problems of every conceivable dimension that is, i.e. international, national or local.

⁴³ Quran 33:59

⁴⁴ Quran 33:30, 31, 51-3.

There is also in addition the conflict between territorial systems of law arising from the co-existence of the federal and state laws.⁴⁵

Furthermore, there is also conflict between the general and the customary/Islamic laws, between Islamic/ customary laws and between systems of laws inter se. The introduction of British laws into Nigeria co-exist with the indigenous customary law and the religiously inclined Islamic law, which has produced a tripartite system of law. It is this type of multiplicity system of law that is often referred to as 'legal pluralism'.

Note however, that in the event of any of the above systems of law and the Nigerian constitution of 1999 (as amended), the supremacy clause of the Constitution is very clear under Section 1, in the sense that any other law which is inconsistent with the provisions of this Constitution, shall to the extent of the inconsistency void.

On the other hand, the chapter four of the 1999 Constitution (as amended) which is the centre point of this paper, guarantees human rights generally on a wide range of civil liberties similar to those contained in the International Bill of Rights. It contains the most basic safeguards for the civil and political rights of the individual citizen, including women's rights vis a vis the state, while the socio-economic and cultural rights of citizens are declared non-justifiable under chapter two of the same constitution.

Notwithstanding the above position, Nigeria is a party to so many international conventions, covenants, as well as instruments which safeguards women's human rights. Notable among these are: the International Covenant on Civil and Political rights (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It has also signed and ratified among others the Convention on the Rights of the Child (CRC); the Convention on the Elimination of All Forms of Discriminations against Women (CEDAW); and at the regional level, Nigeria became a party to the African Charter on Human and People's Rights in 1983.

The argument in principle is that, state parties to all these conventions are obliged to recognize the rights, duties, freedom, and obligations enshrined in them and to undertake to adopt among others, legislative measures to give effect to their

⁴⁵ Ladan, M. T (n 1 above) p. 62

enforcement through a legal action. In reality, this is not so, due to the justifiability caveat. Women's rights, by their very nature constitutes socio, economic and cultural rights i.e. positive rights that they involve financial obligations/commitment on the part of the government as it is provided for under chapter II of the Constitution (Fundamental Objectives and Directive Principles of State Policy).

A way out of this legal dilemma is the domestication of these international treaties through the enactment of the enabling laws.⁴⁶ Following this action, the treaties then become part of the domestic laws which can now be applied by the courts. A case in point is the African Charter on Human and People's Rights which became part of the Nigerian Statutes/legislation,⁴⁷ that has now being applied by the courts in human rights cases.

Article 18(3) of the Charter is very extant when it enjoins that, state parties shall ensure the elimination of all forms of discriminations against women and also ensure the protection of the rights of women as stipulated in international declarations and conventions. The Court of Appeal has equally pronounced on this issue in the celebrated case of *FAWEHINMI Vs. ABACHA*,⁴⁸ when it held that the provisions of the Charter are in class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority. As such, the Charter is superior to domestic law embodied in Decrees as no government will be allowed to contract out by local legislation its international obligations.

The lacuna here is that, it is dicey whether the provisions of Section 18(3) above, has actually been tested and pronounced upon by Nigerian courts so much such that the singular provisions of the said Article 18(3) signifies an incorporation of other international standards on the human rights of women into our domestic laws as to make them directly applicable like the African Charter? So far there is no judicial pronouncement/enactment on this point.

Also worthy of comment is the whether the provisions of the Convention on the Elimination of All Forms of Discriminations against Women (CEDAW) 1979, has equally been ratified like the African Charter to make it enforceable? So far, no specific

⁴⁶ Constitution of the Federal Republic of Nigeria of 1999 (as amended) Section 12

⁴⁷ African Charter on Human and People's Rights (Ratification and Enforcement) Act, (ACHPR) Cap A10 Laws of the Federation of Nigeria, 2004.

⁴⁸ (1996) 9 NWLR Pt..475 p.710 at 747-8.

local enactment has been made in this regard pursuant to the provisions of Section 12 (1) of the Constitution 1999 (as amended) to bring this Convention into force in Nigeria. The question then is, are Nigerian courts thereby precluded from taking CEDAW into consideration in arriving at a decision?

In an attempt to resolve this ambiguity, the optional protocol to CEDAW however provides that; it is within the proper nature of the judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes whether or not they have regard to international obligations which a country undertakes whether or not they have been incorporated into domestic laws, for the purpose of removing ambiguity or uncertainty from national constitutions; legislation or common law.⁴⁹

From a pragmatic point of view, it thus appear that since the consideration and the central purpose of CEDAW is the elimination of discriminations and the enforcement of substantive equality, and the fact that the Nigerian constitution prohibits on grounds of sex,⁵⁰ it will be difficult to exclude the use of CEDAW in decisions involving questions of non-discrimination and equality.

Generally, it should be appreciated that the Nigerian law on the rights of women have hardly been tested from a human rights perspective. As a result, there is a dearth of judicial decision except for a very few, and strict legal women's rights jurisprudence on the use of the judicial system for the enforcement of women's rights.

Secularism Arguments And Women's Rights

The freedom of thought, conscience, and religion is one of the fundamental rights guaranteed under the 1999 Constitution (as amended). Section 38 (1) of the Constitution provides that:

everyone person shall be entitled to freedom of thought, conscience, and religion, including freedom to change his religion or belief and freedom either alone or in community with others, and in public or private to

⁴⁹ Fredman, S. 'Reversing Discrimination 13. LQR and Vos, M. D. Beyond Formal Equality- Positive Action under Directives 200/43 and 2000/78 European Commission 2007 available at <http://www.migpolgroup.com/public/docs/14.Thematic Report Beyond Formal Equality EN.06.07.pdf> accessed 27/11/2015

⁵⁰ Constitution of the Federal Republic of Nigeria of 1999 (as amended), Section 42.

manifest and propagate his religion or belief in worship, teaching, practice and observance⁵¹

Further, the said section, in its subsection (2) provides for a qualifier, when it states that:

no person attending any place of education shall be required to receive religious instructions or to take part in or attend any religious ceremony or observance relates to a religion other than his own, or a religion not approved by his parents or guardians⁵²

The combine effect of the above constitutional provisions was to entrench the recognition of the multi-religious nature of the Nigerian polity and in order to allay the fears of religious minorities in the free exercise of their religious beliefs without interference or imposition from major groups.⁵³ The position was further strengthened by the provision of Section 10 of the Constitution, when it commands that:-

The Government of the Federation or of a State shall not adopt any religion as State Religion⁵⁴

It will be recalled that opinions were sharply divided both within and outside during the draft constituent stage of the previous constitutions about the inclusion of sharia in the constitution. The constitution expressly forbids the adoption of a state religion. Thought after the removal of the word 'secular' from the section of the constitution, the import of the concept of secularism still provoked a rumpus that climaxed into a stalemate leading to the walkout en mass from the meeting by the Moslem community from the North. The position of the Moslem North was articulated in the following words:-

The absence from the draft of a provision to cater for religion, moral and spiritual needs of the nation came as a rude shock to the silent majority of this great nation of ours... Nigeria is gradually sinking into secularism. We now have it under Section 17 of the draft that Nigeria will committed to secularism... hope and prayer that Nigerians will come to their senses and seriously

⁵¹ Constitution of the Federal Republic of Nigeria of 1999 (as amended).

⁵² n 51 above.

⁵³ Okeke, B. O 'Religion, Politics and National Cohesion, Being a Paper Presented at the Nigerian Bar Association's Annual General Conference, held at Abuja Sheraton Hotel & Towers, 21st-25th, August, 2000.

⁵⁴ Constitution of the Federal Republic of Nigeria (as amended).

diagnose this horrible Section 17 together with the implications and consequences that go with it⁵⁵

In the words of an advocate, Islam is a way of life. The Islamic law is what enforces Islam as a way of life. Since Islamic law is meant for the happiness of mankind in this world and hereafter, it follows thereby that for this to be achieved; law must be applied as they affect all aspects of life. This has led to the agitation for the inclusion in the Constitution provisions that the state shall be responsible for the Islamic religious education of all Muslims as well as their secular education; that Islamic law (Sharia) is the only authority in both civil and criminal laws when dealing with Muslims in the court of law; the provisions of Islamic which deals with moral and inhibitions; Islamic law should be understood in the constitution, as it is neither a common law nor a customary law because it is divine law.⁵⁶

This advocacy has generated some critics of the sharia, in the sense that it is likely to drag the country into Muslims/ non-Muslims dichotomy. It may run afoul of the constitution of the general intendment of the draftsman of the constitution that provides that Nigeria is a secular, indivisible and indissoluble sovereign state. As a secular state, Nigeria must remained separated from, unconnected with, and not devoted to religion, but recognises religious freedom and secular citizenship. Meaning that the state would not in any way hinder the religious obligations of any group or groups subject of course to public order, morality and security.⁵⁷

The implication of a state in a contextual form suggest that the state must not adopt any particular creed as the state religion; it must consequently allow the free flourishing of any religion that operates within the just limits of the law, that is, in the interest of peace, order and public morality; it must declare all religions equal before the law, and in practice let them enjoy, equal treatment, protection and respect from all arms of government, by implication.

The state must therefore cooperate with all religion in those areas the state is expected to do for the preservation of the entire religion heritage of the country. Any discrimination

⁵⁵ Sambo, J 'Morality and the Draft Constitution' In the Great Debate. Nigerian View Points on the draft Constitution Ofonagoro, W. (ed) Lagos, (1996-77)p.74.

⁵⁶ n 55 above.

⁵⁷ n 56 above.

to any particular religion in whatever form will offend against this commitment to the principle of equality of rights, of opportunities and protection of all religions before the state and the law.⁵⁸ A secular state symbolises a state which has no religion of its own and which refrains from discrimination on grounds of religion. This is further buttressed by the preamble to the 1999 Constitution that proclaims that Nigeria is one indivisible and indissoluble sovereign nation under God. It guarantees freedom of thoughts, conscience and religion.⁵⁹ It prescribes the taking of oaths of offices which ends with the words “so help me God”. The government provides financial aid to religious bodies either directly through grants or subventions for pilgrimages or indirectly through tax exemptions.

Any issue or inquiry as to the introduction of Sharia Law in a secular state always encounter the prescribed problem of its limitation, constitutionality and the limit of its exercise. The issue of prohibition of a state religion and the guarantee of state religion and its limits are the two main irreconcilable matters that must be resolved.⁶⁰

Around year 1993-96, some states in the northern part of the country promulgated sharia law which violated some constitutional injunctions against the adoption of state religion. This development gave way for a reassessment of the nature of Sharia and the Islamic conception of the relationship between religion and the state. The sharia is of divine origin. It concerned with the whole of a Muslim's life, private and public, political, economic, and domestic life. It also regulates the activities of the tolerated members of other faith so far as they may not be detrimental to Islam.⁶¹

Islamic conception of the relationship between religion and the state is inseparable in the sense that both religion and politics are in human affairs. The combined effects of Sections 10, 22 and 42 of the 1999 Constitution⁶² guarantees the right of every Nigeria citizen to manifest and propagate his religion and belief in worship, teaching, practice, and observance either alone or in a community with others, either in public or private.

The attempted introduction of the expanded sharia legal system in some Northern states in Nigeria, have shown some concern about its implication on human rights. The human rights community, especially at the international level has been much more concerned

⁵⁸ Nasir, J. M (n 23 above) p. 12

⁵⁹ Constitution of the Federal Republic of Nigeria of 1999 (as amended) Section 38

⁶⁰ Nasir, J.M (n 23 above) p 14

⁶¹ Bello, M 'Obstacles Before the Sharia', Tell Magazine, Nos 10, March 6, 2000 p.48.

⁶² Constitution of the Federal Republic of Nigeria of 1999 (as amended).

about the rights of women in particular. The position of women in Islam has been among the most controversial subjects presented to the outside world with the least objectivity. As a fundamental principle of its system, Islam holds that a woman is a human being and that she has a source similar to that of men.

In Islam, men and women are quite equal to each other in their origin, their abode, as well as in their place of return and we as such entitled to similar and equal rights. Islam gave the woman the right to life, honour and to property like men. She is a respectable being and it is not permissible for anyone to find fault with her, nor hold her in contempt due to her functions as a woman. These are rights; both men and women enjoyed their being no differentiation against either of them. The law laid down about these applied to men and women alike.⁶³

Some of the misconceptions about the rights of women in our modern day reality are grounded on cultural and religious practices. Women's rights activists in a number of national settings have stressed that the need to transform religious law and practice, not only as a means of ending gender-based restrictions on specific human rights, but also as an essential step towards dismantling systemic gender inequality.⁶⁴

In Nigeria, although some states (like Zamfara, Niger, Sokoto) have adopted a state religion especially in the late 90s, there has not been any official pronouncement by the Federal Government on such action partly due to political, ethnic, and socio-cultural motivations and undertone behind such actions. With time all these actions and agitations; to quote one of the former Nigeria Head of States (General Olusegun Obasanjo *retired*) will gradually fizzle out as it has done now and died a natural death.

It should be noted that religion has always been a thorny issue in the history of Nigeria polity. Most of the bloody clashes especially in the Northern part of the country were attributed to religion. The fear of domination of one religion over the other has always been the bane of our society. This fear has been buttressed by the government involvement in most cases on religious issues which creates the feelings that the state support religion.⁶⁵

⁶³ Nasir, J.M (n 23 above) p.22

⁶⁴ Sullivan, D. J "Gender Equality and Religious Freedom: Towards a Framework for Conflict Resolution" In 1992, Nos. 2 Vol. 24 Winter NYUJ of International Law & Politics 225.

⁶⁵ Nasir, J.M (n 23 above) p.24

For instance, every year, as we are aware, the government at local, state and federal levels commits a lot of resources to sponsoring delegations to the Holy pilgrimages, either to Mecca or Jerusalem. A lot of resources have also been committed to either to the building of mosque or churches for political reasons. The National Mosque in Abuja Federal capital Territory, the construction of National Ecumenical Centre; the setting up of Pilgrims Welfare Boards in all the states of the Federation; are indications of the involvement of state in religious matters. Thanks to the present administration of General Muhammed Buhari (rtd) who has part of the anti-corruption campaign put a halt on these practices.

All these practices appear to contravene the constitutional prohibition against the adoption of any state religion as provided for in Section 10 of the 1999 Constitution (as amended). The supremacy of the constitution in Nigeria is confirmed by the provision of section 1 (1), while Section 3 states that any other law, which is inconsistent with the provisions of the constitution, shall be void. Furthermore, chapter IV of the same Constitution dwelt on fundamental human rights which include right to freedom of thought, conscience and religion.⁶⁶

Relating all the above to the rights of women suggests that any religious laws that tend to discriminate or deny women their rights will be against the spirit of the constitution, but the situation in Nigeria is more complex, not only because of religious beliefs, but also traditionally/ cultural beliefs that tend to have a strong hold on women themselves.

Conclusion

It would be appreciated that Islam is not the only religion that violates the rights of women, especially on issues of reproductive rights with emphasis on anti- abortion and anti-contraception activities, including sex education among others. Both the Quran and the Hadith of the Holy Prophet (SAW) have accorded the Moslem Woman over 14 centuries ago much more than what the Nigerian constitution in chapter IV on fundamental human rights and the international instruments on rights advocates for women.

However, the problem lies with non-appreciation by Nigerian women of the potency of these rights either due to socio cultural values that inhibits women actualization of these rights, or low level of literacy especially among women in the rural areas where much of the violations take place; or the mischief of some Muslim scholars/ men chauvinist who

⁶⁶ Constitution of the Federal Republic of Nigeria of 1999 (as amended) Section 38.

deliberately misinterpreted the text in pursuit of a male domineering agenda, and the erroneous misconception by the general society of equating negative anti-women cultural practices to Islam religious provisions.

The resolution to all these conflicts rests on efforts that must be geared towards the domestication of international instruments as provided for in Section 12 of the 1999 Constitution (as amended), most importantly, the convention on the Elimination of All Forms of Discrimination Against Women, (CEDAW), African Charter on Human and People's Rights, International Convention of Socio, Economic and Cultural Rights, Convention Against Torture, Child Rights Act, and so on so forth.

The theoretical frameworks for the entrenchment of these rights rest on the understanding that if universal rights are to hold sway, then there should be a conjunction of efforts between intellectual leaders and jurists on the one hand, and grass roots groups on the other hand, to develop an understanding of rights and an appreciation of their functional values.

It is evident from the discussions above that, human rights standards such as CEDAW means that the government have obligations to address the socio, economic, cultural, religious, educational and political discriminations of women through a concerted effort in promoting rights awareness and attitudinal change. The constitutional commitments so far remain an abstract in principle. There should be a clear understanding of what particular rights mean in terms of concrete entitlements in order to be able to claim them.

Against these backdrops, the writers recommends as follow:-

- i) A revise of the laws and administrative practices to ensure women's equal rights and access to economic, educational, political and social resources; by embarking on law reform which removes the discriminatory laws, policies and practices affecting women's rights and incorporate rights conforming with international standards;
- ii) Promoting respect for women's rights under a secular democratic state through a cross cultural dialogue as a way of balancing relativism and universalism of women's human rights by fashioning out how best to ensure human rights of everyone and resolve the apparent tensions between some part of religious and customary law within the concept of human rights regime. We cannot to justify discrimination against women based on cultural and religious particularities; the duty falls on us all to work toward reconciling the sharia and fundamental human rights.

References

- Abd al, A 'The Family Structure in Islam' Islamic' Peace Publications Bureau, Lagos (2000)
- Bello, M 'Obstacles before the Sharia', Tell Magazine, Nos10, March 6, 2000
- Bond, J.E 'Constitutional Exclusion and Gender in Commonwealth Africa' *Fordham International Law Journal* Vol. 31 Issue 2 Article 1 (2007)
- CEDAW General Recommendation No.23 available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23> accessed 23/11/2015.
- Dahlerup, D 'Women, Quotas and Politics (London; Routledge, 2006) p.19-21 available at <http://www.quotasProject.org/aboutQuotas.htm> accessed 27/11/2015.
- Ezeilo, J. N 'Towards A Cross-Cultural Approach To Women Human Rights' In Sharia Implementation in Nigeria: Issues & Challenges on Women's Rights and Access to Justice Ezeilo, J.N (eds) Published by WACOL & WARDC Lagos, 2003
- Fredman, S. 'Reversing Discrimination 13. LQR and Vos, M. D. Beyond Formal Equality- Positive Action under Directives 200/43 and 2000/78 European Commission 2007 available at http://www.migpolgroup.com/public/docs/14.Thematic_Report_Beyond_Formal_Equality_EN.06.07.pdf accessed 27/11/2015.
- Ladan, T. M 'Women's Rights and Access to Justice Under Shariah in Northern Nigeria' In: Shariah & Women's Human Rights in Nigeria: Strategies for Action. Being Proceedings of a Two Days Strategic Conference on Islamic Legal System and Women's Rights in Northern Nigeria, organized by WARDC, Lagos and WACOL Enugu, at Rockview Hotel, Abuja, 27-30th October, 2002.
- Ladan, M. T "Women's Rights and Access to Justice Under the Sharia in Northern Nigeria" In 'Sharia & Women's Human Rights in Nigeria: Strategies for Action' by Ezeilo, J. N (ed) Being Proceedings of a Two Days Strategic Conference on Islamic Legal System and Women's Rights in Northern Nigeria, organized by WARDC & WACOL, Rockview Hotel, Abuja, 27th-30th October, 2002.
- Lucas, L. E 'Does Gender Specificity in Constitutions Matter' *Duke Journal of Comparative International Law* Vol.20 133 (2006).

Nasir, J.M ‘Women’s Human Rights in Secular and Religious Legal System’ In: Shariah & Women’s Human Rights in Nigeria: Strategies for Action. Being Proceedings of a Two Days Strategic Conference on Islamic Legal System and Women’s Rights in Northern Nigeria, organized by WARDC, Lagos and WACOL Enugu, at Rockview Hotel, Abuja, 27-30th October, 2002.

Okeke, B. O ‘Religion, Politics and National Cohesion, Being a Paper Presented at the Nigerian Bar Association’s Annual General Conference, held at Abuja Sheraton Hotel & Towers, 21st-25th, August, 2000.

Shaw, M. N International Law 3rd ed. (Cambridge University Press;1991)

Rashis, K. S., Islamic Law in Nigeria: its Application and Teachings (Islamic Publication Bureau; Lagos, 1986)

Robertson, J. G Merills International Human Rights World 3rd ed. (Manchester New York: Manchester University Press, 1989)p.3

Sambo, J ‘Morality and the Draft Constitution’ In the Great Debate. Nigerian View Points on the draft Constitution Ofonagoro, W. (ed) Lagos, (1996-77)

Sullivan, D. J “Gender Equality and Religious Freedom: Towards a Framework for Conflict Resolution” In NYUJ of International Law & Politics Vol. 24 Winter 1992, Nos. 2.

FEMINISM IN CRIME

- Ms. Sonal Dass¹

Asst. Professor,

Hidayatullah National Law University, Raipur

Fairness consists of people in similar circumstances being treated in similar ways, but it must be recognized that men and women do not necessarily appear in similar circumstances.²

Until the past few decades, women were virtually invisible in the literature on crime. They being almost half the total population of the world should have been represented more. This article aims to add to the existing limited body of literature on women criminals.

The main theme of the paper is feminism intermingled with female criminology and victim ology. The paper throws light on what causes a women to enter in the world of crime and what problems they face afterwards specially during their prison experience. Observing the available statistics revealing that there is only a small number of female criminals as compared to male criminals, it can be easily construed that the whole criminal and penal system is dominated by the needs of men, and women are inappropriately fitted into what was modeled or designed for men. Failing to recognize female offenders as a unique group is detrimental not only to their individual prison experience but also to the overall effectiveness of imprisonment as a punitive sanction for women. It is indeed the demand of time that there should be gender sensitization even in the field of criminal laws, reformation and rehabilitation programmes and prison system.

The research is based on secondary sources of data.

Feminism In Crime

Women are traditionally seen as being law-abiding members of the society and from the available statistics, crime appears to be largely a male activity. The various theories of criminality have been developed from male subjects but have been extended generally to include all criminals including women; and this is where the idea of feminism in criminology entered.

¹ Asst. Lecturer, HNLU Raipur Chhattisgarh

² Hedderman, C. and Gelsthorpe, L. (1997) Understanding the Sentencing of Women, A Research and Statistics Directorate Report. London: Home Office

Feminism is a set of theories about women's oppression and a set of strategies to change it.³ Female criminology inculcated with feminism, is concerned with victimization of women and covers issues such as female delinquency, gender inequality and criminal justice system. It seeks to establish that men and women are different in all spheres of life and so laws, correctional programmes and prison system should be so designed to cover the specific areas dealing with females. Feminism aims to eliminate gender inequality in the field of criminal justice, the goal is not to push men out but to pull women in.

Evolution of Concept of Feminism

The evolution of feminist theory lies back to the period when various assumptions and stereotypes related with women in crime world were questioned. To have a better understanding about the topic, it is necessary to understand it from the point of its start. The feminist perspective in India is greatly influenced by the western world specifically U.S.A., so it is necessary that its origination at U.S.A. should be understood properly to deal efficiently with the topic.

A Brief History of Feminism in the United States:-

Feminism starts from the belief that men and women are inherently of equal worth and so to bring in equality and remove discrimination between the genders, there is a necessity of social movements.

The first such movement also known as the first wave of feminism started in the mid-1800s when women demanded the right to vote. In the Seneca Falls Convention, 1848⁴, about 300 men and women participants established a "Declaration of Sentiments"⁵ as well as 12 resolutions. The Declaration of Sentiments stressed on the need for reforms in marriage, divorce, property and child custody laws.

The second wave of feminism developed in 1960, with demand of equal access to economic opportunities, sexual freedoms and civil liberties for women. This is the point where feminist criminology began to question assumptions and stereotypes concerning women in professions, and as offenders and victims in the criminal world.

³ <http://julianhermida.com/confeminist.htm>

⁴ On 14 July 1848, women placed a small notice in "Seneca", New York announcing a "Women's Right Convention." Five days later, some 300 women and men approved a "Declaration of Sentiments" and 12 resolutions.

⁵ Modelled on Declaration of Independence

The third wave evolve around the late 1980s and 1990s. People show their willingness to accommodate difference, diversity and change. They were eager to understand how gender oppression and other kinds of human oppression co-create and co-maintain each other.

Based on feminism, a lot of theories on female criminology developed with time, one thing which is common in all of them is that all view women as a victim. Victim of men or of circumstances or of their own biological setup. After a scrutinized observation it is found that it is correct that in most of the cases women suffer and there is necessity to make an honest attempt to find out what facts makes women move towards crime and how they are affected once they commit crime.

Factors Responsible for Women's Entry in Crime World

1. Exploitation:-

Exploitation at home or workplace proves to be one of the reasons behind female crimes. Such exploitation might be physical, mental or sexual. Women are more likely to suffer exploitation than their male counterparts. Women all over the world are subjected to beating, torture, mutilation, acid attacks, murders etc. Sexual exploitation and trafficking of women for prostitution, pornography are very common. Many times women see counter attack or ending the life of perpetrator as the last resort. Many women in jails guilty of violence are actually themselves former victims of violence.

2. Economic reasons

Females all over world are increasingly becoming economically marginalized⁶. More women than earlier are now the only, the major, or the joint breadwinner, and therefore the pressure of economic requirements are increasingly placed upon them. As women often inhabit low paid and insecure areas of employment they have tremendous pressure upon them. The inequality of payment is also one of the reasons more and more women in world are becoming economically marginalized. Not only in work of lower income, economic exploitation is common in high income professions too.

Women are more likely than men to be poor. From the official social security status over a number of years it is clear that 2/3 of adults supported by the social assistance income support scheme in Britain and Europe are women⁷. These increased strains may help to

⁶ Box, Steven (1987), *Recession, Crime and Punishment*, London: Macmillan Education

⁷ Williams, Katherine S., *Textbook on Criminology* Fourth Edition, Oxford University Press, ISBN 0-19-566484-1

explain some of the increased female criminality, especially in the traditionally male criminal areas. Clearly, women plays a major role in society, and often fall under similar strains as those suffered by men.

3. Honour Killing

Although the term in itself is vague, but is widely used for explaining killing of individuals by their own relatives because of their love affairs or intimate relations with some individual, the relations which in the opinion of perpetrators, tend to lower the family's respect in society. It has been found that a lot of women are involved in honour killings as main offender or as accomplice in Asia, and Asian families in other continents. It is quite fateful that women offenders in honour killing commit serious offences against other women.

Contemporary female criminals: breaking old myths

It is no doubt true that while playing vital roles as mother, wife and daughter women tend to refrain themselves from committing crimes which can degrade them in society or family or can affect their families, but with change in society this frame is also changing. Contemporary crimes of women in the past few decades shows that women offenders are influenced by changing societal arrangement. Many of the recent crimes shows that there are a lot of other causes which motivates the women of present era to proceed towards criminal acts.

1. Wars and Violence

Another dreadful reasons motivating women to commit serious crimes. Wars and violence whether by State itself or by insurgents always ends up in loss of persons and property. Children and women are the one who are most affected by it. Many of the women most wanted belongs to such war groups who in order to save their homes, families and land are indulged into criminal acts of assault and murders. The unique feature about this kind of crimes is that though opposed or blacklisted by the State, the women offenders of this kind look over themselves as warriors and do not found any wrong in their act.

Another dark side of wars and violence afflicted areas is crimes like prostitution and human trafficking. Women and children of such areas are increasingly indulged into these crimes either as offender or as victims.

2. Increased Opportunities for Female types of crime

The increase in female offenders is not only because of economic marginalization but also because of increase in the opportunities for crime⁸. With the idea of women empowerment a huge number of women are now becoming economically independent and thereby is an increase in the number of opportunities for crime commission. Women are more inclined towards commission of crimes which do not require much criminal skill and in those crimes which are easily accessible in their roles as consumers and heads of families like shop lifting, check frauds, credit card misuse etc.

3. Crimes due to drugs

Illicit drug use is one of the major reason of increased female crimes trends, although it is still male offenders who are more arrested for drug use crimes but still drug dependency amplifies income-generating crimes. Drug dependency bring women in contact with drug-dependent men who use them as accomplice or exploit them for money and thereby pushing them in crime world many times in violent crimes (E.Miller,1986 ; Steffensmeier& Terry,1986)

Statistics about Female Offenders

1. United States

The Federal Bureau of Investigation, through Uniform Crime Reporting Program, collects crime and data from more than 18000 cities and state law enforcement agencies⁹. The data reveals following information:-

1. In U.S.A. in year 2012, Law enforcement agencies made an estimated 12,196,959 arrests excluding arrests for traffic violations, 26.2% of which were of females¹⁰.
2. According to OJJDP's¹¹ Juvenile Court Statistics 2010, Juvenile Court handled an estimated 1,368, 200 cases in 2010, of which females accounted for 28%.The study reported that in between year 1985 to 2010, there is an increase in female delinquency at an average rate of 2%.
3. According to OJJDP's 2011 Survey of Youth in Residential Placement¹², 14% of all youth in residential placement were females.

⁸ Zaplin, Ruth T. , Female Offenders: Critical Perspectives and Effective Interventions, Jones and Bartlett learning, 2008

⁹ www.ncjrs.gov/spotlight/wgcjs/facts.html/dated 21.9.2015

¹⁰ Crime in the U.S.,2012, released in November 2013

¹¹ Office of Juvenile Justice and Delinquency Prevention's Juvenile Court Statistics 2010, released in June 2013

¹² Juvenile in Residential Placement ,2011, released in August 2014

4. According to the BJS statistical tablets report, 2013¹³, the female inmates increased 10.9% between midyear 2010 and 2013.
5. The Bureau of Justice Statistics' Annual Probation Survey and Annual Parole Survey reported that in 2010 approx 19% of the federal offenders under supervision were females but in 2012 approx 11% females were on Parole and approx 24% on Probation were females.

2. *In United Kingdom*

The statistics of UK reveal that there is considerably lower number of female criminals than male criminals. In United Kingdom female prisoners comprise just 5% of the total UK prison population¹⁴.

3. *In India*

According to National Crime Records Bureau, Prison Statistics India 2014¹⁵ report:-

1. The female prisoners contribute 18% of the total prison population. There are 16,951 number of female prisoners in the country.
2. There are total 1,394 jails and 20 are reserved for women. Of the female inmates, the highest number belongs to the age group of 18-50.
3. Another alarming revelation is that while only one correctional staff (psychologists, counselors and social workers) per 245 women inmates is available, the ratio for medical staff in such prisons stood at one for every 105 inmates.
4. Within the prison premises, 55 female prisoners died in 2012, of which 47 were reported as natural deaths, 5 as suicides and rest 3 as a result of assault by outsiders.
 - a. The arrest pattern reveals that there is an increase in crimes committed by women in past few years but still such crimes are much less as compared to crimes committed by males.
 - b. Women are also less involved in serious crimes and mostly commit minor crimes like shop-lifting, forgery, breaking traffic rules, frauds, misuse of credit cards. The loss caused by them are comparatively less than that caused by males.
 - c. In cases of serious offences like murder the case studies reveal that such female offenders generally were themselves former victims of domestic violence or to protect their children they commit violence.

¹³ Bureau of Justice Statistics resource Jail Inmates at Midyear 2013 statistical Tablets featuring data collected from the Annual Survey of Jails.

¹⁴ Berman, G. (2012) Prison Population Statistics, SN/SG/4334. London: House of Commons, Social and General Statistics

¹⁵ <http://www.dnaindia.com/india/report-india-has-16951-women-prisoners-national-crime-records-bureau-2016953/> dated 19/04/2016

- d. Females are also less likely to become habitual offender¹⁶.
- e. Generally women offenders act solo. If they are gang members they use to be part of male gangs. At the onset of twenty-first century, some female gangs evolved but they are few and less violent than male gangs. Such female gangs also operate for less time than male gangs.

Role of Criminal Justice System Towards Female Criminals

The functionaries of criminal justice system namely police, prosecution, judiciary and correctional institutions exhibit a different behavior toward women offenders. In many countries, law show some leniency towards female offenders. Women offenders are less likely to be jailed or imprisoned the reasons being pregnancy, responsibilities for small children the greater likelihood to demonstrate remorse, and perceptions that women are less dangerous and more amenable to rehabilitation¹⁷. But still the actual fact is women offenders are not always benefitted by leniency in law. The functionaries of criminal justice system being part of society have opinion in most of the cases that women who commits crimes lack self control, self discipline and are unfit for social life. While women offenders do suffer all the same deprivations, indignities and degradation as male offenders, they suffer some additional that are specific to them as female offenders.

Problems Faced by Female Offenders

1. Health Need

Although men and women face many similar health problems like communicable diseases, substance abuse, mental illness but women are likely to have additional needs with respect to gynecological health, maternity and psychological health relating to physical, emotional or sexual abuse¹⁸. They are often stereotyped as being responsible for their own health problems and are deemed unworthy of quality care¹⁹.

2. Pregnancy

Pregnant women require specialized attention with respect to diet, medication, medical care, exercise and clothing, the prison environment is incompatible with the needs and care of a pregnant body.

¹⁶ Steffensmeier, D. (1983). Sex-segregation in the underworld: Building a sociological explanation of sex differences in crime. *Social Forces*, 61, 1010-1032

¹⁷ Steffensmeier, D., Kramer, J., and Streifel, C. (1993). Gender & imprisonment decisions. *Criminology*, 31, 411-446

¹⁸ Ash, B. (2003) *Working with Women Prisoners*, 4th edition, HM Prison Service: Women's Estate Policy Unit. [www.hmprisonservice.gov.uk/.../10000339 Working with Women Prisoners.doc/dated 29/9/2015](http://www.hmprisonservice.gov.uk/.../10000339%20Working%20with%20Women%20Prisoners.doc/dated%2029/9/2015)

¹⁹ Wolf, A.M. Silva, Knight, K.E. and Javdani, S. (2007) *Responding to the Health Needs of Female Offenders*.

3. *Mental Health*

United Nations Office on Drugs and Crime in 2009 report states that mental health problems of women in prison are frequently a result of lifetime abuse and victimization. In UK up to 80% of female prisoners have diagnosable mental health issues²⁰, covering all problems ranging from depression, anxiety to neurosis, psychosis. There's a greater prevalence of self harm tendency among female offender. The Ministry of Justice UK states that approximately 30% of women in prison self harmed themselves as compared to 7% of men²¹.

4. *Separation from children*

One of the issues which is different for women prison inmates is their status as mothers and primary carers of young children which makes their prison experience really difficult. While in most of the cases the children of males prisoners are cared by their spouses the same is not the case with female prisoners. Devlin²² noted that while 91% of the male prisoners leave their children in the care of the child's mother, Corston²³ asserts that just 9% of the children are cared for by their fathers while mothers are in prison, the remaining children 25% are cared by their grandmothers while the rest are sent to some fostering or other arrangements. Mothers feel helpless to intervene in these circumstances and undergo stress and worry about the care of their children as a result frustration and anger accumulate within them resulting in breaches of prison discipline, self harm and even suicide.

It seems clear that the current prison system does not fit with the specific needs of female prisoners. The small numbers of female prisoners should not excuse their apparent submersion into the majority male population; instead the policy makers should capitalise on this group as a way of experimenting with new ideas and initiatives.

Revictimization:- Women offenders are more likely to be revictimized by society. Since women are always expected to be law abiding and obedient person, a female offender even after her release is taken as someone who is not fit to be a part of society. Although male offenders also suffer disbelief of society but women offenders are traumatized more.

²⁰ Corston, J. (2007) The Corston Report: A review of women with particular vulnerabilities in the Criminal Justice System. London: Home Office.

²¹ Ministry of Justice (2011) Safety in Custody 2010 England and Wales.; www.justice.gov.uk/downloads/statistics/mojstats/safety-custody-2010.pdf / dated 29/9/2015

²² Devlin, A. (1998) Invisible Women, Winchester: Waterside Press

²³ Corston, J. (2007) The Corston Report: A review of women with particular vulnerabilities in the Criminal Justice System. London: Home Office.

Conclusion:-

Female criminal behavior has been commonly perceived as a less serious problem than male criminal behavior. Women have been more likely to commit minor offenses and have made up only a small proportion of the offender population. These facts cannot concealed a trend in the rising percentage of female offenders, their participation in violent crimes.

Equal treatment for men and women is a matter of approach not outcome. The underlying assumption is that fairness consists of people in similar circumstances being treated in similar ways, but it must be recognized that men and women do not necessarily appear in similar circumstances²⁴.

Female prisoners should receive a different treatment because of the fact that they differ in every sense whether it is in relation to the offence committed by them, criminogenic factors, coping behavior or healthcare needs. This means that women should have equal access to correctional and reformation programmes but still with difference in the content. Most of these programmes are not gender specific and have been designed for use of men, focusing on their criminogenic needs, alcohol, drug abuse and unemployment. These programmes are also used with women but fails to address the factors which is unique to them and fails to cover the issues which are more significant for them.

“Women offenders have needs different from those of men, stemming in part from their disproportionate victimization from sexual or physical abuse and their responsibility for children. They are also more likely to be addicted to drugs and to have mental illness²⁵. There is greater prevalence of illness amongst the female offenders but the provision and the spending in this area are insufficient to deal with the scale of this issue. There is need of development of gender-specific programs to address the issue.

Suggestions:-

1. State shall provide for more effective detection, prosecution and correction of women perpetrators.

²⁴ Hedderman, C. and Gelsthorpe, L. (1997) Understanding the Sentencing of Women, A Research and Statistics Directorate Report. London: Home Office

²⁵ Women Offenders: Programming Needs and Promising Approaches ,National Institute of Justice./dated 19.09.2015

2. State shall take measures to reduce the risk of repeat victimization of women offenders who themselves were victims of crimes at first footing
3. Such offenders should be provided with assistance like first aid, emergency medical attention, post-trauma counseling, family counseling, de-addiction treatment.
4. The right of privacy of such offenders should be guarded.
5. More improved prison system meeting with specific needs of females should be established. Although India is having the credit of establishment of first female prison but there is need of more.
6. Correctional measures like Parole, Probation, Furlough should be abundantly used with these offenders.
7. They should be provided vocational training during sentencing time so that after their release they can earn their own livelihood, as many of the crimes against women happen because they are dependent on others for financial needs.
8. If these offenders show reformation during sentencing then at the time of their release they should be provided with financial help.
9. There is need of research in the field of female criminal behavior, reporting causes of female crimes and specific needs of female offenders.

A GLIMPSE OF VENALITY IN INDIA

- Dr. Pooja Dasgupta

Asst. Professor, Indore Institute of Law

- Ms. Khushbu Dubey

Asst. Professor, Indore Institute of Law

Introduction

The concept of having a good governance in our system which is long awaited and has only become the talk of the town as of today. This concept is gaining popularity and is being used unsparingly in the international community to promote development, peace and security. There is a mode of realisation that the introduction of a good system can only be done by robust engagement that the civil society is the centre of a good management system. This paper aims at studying the parallel scams and events as a case study for good governance since lack of accountability and transparency have been often cited as impediments to governance.

India's Interaction with aid and corruption

Right after 1947, i.e. after attaining independence, India has been highly dependent on Official Development Association (ODA), also known as foreign aid or external assistance. Making its roots from its policies of non-alignment and anti-colonialism, India has always been gaining huge assistance from net economic aid. The United States, Japan, Germany and the United Kingdom have been key donors to the Aid-India Consortium, formed in 1958 to assist India to address its growth needs in different sectors. The nature of providing foreign assistance in India has developed over leaps and bounds. Initially India was provided aid to improve food security through the US-India bilateral food assistance programme PL-480. India is a diverse country which is divided into different sectors. There are different initiatives in the social and economic sectors, which not only need proper nodes to deal with but also financial aid from different resources. Aid has been an extremely lucrative way to fulfil the needs of these social as well as economic sectors and also to maintain the parity in the balance of payments of the country. Prior to the 1980s, external aid covered around 18% of the total gross budgetary support for the central government development programmes and for their assistance to states. The major donors towards such aid are World Bank, Japan, Germany, the UK and the US. Most of the aid gained from these sources are pumped into infrastructural projects like coal, transport and communications. This sort of foreign

assistance has also helped India to usher into the Green Revolution of the 1960s which has led to enhancement of the food security in the country. Between 1951 and 1956, India received about Rs 1430 crores (approx US\$ 92.19 million) as aid and as of 2008, aid stands at US\$ 2.10 billion. External assistance has supplemented the national government's funding of state and central initiatives and Roughly 20 percent of aid flows are accounted by the social sectors.

In the year 2003, India made some major announcements:

- To provide bilateral assistance to other countries
- To accept aid only from five countries
- Not to accept any more tied aid

Due to these huge announcements, it became a mandate for bilateral donors to contribute their aids by channelizing them via NGOs, the UN or other multilateral agencies. This signalled a substantial change in its image from 'aid taker' to 'aid giver' and has since then proactively providing assistance to other developing and neighbouring countries like Nepal, Bhutan and Afghanistan. Interestingly, researchers observe three important ideas influencing India's attitude towards aid: assistance is given for political or economic purposes and that can be a highly effective means of improving relations, the wrong type of assistance is counter-productive and conditional or tied can be degrading to the recipient.

Corruption in India

Time and again corruption has been identified as the biggest challenge in development in India. The culture of corruption has become well entrenched in the society and is expected to be a part of any transaction. In the past, people paid a bribe or an additional fee to get an illegal benefit, but now public servants have to be bribed even for a legitimate demand or for services citizens are entitled to. A number of government commissions have noted corruption as being systematic in India because of the concentration of power among bureaucrats and politicians, "who flourished on the basis of mutual dependence and institutional abuse of power structures. Many trace the growth of corruption to its colonial roots. They believe that culture of secrecy in governance, which began during the British rule and continues now, has perpetuated corruption, where large amount of public money is diverted from development projects and welfare schemes for private use by the authorities. In India, the continuing existence of corruption has been attributed to the weak system of governance, the societal structure based on caste and kinship, the differences in the states of development,

nepotism, society's tolerance of amassing of wealth as it is viewed as a "symbol of competence growing consumerism and the practice of the dowry system. Corruption is also believed to be a result of policy distortion, institutional incentives and governance. Experts say people are not concerned with corruption on higher levels, instead worry about corruption at the cutting edge level of administration, which they experience on a daily basis. A detailed empirical research in 2007-08, focussing on 22,728 households living Below the Poverty Line (BPL), found that they paid about Rs. 9,000 million (approx US\$ 192 million) in bribes to access basic and need-based public services.

Corruption aid in India

Foreign assistance often supplements existing government programmes and projects at the national and state level. Our research relies on the available literature on corruption in different welfare schemes, mainly aimed at poverty alleviation. A need to properly examine the sense of urgency and necessity to address corruption in food aid and humanitarian aid is felt lately.

Food For Work (FFW)

the year 2002, a scam involving food aid, which was introduced for millions of poor farmers suffering from drought affected condition in the Southern State of Andhra Pradesh had received considerable attention. Under this programme, rice was being given to workers who were working on different developmental projects initiated by the government. Different allegations of corruption were raised in the supply of rice which was intended only for poor farmers and agricultural labourers. The Government of India had allocated more than three million metric tons of rice, enough to feed 20 million workers for nearly a year. This massive aid was stopped as a consequence towards the allegations and the aid towards the FFW scheme was curtailed. However, it was found that members of the ruling party in the state and other officials were selling the rice back to the Food Corporation of India, an agency of the central government, and adding fictitious names of labourers to claim more rice. Authorities were found to have wielded unfair influence in the employment of contractors, the selection of beneficiaries, wage-setting and for payments. All means of these labourers to contact higher officials was destroyed and the people were kept away from informing or even talking to any person among the high officials or the media.

Good governance and aid effectiveness:**Aid effectiveness: The endless debate**

There are many views and perspectives when it comes to good governance and aid effectiveness and we have tried to consolidate existing views in the international aid community. The impact of aid relies wholly on the quality of governance and the quality of how a country's governance system proves its ability to pursue sustainable economic as well as development. Experts are of the opinion that aid will not have the desired impact if governance is not properly improved. However, before examining the role of governance, it is imperative to look at the complex topic of aid effectiveness.

In the year 1997, a significant drop in the allocation of aid by the Organisation for Economic Cooperation and Development (OECD) countries was noticed. A year later a World Bank study concluded that "foreign aid in different times and different places has been highly effective, totally ineffective and everything in between. The study lays emphasis on governance and tries to urge a rethink on aid has tried to make a blueprint for the future. World Bank economists Burnside and Dollar argued that on an average "aid had little impact on growth and their study further resonated with the Bank's findings, linking foreign aid to sound economic policies. It is very likely to observe that making aid more systematic and stringent specially on terms of quality. Such systematic control is expected to increase its impact on economic growth and development. It is further concluded that such aid has a positive impact in good environments and has been proven to be ineffective in countries with poor governance and policies. These two studies have also given further impetus to the concept of conditionality or tied aid, which will be later explored. Besides paving the way for discussions on good governance, the Burnside and Craig research provided the basis for policy recommendation to increase foreign aid which was heavily contested by economist and aid sceptic William Easterly.

The relationship between good governance and corruption in aid

There have been major disputes around the fundamental issue of aid effectiveness. But despite these ongoing disputes, there also exists a consensus among aid advocates and critics that corruption, lack of accountability and absence of transparency are major deterrents to foreign aid delivery. There has been an increasing discussion over the phenomenon of tackling corruption to be the centre for aid to have its desired results and the antidote for the same is good governance. Therefore, good governance has become a recurring theme in foreign aid. The World Bank has identified it as a key factor for enriching the aid effectiveness. It has a very conducive approach towards good

governance as it has placed corruption and government accountability as two pillars of the distinguished dimensions of the same. A World Bank report illustrated how foreign aid has been an unmitigated failure in some countries, notably the Democratic Republic of Congo and Tanzania, where heads of states channelled development aid in to their personal bank accounts. At the 2002 Monterrey Conference in Mexico, the former World Bank President noted, “We have learned that corruption, bad policies, and weak governance will make aid ineffective”. Academics, who have sought to answer what constitutes good governance, note that the shift from the notion of governance to good governance “introduces a normative dimension addressing the quality of governance”. Surely, the notion of good governance has gained momentum over the years as a response to the instances of corruption in aid. However, the concept would have to be expanded to include political dimensions rather than just economic dimensions, which is what the World Bank’s approach has been confined to.

References:

1. Sukhtankar, Sandip, (2015), “The Impact of Corruption on Consumer Markets: Evidence from the Allocation of 2G Wireless Spectrum in India,” *Journal of Law and Economics* 58.2.
2. Sridharan, E. and Milan Vaishnav (forthcoming), “The Evolution of India’s Political Finance Regime,” in Pippa Norris and Andrea Abel van Es, eds. *Checkbook Elections? Political Finance in Comparative Perspective*.
3. *The Economist* (2014), “Campaign Finance in India: Black Money Power,” *Banyan* weblog (May 14).
4. Transparency International (2011), *Daily Lives and Corruption: Public Opinion in South Asia*, *South Asia Corruption Barometer*.

ECOLOGY AND AIR POLLUTION AS A PART OF ARTICLE 21

- Dr. Varsha Upadhyay

Asst. Professor, Indore Institute of Law

- Mr. Vivek Wilson

Asst. Professor, Indore Institute of Law

The Supreme Court of India has made huge contribution in the environmental jurisprudence of this country. SC has entertained maximum number of genuine public interest litigation (PIL) cases under Art. 32 of the Constitution. Even the High Court's under Art. 226 of the Constitution have played a vital role on the environmental jurisprudence. The Indian Courts have issued various directions environmental writ to develop a vast environmental jurisprudence. Even the Art. 21 of the Constitution of India has also expanded the meaning of the word life in that Article which includes that every person has a right to live in the healthy environment.

Juristic view in Environmental Issues

If anyone examines the juristic approach in the case which involves the environmental related issues against the construction of the building projects then one can generally conceptualise some juristic approaches under three categories.

- I. It can be described as a pro-project approach where the judges tend to stress the latent profit of a particular project or trade activity.
- II. It can be described as that of juristic control there has been determinations made by managerial agency and expert with regard to the feasibility of the environmental.
- III. It is a rigorous juristic review where it has been examining the environmental blow on particular activities.

Judicial Steps

The judiciary has to suffice its constitutional obligations where to issue a proper instructions, orders and the writs was against those persons who has caused environmental pollution and disturbed the ecology. The evidence can be taken from the plethora cases which are decided on the basis of Ratlam Municipality Case. This case has aggravated the awareness of the judiciary to see the environmental problem. The Supreme Court has responded with fretfulness and raise that the issue of environment should come within the mandate of the Constitution of India.

Developments of The Environmental Law by The Decision of Supreme Court

Rural Litigation and Entitlement Kendra vs. state of U.P. in this case the Supreme Court has given the directions for elimination of open drains and prevention of public seepage by the nearby slum dwellers. This matter was brought up by the way of a criminal appeal. So in this case the Court has relied upon Art 47 which is the Part IV of the Constitution and which relates to the Directive Principles of state policy. This Article refers to the improvement of public fitness so in this judgment, the Supreme Court has given several directions in the Ratlam Municipality case also which is for the maintenance of public fitness. In this case the court has held that there is threat to ecological balance which is resulting into the decline of the environment and it is threat to right to life also. In other words it can be said that the right to have clean environment was indirectly recognized as an integral part of right to live. This has been followed in the judgment of **B.L. Wadhwa vs. Union of India** and directions were given to the **Municipal Corporation of old Delhi and New Delhi**, for removal of garbage etc.

The Supreme Court, in the case of **Sachidanand Pandey vs. State of West Bengal AIR 1987 SC 1109**, has laid down the rules which were like Wednesbury principles which is applied in administrative law. If there is a problem of ecology which is brought before the Court, then the Court is bound to hear, under article 48 and Art. 51A (g) of the Constitution of India. The Court is liable to examine whether appropriate considerations are borne in mind or not. Even the Court may go for further circumstances of the case. Even the Court may also give necessary directions for the ecology. In present scenario the Courts appoint independent experts to test the claims of parties which is based on the basis of the expert advice which is given to the Court.

The Supreme Court has also emphasized the importance of the forest conservation in the **Ambica Quarry Works v. State of Gujarat** and others, In this case, the petitioner has appealed to the Court that when the State Government has rejected an application for restoration of a mining lease under Section 2 of the Forest (Conservation) Act of 1980, where the permission is to be obtained by the Central Government for using the forest areas for non-forest purposes. In this the State government has rejected the application of the appellant for restoration of lease on the ground that the land falls under the Reserved Forest area. In the appeal the Supreme Court has centred the question of a proper balance between the need of misuse of the mineral resources lying within forest areas, the protection of ecological balance, and curbing the growing environmental deterioration.

In State of Bihar vs. Murad Ali Khan, AIR 1989 SC, the Supreme Court has been dealing with an appeal which is concerning with the protection to wild life in Kundurugutu Range forest in Bihar. The Supreme Court has quoted from an order issued by Emperor Asoka in the third century BC, that there should be a particularly contemporary ring in the matter of protection of wild life and environment. In the decree it was said that some of the animals should not be killed like parrots, mynas, the arunas, ruddy-geese, wild geese, the nandimukha, cranes, bats, queen ants, terrapins, boneless fish, rhinoceroses and all quadrupeds which are not useful or edible forests must not be burned. The Supreme Court has observed and said by citing the case **Damodar Rao Vs S.O., Municipal Corporation** that the slow poisoning by the polluted atmosphere is causing an environmental pollution and spoliation which should be regarded as amounting to the violation of Article 21 of Indian constitution.

In the case of **Subash Kumar vs. state of Bihar**, the Supreme Court has observed that the right to life is a fundamental right under Art 21 of the constitution and it includes the right to enjoyment of a pollution free water and air for the life. If anything creates a hindrance to get such quality of life which is in an derogation of laws of a citizen then there is an Article 32 of the constitution for removing the pollution from water or air, which is, harmful to the quality of life.

In the case of M. C. Mehta V. Shriram Food and Fertilizer Industries and Union of India (Oleum Gas Leak Case -I) the petitioner has filed the writ against the oleum gas leakage and to close down the one of the units of Shriram food and Fertilizers industries which is belonging to Delhi Cloth Mills Ltd. The Court has allowed for restarting the plant which subject to some certain rigorous conditions laid down in the order. But the notable development has been made in **Rylands vs. Fletcher** and it was modified by the Court , by holding that the enterprises were engaged in a hazardous industry which has poses a potential threat to the health and the safety of the person who were working in the factory and residing in the surrounding areas of that factory, which given an absolute and non-delegable duty to the community which ensure that no harm will results to anyone on the account of hazardous activity though the enterprise must be absolutely liable to compensate for such harm .

The decision which was laid by the Supreme Court in **Narmada Bachao Andolan v. Union of India 2000 (10) SCC 664 at p.727** which has clearly said that the sustainable development means what type of development can take place, what can be sustained by nature or ecology with or without alleviation. In **Vellore Citizens Welfare Forum v.**

Union of India AIR 1996 SC 2715, the Supreme Court has clearly recognized that the precautionary principle as an principle of Indian environmental law. In the case of **A.P. Pollution Control Board v. M.V. Nayudu AIR 1999 SC 812**, the Court has also discussed about the development of the precautionary principle. In the case of **S. Jagannath v. Union of India (Shrimp Culture case), AIR 1997 SC 811**, and in the case of **Narmada Bachao Andolan v. Union of India, AIR 2000 SC 3751.**, the Court has explained that when there is a state of uncertainty due to lack of something which creates damage to the environment, then, in order to maintain the ecological balance, then balance will be maintained by the industry or the unit which is likely to cause the pollution.”

Conclusion

To figure out, The Supreme Court, in the interpretation of Article 21, has given the environmental jurisprudence in India, by reinforcement of human rights jurisprudence. There are number of decisions which are related to the right to a clean environment, drinking water, and a pollution-free atmosphere, etc. which has been giving the status of indisputable human rights which are the fundamental rights of Indian citizens. The above judgments of the Supreme Court of India also show the broad range of cases which is related to environment and it is decided by the Court from time to time. Some of the judgments of the Supreme Court have been given an original writ petitions which is filed under Art. 32.

Bibiliography

Articles

- P. Shrivastava Memorial Lecture -? The role of the judiciary in environmental protection by Honble Mr. K.G. Balakrishnan, Chief Justice of India.
- Environmental Governance and Role of Judiciary In India by Geetanjoy Sahu p-24.
- Green Decisions: Summary of some Important Judgments by Bhat Sairam.

Books

- Indian Constitutional Law:- By- Prof. Mp Jain.
- The Right To Information Act,2005: A Handbook:- By- Sudhir Naib.
- Right To Information Act In India:Concepts And Problems:- Ritu Banerjee.

Case

- Ambika Quarry Works v. State of Gujarat, AIR 1987 SC 1073.
- M.C.Mehta vs. union of India, AIR 1987 SC 965.

Reports

- Law Commission of India One Hundred Eighty Sixth Report On Proposal To Constitute Environment Courts p-25
- Law Commission of India One Hundred Eighty Sixth Report On Proposal To Constitute Environment Courts

Statute

- The constitution of India
- Environmental Act

IS GUARANTEE FOR PAST DEBT VALID? -AN ANALYSIS OF THE CONFLICT BETWEEN SECTION 127 OF THE INDIAN CONTRACT ACT, 1872 AND ITS THIRD ILLUSTRATION

- Nitya Jain
NLU, Jodhpur

Abstract

The wording of Section 127 of the Indian Contract Act, 1872 which uses the phrase “anything done” gives one the impression that anything done in the past will constitute as valid consideration for a contract of guarantee. However, it is in contradiction to its third illustration which clearly makes past consideration inapplicable in case of guarantee. This stark contradiction within the Section has given rise to diverse opinions by Courts in India. While some decisions rely on the wording of the main section itself, others solely rely on its third illustration. Still others hold that illustrations cannot restrict the meaning of the main section. The whole discussion boils down to the fulfilment of two conditions for a guarantee for a past debt to be valid. First, that there must be some detriment suffered by the creditor and the second requirement is that such detriment must be at the instance or request of the surety. The first condition is nothing but an application of the wider principle that in all cases of contract the really necessary element of consideration is the legal detriment incurred by the promisee. As for the second condition, if the consideration had already moved without the instance of the surety then the principal debtor has already received the benefit and the creditor has already voluntarily suffered the detriment even before the surety came into picture. Now, if the surety executes a contract of guarantee he acts not for the benefit of the principal debtor but as surety for the benefit of the creditor in the sense that he guarantees receipt of payment by the creditor which defeats the purpose of the guarantee.

Introduction

As a general principle of Law of Contracts, every contract must be supported by some consideration. The same applies to a contract of guarantee. A contract of suretyship like any other contract must be supported by some consideration for it to be valid. A guarantee without consideration is void.¹

¹ Janaki Paul v Dhokar Mall Kidarbux, (1935) 156 IC 200.

However, there need be no direct consideration between the surety and the creditor.² It has been observed that “no court of common law has ever said that there should be a consideration directly between the persons giving and receiving the guarantee. It is enough if the person for whom the guarantor becomes surety receives a benefit, or the person to whom the guarantee is given suffers inconvenience, as an inducement to the surety to become guarantor for the principal debtor.”³ This is also evident from the definition of consideration in the Indian Contract Act, 1872 which states that consideration can move from the promisee or any other person.

Where the surety guarantees some future debt or transaction, the consideration may be a promise on part of the creditor to grant the credit or enter into transaction or the actual act of doing so.⁴

However the problem arises when the surety guarantees some past debt or transaction which has already taken place between the creditor and the principal debtor but has not been paid for by the principal debtor. There is some divergence on the view whether the benefit is given at the time of the execution of the guarantee or even a past benefit can constitute a valid consideration for the sustenance of such an engagement.⁵

There is considerable conflict of opinion as to whether the past benefit to the principal debtor amounts to a good consideration. In other words whether past consideration can be a good consideration for a contract of guarantee.⁶

The reason for such conflict is the wording of Section 127 of the Indian Contract Act, 1872 which states that “anything done” will constitute as valid consideration for a contract of guarantee, which is in contradiction to its third illustration which clearly makes past consideration inapplicable in case of guarantee.

Courts in India have given diverse opinions on the matter. While some agree with the interpretation that past consideration is good consideration for a contract of guarantee, majority of the decisions hold otherwise.

² Marley v Boothby (1825) 3 Bing 107.

³ Id.

⁴ Pitts v. Jones (2007) ECWA Civ 1301.

⁵ Ram Narain v Lt. Col. Hari Singh and Anr. AIR 1964 Raj 76.

⁶ Mir Niyamath Ali Khan v. Commercial & Industrial Bank, AIR 1969 AP 294.

Section 127

Section 127 of the Indian Contract Act, 1872 states that-

*“Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.”*⁷

The purpose of this section is manifold. Firstly, it makes it clear that consideration is required in a contract of guarantee. Next, it establishes that a direct flow of consideration between the creditor and the surety is not essential. Anything which is for the benefit of the principal debtor will be sufficient consideration for the surety to give guarantee. In *Chakhan Lal v. Kanhaiya Lal*,⁸ the Learned Judges held that there was sufficient consideration for the undertaking of suretyship for the whole sum to render it valid even though the surety may not have benefited from any of the advances made.

Finally it creates an impression that any act of the creditor done in the past before giving of the guarantee will also constitute valid consideration. In *Ghulam Husain Khan v. Faiyaz Ali Khan*,⁹ it has been held that the word 'done' in Section 127 shows that past benefit to the principal debtor can be good consideration for a bond of guarantee. Hence, where a lessee has agreed to pay the amount due under the lease by certain instalment and after some days a person executes a surety bond binding himself to pay certain amount in default of payment of instalments the surety bond cannot be said to be without consideration.¹⁰

However, in *Union Bank of India vs Avinash P. Bhonsle*,¹¹ the contention of the counsel for the defendant was that "anything done or promise made" cannot be construed to mean that anything done or promise made had reference to something done in the past. i.e. prior to the contract of guarantee and cannot be deemed to be sufficient consideration for the surety for giving the guarantee.

Also, in *Ram Narain v Lt. Col. Hari Singh And Anr.*¹² the Judge was unable to agree with the interpretation of the Section as done in *Ghulam Husain Khan*¹³ case and said that “With great respect, I regret, I am unable to agree with the interpretation put by their Lordships in this judgment. It is giving the word 'done' an unnatural meaning.”¹⁴

⁷ Indian Contract Act, 1872.

⁸ *Chakhan Lal v. Kanhaiya Lal*, AIR 1929 All 72.

⁹ *Ghulam Husain Khan v. Faiyaz Ali Khan*, AIR 1940 Oudh 346.

¹⁰ Supra Note 5.

¹¹ *Union Bank Of India vs Avinash P. Bhonsle*, (1991) 93 BOMLR 282.

¹² *Ram Narain vs Lt. Col. Hari Singh and Anr* AIR 1964 Raj 76.

¹³ Supra Note 9.

¹⁴ Supra Note 12.

The decision¹⁵ was also criticised in Pollock and Mulla¹⁶ where it is stated that “this seems to attribute an unnatural meaning to the word, which it is submitted and as the rest of the section shows, refers to an executed as distinguished from an executory consideration.”¹⁷

Illustration (c) To Section 127

The third illustration to Section 127 states that-

*“A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.”*¹⁸

Illustration c implies that a guarantee for a past debt would be invalid. There must be some fresh consideration moving from the creditor at the time of guarantee, for example- a further advance is made or the creditor refrains from suing the principal.¹⁹

In *Ram Narain v Lt. Col. Hari Singh And Anr.*²⁰ The Judge while answering the question on validity of past debt in guarantee held “From this illustration, I feel fortified in my conclusion that anything done or any promise made for the benefit of the principal debtor must be contemporaneous to the surety's contract of guarantee in order to constitute consideration therefore. A contract of guarantee executed afterwards without any consideration is void. Illustration (c) to Section 127 completely negatives a consideration which the Oudh Court²¹ has chosen to give to Section 127 of the Indian Contract Act.”²²

However, various comments were made by Courts on the correctness of giving decisions based solely on an illustration to a section. These illustrations, although attached to, do not in legal strictness form part of, the Acts, and are not absolutely binding on the Courts. They merely go to show the intention of the framers of the Acts, and in that and in other respects they may be useful, provided they are correct.²³ The Judge while commenting on the third illustration to Section 127 said that “This illustration appears to have received much more attention in the lower Courts than Section 127 itself. In fact, the lower Appellate Court goes entirely upon it, and at the hearing of this appeal it was almost entirely relied on, notwithstanding repeated

¹⁵ Supra Note 9.

¹⁶ Indian Contract and Specific Relief Act, 8th Edn (1957) p.517.

¹⁷ Id.

¹⁸ Supra Note 7.

¹⁹ M C Kuchhal Mercantile Law - 7th Edn.

²⁰ Supra Note 12.

²¹ Supra Note 9.

²² Supra Note 12.

²³ *Nanak Ram v Mehin Lal* (1875) ILR 1 All 487.

attempts on my part to point out that it was the meaning of Section 127 itself and not the illustration that was material. This illustration (c) is so vague and bald as to be open to misapprehension. To be of real service to those for whose assistance these illustrations are intended, they ought to be placidly clear in their phraseology and, if possible, I had almost said infallibly sound in their law.”²⁴

The purpose of illustrations is to illustrate the section.²⁵ It is well settled that just as Illustrations should not be read as extending the meaning of a section, they should also not be read as restricting its operation, especially so, when the effect would be to curtail a right which the plain words of the section would confer. Though the illustrations may be looked into in order to understand the meaning of the section, they do not exhaust its meaning. The illustration thus understood does not in any manner restrict the operation of the section. It just illustrates its meaning and does nothing more.²⁶

Also, in the case of *Shambhu Nath Mehra v. The State of Ajmer*²⁷ the Court observed “We recognise that an Illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit.”²⁸

It is therefore clear that if the language of the text of Section 127 of Contract Act is clear and unambiguous, the sweep of the text cannot be curtailed by using Illustration (c) to impose a limitation on the expression "anything done or any promise made for the benefit of the principal debtor" that it should be done at the time of giving the guarantee. The language is wide enough to include anything that was done or a promise made before giving the guarantee and would not restrict the application of the section only what was contemporaneously done.²⁹

Critical analysis

Thus contrary views exist when the question of the validity of a contract of guarantee with respect to a past debt arises. While some decisions rely on the wording of the main section itself, others solely rely on its third illustration. Still others hold that illustrations cannot restrict the meaning of the main section. While deciding which of the plethora of opinions is sound we need to analyse Section 127 in light of the basic principles of

²⁴ Id.

²⁵ *Aniruddha Mitra v. The Administrator General of Bengal and Ors.* (1949) 51 BOMLR 971.

²⁶ Id.

²⁷ *Shambhu Nath Mehra v. The State of Ajmer* 1956 AIR 404.

²⁸ Id.

²⁹ *Supra* Note 11.

contract. It is important to remember that a contract of guarantee is essentially a “contract” first and thus the principles regarding consideration which apply to any other contract will also apply to a contract of guarantee.

It has been widely argued that for a contract of guarantee for a past debt to be valid the creditor must suffer a detriment at the instance of the surety. This is nothing but an application of the wider principle that in all cases of contract the really necessary element of consideration is the legal detriment incurred by the promisee at the promisor’s request and it is immaterial whether there has been any apparent benefit to the promisor.³⁰

This argument has two aspects, the necessity for there to be detriment suffered by the creditor and the requirement that such detriment must be at the instance or request of the surety.

1) Suffrance of detriment by the Creditor

A valuable consideration in the sense of the law, may consist either in some right, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility, given, taken or suffered by the other.³¹ This means that whatever is provided by way of consideration should be a benefit to the person receiving it or a detriment to the person giving it.

It is a well-established rule that for a contract of guarantee to be valid there must be some detriment caused to the creditor. Even if the surety derives no benefit from the transaction, the creditor suffers a detriment which is enough consideration.³² The "something" which the promisee has done cannot be a merely illusory thing. For instance, if B asks his friend A to take Rs. 5 from A's left-hand pocket and put it into A's right-hand pocket and A accordingly transfers the money from his left-hand pocket into his right-hand pocket, A suffers no detriment at all by complying with that request of B. It would be against common sense to hold that A's above act at B's request will be good consideration for B's signing a promissory note in favour of A for Rs. 1000.³³

In *Paulo Verghese v, Ittipe Abraham*³⁴ after a debt had been contracted, A (the alleged surety) came forward and promised that he would see that the debtors duly discharged

³⁰ Pollock & Mulla, *Indian Contract and Specific Relief Act*, 8th Edn (1957) p.1795.

³¹ *Currie v Milsa*, (1875) LR 10 Ex 153.

³² Chitty on Contracts, *Specific Contracts*, p. 1651.

³³ *Muthukaruppa Mudali and Ors. vs Pi. Mu. Kathappudayan and Ors.* (1914) 27 MLJ 249.

³⁴ *Paulo Verghese v, Ittipe Abraham* AIR 1952 Tr & Coch 202.

their obligation. The Court held that “there is no suggestion of any benefit which the creditor was prepared to confer on the principal debtor at the request of the surety. The debt was already contracted and subsequently the alleged surety is stated to have come forward and said that he would be responsible for the discharge of the debt. The creditor did not suffer any detriment at the instance of the surety. This is an obvious instance of a promise not supported by consideration and for that reason cannot be enforced in a Court of Law.”³⁵

2) Detriment at the request of the surety

In accordance with the position as regards contracts in general, consideration to support a promise of guarantee may be found in an act done before it is made, provided that the act is done at the guarantor’s request, that the parties understood that the act was to be remunerated in some way and that the conferment of a benefit would have been legally enforceable had it been promised in advance.³⁶

It is imperative here to draw a distinction between a request and a recommendation. The mere fact that a person recommends certain advances to be made to another and they are made accordingly is not sufficient consideration in law for a subsequent promise by him guaranteeing their payment.³⁷

In case of *Muthukaruppa Mudali And Ors. v Pi. Mu. Kathappudayan and Ors.*³⁸ it was argued that the advances made to other persons on the recommendation of the 1st defendant were good past consideration for the contract. Section 127 of the Indian Contract Act says that anything done, for the benefit of the principal debtor may be a sufficient consideration to the surety. Consideration is defined in Section 2(d)-“When at the desire of the promisor, the promisee... has done...something, such act...is called a consideration.” The Court referred to the case of *Sindha Shri Ganpatsing v. Abraham*

The Court further pointed out that “the appellants were unable to refer us to any case in which a recommendation was held to be within the words of the section.....”

In a case reported in *Juggot Indur Narain Roy Choudhry v. Nistarinee Dassee*⁴⁰ decided subsequent to the passing of the Indian Contract Act, but, it may be arising before that

³⁵ Id.

³⁶ *Pau On v Lau Liu Long* (1980) A.C. 614, 629.

³⁷ *Supra* Note 33.

³⁸ Id.

³⁹ (1895) I.L.R. 20 B 755.

⁴⁰ (1876) 24 W.R. (Civil Rulings) 445.

date, there is a dictum that a mere recommendation by one party to another to lend money to a third party does not render the first party liable to repay the loan.

The Court in *Muthukaruppa*⁴¹ also referred to English Law on this point and said that "according to English law also a recommendation alone cannot be valuable consideration. Vide Halsbury's Laws of England ,⁴² --consideration where is " the promise does some act (in India it would include 'has done some act') from which a third person benefits and which he would not have done but for the promise."

The distinction between the recommendation by A of B to C for a certain favour to be shown to B and a request by A to G to do a service to B may no doubt become in many conceivable cases a very thin distinction but, when we know the circumstances under which a particular recommendation or a particular request is made, it is not usually difficult in most cases to recognise the distinction. A desire or request shows much more earnestness and personal anxiety than a mere recommendation.⁴³

Thus, guarantee for a past debt can be valid provided that the past debt was executed at the request of the surety and was detrimental to the creditor. In case the consideration had already moved without the instance of the surety then the principal debtor has already received the benefit and the creditor has already voluntarily suffered the detriment even before the surety came into picture. Now, if the surety executes a contract of guarantee he acts not for the benefit of the principal debtor but as surety for the benefit of the creditor in the sense that he guarantees receipt of payment by the creditor. Thus, instead of the principal debtor receiving the benefit it is the creditor who receives the benefit of the contract of suretyship where it is actually supposed to be other way around.

⁴¹ Supra Note 33.

⁴² Volume 7, paragraphs 793 and 794.

⁴³ Supra Note 33.

RIGHT TO EDUCATION FOR TRANSGENDER CHILDREN: A ROUTE TOWARDS UNPREJUDICED HUMAN RIGHTS

- Navshesh Khatri
GNLU, Gandhinagar

Abstract

The Constitution of India guarantees right to free and compulsorily education between 6 to 14 years of children under Article 21-A as a fundamental right with an aim that not a single child should be deprived of education due to lack of financial help. In this regard, the biggest challenge India is facing at present is the education of transgender children who are deprived of primary education due to their inappropriate and unexpected gender role including other reasons which contributes to social exclusion. The recent judgment of Supreme Court of India in the National Legal Services Authority vs. Union of India which gave legal recognition to the transgender community for their empowerment and the upliftment of the marginalized group as there is a need for affirmative action on behalf of the government of India and state governments. This paper will focus on the constitutional goals and safeguards for the welfare of transgender children in the light of important judgments and how the Centre and State are effective in implementing these goals. In an unprecedented move, the Delhi government under the right to education act had ensured primary education for the transgender children by including them under 'disadvantaged category' which will become a benchmark for other states as well to implement strong and effective education policies. The central government also has come up with a scheme to fund the family of a transgender child on monthly basis to ensure no dropout from schools. The present challenges before the Indian society is to achieve the goals enshrined under Article 14, 15, 16 and 21 of the constitution, accept the transgender children and enhance their employability skills, curb the dropout rate in the school by providing scholarships and to encourage transgender children for what they are from inside and not subject them to discrimination or violence.

Keywords: Transgender Children, Right to Education, Constitution of India, Government of India

I. Introduction

Education is a human right with immense power to transform. On its foundation rest the cornerstones of freedom, democracy and sustainable human development.

-Kofi Annan

In India, a child is considered equivalent to god and to ensure that every child should get freedom of thoughts and become independent than each parent must provide quality education for their progeny. Education whether it's primary or higher gives an individual a direction to achieve their goals by knowing what exactly they want to become in life. Denying education to a child will not only deprive them of a fundamental right but prima facie violates their human rights. In a largest democracy like India, through the 86th Constitutional Amendment 2002, the Government of India had ensured Right to Education compulsorily from 6 to 14 years of age for every child by making it a fundamental right. The state being a welfare state wants to achieve the goals mentioned in the directive principles of state policy by making it a fundamental right but in this regard, the biggest challenge is enforcing Article 21-A of Indian Constitution i.e., Right to Education for the transgender children in India.

The transgender children are those who experience a gender identity or expression, or behaviour that is inconsistent with or not culturally associated with, the societal norms of their assigned sex. It is also called as gender dysphoria, where the person does not behave in such a manner due to psychological causes but also biological ones related to their genetics or prenatal exposure to hormones. In early childhood, a child may express behaviour incongruent with their assigned gender and also experience rejection due to their different conduct.

The recent developments in the Indian society had witnessed a wave of change as the Supreme Court of India on 15th April 2014 has given legal recognition to the third gender i.e., the transgender community paving the way for ensuring social, political, cultural and economical empowerment for the marginalized group. In this regard, the Government of India and state governments are working together on the policies to ensure literacy among the transgender children for the fulfilment of the constitutional goals enshrined under Article 21 to ensure right to life and personal liberty and Article 45¹ for education to children below the age of six years. Despite the rights ensured by the constitution, it's unfortunate that the state is failing to implement the education schemes

¹ Article 45 of the Constitution of India, as originally enacted, provided that it is the obligation of the State to "endeavour to provide" within 10 years "for free and compulsory education for all children until they complete the age of fourteen years".

for the transgender children due to less support from the society for providing an enormous boost to the self confidence and self esteem of the transgender children. The lack of awareness among the parents and negative attitude of the society is complicating the situation by making it worst for the transgender child.

Education is a right of every child and denying it by any mean leads to deprivation of social and cultural participation which makes the life of any children vulnerable. Similarly, the transgender children like any other children have the right to education and it's the state prerogative to convince such parents to support their child mentally, physically and most importantly emotionally because the child itself does not know about their behaviour. The society too is having a responsibility to be affectionate towards transgender children and prevent them from any form of violence, discrimination and abuse if so happening. Right to education should not only cover those transgender children who are economically incapable but also social phenomenon should be seen which prevents a family to send them in a primary school. Hence, the seeds of knowledge can only be sown through education which will help transgender children to explore about themselves, their career and how to tackle the differences they are facing in the society.

II. Transgender children & Indian society

Due to transgender children divergent behaviour from the normative gender roles they faces social exclusion which not only generates tension, violence and disruption but also diminishes a sense of social responsibility in them and perpetuates inequality in the democratic society like India. Some of the instances which can be mentioned are:

1. The school's itself where the transgender children experience emotional trauma, humiliation, torture (either mental or physical), unequal treatment by fellow peers who won't accept them as normal and make fun of their behaviour, gestures, body language and bully them as well.
2. Discrimination begins at home when parents relegate the self-identity of their child to a 'medical condition'. Predilections for cross-dressing and 'outlandish' sexual choices are all perceived with disgust.² The family without understanding the psychological condition of a child treat them as degraded and unworthy to live and later ostracise them or force them to leave parental house if identified as transgender which invariably has a severe negative impact on their ability to access and continue schooling.

² Arati Nair & Arati Nair, The Jarring Truth about Trans People Living on the Fringes of 'Normal' Society Youth Ki Awaaz (2015), <http://www.youthkiawaaz.com/2015/06/transgender-rights-in-india/> (last visited Mar 29, 2016).

3. In some cases, the schools either directly or indirectly ask or pressurize the parents due to social stigmatization to get admitted their child to other schools which is resulting into increase of dropout rates in India.
4. Frequent experience of abuse and discrimination in the public places sometimes force transgender children to commit suicide. Here, it is important to note that being a transgender is not a disorder or a disease.

When a person faces continual harassment and ostracism, it affects their sense of self and places a heavy strain on their quality of life. The reality is that there is a lack of awareness and understanding of transgenderism.³ The society can only progress when they will accept the invisible group and make them visible with the help of legal developments otherwise with the growing age transgender children left with no choice but either to join prostitution (which may cause sexual transmitted infection) or dance in marriages or begging as a profession. If public perception will change, it would be easier to accommodate the transgender children in the society.

Hence, it is important here to emphasize that there should be no reason to be disappointed about the way the child is behaving rather it is essential to ensure elementary education at school which will further retain them up to the higher level. The state should not only focus on the matter of welfare but also look at the development aspect at large for taking this marginalized group to the mainstream group by addressing the stigma at the early stage.

III. Right to Education in India: a boon for transgender children

The latest report of Census 2011 by the Government of India showed that there are approximately 55,000 children's between the ages 0-6,⁴ who were identified as transgender or third gender by their parents willingly without having any phobia. Such evidences cast responsibility on the state to encounter the low literacy rate among the transgender children and the only tool to curb the menace is right to education. The affirmative actions through legal recognition were taken in the past by the Election Commission of India for issuing voter identity cards, State governments like Tamil Nadu had issued Ration Cards, reserved seats in government-owned art and science

³ The future of transgender rights — SOS Children, [Soschildrensvillages.org.uk](http://www.soschildrensvillages.org.uk/news/blog/transgender-rights) (2014), <http://www.soschildrensvillages.org.uk/news/blog/transgender-rights> (last visited Mar 29, 2016).

⁴ Rema Nagarajan, First count of third gender in census: 4.9 lakh, *The Times of India*, 2014, <http://timesofindia.indiatimes.com/india/First-count-of-third-gender-in-census-4-9-lakh/articleshow/35741613.cms> (last visited Mar 29, 2016).

colleges and Delhi Government allowed pension schemes for transgender. Now, the next step towards empowerment and development of transgender children would be providing Education through Article 21-A of the Constitution of India.

The Right of Children to Free and Compulsory Education (RTE) Act, 2009, which represents the consequential legislation envisaged under Article 21-A,⁵ means that every child has a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards.⁶ This legislation is of significant importance for the transgender children not only because they are weaker section but also the government at both the levels i.e., the centre and the state will act as a backbone to strengthen the goals enshrined in Constitution. The government of India, state governments and local authorities should consider the other social factors as a legal obligation apart from the financial aid (loans) which prohibits a transgender child to access free and compulsory elementary education. Apart from the state prerogative, the private educational institutions under the said act have to reserve 25 per cent seats for the weaker section and as a major responsible stakeholder such institutions should ensure that transgender children should also get admitted within that reserved seats. Now, it's important to emphasize on Fundamental duty under Article 51A (k) of constitution which ensure that parent or guardian should provide education opportunities for his ward between the age of 6 and 14 years.

Education will help the transgender child to generate their interest or skills in any field of study through which they can get employment which can contribute strongly and effectively in the making of Indian economy.

IV. Supreme Court of India & International perspective towards transgender children education rights

The Supreme Court of India addressed the issue of Transgender education in the case of *National Legal Services Authority vs. Union of India & Ors*⁷, where not only legal recognition to the third gender⁸ is given but also the court upheld the protection of their

⁵ The Constitution (Eighty-sixth Amendment) Act, 2002 inserted Article 21-A in the Constitution of India "to provide free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such a manner as the State may, by law, determine".

⁶ Elementary Education | Government of India, Ministry of Human Resource Development, Mhrd.gov.in (2016), <http://mhrd.gov.in/rte> (last visited Mar 29, 2016).

⁷ Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013. Judgment delivered on 15 April 2014

⁸ Every person must have the right to decide his/her gender expression and identity, including transsexuals, Transgenders, and should have right to freely express their gender identity and be considered as a third sex.

fundamental rights like any other Indian citizen under Part-III of constitution by ensuring right to personal liberty, equality, dignity, freedom of expression, access to education or public employment without any discrimination on the basis of sex or gender, right against violence, discrimination and exploitation and the right to constitutional remedies. The Centre and State governments treat transgender persons as “socially and educationally backward classes of citizens” and extend two percent reservation for admission in educational intuitions including adequate facilities for higher education.

Further, the government while making education policy for transgender children should consider the judgment of *Mohini Jain vs. State of Karnataka*⁹, where the Apex court held, Right to Education is a fundamental right under Article 21 and the dignity of the individual cannot fully be appreciated without the enjoyment of right to education. The state government is under an obligation to provide educational facilities at all levels to its citizens. In *Unni Krishnan J.P. vs. State of Andhra Pradesh*¹⁰, the Court held that, the Right to Education is implicit in the right to life and personal liberty guaranteed by Article 21 and must be interpreted in the light of the Directive Principle of State Policy contained in Articles 41, 45 and 46.

While making Legislations, the Centre and State Government’s should keep in mind all those principles laid down under:

1. Article 1 of the UDHR, 1948¹¹, i.e., all human-beings are born free and equal in dignity and rights and Article 3 which states that Everyone has the right to life, liberty and security of person including Article 26 which emphasize on everyone’s right to education and it shall be free, at least in the elementary and fundamental stages and directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.
2. The International Convention on Economic, Social and Cultural Rights (ICESCR) which includes Right to Education for all including the dependent child under Article 10 and 13;
3. Article 8 of the Convention on the Rights of the Child which preserve right of one’s

⁹ AIR 1992 SC 1858

¹⁰ AIR 1993 SC 2178

¹¹ The Universal Declaration of Human Rights | United Nations, Un.org (2016), <http://www.un.org/en/universal-declaration-human-rights/> (last visited Mar 29, 2016).

identity. UNICEF¹² in 2014 noted, that “The discrimination and harm that transgender children and parents face stems from attitudes that do not accept all individuals as equal...” such discrimination can manifest as “marginalization and exclusion from essential services like education.

V. India's initiative towards transgender children education

After India got independence, initially the subject matter of education was under the State List for ten years. Later on, through the 42nd Amendment Act of 1976 it got shifted to the Concurrent List. Now, it's not only the State Government but Parliament too can enact legislations, draft policies and schemes regarding education. From this incident, it can be inferred that governments at both the levels became permanent partners to make the delivery process more efficient with the help of great sensitivity and care.

The Union Government after the landmark judgment of *National Legal Services Authority (NALSA) vs. Union of India and Ors*¹³ is now working on the transgender bill for the overall social, economical, cultural and political upliftment and development of the community. On 24 April 2015, the Rajyasabha unanimously passed the Rights of Transgender Persons Bill, 2014 having a range of substantive rights; one of the key features of the bill is two percent reservation in primary, secondary and higher education.¹⁴ The bill still needs amendments before presented in the Lok sabha like inclusion of anti-discrimination and anti-bullying cells to prevent dropouts under the education chapter (educational institutions to provide for inclusive education for transgender children) of the Bill, school curricula include transgender issues from the start which must be accompanied by teacher sensitisation and expand its reference to “transgender children” to include “gender non-conforming children”.¹⁵

The Union Human Resource Development (HRD) Ministry on 25 July 2014 has advised all the states¹⁶ and union territories to take appropriate action for the inclusion of “third

¹² UNICEF's 2014 position paper on ending discrimination on the basis of sexual orientation and gender identity. Letter to the Government of Ireland on the Rights of Transgender Children, Human Rights Watch (2015), <https://www.hrw.org/news/2015/07/14/letter-government-ireland-rights-transgender-children> (last visited Mar 29, 2016).

¹³ AIR 2014 SC 1863

¹⁴ The Rights of Transgender Persons Bill, 2014, Currentaffairs.gktoday.in (2015), <http://currentaffairs.gktoday.in/rajya-sabha-passes-rights-transgender-persons-bill-2014-04201522124.html> (last visited Mar 29, 2016). The Central Government will introduce the bill in Lok Sabha only in the comprehensive form as the government feels that the Bill still needs some changes in its present form.

¹⁵ Danish Sheikh, for those marked ‘Other’ The Indian Express (2015), <http://indianexpress.com/article/opinion/columns/for-those-marked-other/> (last visited Mar 29, 2016).

¹⁶ Except The State of Jammu and Kashmir

gender” children among socially and educationally backward classes for admission in educational institutions under the Sarva Shiksha Abhiyan¹⁷ to universalise elementary education.¹⁸ Even ahead of the Apex courts order it has been tweaked to provide transgender as an option from 2013-2014 onwards along with male and female under the National Means-cum-Merit Scholarship Scheme and the National Scheme of Incentive to Girls for Secondary Education. The University Grant Commission too had issued a circular for the Transgenders scholarship and fellowship schemes to promote and enhance the full enjoyment of all human rights by all persons irrespective of their sexual orientation or gender identity.

The 12th Five Year Plan (2012-17) provides recommendation for transgender community education with financial assistance¹⁹ and on that basis the Ministry of Social Justice and Empowerment has constituted an Expert Committee for studying in-depth problems of transgender community and had submitted report with recommendations of an Umbrella scheme²⁰ for the empowerment and welfare of Transgender children. The Scheme for supportive Money to the Parents of Transgender children is a progressive measure taken by the Union Ministry of Social Justice and Empowerment in accordance with Article 41²¹, one aspect covered is education where the state is trying to secure fundamental rights given under Article 14 i.e., equality before the law, Article 19 (1) freedom of speech and expression for all citizens, Article 21 for right to life and personal liberty and prohibit discrimination on the ground of sex under article 15 (1), 15 (2) and 16(2) of the Indian constitution. Under this scheme, 100% Central assistance from the Government of India will be received by the State Government and Union Territory Administrations and Rs. 1000/- per month would be provided to each transgender parent per child.²²

¹⁷ The affirmative action provided for Transgenders under the Sarva Shiksha Abhiyan (SSA) is aimed at pushing up their literacy levels, which is around 44 per cent as opposed to the national average of 74 per cent as recorded in the 2011 Census.

¹⁸ Right To Education, Righttoeducation.in (2014), <http://righttoeducation.in/media/news/2014/07/25/include-third-gender-children-in-schools-hrd-ministry> (last visited Mar 29, 2016).

¹⁹ Indian Exclusion Report 2013, (2013), <http://www.indianet.nl/pdf/IndiaExclusionReport2013-2014.pdf> (last visited Mar 29, 2016).

²⁰ Five Centrally Sponsored Schemes for the Welfare of Transgender Persons: Financial support to the parents of Transgender children, Pre-matric and Post-matric Scholarship for transgender students, Assistance for skill development training and National Pension scheme for transgender persons.

²¹ Article 41 of the Indian Constitution states that, the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

²² This scheme proposes to cover about 5000 beneficiaries (parents of transgender children) in a year. Scheme of Financial support to parents of Transgender Children, <http://himachal.nic.in/> (2015), http://himachal.nic.in/WriteReadData/1892s/9_1892s/scan0001-74363681.pdf (last visited Mar 29, 2016).

For the first time, Tamilnadu government's education department has issued guidelines for schools to provide for counselling of transgender students and their families to ensure they don't disown them, and ensuring disciplinary action against schools including permission for transgender students to join any college of their choice for undergraduate courses.²³ The State government issued an order on November 8, 2011 which expanded the definition to include transgender children under the RTE Act, 2009²⁴. The Kerala Government had also included Transgender child from the age of 6 to 14 years belonging to SC's, ST's and families engaged in traditional means of livelihood under "child belonging to disadvantaged group"²⁵.

In the National Capital of Delhi, a notification²⁶ notified by the Lieutenant governor Najeeb Jung has included transgender kids under economically weaker sections and given reservation in Delhi schools under the 25 per cent quota meant for the disadvantaged students category for admission (the health department will issue the certificate only after ascertaining the gender), allowing them to pursue studies free of cost under the Right to Education Act, 2009. The 'transgender' child is included within the meaning of 'child' belonging to a 'disadvantaged group as defined in the section 2(d) of the RTE Act'²⁷.

Similarly, the Chhattisgarh Government came up with Equal Right & Free education policy whereby they will provide equal rights to transgender children²⁸ or those facing identity crisis, by compulsory admission and free education including books, uniforms, food and equal participation in all educational institutions. Also, the Chhattisgarh School Education Department has ordered formation of special monitoring committee

²³ The Tamil Nadu government issued an order in May 2008, Rights of Transgender People – Sensitising Officers to Provide Access to Justice, Justice P. Sathasivam (2011), <http://www.tnsja.tn.nic.in/article/Rights%20of%20Transgender%20PSJ.pdf> (last visited Mar 29, 2016).

²⁴ Mohamed S., Advantages and disadvantages of RTE Act The Hindu (2013), <http://www.thehindu.com/news/cities/Madurai/advantages-and-disadvantages-of-rte-act/article4735501.ece> (last visited Mar 29, 2016).

²⁵ Section 2 (g) of The Right of Children to Free and Compulsory Education Kerala Rules 2010, http://www.azimpremjiifoundation.org/pdf/Kerala_RTE_Rule_17-12-2010.pdf

²⁶ eGazette Number:No.F.DE23 (42)/RTE/2013-14/1305-1314 dated on 09.10.2014, the notification was issued by the Directorate of Education and the order will be applicable to all schools situated within the National Capital Territory of Delhi.

²⁷ Transgender kids quota, ABP Live (2014), <http://www.abplive.in/india-news/transgender-kids-quota-95710> (last visited Mar 29, 2016).

²⁸ As per the survey conducted by National Aids Control Organization in the State of Chhattisgarh to identify and register transgender, it revealed that there is one child transgender in every 12 transgender.

presided by the head master, has also been made mandatory to prevent transgender children from ridiculed behaviour and pestering in schools by other students. The monitoring body in schools would also keep a watch on suspected²⁹.

Replicating the five centrally sponsored sub-schemes of the Central Government for social and academic development, the state government of Odisha via newly created Department of Social Security and Empowerment of Persons with Disabilities is financially aiding parents of transgender children with Rs. 1,000 every month³⁰. Also, centrally-sponsored scheme of Pre-matric scholarship for transgender students from classes VIII to X and post-matric scholarship for the day scholars and hostel students (studying in classes XI and above), with a reimbursement of compulsory refundable fees during higher studies in India.³¹

VI. Conclusion

India is going through a transition whether it's the Judiciary by acknowledging gender based violence as a fundamental violation of human rights or Legislature which is enacting the education schemes for the transgender children shows its seriousness towards upliftment of the marginalized group. At present, it's the government's responsibility (at Centre and State Level) through mass awareness to curb those barriers and associated taboo which prohibits access to elementary education like bullying and harassment of transgender child at home and families on account of their gender. Violation of Article 21-A by schools, students and teachers to treat them differently or

²⁹ Rashmi Drolia, Transgender children skeptical about Chhattisgarh government's equal right & free education policy, The Times of India, 2015, <http://timesofindia.indiatimes.com/india/Transgender-children-skeptical-about-Chhattisgarh-governments-equal-right-free-education-policy/articleshow/47619242.cms> (last visited Mar 29, 2016).

³⁰ Transgender Students in classes VIII to X will receive assistance, with day scholars being given Rs. 150 and hostel students Rs. 350 for 10 months in a year under a pre-matric scholarship and post-matric scholarship of Rs. 550 for day scholars and Rs. 1,200 for hostel students. The Objective of this scheme is to minimize the incidence of drop-out, especially in the transition from the elementary to secondary stage and to improve participation of transgender children in pre-matric stage so that they can progress and perform better in the post-matric stage of education. Shahana Yasmin, Odisha Government Introduces Pension Schemes and Scholarships for Transgender Empowerment Vaga Bomb (2015), <http://www.vagabomb.com/Odisha-Government-Introduces-Pension-Schemes-and-Scholarships-for-Transgender-Empowerment/> (last visited Mar 29, 2016).

³¹ Guidelines by the Ministry of Social Justice & Empowerment Government of India, Scholarships will be paid to such students whose parents/guardians income for all sources does not exceed Rs. 2,50,000/- per annum, Centrally-Sponsored Scheme of Pre Matric Scholarship For Transgender Students, <http://himachal.nic.in/> (2015), http://himachal.nic.in/WriteReadData/1892s/9_1892s/scan0001-28709629.pdf (last visited Mar 29, 2016).

which discourages a child to give up studies or any gender based violence will directly hits at the root of Article 14,19 and 21.

Hence, provisions to be made in law for stringent measures against those who ill-treat transgender children through which a sense of respect should be developed in the Society. To ensure Right to education Schools should include “gender identity” and “gender expression” within its non-discrimination policies, zero tolerance guidelines to handle bullying, positive transgender literature in school library, help the child to open up with the school staff, respect them for their sense of self irrespective of in whatever attire a child comes to school, support them in developing their gender identity and make them feel emotionally safe by which transgender students and their parents will get confidence without any struggle to access primary education. Teachers should aware all children from the beginning that different people identify their gender differently and their choices should be respected.

The Central Government like Sarva Shiksha Abhiyan should also review existing schemes like Rashtriya Madhyamik Shiksha Abhiyan, Jan Shikshan Sansthan at primary and secondary level to include transgender children unless they attain the age of 14 but State should also commit to provide them enabling environment for equal access to education opportunities at higher level studies after the completion of 14 years. MHRD through National Council for Teacher Education may prepare an Inclusive policy to sensitize teachers on transgender is required to make the teachers explicitly positive and vocal about transgender identities and also to train administrative bodies in schools to create a classroom environment which nurture all students without falling into any perceived social norm.

Like Delhi, Tamilnadu and Chhattisgarh, the scheme by Ministry of Social justice and Empowerment on right to education cast a positive obligation on other State Governments (less than 20 percent state governments had introduced such legislations and policies) to implement it by making policies or schemes as per their requirement for transgender children without discriminating on the basis of religion, race, caste, sex, gender, place of birth etc., so that they are also admitted in private unaided schools under section 12(1) (c) of the RTE Act, 2009. All transgender students should have equal opportunity to participate in all the school activities like sports, recreation, leisure

activities and facilities, including bathroom and locker rooms in consistent with their gender identity. There is no need to establish separate schools for transgender children rather inclusive education is needed so that the negative attitude of the members of society can be curbed. Lastly, such affirmative action's will be efficient and successful when Centre and State Government's with the help of Media will work to sensitize in all the forums about the need of transgender children education and then only they will turn into professionally skilled workforce who will later contribute to the Indian economy.

TAX INCENTIVES AND THEIR ROLE IN RESEARCH AND DEVELOPMENT

- Nivruthi Tumu Reddy
Jindal Global University

Abstract

Research and Development (hereinafter referred to as R&D) is a term covering three activities: Basic research, applied research and experimental development.¹ These regulate one aspect of the market behaviour as they encourage innovation based economies. Of late, countries around the world have shown profound interest in investing in R&D to promote domestic growth and international relations. Each of these countries have a unique tax system modulating its performance, and the tension between the kind of incentives the system provides and research and development is still an eminent issue². This paper seeks to analyse, firstly, the basic structure of tax incentives for R&D and secondly, the role of tax incentives in R&D specific to India, its optimal outcome on the Indian market, features, requirements and any recommendations if necessary critiquing the existing model in the technological industry sector. Furthermore it draws a comparative narrative between different tax incentive systems from around the globe to promote and progress the growth of R&D.

Universal Anatomy of Tax Incentives

“Taxation is a government’s monopolistic power which unavoidably distorts market efficiency”.³ Tax incentives are used as a medium to reduce taxes and promote market growth by inducing businesses and individuals in exchange of desirable functions on their parts.⁴ In other words a tax incentive can be referred to as a form of Douceur. This is denoted as an incentive as it helps in ‘mitigating a market failure associated with the

¹ Research and Development- OECD, <https://stats.oecd.org/glossary/detail.asp?ID=3111>

² ISS 1936-5357, Harvard, John M. Olin Centre for law, Economics, and business fellows’ discussion paper series: Integrated tax policy approach to designing research tax benefits, by Noam Noked, Discussion paper no. 57. 06/2014, MA 02138

³ Can Research and Development Tax Credit be Properly Designed for Economic Efficiency?- Jason J. Fichtner and Adam N. Michel, Mercatus Research

⁴ Section 3. Using Tax incentives to support community health and development, what are tax incentives? <http://ctb.ku.edu/en/table-of-contents/implement/changing-policies/tax-incentives/main>

externality of certain economic activities'.⁵ Under this purview only those activities are encouraged which are most beneficial to the society as a whole.⁶ Targeting and providing the business and individualised sectors⁷ with a tax break is considered crucial to promote national or regional economic growth.⁸ Availing this form of incentive increases the value of goods and services, which in turn helps in the growth of income derived from that production.⁹

Research and Development is one area which every country, on one hand wants to overly exploit as it promotes economic growth derived by innovation and technology,¹⁰ however on the other, to invest in it is what every country fears, as it does not guarantee the long run growth of economies rather it has the tendency to produce uncertain outcomes and reluctant disclosures.¹¹ Most governments use tax incentives in order to facilitate and inculcate research and development in different sectors of market, as then companies don't hesitate in investing their share after being subsidised by the government.¹² Research and development as a tool is chosen to keep to the market functional and to revise it with changing times. From more than a decade, more countries are using tax incentives for R&D as the schemes outlined by the government have become more generous.¹³

General Structure of The R&d Model

The OECD innovation policy platform lays down a structural process for R&D. It avails the government a choice between grants or procurement and fiscal incentives. For sustenance of R&D more than 20 OECD governments provided tax incentives¹⁴ in the

⁵ The Framework for assessing tax incentives: A cost-benefit analysis approach, by Duanjie Chen, research fellow, School of Public policy, university of Calgary, New York, 23-24 April of 2015

⁶ Supra 3

⁷ According to a CCTV (China Central television) news report (<http://news.cntv.cn/special/tan/11/0519/>), the medium of providing a tax break to preferential tax payers violates the 'equity principle' as when everyone are falling within the purview of the tax system, these preferential tax payers aren't treated on their ability to pay rather they are given economic significance by policy makers to facilitate market growth. However positive impact this has on the market, it still draws a line of equity within the integral system of tax law.

⁸ Supra 4

⁹ Importance of tax incentives, tax revenue and stabilization interim committee, October 25, 2011

¹⁰ Supra 3, page 3

¹¹ R&D tax incentives, rationale, design and evaluation, OECD, November 2010

¹² Supra 8

¹³ Supra 3, page 3

¹⁴ There is a difference between a tax incentive and the general tax structure as a whole. When a 'selected group of tax payers' are provided with preferential tax treatments, it falls within the purview of the tax incentive, as these groups are leveraged to perform a certain activity. However when a 'tax provision' ranging between different levels of allowances is universally applicable regardless of other factors associated to them, then it becomes a part and parcel of the general tax structure.

form of fiscal incentives, which is a hike from 12 countries in 1995 to 18 countries in 2004.¹⁵ Now why are the governments promoting R&D? Developed and Developing countries not only endorse their economic growth to elements in the short run, but rather look for elements in the long run they can associate with. Research and Development is one such element which a) quantifies and ensures growth in the future through invention of innovation policies and b) promotes national competition.¹⁶ To fulfil both the above requirements the governments of these countries need to leverage their markets to invest in the business of R&D and a form of leverage is tax incentives or benefits.

When a country's tax code enables a tax incentive, it encourages and incentivizes its economic activity.¹⁷ These incentives are not only attributed to a specific group rather they are industry, region and firm-neutral.¹⁸ These groups use tax incentives for R&D as a form of augmentation. For any firm/company to exist in a competitive market, changing innovation and technology is a crucial element as they have to strive constantly to be at the top of the market. When a tax incentive or benefit is provided for promoting research and development a company can either reduce its tax liability or provide itself with a sizeable cash rebate.¹⁹ Such inflow of cash incentivizes the company to promote and better its technology rather than incurring overflow of resources resulting in heavy tax costs.²⁰ For any corporate company, the tax incentives can be of two types, firstly credits which enable direct deduction from the tax payable and secondly allowance which enable deduction from the taxable income.²¹

Of late countries have been adopting R&D as a mechanism to promote their economic activities. This internationalising has made tax incentives more generous and helped in promoting its growth in terms of investments. However such investments are performance based i.e. up until the company is socially optimal to do so.²² In simple words, a company's R&D activity is pertinent only until when a company's rate of return in terms of social acceptance is higher than the rate of return privately earned by R&D.

¹⁵ OECD innovation Policy platform, R&D tax incentives: rationale, design, evaluation

¹⁶ Market Mechanisms: understanding the options, <http://www.c2es.org/publications/market-mechanisms-understanding-options>

¹⁷ Supra 3

¹⁸ Tax agenda for tech companies by Steve Clarke, <http://www.indiaincorporated.com/item/4375-tax-agenda-for-tech-companies.html>

¹⁹ Ibid, at page 2

²⁰ Ibid, at page 4

²¹ Supra 3, at page 1

²² Ibid, at page 1, In addition to that, when a company is considering an R&D and seeks tax incentive it requires attributes such as target group, what kind of activities it wishes to perform to claim that tax credit etc.

Therefore for a company to accept a tax incentive to invest in R&D there exist several variables that it must consider. One of the most predominant of these factors is the fiscal environment the company is established in, as if the tax rate of a country is lower in comparison to the tax incentive it is receiving then the framework of the tax incentive system for R&D is less effective.²³ Secondly, a company evaluates as to what expenditure the R&D falls within, whether it falls under the purview of wages, process or capital.²⁴

According to a simulation of R&D incentives in the European Union, the preferment of research and development has been prominent in various countries broadly in two ways: firstly where universities are raising public funds in order to raise performance of R&D which are interlinked by technology transfer and secondly where R&D is promoted via market signals and competition to bring potential distortions to its minimal level²⁵ and maximising compliance costs on parallel platforms.²⁶

Under the European Union, tax incentives as a part of R&D are said to be neglected due to various reasons. First out of this is “the lack of liquidity”²⁷ it provides. A company’s disablement in raising its cash flow can be rectified by the inflow of R&D. Secondly, the bar and limitations R&D thrusts on its own growth and lastly, as R&D is applicable to firm specific, the expenses incurred also remain firm-specific which reduces the intensity as to till what extent these incentives can be used within a period of time.²⁸

A company can choose between two types of tax credits for R&D, firstly level based incentive which evaluates the amount of research and development taken by the company and appropriates sufficient credit with respect to that amount undertaken and secondly, increment based incentive which analyses research and development of the

²³ Ibid, at page 1, Wages related to R&D promotes investment in human capital, secondly expenditure evaluates the process of R&D and lastly capital enlarges the incentives for companies.

²⁴ R&D tax incentives by Pierre Mohnen, Innovation for Growth-i4g- Policy brief, https://ec.europa.eu/research/innovation-union/pdf/expert-groups/i4g-reports/i4g_policy_brief_25_-_brief_RD_tax_incentives.pdf

²⁵ One advantage of R&D tax incentives is that it ensures that the composition of it is not startled rather it is provided on an equal platform to ensure a raise in its development by availing it to both small and medium-sized enterprises. “Moreover the strains faced by SME’s due to asymmetric information are least partly mitigated by tax incentives”

²⁶ Evaluation of Tax incentives for Research and Development in Germany by Christ of Ernst, Chapter 4- What the design of an R&D Tax incentive tells about its effectiveness- A simulation of R&D tax incentives in the European Union, page 35

²⁷ Ibid

²⁸ Ibid

company for the last few years as required and then proportionately increments the expenditure for R&D.²⁹

When a company expends for R&D using tax incentives, the kind of production embodied undoubtedly persists the incentives but also denigrates the provisions of the tax code of the country.³⁰ Are tax incentives a productivity miracle or media hype?³¹ Such a statement definitely hinders the entire framework of tax incentives for R&D. One of the major critiques of this framework is that although it projects endorsement of economic growth it doesn't ensure it. In other words the rate of investment into R&D doesn't always fall parallel to the rate of return it has to offer. As R&D has to do with the long run, its outcome is not inevitably supportive to the economic growth, it may vary in terms of wage effect, asymmetric information which are also the reasons for market failure. The irony here is that the rationale in introducing tax incentives for R&D rested on the existence of market failures.³²

Tax Incentives in the Indian Context

India is a developing country which shows ardent interest in R&D. The government of India mainly focuses on the science and technology field and promotes R&D in the same as it believes it promotes growth at a faster rate. In the year 2013 the government has launched a program which encapsulates objectives for the growth of R&D.³³ In India for funding R&D activities in the technological sector the projects must be approved by the Technology Development board which is run by the Technological Development program.³⁴ In the Science and Technology policy of 2003, India stated that 'the government targets the expenditure on Science and technology to be about 2 % of GDP' which is majorly contributed by 'the industry through significant increases in Industrial R&D, both inclusive of the technological and pharmaceutical sectors.'³⁵

²⁹ Tax incentives for innovation: Productivity Miracle or Media Hype?- by Eileen L. Collins, *Journal of Post Keynesian Economies*, Vol. 4, No. 1 (Autumn, 1981), pp. 68-74, published by: Taylor & Francis, Ltd.

³⁰ Ibid

³¹ Supra 12

³² Worldwide R&D incentives reference guide, 2013-2014, [http://www.ey.com/Publication/vwLUAssets/EY_Worldwide_research_and_development_incentive_guide/\\$FILE/EY-Worldwide-RD-incentives-reference-guide-2013-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY_Worldwide_research_and_development_incentive_guide/$FILE/EY-Worldwide-RD-incentives-reference-guide-2013-2014.pdf)

³³ Ibid

³⁴ India's software Industry by Subhash Bhatnagar, Indian Institute of Management Ahmedabad, <http://www.iimahd.ernet.in/~subhash/pdfs/Indian%20software%20industry.pdf>

³⁵ Financing of Industrial innovation in India, How effective are tax incentives for R&D? by Sunil Mani, Centre for Development studies, *Int. J. Technological learning, innovation and development*, Vol. 3, No. 2, 2010

Tax incentives in the field of R&D in India although trying to be prominent are still persistently small with minimal increase over the years. Moreover this can be determined by the service rather than the end product as the product in itself would require greater investment of R&D.³⁶ As India is a developing country, for a long term project and analysis, it lacks the resources and expertise, as to enter into national competition at such a stage with unfamiliar markets, or familiar yet distant markets, is a cost to its development, hence most firms remain reluctant to spend even the minimum incentive into R&D.³⁷ Nevertheless, this is subjective to the small and mediocre firms, as multinational companies and the bigger firms still step ahead to invest in R&D to promote innovation, as for in such firms the risk of investment in product development is comparatively lower than the small and mediocre firms. In India the kind of tax incentives provided to promote research and development in the small and mediocre firms is mainly done through soft loans, free funds or incubator centres.³⁸ These are subject to separate schemes as provided by the state and central governments.³⁹

India offers both intramural and extramural tax incentives which broadly cover input based and output based for research and development, amongst which there is one input based tax incentive which provides weighted deduction of 150% on any expenditure on intramural R&D, which is considered most popular amongst the lot.⁴⁰ This was founded in 1998 and ever since was applicable to almost 10 different types of industries; however the agriculture sector was not added until budget for the fiscal year 2008 to 2009 was released.⁴¹

In India the corporate tax rate is at 30%, and to qualify for R&D under such tax rate includes wages, supplies, utilities and other expenses directly related to R&D.⁴² For example distinct from the technological sector, the pharmaceutical sector as a part of its R&D is attempting to promote its stake in business to foreign companies and this draft

³⁶ Ibid.

³⁷ 2014 Global survey of R&D tax incentives, by Deloitte, file:///C:/Users/Nivruthitumu/Desktop/Semester%209/Economics/articles%20for%20paper/dttl-tax-global-rd-survey-aug-2014.pdf

³⁸ Making India a preferred R&D hub, by Naveen Aggarwal, March 13 2012, the financial express-
<http://archive.financialexpress.com/news/making-india-a-preferred-r&d-hub/922866>

³⁹ In India most small and mediocre firms use research and development centres of other company for hourly basis with nominal costs.

⁴⁰ Supra 35

⁴¹ Ibid

⁴² Supra 37

proposal for the drug and its R&D is partly funded by the government that is in the for tax incentives.⁴³ The government of Indian indulged in such a proposal to promote development and national competition. Such a proposal widens the gap for newer drugs and pharmaceutical technologies between the countries signatory to the proposal, being most beneficial to India.⁴⁴

Tax incentives for R&D in India are currently in the form of either weighted/accelerated deduction for expenses as it is a developing country.⁴⁵ Currently the policy of tax incentives in India enables tax benefits for those expenses incurred on R&D that are aroused and incurred in India. However those Companies which are multinational have transaction overseas, still will be provided with incentives if the expenses incurred are within the territory of India.⁴⁶ This in a way disables the larger companies to access R&D with flexibility.

Moreover a lot of firms are unaware of the fact that the government actually subsidizes the expenses incurred on R&D as a form of tax incentives. For example, companies are unaware of the fact that the government of India provides a weighted tax deduction @200% on expenditure incurred on approved in-house R&D facilities of companies as per the section 35(2AB) of the Information Technology Act.⁴⁷ The lack of awareness in India of most existing laws is also a major logjam in accessing these R&D tax incentives.

The Indian government in the electronics hardware sector has been relentlessly taking steps to condense the total taxation level to promote better production of products and stipulate interest in R&D. In order to do the same the government has reduced the general rate of excise duty to 8%, sales tax to 2% and VAT on IT products to 4%.⁴⁸ India offers a variety of tax incentives both intramural and extramural which can be further divided into input based and output based.⁴⁹

⁴³ Ibid

⁴⁴ Take advantage of R&D credits any which way you can: Global, Federal and state, November 10, 2011, <http://www.alvarezandmarsal.com/take-advantage-rd-credits-any-which-way-you-can-global-federal-and-state>

⁴⁵ <http://blog.ficci.com/innovation/5894/>

⁴⁶ Ibid

⁴⁷ Department of Electronics and information, Ministry of Communication & IT, Government of India- Industry Promotion activities, <http://deity.gov.in/content/industry-promotion-activities-dpl-industryactivities>

⁴⁸ Financing of Industrial Innovation in India, How effective are tax incentives for R&D? by Sunil Mani, Working paper 405 of August 2008

⁴⁹ Ibid

In the year 2001, targeting the technological based industries treatment for R&D had slowly taken an upward curve, however the findings of it end with setting of the framework during that year as there or no studies depicting the effectiveness of these incentives.⁵⁰ Nevertheless, in India the promotion and functioning of R&D is carried out mostly by the government and public sector which further motivated the business enterprises to invest in R&D. The same reflects in the outcomes, as for 2015, the same sector accounts for about 20 percent of the R&D.⁵¹

One evidence that proves the effectiveness of tax incentives for R&D in India by the methodologies used by Hall and Van Reenen (2000) and Mohnen (2007) which is based on the experience of the OECD countries.⁵² However their conclusion to the tax system is that “a dollar in tax credit for R&D stimulates a dollar of additional R&D”.⁵³ In India tax incentives for R&D are stipulated in a manner proportionate to the expenses that are incurred as it manifests itself as “an immediate write-off or expensing.”⁵⁴ “The Software Technology Parks of India” provide a 10 year 100 percent income tax exemption, only through 2009, on export profits and for onsite services.⁵⁵ This provision also avails an exemption from excise duty on domestic purchases of capital goods and central sales tax in relevant cases (hardware and software) which enables an option for the taxpayer to choose between “a complete tax holiday or on all other tax concessions”⁵⁶ available under the information technology act.”⁵⁷

Specifically for SEZ (special economic zones), a key incentive has been established in India which provide a 15-year income tax holiday under which the first five years for qualified companies are completely tax free, the next five year period has 50 percent exemption and lastly the third five year period is availed a 50 percent tax free depending upon the amount of profits that have been reinvested.⁵⁸ This provides companies with flexibility in adopting research and development. In fact as this stands more beneficial than what STI offered companies under the STI scheme are looking to convert to the SEZ incentives unless the STPI provide extended incentives.

⁵⁰ Ibid

⁵¹ Ibid

⁵² R&D Cash back for loss making SME's

⁵³ Supra 35

⁵⁴ Ibid

⁵⁵ Practical guide to Research and Development Tax incentives, Federal State and Foreign, by Michael D. Rashkin, page 562

⁵⁶ Not only software development but all activities related to electronic hardware for export, consultancy fall within this purview.

⁵⁷ Ibid

⁵⁸ Ibid, page 563

However in India it is a matter of concern to the government with the revenue foregone as a part of tax concession. From the beginning of Union budget of 2004-2005 up until 2007-2008, the government's computation on the revenue foregone as a result of tax incentives negatives the growth rate up to 45.36 percent in 2006-2007.⁵⁹ An effective tax incentive varies accordingly as per its tax rate. The incentive might be neutral across the target industries however the effective rate varies according to whether the firm or the industry has actually taken advantage of the leverage granted.⁶⁰

Nevertheless, since economic liberation, there has been constant advancement in India with respect to its preference in research and development and the kind of tax incentives which assist it. Although this development is measurable, it is steady and progressive, with an adaptive concealment to it.

Comparative analysis of the Various R&d Incentive Models

Germany

Germany is considered a hub for Europe's R&D leaders and in 2003 it spent over 2.55 percent of its GDP on research and development.⁶¹ It unlike other countries solely relies on direct subsidies by the government to promote R&D, than any special credits and allowances.⁶² These subsidies mainly are in the form of cash grants which awarded on per project basis.⁶³ Although tax incentives are not yet a part of the R&D program, the government still grants⁶⁴ "100 percent of non-capital R&D expenditures to be deducted from taxable profits".⁶⁵

China

The communist party of china promotes research and development in the form of tax deduction and reductions in enterprise income tax rates.⁶⁶ Furthermore it offers 150% super deduction for eligible research and development expenditures.⁶⁷ With respect to

⁵⁹ Ibid

⁶⁰ If for instance a R&D project is provided with incentives to a target group of industries, the effective rate applies to those industries which choose to avail of the incentives applicable. This in a way promotes competition but restricts growth.

⁶¹ Supra 55, page 564

⁶² Ibid

⁶³ 2014 Global Survey on R&D tax incentives, by Deloitte, Page 17

⁶⁴ Ibid

⁶⁵ Supra 55, the tax incentives as part of R&D are opposed by the Association of German Chambers of Commerce and Industry as they believe such incentives do not foster research and development. The government is focusing on overall structuring its tax structure to reduce the burden of tax on the industry.

⁶⁶ Supra 63, page 10

⁶⁷ ibid

the technology/software companies', the EIT (enterprise income tax) exempts any income of 5M RMB from qualified technological transfers and any income in excess of this is taxed at 50% reduced EIT rate, newly established software companies are granted tax holidays are granted business tax exemption on qualified income and so on.⁶⁸ Furthermore nay losses that are incurred from these tax incentives which are attributable to R&D are eligible for super deduction claims which are carried forward up to 5 years.⁶⁹

Austria

Austria had planned to reach an investment of 3 percent GDP for research and development in 2010 which is on par with the Lisbon target.⁷⁰ It vigorously promotes funding R&D through programs and majorly through tax incentives. In 2004, in terms of its tax policy it enacted a tax reform that minimised the corporate tax rate to "25 percent and expanded tax incentives for R&D".⁷¹ An incentive called the Research I allowance enables a 125 percent R&D deduction which encourages companies to promote and raise their levels of R&D spending, by increasing deduction to 35 percent for a period of 3 years in its incremental expenditures exceeding the average R&D expenditures.⁷² In 2014 the nature of tax incentives for R&D included a "10 percent volume based credit on all qualified R&D related expenditures".⁷³ However the approval of quantity and quality of the eligible industries for this incentive lies within the Austrian Research promotional organization. Once the tax credit is approve, the tax loss or the low profit position of the company doesn't remain under question anymore as the benefit incurred is refundable till the "extent the credit exceeds the amount of tax liabilities".⁷⁴

France

France offers R&D tax credits which are volume based and that can be carried for three years.⁷⁵ This is done to expand the amount and utilization of innovation.⁷⁶ A form of tax credit it avails is "a 30 percent of the first 100M of qualified R&D expenditures incurred during the tax year with an additional 5 percent in excess of the 100 M threshold and

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Supra 55, page 544

⁷¹ Ibid, also a part of the Austrian Research and Technology Report of 2004

⁷² Supra 55, page 545

⁷³ Supra 63, page 3

⁷⁴ Ibid, the eligibility in approving tax incentives is not restrictive or constrained to one particular industry. In approving the industry the organization looks at the definition of R&D as specified by the OECD which makes software development also a part of this approval process.

⁷⁵ Ibid, however if this benefit is not availed within the three years the tax payers are not entitled to any refunds.

⁷⁶ Supra 55, page 560

secondly.”⁷⁷ The first of France’s tax credit for R&D was found in 1983 when its GDP was moderately low. The purpose of this credit was to stimulate economic and market growth by promoting both R&D expenditures and its involvement in the companies.⁷⁸ Progressively the law reached a point where the tax credit was divided amongst two years, first which equalled fifty percent of research and development costs in comparison to the current year budget and second which equalled fifty percent of the difference between the current year and the previous year.⁷⁹ This furthermore changed with time and is a process that is continuously evolving itself.

Japan

In 2003, Japan spent over 3.2 percent of its GDP on research and development,⁸⁰ which shows that it recognises the importance of research and development for its economic growth. However it laid down the perfect example as to how R&D solely cannot form the foundation of innovation as a result to which apart from availing tax incentives, Japan is looking for alternative strategies to “modify cultural impediments to innovation”.⁸¹ However, Japan has been prominently active in the area providing tax incentives for R&D expenditure and this was ushered by its tax reform in 2006. This availed a three year⁸² tax incentive period which was calculated out of the five year credit period of the companies/industries. However to qualify as eligible for a tax incentive, the company’s/industry’s credit year must “exceed the R&D expenditures either for the year prior to the credit year or the year prior to that”.⁸³

Canada

The primary target of Canada was to be amongst the top five countries that contribute to R&D performance and was to double its performance from its previous years by 2010. The tax policy regime of Canadian federal government allows a deduction and 20 percent tax credits for “Scientific research and experimental development” (SR&ED).⁸⁴ The Canadian government is said to provide the most “lucrative research credits in the world”,⁸⁵ however changes over the period of time have curtailed its incentive facilities.

⁷⁷ Supra 63, page, 15

⁷⁸ Supra 55, page 560, in 2004 this form of tax credit was changed from a purely tax incremental credit to an inclusive of incremental and volume credit.

⁷⁹ Ibid

⁸⁰ Supra 55, page 571, It’s an intensity that is the third highest according to the rankings of OECD.

⁸¹ Ibid

⁸² The three years were the most R&D spending periods.

⁸³ Supra 55, page 572, “however the credit could not exceed 12 percent of the tax due”.

⁸⁴ Supra 55, page 549,

⁸⁵ Supra 63, Page 8

Canada as a country under OECD, adheres to its definition of Research and Development before qualify a project for incentivising tax benefits.⁸⁶

However there exist credits which are refundable, those credits which are provided to the small and mediocre private corporations. The tax credits which are provided to this corporation are for the first 3M expenditures each year.⁸⁷ For any of this corporation to be eligible, they must a minimum of 800K taxable income and less than 50M taxable capital in their prior year.⁸⁸

United Kingdom

In the United Kingdom, the small and medium sized enterprises (SME's) although reluctant in investing in R&D, in loss made a benefit in procuring these tax incentives available for R&D. For the longest time the movement for the tax credit has been downward, however in 2014, with a hike from 11% to 14.5% the SME's found a path in recovering their losses.⁸⁹

Conclusion

Research and development acts as a significant contributor to forefend market failures. Technology is required to change with accelerating times, and for companies/industry's to be a part of this globalised and competitive world, they require the innovation and capacity to keep up with it.⁹⁰ Tax incentives as an initiative by the government plays a key role in sustaining this sector of research and development. For any country to endure in the global race of this innovation hub, the policies holding research and development must be contained and strengthened within as these develop changing products and technologies. One such policy within this confinement, as specified earlier is tax incentives which assist in promoting global standards through research and development.⁹¹

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Ibid, however there is an annual cap on refundable credits, but there exists no cap on the total amount of non-refundable costs available through R&D tax incentives

⁸⁹ Supra 48

⁹⁰ Opportunities and Challenges for Sustainable R&D in India, Avinash Patil, Subrata Biswas, Ird India, http://www.irdindia.in/journal_ijrdmr/pdf/vol3_iss1/1.pdf

⁹¹ Ibid

India and other countries around the globe have elastic and a fine target to promote and establish research and development with changing times. As R&D is considered as a tool to enhance innovation and develop effectiveness of markets. Although R&D doesn't provide stabilised and conclusive outcomes in the future, there is still a scope of advancement. Moreover utilisation of R&D for short term growth provides it with an evolving structure to adapt to changing times with changing requirements of the markets and the players in it. It further prevents any "bureaucratic delays or difficulties in the actual administration of tax incentives", ⁹² as the company's/industry's use these benefits as and when they are availed.

⁹² Financing of Industrial innovation in India, how effective are tax incentives for R&D? by Sunil Mani, Int. J. Technological learning, Innovation and development, Vol. 3, N0.2, 2010

BACKWARDNESS IN INDIA WITH REFERENCE TO MADHYA PRADESH

- Pranay Joshi

Institute of Law, Nirma University

Abstract

This Paper talks about How India has become the backward country from a growing economy which includes the major factors of backwardness in India this paper has given special preference to Madhya Pradesh and discussed how Madhya Pradesh is facing the problems of backwardness what are the legal provision and planning done on the state level to eradicate the backwardness in the state. What are the Criteria and Strategy for Backward Area Development the country which is helping the backward people in the country? How these measures help the development of these people and what are the laws which are made for upliftment of these class of people. Till now these classes have reached what extent of development in the county and in the state of Madhya Pradesh. How the constitution of India does helps these class what are the rights which are being made available to this class in the country under the constitution of India. Till what extent the government of India has achievement the development of this class India has got independence 1947 this class of people are existing from that period since we got independence but in those 68 years India has not been able to achieve eradication of backwardness from the country. The factors which were responsible earlier are the same reasons till now. The Laws should concentrate on one problem at a time- Increasing Backwardness or Decreasing Backwardness. The provisions of the Act should be properly drafted and should be amended so that they do not result in harassment of Backward Class. The NGO's or other organizations working for the benefit of backward classes should help to sensitize the condition of these people so that the government takes quick notice.

1. Introduction

"The backwardness of our religious and social developments is undoubtedly holding back the development of the intellectual and political levels."-Carroll Quigley

The advancement of the social structure amid hundreds of years of feudalism in districts which were not then created by interchanges prompted the presence of vast groups which endured impediment and incapacities forced by other monetarily and socially overwhelming gatherings. The boss amongst the underprivileged or extraordinarily impeded gatherings are the Harijans, i.e., the booked positions, the tribal populace, bunches which were up to this point known as criminal tribes, and different gatherings who can be considered to constitute the weaker area of the populace and who are socially, monetarily, and instructively in reverse.

An arrangement of social stratification of rank rests upon the unequal appropriation of force between the gatherings having clear position in the chain of command. Social imbalance is a production of Hindu position ridden society. About 33% of India's populaces are socially, monetarily and instructively in reverse. The social chain of command of Indian culture working during a few time forced various weights on the purported lower classes including the untouchables.

As an impact a few classes progressed socially and financially at the expense of lower classes. The regressive classes experience the ill effects of weaknesses and inabilities which are age-old and which get their approval mostly from the rank framework.

The expression "class" connotes a type of social stratification. It is characterized as an area of individuals who offer comparative financial status or position. It is similarly open when contrasted with different types of stratification like station. A class is thought to be in reverse if its individuals are financially and instructively less special contrasted with different classes in that society.

2. Objective of the Paper

- The Objective of the research is to understand about backward classes in India and then in Madhya Pradesh.
- To understand who is a backward class? What are the factors which are responsible for creating backward classes in India and Madhya Pradesh?
- To know what is the Extent of Backwardness in India.
- To understand the criteria and strategy for backward area development made by the Indian government.
- To understand how the backwardness class is being developed. To study the History of Backward class in India.

- To read and understand the constitutional provisions for backward classes in India.
- To understand the Policies which are made by the Madhya Pradesh State Government.
- To suggest the benefits and effects of legislation on backward classes in India.
- To suggest change in the legislation related to backward class in India.

3. *Madhya Pradesh (As State)*

The number of inhabitants in Madhya Pradesh comprises of ethnic gatherings and tribes, standings and groups, including the first tribal's and moderately later transients from different states. The planned ranks and the booked tribes constitute a critical bit of the occupants in the State. As indicated by the 2001 enumeration, the number of inhabitants in the tribal's in Madhya Pradesh was 12,233,000, constituting 20.27% of the aggregate populace. There were 46 perceived Scheduled Tribes and three of them have been distinguished as "Uncommon Primitive Tribal Groups" in the State.

Madhya Pradesh gross GDP (ostensible GDP) for 2013-14 was ₹ 4,509 billion (around US\$ 72,726,000,000). The per-capita figure was US\$ 871.45 in 2013-14, the 6th most reduced in the nation. Somewhere around 1999 and 2008, the annualized development rate of the state was low: 3.5%. Subsequently, the state's GDP development rate has enhanced altogether, ascending to 8% amid 2010–11 and 12% amid 2011–12.¹

The state has an agrarian economy. The real products of Madhya Pradesh are wheat, soybean, gram, sugarcane, rice, maize, cotton, rapeseed, mustard and arhar. Minor Forest Produce (MFP, for example, tendu leaves used to roll beedi, sal seed, teak seed, and lak likewise add to state's provincial economy.

Madhya Pradesh has 5 Special Economic Zones (SEZs): 3 IT/ITeS (Indore, Gwalior), 1 mineral-based (Jabalpur) and 1 agro-based (Jabalpur). In October 2011, endorsement was given to 14 proposed SEZs, out of which 10 were IT/ITeS-based. Indore is the significant business focal point of the state. As a result of the state's focal area, various purchaser merchandise organizations have set up assembling bases in MP.²

1 Indiastat.com,. "Indiastat.Com - India's Comprehensive Statistical Analysis, Data Information & Facts About India". N.p., 2016. Web. 1 Feb. 2016.

2 Mp.gov.in, "Home - Govt-Of-Mp-India". N.p., 2016. Web. 15 Jan. 2016.

Mp.gov.in, "Backward Classes & Minorities Welfare - Govt. of MP India". N.p., 2016. Web. 15 Jan. 2016.
Bccomm.mp.gov.in, N.p., 2016. Web. 14 Jan. 2016.

The state has the biggest stores of precious stone and copper in India. Other real mineral stores incorporate those of coal, coalbed methane, manganese and dolomite.

Madhya Pradesh has 6 Ordnance Factories, 4 of which are situated at Jabalpur (Vehicle Factory, Gray Iron Foundry, Gun Carriage Factory, Ordnance Factory Khamaria) and one each at Katni and Itarsi. The plants are controlled by the Ordnance Factories Board, and fabricate an assortment of items for the Indian Armed Forces.

4. *Backwardness in Madhya Pradesh*

The economy of Madhya Pradesh is primarily agrarian, it is additionally described as one of the mechanically in reverse states. As per Annual Survey of Industries (ASI) report, the aggregate capital put resources into the sorted out division of MP amid 1997-98 was Rs 21445 crores and the aggregate business was of the request of around 4640 crores. The aggregate state salary amid that year at current costs was Rs 53435 crores out of which the aggregate offer of auxiliary segment was 21.94 for each penny. Aside from the mechanical backwardness, the state likewise experienced disturbing nature of between provincial differences in level of modern advancement. This made the concentrate more pertinent with regards to Madhya Pradesh. It is surely understood that the Indian economy and society show colossal territorial varieties and consequently grabbing a specific state or specific locale may seem risky in a from the earlier sense. In any case, unified Madhya Pradesh (from this point forward MP) happens to be one among the regressive districts in India and its choice was principally done in light of the fact that we liked to evaluate the development execution of unified Madhya Pradesh with regards to continuous liberalization arrangement. The development of a different condition of Madhya Pradesh will achieve a mess of changes in the present situation particularly as the mineral base of MP will go to Chhattisgarh. There is an incomprehensible bay of contrast between the unified and separated Madhya Pradesh a sharp study into the status of unified Madhya Pradesh gets to be unavoidable as (will be as provincial incongruities in mechanical advancement are concerned. The choice of the district was inspired by our understanding that the locale symbolizes the key qualities and shortcomings of a portion of the noteworthy components of India's improvement methodology specifically the substantial business drove monetary change drive that developed after freedom. Besides, the district has a decent amount of Scheduled Caste (SC) and Scheduled Tribe (ST) populace, areas which were among the most disregarded amid the pre NEP period, and who might be among the most exceedingly terrible hit in the wake of NEP. In addition, looking to the past writing, there had scarcely been any

study completed on this subject with regards to Madhya Pradesh. To scaffold this crevice, it was along these lines, chose to embrace the investigation of 'modern development and structure of Madhya Pradesh'.³

5. Common Factors of Backwardness

“India must be the only country in the world, where people fight to be called backward”-

A. Sen

1. The main occupation of the people is agriculture-

Around 72 % of our populace were reliant on horticulture at the season of our Independence. Indeed, even in this day, as per Economic review 2013-14, roughly 49% of our populace are straightforwardly or by implication subject to horticulture.

2. Incidence of poverty is very high and widespread-

Because of this present, individuals' capacity to spare is fantastically low which in the long run prompts low capital arrangement in the economy-Every third destitute individual on the planet is an Indian, which fundamentally implies that 1/third of the world's poor live in India. In light of this the gross reserve funds rate and gross capital arrangement rates are impressively lower, even contrasted with other creating countries. Low gross capital development prompts lower development of our economy. Be that as it may, the photo searches splendid for the future as the gross capital arrangement was at 26% in 1990-91, however it has ascended to 34.8% in the money related year 2012-13.

3. Growth of the population is high and so the percentage of dependent population-

India's populace has reliably developed at more than 2%. The issue of populace blast intensifies on the grounds that the demise rate is falling radically yet we are seeing no impressive fall in birth rate. Additionally about 57.5% of our populace is underneath the age of 15 or over the age of 64, which makes them reliant on another person. They are a weight for the economy as they can't add to the economy.

4. Standard of living of the people is generally low-

As of now India's per capita pay is just \$ 1,626. Its not just low contrasted with first world nations like USA, Canada, Australia additionally low contrasted with creating nations like Sri Lanka, Indonesia, and so forth. Low per capita wage in the end

3 Bcomm.mp.gov.in,.N.p., 2016. Web. 14 Jan. 2016.

prompts low expectation for everyday life for the all inclusive community of a nation.

5. *Production techniques are obsolete and investment in research & development is low-*

Contrasted with cutting edge nations our creation procedures and our efficiency is unfathomably low. This is correctly the motivation behind why the "Make in India" crusade should be a win.

6. *Unemployment and underemployment is high-*

As indicated by the national example overview in the year 2009-10, around 6.6% of our work power are unemployed taking into account current day by day status . It tumbled to 5.6% in the year 2011-12. Unemployment is pervasive, as well as so is underemployment or masked unemployment. Masked unemployment implies individuals are utilized, however their profitability is nill or in negative figures. Its more basic in agribusiness division.

7. *Level of human well being is low-*

Human prosperity is measured by the Human Development Index (HDI), which was built by the United Nations Development Program (UNDP). HDI is computed by arranging three pointers of human advancement, they are:-

- Longevity, which is measured by future.
- Knowledge, which is measured by education rate
- Standard of living, which is measured by per capita salary.

As of now India's positioning is 135 among 187 nations. The pitiful part is numerous creating nations like China, Sri Lanka, the Philippines, have a superior HDI positioning than India.

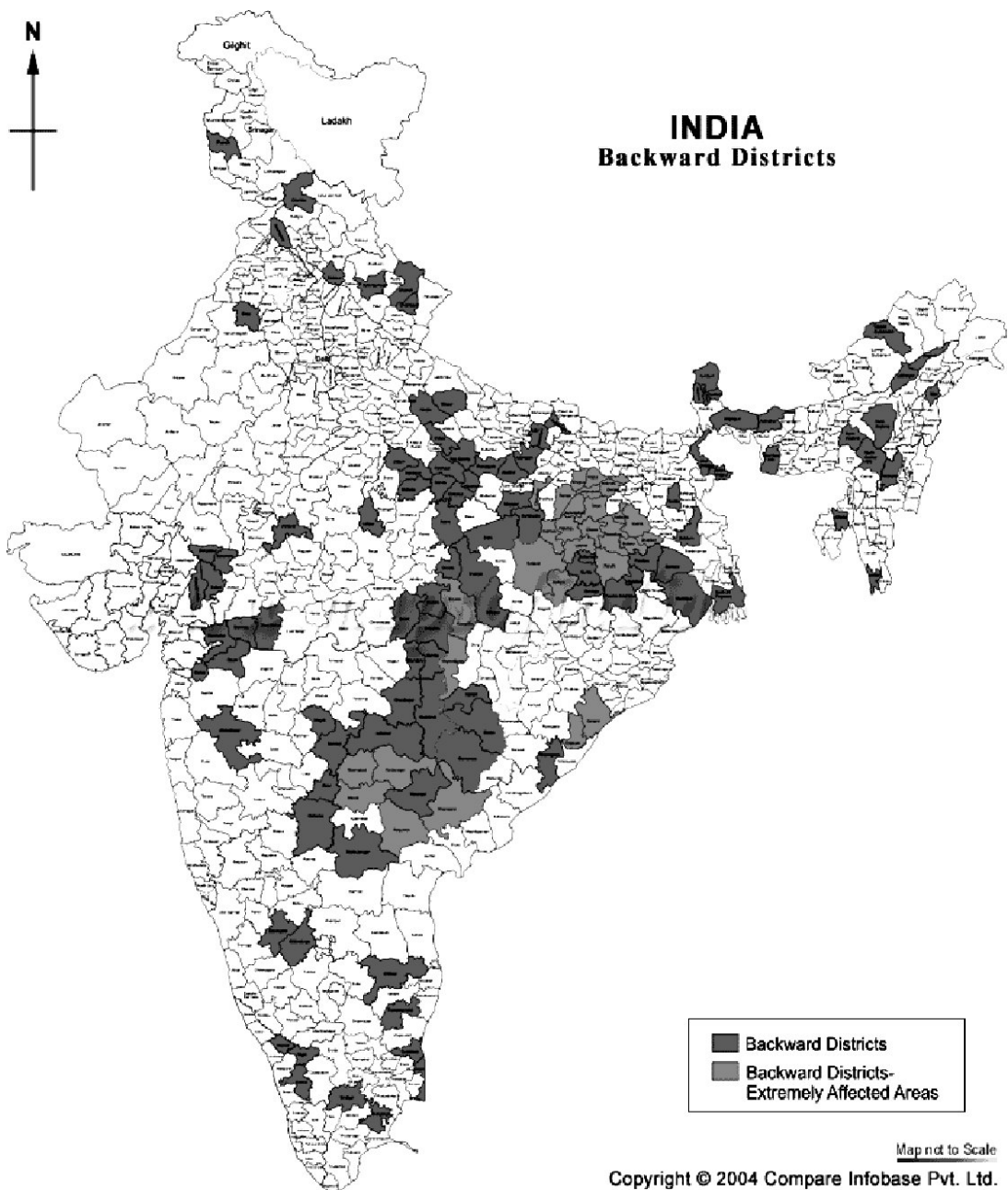
8. *Widespread inequality of Income-*

The Gini list is utilized to quantify the imbalance of pay and riches in a nation. At present India's Gini record is 0.339, though the Gini file in 1994 was 0.297. So we can reason that wage imbalance has expanded throughout the years. Shockingly, our Gini record is lower than that of United States.

9. *Orthodox society-*

This reason has been said in the majority of the answers. The social existence of individuals is customary, and standpoint of individuals is by and large conventional. Likewise individuals once in a while go for broke to change their financial relations.

6. *Extent of Backwardness In India*



7. *Criteria and Strategy for Backward Area Development*

These suggestions ought to frame the premise for activity in these ranges. There are a few territories which can fall into more than one classification of backwardness. For instance, there is a broad cover in the middle of tribal and slope territories especially in the north-east. There is likewise some cover in the middle of tribal and dry spell inclined ranges e.g. in south-east Madhya Pradesh. In these cases the proper system must be to join the cures proposed for both sorts of regions.⁴

• *Industrial Development of Backward Areas*

The striking components of the particular suggestions of the Committee for operational punch the system for modern dispersal are recorded beneath:

- (i) The cut-off rule for the determination of communities for the improvement of medium and substantial industry would be that they ought to have a populace of no less than 50,000 and that they ought to be arranged at the very least separation from a current mechanical centers. For this reason "existing mechanical centers" ought to be all towns/urban agglomerations with a job in non-family unit assembling of more than 10,000. The base separation ought to be 150 km. for focus' with a vocation of more than 150 thousand, 100 kms. For focus with a livelihood of 50—150 thousand, 75 km. For focus with a job of 25—50 thousand and 50 km. For focus with a vocation of 10—25 thousand.
- (ii) 100 such focus' ought to be chosen out of every single qualified town for advancement in the Sixth Plan.
- (iii) Each development focus ought to be overseen by an Industrial Development Authority which would have the contract to advancement and give the essential infrastructural support and additionally to activate reserves from organizations like IDBI, HUDCO, and so forth.
- (iv) For foundations like IDBI, HUDCO, and so on to assume a successful part, it would be attractive that suitable money related backing to these organizations is guaranteed amid the arrangement period.

• *Statistical Base for Local Planning*

These activities in nearby making arrangements for in reverse range improvement can't be embraced in any successful way if the information base for such arranging is

4 General Issues Relating To Backward Areas Development. New Delhi: Planning Commission, 2016. Web. 16 Jan. 2016. (National Committee on the Development of Backward Areas).

not developed. Concerning crop insights the spread period of plant yields and minor products, which might be essential, in a few territories should be made strides.

- ***Focal Point—an area-cum-beneficiary oriented approach***

The proper level must be a group of towns, with a populace of 15,000—20,000, where arrangements would be actualized and family-wise contacts manufactured. The way that the Committee has prescribed tries to conform the system at every stage with the offices that are accessible by then of time. The arrangement of activity is, as per the following:

- (a) advancement projects which are as of now comprehended in the territories and are suitably illustrated, ought to be connected up with the family approach ;
- (b) general plans, of advancement which naturally prompt the improvement of families, inside of the ambit of the plans are to be recognized and the recipients recorded and their prerequisites guaranteed ;

- ***Growth Centre as the Catalyst of Area Development***

The Committee has recommended measures for expanding profitability and using completely the advancement potential for in reverse ranges furthermore to achieve a sensible dispersion of advantages towards the objective of social. Comprehensively talking, we can anticipate five noteworthy sorts of advancement which would make development focus' with the generous potential for producing all round improvement in the back ward regions encompassing the tasks and amongst the general population of the region. These are:

- (i) Industrial buildings
- (ii) Growing Urban complex
- (iii) Raw material misuse (woods and minerals and commercial enterprises based consequently).
- (iv) Large Irrigation Projects; and
- (v) Hydro and Thermal Projects.

- ***Rural Marketing***

The destinations of a productive provincial showcasing framework are:-

- (a) To empower the essential makers to get the best cost
- (b) To give offices to lifting of produce which the makers will offer at a sensible cost
- (c) To diminish the value spread between the essential makers and extreme buyers
- (d) To make accessible all results of homestead beginning to customers at a sensible cost without disabling the nature of the produce.

• **Organization And Administration**

The successful usage of the procedure for the improvement of in reverse regions will require considerable reinforcing and streamlining of organization and in addition changes in the modalities of financing and execution of advancement ventures. It has shown that the crucial prerequisite of arranging and organization at the zones must be as per the following:

- (a) It must offer coordination of the political, regulatory and neighborhood organizations for deciding the system of advancement for the range and the way in which it can be actualized, in this way empowering direct collaboration between subjects, panchayati raj bodies., non-official offices like cooperatives and executing offices.
- (b) It must unite all the authoritative operations at the territory level under viable coordination and a base compelling control of a solitary office to have the capacity to adequately balance the effective powers of centralization and divided basic leadership, connected with vertical managerial chains of importance managing separate sections of the economy.

8. **Backwardness and Development in India**

MDG India Factsheet			
Goal 1: Eradicate extreme poverty and hunger		1993-94	2004-05
1	Poverty Headcount ratio (%)	45	37
2	Poverty Gap Ratio (rural)	8.5	5.7
3	Poverty Gap Ratio (urban)	8.1	6.1
4	Share of poorest quintile in National Consumption (rural) (%)	9.6	9.5
5	Share of poorest quintile in National Consumption (urban) (%)	8	7.3
		1998-99	2005-06
6	Prevalence of underweight children under 3 years of age (%)	42.7	40.4
		1990-92	2004-06
Goal 2: Achieve universal primary education		2007-08	2009-10
7	Net Enrolment Ratio (%)	95.9	98.3
		1999	2008-09
8	Proportions of pupils starting Grade 1 who reach Grade 5 (%)	62	76
		2001	2007-08
9	Literacy rate of 15-24 year olds (male) (%)	76.7	91
10	Literacy rate of 15-24 year olds (female) (%)	54.9	80
Goal 3: Promote gender equality and empower women		2004-05	2007-08
11	Gender Parity Index (Primary)	0.95	0.98
12	Gender Parity Index (Secondary)	0.79	0.85
13	Gender Parity Index (Tertiary)	0.71	0.7
		2001	2007-08
14	Ratio of literate women to men, 15-24 years old	0.8	0.88
		1999	2011
15	Proportion of seats held by women in parliament (%)	9.6	10.96

Source: Millennium Development Goals India Country Report 2011
http://mospil.nic.in/Mospil_New/upload/MDG_2010_01jan12.pdf

Talk at CH by Dr. Anoop Sharma : 23 Jan 2013

9. National Policies

- The National Commission for Backward Classes Act, 1993
- Gazette Notifications / Resolutions issued so far specifying Castes / Communities in the Central list of Backward Classes
- The National Commission for Backward Classes Rules, 1994

10. Constitutional Provisions

What we find, however, is the. Characteristics of backwardness described and spread over the different articles of the Constitution. Article 15 (4) speaks of social and educational backwardness. In article 16 (4), mention is made of backward classes and their inadequate representation in services. Article 46 refers to weaker section of the people in which the Scheduled Castes and Scheduled Tribes are included.

Along with such references of backwardness, the Constitution also makes a special provision for their upliftment. To overcome the problems of social disabilities the Constitution has laid down certain provisions under Article 46. It states that the state shall promote with special care the educational and economic advancement of the weaker section of the people, in particular the Scheduled Castes and Scheduled Tribes. Finally, there is the Article 340 which makes provision for the State Government to investigate the condition of the backward classes. Keeping these points in view, we will examine each category of backward classes like the Scheduled Castes, Scheduled Tribes and the Other Backward Classes' composition.

III. Provisions relating to Socially & Educationally Backward Classes (OBCs)

III.A - Commission for Enquiring into Conditions of Backward Classes

340. Appointment of a Commission to investigate the conditions of backward classes -

1. The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

2. A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.
3. The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

III.B Safeguards Relating to Educational and Public Employment

III. Fundamental Rights

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth -

- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
- (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
- (5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

16. Equality of opportunity in matters of public employment -

1. There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
2. No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.
3. Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

4. Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

III. C Agency For Monitoring Safeguard

XVI. Special Provisions relating to certain Classes

338. National Commission for Scheduled Castes -

(10) In this article, references to the Scheduled Castes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of article 340 by order specify and also to the Anglo-Indian community.⁵

11. Policies In MP

- The Purpose Of the Backward Classes And Minorities Directorate:
- To Protect the Provisions Made in the interests of Backward classes and Minorities and Protect their Rights in Context of Facilities available to Backward classes.
- Formulation of the Policies and Planning, for the welfare and development of the Backward Classes and Minority.
- Prepare various educational, social and economic development programs to ensure maximum benefits to peoples of the Backward classes and Minority.
- Priorities Of The Department
- Take successful Measures to associating Backward classes and Minorities to standard of society.
- Do executions of different plans for the upliftment of scholarly, social and monetary development of the Backward classes and Minorities.

5 Socialjustice.nic.in., "III. Provisions Relating To Socially & Educationally Backward Classes (Obcs) - Constitutional Provisions: Ministry Of Social Justice And Empowerment, Government Of India". N.p., 2016. Web. 17 Jan. 2016.

- Do usage of deliberate advancement plans, to raise the self-assurance and end the felling of backwardness.
- Do the improvement of the procedure, for getting the testament of Backward Classes.
- Make procurements for Diploma, Degree Programs in Traditional Technical and in the range of mechanical training, give acknowledgment in each area to these refinements.
- To overcome from the social backwardness, give the uncommon need every zone.
- For the young ladies of Economically Weaker individuals of Backward Classes, Hostel Building at the local level and for advanced education understudy to give instructive offices and grants.
- Do the review of area/structures of Mosque, Dargah and Gurudwara and so forth to uproot the unlawful ownership.
- Use/Access the Wakf Properties in Favor of Minority.
- Attempt Reasonable Efforts to Protect and Promote the urdu dialect and to regard the State Authors.⁶

MP state backward classes commission

- Constitution and Organization functioning under this Department.
- Backward Classes Commission External Website that opens in new Window.
- RTI

12. Conclusion

In India, there have been many debates and discussions on Backward classes but all have been in vain. Condition of Backward classes in India has not been improved at all. The Government of India has made several policies, schemes which are made for the betterment of backward classes but none of them have been implemented properly. India has 29 states and all states have their own state made laws for the welfare of backward classes but the condition is not improving. The Founding fathers of the constitution gave reservation to the backward classes for their betterment for a period of 10 years with a view that the condition of them will be improved with time. But it's been 60 years and the reservation still exist in the society which itself proves that the backwardness is still there in the roots of Indian society. few states like Uttar Pradesh, Bihar, Madhya Pradesh

6 Mp.gov.in, "Backward Classes & Minorities Welfare - Govt.of MP India".N.p., 2016. Web. 15 Jan. 2016:
Bccomm.mp.gov.in,.N.p., 2016. Web. 14 Jan. 2016.

they are called as "Bimaru" state because of these backward class present and don't contribute much to the state.

13. Suggestions

The researcher has thoroughly studied the concept of Backwardness. He finds out that there are several loopholes in the Laws which needs to be addressed by the legislators. In context of the study made for the research, the researcher makes the following suggestions.

- The Laws should concentrate on one problem at a time- Increasing Backwardness or Decreasing Backwardness.
- The provisions of the Act should be properly drafted and should be amended so that they do not result in harassment of Backward Class.
- The NGO's or other organizations working for the benefit of backward classes should help to sensitize the condition of these people so that the government takes quick notice.

TRANSCENDING FROM POSITIVISM TOWARDS NATURAL JUSTICE: JOURNEY OF INDIAN JUDICIARY

- *Aman Aditya*

Symbiosis Law School, Noida

- *Shreya Sinha*

Symbiosis Law School, Noida

Abstract

The Constitution of India enshrines various Rights and Liberty to its citizens. Article 19, 21 and 22 are the very basis of rights which are bestowed by the Indian Constitution to its citizens. Against the background of the legislative history of our country, the discussion of Article 21 and its relation to Articles 19 and 22 begins with the landmark case of ***A.K. Gopalan v. State of Madras***. After this landmark judgement in the year 1950, the judiciary took recourse with these three Articles. Though the Supreme Court in Gopalan case clearly distinguished between these three Articles and divided them in single entities which were not correlated with each other and what the Court did was just followed the Positivist approach of law.

The final blow to Gopalan's self-abnegation has been given by ***Maneka Gandhi v. Union of India***. Although Maneka's case was not *prima facie* responsible for overruling Gopalan's case as there was various interim cases which directly or indirectly was responsible for it. In Maneka's case the Court decided that Article 19, 21 and 22 are not exclusive in nature and so to derive the proper meaning of these Articles they should be considered as mutually inclusive of each other and the Court followed the principle of Natural Justice.

In contrast to positivism the theory of natural justice has a wider concept, it includes of the law which are derived from a divine origin and so depends on values, and as society and its needs changes with time the values also changes and so the theory of natural justice is that theory which is made in accordance with the needs of the society. Therefore, this research paper will focus on the jurisprudential shift which has changed the judicial structure of our country and will also give a detailed account of the important case laws which indicate the slow and steady transition of the judiciary from positivism to natural justice.

The Era of Legal Positivism

The Constitution of India enshrines various rights and liberty to its citizens. Article 19, 21 and 22 are the very basis of rights which are bestowed by the Indian Constitution to its citizens. Against the background of the legislative history of our country, the discussion of Article 21 and its relation to Articles 19 and 22 begins with the landmark case of **A.K. Gopalan v. State of Madras**¹. Here the petitioner A.K. Gopalan was a communist leader, who was detained under the Preventive Detention Act, 1950. The petitioner challenged the validity of his detention on the wide ground that the Detention Act under which he was detained, was void as violating Articles 19 and 21, and also on narrow ground that the Act did not comply with the requirements of Article 22². It was contended by Gopalan that his detention contravened Article 21 which provides that “no person shall be deprived of life or personal liberty except according to the procedure established by law”³. Counsel of Gopalan contended his detention to be void on the basis of-

1. Personal liberty included the freedoms conferred by Article 19(1) (a) to (e) and (g) and the impugned law did not satisfy the test of Article 19(2) to (6).
2. In the alternative, the impugned law directly violated Gopalan’s right to move freely throughout the territory of India because the freedom of movement is of the essence of personal liberty and the impugned Act did not satisfy the test of Article 19(5).
3. Article 19(1) and Article 21 should be read together because Article 19(1) deals with substantive rights and Article 21 deals with procedural rights.
4. The reference in Article 21 to “procedure established by law” meant “due process of law”, and the impugned Act did not satisfy the requirement of “due process”.
5. In any event, the word “law” in Article 21 meant not state enacted law, but *jus naturale* or the principles of natural justice. The impugned Act did not comply with the requirements of natural justice.⁴

This contention of Gopalan’s counsel was opposed by saying that Article 21 did not apply to preventive detention and therefore the proposition that Article 21 applies to a law of preventive detention was incorrect and so the very basis of Gopalan’s claim was void. The validity of the impugned Act would have been tested only by Article 22.⁵ A six bench judge was appointed in this case and it was held by the majority that the concept of

¹ A.K. Gopalan, AIR 1950 SC 27.

² H.M. Seervai, Constitutional Law of India, 973 (Universal Law Publishing Co. Pvt. Ltd., Vol. 2, 4th edn., 2013).

³ P.M Bakshi, The Constitution of India, 63 (Universal Law Publishing Co. Pvt. Ltd., 13th edn. 2015).

⁴ Id. at 973.

⁵ Id. at 973.

the right 'to move freely throughout the territory of India' was entirely different from the concept of the 'right to personal liberty' in Article 21. The emphasis was not on the free movement, but on the right to move freely throughout the territory of India and that Article 19(1)(d) read with the sub Article (5), meant that if restrictions were put on the movement of citizen within the states then it should be in accordance to Article 19(5). It is clearly stated in Article 19(5) about the reasonable restrictions to be imposed on the right in the interest of the general public. And therefore Article 19(1) (d) has nothing to do with any form of detention.⁶ The Supreme Court by the majority held that the word personal liberty in Article 21 means nothing more than liberty of the physical body that is freedom from arrest and detention without the authority of law. But the Court said that though liberty has a vast meaning of its own but the word personal narrows down its meaning to liberty of the person. Articles 19 and 21 deals with different concepts of 'liberty'. Article 21 is guarantee against deprivation of personal liberty on the other hand Article 19 bestows protection under unreasonable restrictions.⁷ Thus the Supreme Court ruled in *Gopalan* that in Article 21 the expression 'procedure established by law' meant the procedure as laid down in the law was enacted by the legislature and nothing more. A person could thus be deprived of his 'life' or 'personal liberty' in accordance with the procedure laid down in the relevant law. The court was concerned with the procedure laid down in the statute. Whether the procedure was fair or reasonable, or according to natural justice or not was not the concern of the court. The ruling thus meant that to deprive a person of his life or personal liberty-

1. There must be a law;
2. It should lay down a procedure; and
3. The executive should follow the procedure while depriving a person of his life or personal liberty.⁸

Therefore the Court said that preventive detention is not a part of personal liberty covered under Article 21 or a part of fundamental rights under Article 19, but it is covered by Article 22 and so it deals separately with Article 22. However as different views were expressed by different judges, no common pattern emerges from the

⁶ Seervai, *supra* note 2 at 976.

⁷ J.N. Pandey, *Constitutional Law Of India*, 249 (Central Law Agency, 52nd edn. 2015).

⁸ M.P. Jain, *Indian Constitutional Law*, 1181 (Lexis Nexis, New Delhi, 6th edn. 2011).

judgements which can be said to fix authoritatively the correlation of Article 19 to Articles 20, 21 and 22, or the meaning of the expression ‘personal liberty’.⁹

Though the Court in A.K. Gopalan’s case clearly distinguished between these three Articles and divided them in single entities which were not correlated with each other. The restrictive interpretation of the expression ‘personal liberty’ in Gopalan’s case has not been followed by the Supreme Court in the *State of West Bengal v. Anwar Ali Sarkar*¹⁰, In this case the validity of the trial of the respondents, Anwar Ali and 49 others, by the Special Courts, established under Section 5(1) of The West Bengal Special Courts Act, 1950, was at issue and where also personal liberty was involved, the Court did not take the view that, if ‘procedure established by law’ was followed no other fundamental right could be applicable and the prosecution was held to be violating the right of equality guaranteed in article 14 of the Constitution.

In the year 1953, in *Ram Narayan Singh v. Delhi*¹¹, a person was detained under the Preventive Detention Act for making speeches prejudicial to the maintenance of public order. At this time, Article 19(2) did not contain the expression ‘public order’ and so the freedom of speech could not be controlled for that purpose, but a preventive detention order, a much drastic restriction on the person concerned, could be passed on that basis. The Supreme Court followed its earlier decision in 1950 and refused to access the validity of the detention order with reference to Article 19(1)(a) read with Article 19(2) stating that even if a right under Article 19(1)(a) was abridged, the validity of the preventive decision order could not be considered with reference to Article 19(2) because of the Gopalan ruling that legislation authorising deprivation of personal liberty did not fall under Article 19, and its validity was not to be judged by the criteria in Article 19. The validity of such a law depended on its compliance with Articles 21 and 22. The court stated that if this led to an anomaly, it was inherent in the structure and language of the relevant constitutional provisions.¹²

In *KharakSinghv.State of U.P.*¹³, the petitioner Kharak Singh was charged in a dacoity case but was released as there was no evidence against him. Under the U.P. Police

⁹ Seervai, supranote 2 at 981.

¹⁰ State of West Bengal, AIR 1952 SC 75.

¹¹ Ram Narayan Singh, AIR 1953 SC 272.

¹² Jain, supra note 8 at 1183.

¹³ Kharak Singh, AIR 1963 SC 1295.

Regulations 236(b), the police opened a history sheet for him and he was kept under police surveillance which included secret picketing of his house by the police, domiciliary visits at nights and verification of his movements and activities.¹⁴ The majority of the Supreme Court has reiterated that the personal liberty which is safeguarded by Article 21 is the freedom from a tangible physical restraint and did not, therefore, include freedom from invasion of privacy or protection of a person's personal sensitiveness. The construction put by the majority on regulation 236 required no elaborate discussion of the meaning of the Article 19(1) (d) and Article 21, for domiciliary visits which knock up a person from sleep, compel him to open the door and to allow persons to enter his house unquestionably impose restraints on his personal liberty. It is submitted that in Kharak Singh's case, the majority declined to lay down the relationship between Article 19 and Article 21 and the construction which the majority never the less put on Article 19(1) (d) and Article 21 is contrary to the decision in Gopalan and is incorrect.¹⁵ In the 1950's the judicial trend of our country laid a strong emphasis on the positivist approach of law. Legal positivism is a view according to which law is produced by the ruling power in society in a historical process. In this view, law is only that which the ruling power has commanded, and anything which it has commanded is law by virtue of this very circumstance.¹⁶

Escalation Towards Natural Justice: A New Approach

In course of time the rigid judicial view came to be softened and now the cases were analysed out of the premise given in Gopalan's case. It was the first time in *R.C. Cooperv. Union of India*¹⁷ when the correctness of the law laid down in Gopalan was doubted as before this no case seriously doubted Gopalan's judgement. Also known as the Bank's Nationalization Case, a Bench of 11 Judges by a majority of 10:1 reconsidered Gopalan and held it was wrongly decided because, according to the Court, its main premise, namely that Article 22 was a complete code was wrong, and also because the majority in Gopalan treated the fundamental rights conferred by various articles as mutually exclusive. It may be added that three majority Judges in Gopalan's case held that Article 22 was not a complete code & they did not hold that fundamental rights conferred by different Articles were mutually exclusive, as will appear hereafter.¹⁸

¹⁴ Pandey, supra note 7 at 250.

¹⁵ Seervai, supra note 2 at 983.

¹⁶ Dr. N.K. Jaya Kumar, Lectures in Jurisprudence, 116 (Lexis Nexis Butterworth's Wadhwa, 2nd edn. 2010).

¹⁷ R.C. Cooper, AIR 1970 SC 564.

¹⁸ Seervai, supra note 2 at 969.

This case was the trend setter in linking Articles 19, 21 and 22 as in this case Article 19(1) (f) was linked with Article 31(2) then why cannot be Articles 19, 21 and 22 is linked together.¹⁹

In another major development against the point of view of Gopalan's case, The Bank Nationalisation case was followed by the Supreme Court in ***Bennett Coleman & Co. V. Union of India***²⁰, the Court overruled the argument that Article 19(1) (a) could not apply to a law affecting freedom of speech but not enacted directly with respect to Article 19(1) (a). The Court declared that if a law affected freedom of speech, its reasonableness became assessable with reference to Article 19(2) even though it was not enacted directly to control freedom of speech. This completely knocked out the Court's earlier argument in Gopalan that Article 19 applied only when a law was passed directly in respect of a matter falling under it, and not when a law not directly in respect of a right under Article 19, though it abridged such a right. The Court had emphasised in Gopalan that the question was only to consider the 'directness' of legislation and not what would be the result of the law on a right under Article 19. Therefore, even though preventive detention deprived a person of the several rights under Article 19, the validity thereof could not be judged under Article 19. This view was no longer tenable after Bennett Coleman.²¹

The Final Blow to Legal Positivism: Insurgence of Natural Justice

The final blow to Gopalan's self-abnegation has been given by ***Maneka Gandhiv. Union of India***²². Although Maneka's case was not the case prima facie responsible for the overruling of Gopalan's case as there were various interim cases which were directly or indirectly responsible for it, but it was this case which finally terminated the supremacy of Gopalan's case over the Indian Judiciary. Thus in Maneka's Gandhi case the Court gave a new dimension to Article 21.

In Maneka Gandhi's case, the petitioner challenged the action of the government of India in impounding her passport in the public interest. The judgement dealt with few questions such as whether the right to obtain a passport was a fundamental right under Article 19(1) ?, whether that right was a part of 'personal liberty' under Article 21 which

¹⁹ Jain, supra note 8 at 1184.

²⁰ Bennett Coleman, AIR 1973 SC 106.

²¹ Jain, supra note 8 at 1184.

²² Maneka Gandhi, AIR 1978 SC 597.

raised the question of the correlation of the Article 21 to Article 19(1)?, whether the provisions of the Passports Act, 1967 violated Articles 14 and 19?²³ It is enough to say that an elaborate discussion of ‘personal liberty’ in Article 21 was not called for, because even if the narrower meaning of ‘personal liberty’ was adopted, namely, a restraint on the person, to prevent a person from leaving India without the authority of law is to impose a restraint on his ‘personal liberty’. A restraint is also put on a person’s liberty by restricting his movement when he desires to leave the country. Since preventing a person from leaving India is to put a restraint on his personal liberty, such restraint can only be imposed by a procedure established by laws required by article 21. The expression ‘procedure established by law’ was interpreted in Maneka Gandhi’s case in the context of impounding passports and the interpretation so put has been rightly treated as involving an enlargement of the right conferred by the Article 21. The grounds for impounding a passport is a matter of substantive law whereas impounding a passport on the facts of the particular case is a matter of procedure, the officer being under an obligation to disclose his reasons, unless the case falls within the exception which justifies withholding the reasons.²⁴ As limited to the procedure the judges were agreed that the procedure must be reasonable and fair not arbitrary and capricious.

In Gopalan’s case the Supreme Court held that Article 19 has no application to laws depriving a person of his life and personal liberty enacted under Article 21 of the Constitution. Thus the view taken by the majority in A.K. Gopalan’s case was that so long as a law of preventive detention satisfies the requirements of Article 22, it would not be required to meet the challenges of Article 19. But in Maneka’s case the Supreme Court has overruled the view expressed by the majority in Gopalan’s case and held that Article 21 is controlled by Article 19, that is, it must satisfy the requirement of Article 19 also.²⁵ It was held in Maneka Gandhi’s case that the expression ‘personal liberty’ in Article 21 is of the widest amplitude and its causes a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19.²⁶

It was A.K. Gopalan’s case that restricted the periphery of interpretation of the Indian Constitution on the lines of rights and liberty, but then slowly few cases came up and

²³ Seervai, *supra* note 2 at 1003.

²⁴ H.M. Seervai, *Constitutional Law of India*, 2513, (Universal Law Publishing Co. Pvt. Ltd., Vol. 3, 4th edn., 2013).

²⁵ Pandey, *supra* note 7 at 253.

²⁶ Jain, *supra* note 8 at 3107.

finally came the landmark case of ***Maneka Gandhi. Union of India***. This case not only ended the monopoly of Gopalan's case from the Indian Judiciary but also gave a new definition to the personal rights and liberty. It took 30 years to the judiciary to accept this slow and steady transition. It is true that Maneka's case is not the sole reason behind overruling the case of Gopalan, it is the cases which came after Gopalan which demanded a slow transition in the judiciary and as a result with the coming of Maneka's case this demand was fulfilled and now the Court accepted that the horizon of Natural Justice is constantly expanding, and so to meet the demands of this kind of justice, the judiciary needed to adopt itself to the changes so to keep it up with the fast growing pace of the society.²⁷ One can observe the slow diminish of positivism from the Indian judiciary with the appearance of natural justice. The theory of natural justice is contrary to the theory of positivism. Natural justice believes in morality and does not lay a thought on what is prescribed in the law but on the other hand it focuses on the path to grant justice and thereby looks on the moral and social aspect. Natural justice is not tied to any particular system or legal structure, but it seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule governed aspect.²⁸

Jurisprudential Shift: A Closure To Legal Positivism

In India the concept of justice lies anchored in the Preamble of the Constitution. The Constitution guaranteed fundamental rights and declared that any law which contravened a fundamental right was invalid.²⁹ The journey from ***Gopalan to Manekahas*** been an eventful one. Article 21 of the Constitution of India read with Articles 14 and 19 has been the gold mine for providing a shield on moral humanitarian and constitutional grounds against arbitrary state action. The influence of natural law on the Constitution makers is quite evident from the fact that they have placed the natural rights and fundamental freedoms beyond the reach of ordinary legislation.

The main difference in the concept of personal liberty between Gopalan's case and today is that the new needs of a person for liberty in the different sphere of life can be now claimed as a part of personal liberty under Article 21 and these personal liberties cannot

²⁷ Pandey, supra note 7 at 756.

²⁸ H.L. A Hart, *The Concept of Law*, 239 (Oxford University Press, 2nd edn. 2002).

²⁹ Jaya Kumar, supra note 16 at 114.

be restricted either by legislation or by law except satisfying Articles 14 and 19. But with the advent of Maneka's case the judiciary widened its scope of applicability of Article 21 and other fundamental rights. Article 21 says, 'No person shall be deprived of his life or personal liberty, except according to procedure established by law.' The phrase 'procedure established by law', which was interpreted as any procedure established by an Act of the legislature during the initial years of the Constitution, was later interpreted to mean reasonable and fair procedure. The narrow interpretation in Gopalan's case which held 'personal liberty' as the liberty relating to or concerning the person or body of the individual and personal liberty within sense in antithesis of physical restraint or coercion does not hold the field after Maneka Gandhi's case.³⁰ The judicial creativity, which we find in the interpretation of Article 21 is undoubtedly influenced and inspired by natural law.³¹

In Maneka's case the approach of Article 22 was combined with Article 19 and 21 and so accordingly the scope of these Articles was widened. But such a collaboration of these Articles was not strictly required; some of the rights infringed under Article 19 such as Article 19(1) (a) and (g) was not directly the result of detention under Article 22. The infringement under Article 19 was implied by the Court itself and thus no direct link appears *prima facie* between these two Articles. Although it increased the scope of freedom rights in the judiciary but the compilation of these Articles makes the laws very broad in it and so it creates a ruckus.³²

The Supreme Court has also imposed limitations on the power of Parliament to amend the Constitution. The makers of the Constitution have not expressly provided any such limitation in the Constitution. However, by laying down that the basic structure of the Constitution cannot be amended or abridged in exercise of the amending power, the Supreme Court has proclaimed that there are some immutable values and principles underlying the Constitution. This is nothing, but a declaration of faith in natural law, which must remain superior to positive law.³³

³⁰ Jain, *supra* note 12 at 3147.

³¹ Jayakumar, *supra* note 16 at 114.

³² Pandey, *supra* note 7 at 2517.

³³ Jayakumar, *supra* note 16 at 114.

PRESERVATION OF WOMEN'S RIGHTS UNDER PENAL LAW IN THIS ERA OF GLOBALISATION, DO WOMEN STAND AT PAR?

- Kajal Verma

*KIIT University, School of Law,
Bhubaneswar*

Abstract

This research expresses the various steps taken for the fortification of Women's Rights in India which has been evolved through a numerous amendments in the many of the legislatures but specifically emphasising on the aspects of Penal Law. Considering from the viewpoint of an ordinary citizen, almost 68% of adults out of 781 million are still illiterate in India which has a direct impact on their awareness and understanding of their legal rights. This study critically examines the laws regarding the upliftment and the betterment of Women's Rights and explores the ways in which the Criminal Law has been enforced and structured in India. The modifications done in the Law system through the introduction and amendments of various Women related Legislation and Women specific Legislation have brought a remarkable change in the society. But then simply adopting the mechanism of Law is not sufficient until there is proper execution of it and some of the crucial reasons for this ineffectiveness is the women's incapacity to reach the proper legal proceedings, or the orthodox view of minority representation of women and even the socio-economic factors. To controvert this proper administrative and judicial methodology needs to be in reach of this so-called minority section. Moreover Women's rights has been considered as a fundamental right and they are entitled to live with dignity and without any fear or repercussion of inequality. In the light of these traits, this research scrutinises and links the various provisions under the Penal Law in India relating to the constructive standing of women's in India and explicit recommendations for ensuring Women's Rights in the present-day state.

Introduction

From the time immemorial, women have been speculated as the weaker or the minority section of our society and the struggle for social justice and equality still continues even today. Even in the course of the historical time, the womankind was subjected to the malevolent and immoral practices which were termed as the societal culture in the society like sati, female infanticide, out casting the widows from the community, child marriage and other callous customs. While some of these corrupt practices were

abolished by the Britishers during their regime in 19th and 20th century, some still continue to be rampant in the rural areas of the developing India. Post-Independence when the Constitution of India came into force on 26th January, 1950 it brought with it the principle of gender equality which is enshrined in the Preamble of our Constitution along with the various Fundamental Rights, Fundamental Duties and the Directive Principles of State Policies which directs the State not to discriminate Women on the basis of their gender and sex and equal protection of law is the fundamental right of every citizen of this country. The inscription of these provisions in the Constitution of India which is treated as the supreme law has still not brought the desired effect which the Constituent Assembly had intended to achieve as still after the 68 years of Independence women are subjected to physical as well as sexual violence. According to data from the National Crime Records Bureau the government agency that keeps track of the country's crime rate cases of violent abuse of women have steadily increased since 2009. By 2013, the number of such cases has increased by over 50 percent. That's over 848 women who are either harassed, raped or killed after abduction every single day. A sizeable portion of the rape survivors over 13 percent are under the age of 14 years. If you count all the women who are raped by the time they turn 18, that's almost 40 percent of the entire demographic of women rape survivors. Worse, almost all of these women are raped by their neighbours, parents, a close family member or other relatives. Rapes in 15 out of India's 35 states and Union Territories are only committed by people known to the survivor.¹ And this is not the end, the crime rate is increasing at such a speed in spite of so many safeguards being provided for women under Penal Law.

Legal Safeguards under the Indian Penal Code, 1860

A total of 3,37,922 cases of crime against women (both under various sections of IPC and SLL) were reported in the country during the year 2014 as compared to 3,09,546 in the year 2013, thus showing an increase of 9.2% during the year 2014. The year 2014 has increased by 9.2% over the year 2013 and by 58.2% over the year 2010. The IPC component of crimes against women has accounted for 96.3% of total crimes and the remaining 3.7% were SLL crimes against women. These crimes have continuously increased during 2010 - 2014 with 2, 13,585 cases reported in 2010, which increased to 2, 28,649 cases in 2011, which further increased to 2,44,270 cases 2012 and 3,09,546 cases in 2013. In 2014, a total of 3, 37,922 such cases were reported.²

¹ Indrani Basu, 848 Indian Women Are Harassed, Raped, Killed Every Day, HuffPost India, December 16, 2014.

² Statistics from National Crime Records Bureau, 2015

Rape

A total of 36,735 cases of rape under section 376 IPC were reported during 2014 including custodial rape, attempt to commit rape (excluding the Protection of Children from Sexual Offences Act, 2012). A cumulative inclination in the incidence of rape has been perceived during the periods 2010 - 2014. These cases have shown an escalation of 9.2% in the year 2011(24,206 cases) over the year 2010 (22,172 cases), an increase of 3.0% in the year 2012 (24,923 cases) over 2011, with further increase of 35.2% in the year 2013 (33,707 cases) over 2012 and 9.0% in 2014 (36,735 cases) over 2013. 14.0% of rape cases were reported in Madhya Pradesh (5,076 out of 36,735 cases) followed by Rajasthan (3,759 cases), Uttar Pradesh (3,467 cases), Maharashtra (3,438 cases). Mizoram reported the highest crime rate of 23.7 followed by Union Territory of Delhi at 23.2 as compared to national average of 6.1³

The Criminal Law (Amendment) Act, 2013 which came into force on 3rd April, 2013 brought massive change in the several sections relation to the clauses of Rape and Sexual Assault under the Indian Penal Code after the outpouring of *Nirbhaya Rape Case*⁴. The Justice Verma Committee suggested the major 10 points for swotting the whole of Criminal Law including Criminalisation of Voyeurism, Stalking and Intentional Touching, amendments to the Rape clauses under IPC, revising the Armed Forces Special Powers Act (AFSPA) which stated a no. of sexual offences cases in the area of Kashmir and Northern Eastern areas, scrutinising the prohibited measures of *Khap Panchayat* and honour killing of women, reviewing the medical procedure of Rape victims by scrapping off the two-finger test, improving the Police and the Electoral reforms, the Gender sensitisation through education, endorsement for incorporating the Bill of Rights for women, along the lines of similar bills in South Africa and New Zealand, the bill would set out the rights guaranteed to women, which would include the right to life, security, bodily integrity, democratic and civil rights and equality and lastly altering the Human trafficking offences under IPC.

The Supreme Court in *Sakshi v. Union of India*⁵ had accredited the deficiencies in the law relating to Rape and had commended that the legislature should bring about the prerequisite changes. The Bill, drafted by Ms. Kirti Singh advocate and legal convener of AIDWA, is based on 172nd report of the Law Commission to modify the laws relating to sexual assault in Section 375, 376, 354 and 509 IPC and the appropriate sections of the

³ Statistics from National Crime Records Bureau, 2015

⁴ SC No. 114/2013

⁵ AIR2004SC3566

Code of Criminal Procedure 1973 and the Indian Evidence Act 1872. The acclamations are based on the national consultation on the issue organized by the national commission for women.

Dowry Death

The cases of dowry deaths have increased by 4.6% during the year 2014 over the previous year (8,033 cases). A total of 8,501 victims were reported under 8,455 dowry deaths cases in the country during the year 2014. 29.2% of the total cases of dowry deaths were reported in Uttar Pradesh (2,469 cases) alone followed by Bihar (1,373 cases). The highest crime rate in respect of dowry deaths was reported in Bihar (2.8) followed by Uttar Pradesh (2.5) as compared to the national average of 1.4.⁶

Section 304B of the Indian Penal Code would be pertinent if cruelty or harassment was perpetrated by the husband on any of his relative for, or in linking with demand for dowry, immediately foregoing the death by bodily injury or by burning (irregular circumstances) within seven years of the marriage. In such situations the husband or the relative, as the case may be, will be believed to have caused her death and will be accountable to punishment. The prosecution under section 304B of Indian Penal Code cannot escape from the burden of proof that the harassment to cruelty was related to the demand for dowry and such was caused “soon before her death”. To invite the necessities of section 304B, one of the main elements of the offence which is required to be established is that “*soon before her death*” she was endangered to cruelty and harassment “*in connection with the demand of dowry*”. The expression ‘soon before her death’ used in the practical Section of 304B, I.P.C. and section 113B of the Evidence Act is present with the idea of propinquity text. *The Dowry Prohibition (Amendment) Act of 1984* acclaims a minimum punishment of two years imprisonment and fine to anyone demanding dowry. This Act is forbidden to give or to agree to give, directly or indirectly, any property or valuable security, in construction with a marriage. The giving of or agreeing to the giving of any amount either in cash of kind, jewellery, articles, properties, etc. in respect of a marriage is absolutely barred by the Dowry Prohibition Act. Even the making of a demand for dowry is also now prohibited and it is punishable with imprisonment of 5 years and a fine of Rs.10, 000/-

Assault on woman with intent to outrage her modesty

Occurrences of assault on women with intent to outrage her modesty in the country have

⁶ Statistics from National Crime Records Bureau, 2015

amplified by 16.3% during 2014 over the previous year (from 70,739 cases in 2013 to 82,235 cases in 2014). Delhi Union Territory has stated the highest crime rate of assault on women with intent to outrage her modesty cases (47.9) as compared to the national average of 13.7. A total of 82,620 victims were reported under 82,235 cases of assault on woman with intent to outrage her modesty cases in the country during the year 2014. Statistics on carnal nuisance under section 354A IPC is collected individually for the first time in 2014. A total of 21,938 cases were registered under sexual harassment during 2014. Maximum cases under sexual harassment were registered in Uttar Pradesh (4,435 cases) followed by Maharashtra (4,052 cases) and Madhya Pradesh (3,163 cases). Data on assault or usage of criminal force to women with intent to disrobe (section 354B IPC) is collected separately for the first time in 2014. A total of 6,412 cases were registered under this crime head. Maximum cases under assault or use of criminal force to women with intent to disrobe were registered in Odisha (1,142 cases) followed by Uttar Pradesh (1,066 cases).⁷

Section 354A, IPC, has been ratified with a view to shield a woman against licentious assault. The object of the provisions as contained in Sections 354A, 354B and 509, IPC is to safeguard a woman against offensive conduct of others which is offensive to morality. In fact, these offences are as much in the awareness of the woman as in the interest of public morality and decent behaviour. These offences are not only offences against individual but against public morals and society as well. The felony of outraging the modesty of a woman has been dealt with under the Indian laws in a soft manner. *“The essence of a woman’s modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possess a modesty capable of being outraged. From the very birth she possess the modesty which is the attribute of her sex.”* stated by Justice Bachawat in the case of *State of Punjab v. Major Singh*⁸ The legislation provides a hoary area wherein it does not deliver exact definitions as to what modesty is and what would constitute outraging of modesty. Therefore it is mandatory upon the courts to look at the facts of the case and the intention of the accused carefully before holding a person guilty or letting him go scot-free.⁹

Domestic Violence

Domestic Violence was acknowledged as a criminal offence in India in 1983. The offence imputable under Section 498-A of the Indian Penal Code that relates to domestic

⁷ Statistics from National Crime Records Bureau, 2015

⁸ AIR 1967 SC 63

⁹ Lihasegal, Molestation under the Indian Penal Code, In Law of Crimes, August 8, 2012

violence is any act of cruelty by a husband (or his family) towards his wife. However, until recently, there was no single civil law speaking the precise intricacies allied with domestic violence, including the entrenched nature of violence within matrimonial networks, the requirement for fortification and conservation of mistreated women, and the fact that punishment and imprisonment for the husband may not be the best resolution in every case. Accordingly, after a decade-long process of consultations and reconsiderations, a comprehensive domestic violence law, known as the *Protection of Women from Domestic Violence Act 2005*, took effect in 2006. Key rudiments of the law include the prohibition of marital rape and the provision of protection and maintenance orders against husbands and partners who are fervently, bodily, or frugally abusive. March 3, 2015 was the press release by *India's Ministry of Women and Child Development* reports that over the previous three years, the number of cases registered under The Protection of Women from Domestic Violence Act, 2005, which came into force in 2005, has decreased. The same source specifies that 531 cases were registered in 2014, 4,204 in 2013 and 16,351 in 2012. The Hindu reports that, according to domiciliary analyses conducted in India by the *United Nations Office on Drugs and Crime (UNODC)*, 10 percent of women in India reported that they have experienced sexual violence by their husbands in their lifetime. Reuters reported in June 2012 that, according to the *Health and Programme Development Adviser* at Save the Children UK, an international NGO that works in 120 countries to "save children's lives" despite India's Domestic Violence Act, "women and girls continue to be sold as chattels, married off as young as 10, burned alive as a result of dowry-related disputes and young girls exploited and abused as domestic slave labour". Documenting information could not be found among the sources referred by the Research Directorate within the time constraints of this response.¹⁰ The Domestic Violence law has made a transformation is clear from the fact that some organisations now believe that the law is often tainted by women and their families to settle scores with a husband or live-in partner they may have fallen out with. The short point, however, is that wives are not that helpless in the case of marital rape they can seek the help of a magistrate under the Domestic Violence law whereas under the IPC only separated women can complain against rape by their own husbands.¹¹

¹⁰ Canada: Immigration and Refugee Board of Canada, India: Violence against women, including domestic violence, homelessness, workplace violence; information on legislation, state protection, services, and legal recourse available to women who are victims of violence (2013-April 2015), 15 May 2015, IND105130.E, available at: <http://www.refworld.org/docid/55681b04a.html>

¹¹ S Murlidharan, Law on marital rape: Why the Domestic Violence Act is a reasonable substitute, May 3, 2015

Human Trafficking

Facts and figures on Human Trafficking under Section 370 and 370A of IPC has been collected for the first time in 2014. A total of 720 cases of human trafficking under section 370 and 370A of IPC were reported in the country during 2014. Jharkhand has reported 150 such cases followed by Maharashtra with 108, Assam (68 cases), West Bengal (55 cases) and Madhya Pradesh (50 cases). However, maximum victims (2,605 persons) against 1,106 such cases were recovered or reported in Kerala during 2014. A total of 82 cases of selling of minors for prostitution were reported in the country during 2014 as against 100 such cases in 2013, thus indicating a decrease of 18.0% over 2013. West Bengal has reported 67 such cases accounting for 81.7% during 2014. Cases registered an increase of 1.5% during the year 2014 as compared to the previous year (2,579 cases). 509 cases were reported in Tamil Nadu followed by Karnataka (392). There were 3,351 victims (consisting of 595 males and 2,756 females) for 2,617 cases reported under the Immoral Traffic (Prevention) Act. Cases have increased by 65.0% during the year 2014 as compared to the previous year (1,224 cases). 852 cases with equal number of victims were reported in West Bengal followed by Assam (303 cases & 303 victims). There were 2,025 victims for 2,020 cases. Maximum cases of procurement of minor girls were reported in West Bengal (852 cases) followed by Assam (303 cases), Bihar (280 cases) and Haryana (277 cases) during 2014.¹²

The Immoral Traffic (Prevention) Act, 1956 explains child as any person who has completed eighteen years of age. The first section of the act has provisions that outline the illicitness of prostitution and the punishment for owning a brothel or a similar establishment, or for living of earnings of prostitution as is in the case of a pimp. To guarantee that the people in the chain of trafficking are also held responsible the act has a provision that states that any person involved in the recruiting, transporting, transferring, harbouring, or receiving of persons for the purpose of prostitution if guilty of trafficking. In addition any person attempting to commit trafficking or found in the brothel or visiting the brothel is punishable under this law. If a person is found with a child it is presumed that he has detained that child there for the purpose of sexual intercourse and hence shall be punishable to seven year in prison up to life imprisonment, or a term which may extend to ten year and also a maximum fine of one lakh rupees. If a child is found in a brothel and after medical examination has been found to have been sexually ill-treated, it is assumed that the child has been incarcerated for the purpose of prostitution. If prostitution of a child is being committed with knowledge of

¹² Statistics from National Crime Records Bureau, 2015

an establishment owner such as a hotel the license of the hotel is likely to be cancelled along with the given prison sentence and/or fines. Any child found in a brothel or being abused for the purpose of prostitution can be placed in an institution for their safety by a magistrate. In 2006, the Ministry of Women and Child Development proposed an amendment bill that has yet to be passed. The amendment does not really concern any of the provisions related to the child but has many important benefits for the right of women sex workers.¹³

Sexual Harassment

For Indian women, sexual harassment is nothing new. Every day they come across stories, or rather dare say witness stories of women (including themselves) being stalked, eye raped, or going through verbal and physical attacks. Their biggest brawl, every single day, is to maintain their inviolability at their homes, on road, in their educational institutions, as well as at their workplace. Women aren't even spared in their dreams, as their stalkers often manage to enter their private zone mind that is and scare them. According to one of the recent surveys conducted, Indian women don't feel safe at their workplace. The survey, titled *Nimbuzz - Pulse of the Nation*, reveals that “47% of women feel their top issue at work is sexual harassment vis-a-vis inequality in pay and unequal opportunities”¹⁴ In 1997, the Hon'ble Supreme Court of India, in *Vishaka and Others v. State of Rajasthan and Others*¹⁵ accepted the severity of sexual harassment of the working women at the workplaces and laid down guidelines making it mandatory for employers to prevent the commission of acts of sexual harassment and to provide the measures for the resolution, settlement or prosecution of acts of sexual harassment. The guidelines issued by the Hon'ble Supreme Court were treated as law declared by the Hon'ble Supreme Court under Article 141 of the Constitution of India. It was held by the Hon'ble Supreme Court that the guidelines framed by the Supreme Court would be strictly observed in all work places for the deterrence and implementation of the right to gender equality of the working women. It was observed by various courts from time to time in the past that the guidelines and norms framed by the Hon'ble Supreme Court in *Vishaka* Judgment have not been followed in workplaces strictly. The increasing work involvement rate of women made it overbearing for enacting a comprehensive legislation focusing on preclusion of sexual harassment as well as providing a redressal machinery.

¹³ www.childlineindia.org.in/Immoral-Traffic-Prevention-Act-1986.htm

¹⁴ Richa Sharma, 47% of Indian Women Find Sexual Harassment at The Workplace a big Issue, Business Insider India, Nov 7, 2014

¹⁵ AIR 1997 SC 3011

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 after a span of 16 years, for prevention of sexual harassment against women at the workplaces. The Act is enacted by the Indian Parliament to provide defence against sexual aggravation of women at workplace and prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto. Sexual harassment is termed as a defilement of the fundamental rights of a woman to equality under Articles 14 and 15 of the Constitution of India and right to life and to live with dignity under Article 21 of the Constitution of India. Sexual harassment is also considered a violation of a right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe environment free from sexual harassment under Article 19 of the Constitution of India. The Act has adopted the definition of “sexual harassment” from *Vishaka* Judgment and the term sexual harassment includes any unwelcome acts or behaviour such as physical contact and advances, demand or request for sexual favours, making sexually coloured remarks, showing pornography or any other unwelcome physical, verbal or non-verbal conduct of sexual nature. As per the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 in case the distressed woman is unable to make a complaint on account of her physical incapability, a complaint may be filed inter alia by her relative or friend or her co-worker or an officer of the *National Commission for Woman or State Women's Commission* or any person who has knowledge of the incident, with the written consent of the aggrieved woman.¹⁶

Conclusion

Pre and Post-Independence there were massive improvements, introductions, repealing of many laws but still there is a void which the Government hasn't been able to fill up till now. At present there are innumerable laws that have been implemented and executed but still women are dominant and minority to our society. Those concerned in females' issues may like to glance the enumerated Articles in the Constitution and the requirements they make for women's access to power resources. To elucidate them in this article would take up too much space. Firstly, non-punishable provision in respect of spouses for their actions. Instead of proactively antagonising and limiting marital rape, it simply provides a conservative opportunity of escape. Secondly abovementioned shields if the sexual abuse committed was nasty or dangerously harmful. These conditions fail to put women in a position of authorisation and strip women of their freedom of choice and consent. Thirdly marital rape is at no time unambiguously

¹⁶ Rajdutt S. Singh, India: Overview of The Sexual Harassment of Women at Workplace, October 21, 2014

defined. Therefore the formation of The National Commission for Women which is a statutory body with a specific instruction to study, improvise and display all matters

WOMEN EMPOWERMENT IN POST INDEPENDENT INDIA WITH SPECIAL EMPHASIS THROUGH CASE LAWS

- Bandita Sengupta

*Research Scholar, Dept. of Law,
Tripura University*

Abstract

For last six decades of independence gender justice has shaped both the legal and cultural landscapes in India. Numerically women population is less in comparison to man and gender inequality and differences persist in every variety of social institution. It is the harsh reality that in India women are ill-treated and considered as an object of sexual pleasure for men. Our Constitution as supreme law of land and ample of legislations tried to ameliorate their conditions and provide assistance for protection and their upliftments from pre to post-independence period. The Constitution of India focuses at creating legal norms, social philosophy and economic values which are to be effected by striking synthesis, harmony and fundamental adjustments between individual rights and social interests to achieve community goals. The Preamble contains the quintessence of the Constitution and reflects the ideals of equality and prohibits unreasonable discrimination between genders. Thereby Indian legal system provided various legislations which contain certain provisions for equal opportunities of women and prohibit discriminations against women or gender-biasedness. Similarly, Indian Judiciary has independently and effectively intervenes on the issues of women emancipation and specifically the dynamic role of the Apex court has expanded the status of woman and empowered them to lead a dignified life in society.

Introduction

Law and society are closely related to each other. Law tells the nature to live social life and lead to socio-economic and technological progress and both male and female are part of that progress. Our Constitution aims at creating legal norms, social philosophy and economic values which are effected by striking synthesis, harmony and fundamental adjustments between individual rights and social interests to achieve the desired goals. Concept of equality with reasonable classification is a noble epitome in Indian legal system. Man and Woman are equal in the eye of law. Thereby Indian judiciary has independently and effectively intervenes on the issues for woman emancipation.

Women Under Indian Constitution

Art.14 of Constitution of India entails the concept of equality and prohibits unreasonable discriminations between persons. In *C.B. Mutthamma Case* (1979) the Apex Court of India challenged the validity of *Indian Foreign Service (Conduct and discipline)* Act to dogmatize and universalize man and woman in all occupations and situations and to exclude the need to pragmatic requirement for employment of sensitiveness of sex cannot be handicapped but rule of law governed where to save differentiation. Art.15 (3) lifts that rigor and permits the state to positively discriminate in favor of women to make special provisions to ameliorate their social conditions in Indian society. Gender equality is one of the basic principles of our constitution. Art. 21 covers to protect the women's right to live with dignity and personal freedom in *Bodhiswatta Gautama vs. Subhra Chakraborty* (1996) Hon'ble Justice Saghir Ahmed pioneered an entirely new and revolutionary concept and ruled out that rape is not only an offence under Indian Penal Code 1860, it is a violation of women's dignity and personal freedom. Similarly, to give meaning to Art.23, various laws were passed to prevent Immoral trafficking of young girls, women. In *Gaurav Jain vs. Union of India* (1997) the Apex Court highlighted the plights and painful conditions of prostitutes and issued prohibitory measures in relation to these matters. Fundamental Rights (Part III) cater to individual rights while Directive Principles of State Policies (Part IV) cater to social needs. Art. 39 (a), (d), (e) provided for an adequate means of livelihood and gave direction of state to protect health of workers including woman and equal pay for equal work. Art.40 represents women in local bodies after 73rd and 74th Amendments and mandated 1/3 reservation for woman in local governance. Art.42 incorporates an important provision for benefits of woman. Art.44 has objectives to facilitate common/uniform civil code as most of the problems arisen due to non-registration of marriages and certain unscrupulous husbands deny marriage by leaving spouses in lurk. The benefits of uniform civil code are: 1) to prevent child marriage 2) to check bigamy and polygamy 3) to help woman in exercising right to maintenance and custody of children 4) enable widows to claim inheritance. Art.44 divests religion from social relations and personal laws. Art. 51(A) (e), with the 42nd Amendment on 1976 added as fundamental duties (Part IVA) for promotion of harmony and brotherhood. Equality is not simply about reserving of sexes and comparing, nor it is simply passing laws that appear on the face of them to be gender neutral, it is all about equal treatment.

Women under Indian personal laws of India

In India, marriage is a well-recognized institution and its ideals are very high

irrespective multi-religious communities. In *T. Sareetha vs. T. Venkat Subbhaih* (1983) the court held that under Hindu Law, Sec.9 of Hindu Marriage Act 1955 is violative of right to privacy and human dignity. Though it has overruled and Sec.9 affords a remedy to the aggrieved husband and wife against deserting spouse. Adultery as ground for divorce u/s.13 (1) (i) of 1955 Act as if any other spouse committed the act. In *Yusuf Abdul Aziz v. State of Bombay* (1954) the validity of Sec.497 of *Indian Penal Code 1860* challenged as punishing only male participant as violative of Art.14 and Art. 15(1) of Constitution But the court mandated obvious only Art. 15(3) and upheld classification was on solely based on sex only. Later in *Sowmithri Vishnu vs. Union of India* (1985), the court contended there is difference between married woman, unmarried woman, divorcee and a widow and in this case the man had illicit relation with married woman which has constituted the offence. The amendment and changes with the flow of society as interpreted Sec. 6 of *Hindu Majority and Guardianship Act 1956*, as decided in *Gita Hariharan vs. Reserve Bank of India Case* (1999) the mother could act as natural guardian during the lifetime of father if he is not in charge of the affair of minor. Sec.4 of *Hindu Succession Act 1956*, removed disability of a female to acquire and hold property as absolute owner and to convert limited ownership into absolute estate so that equality could be conferred on women.

Under Muslim Law, the judiciary has taken initiative in case of injustices done to woman in personal laws. In *Shah Bano vs. Md. Ahmad Khan* (1985) the Supreme Court voiced its concerns pertaining the liability of woman husband to maintain his divorced wife, beyond Iddat period, if she is incapable to maintain herself. The obiter of this historic case rocked the Muslim community in India leading to enactment of *Muslim Women's (Protection of Rights on Divorce) Act 1939*.

Women Under Commercial Laws of India

Social justice means to attain the socio-economic objectives. The jurisprudence of industrialization has demonstrated the vital roles as instrument of social justice. *Equal Remuneration Act 1976* passed with objectives of equal pay for equal work both man and woman and provided there will be no discrimination against recruitment of woman and promotes opportunity for them. *Maternity Benefit Act 1961* provides protection to women workers maternity leave, extra leave for child infancy adequate attention to their safety and health of woman during pregnancy and lactation. *Factories Act 1948* makes detailed provisions regarding health, safety and welfare of employment of women. Sec.25 of *Beedi and Cigar Workers (Condition and Employment) Act 1966* laid

down no woman shall be required to industrial premises except between 6 a.m. and 7 a.m. and to ensure safety of woman.

Women Under Criminal Legal System of India

Atrocities towards woman are a burning issue under law of crimes. Under sec.375 of *Indian Penal Code 1860*, rape constitutes an offence against body and *Criminal Law Amendment Act 1983* introduces several sections to stop sexual abuse of women in custody, care and control by various categories of person. In famous *Mathura Rape Case* (1979), in absence of injuries the Supreme Court reversed the decision of Bombay High Court and acquitted accused, this made a great hue and cry in whole nation as one of the reasons for Mathura Trail was unchastely of woman and thereby a fight began for the protection of woman alleged to be of unchaste woman. Responding to voice of women activists the Supreme Court decisions on *State of Maharashtra vs. Madhukar. N. Gardikar* (1990) held that even a prostitute has a right to privacy and she is entitled to protect her personally if there is an attempt to violate it against her wish. *Criminal Law Amendment 1983* made for combating the evils of custodial rape, marital rape, rape on pregnant woman and young girls under 12 years and gang rape and a minimum punishment for ten years imprisonment has been prescribed .

Woman empowerment is essential as dignity of woman vests on spirit of harmony to maintain the decorum of society. A state runs in the healthiest way with its citizens irrespective of man and woman. Modesty is an attribute which female possesses right from her birth. But when an act is done or in presence of a woman clearly suggestive of sex according to common notions of mankind covered within Sec.354 of *Indian penal Code 1860*. Law relating to obscenity and indecent representation of woman through advertisements, publications, writings and paintings. To respect woman is ultimate motto for development of healthy society. But Indian patriarchal society has long desire for birth of male child and thereby leads to indiscriminate abortion of female fetus. Though to prevent such illegal acts Secs. 312-318 of *Indian Penal Code 1860* deal with the causing of miscarriage with or without consent. To prevent such unethical activities *Medical Termination of Pregnancy Act 1971* came into force with the objectives to terminate pregnancy by registered medical practitioners where it involves high risk to the life of pregnant woman and there is grave injury to her medical health and there is substantial risk of child in her womb and if it is born there will be physical or mental abnormalities. Similarly *Female Foeticide Act 1994* is a regulation of the use of pre-natal diagnostic technique for detecting genetic disorder and prevention of misuse of such techniques for the purpose leading to female foeticides. The Supreme Court in

CEHAT vs. Union of India (2003) expressed concern to stop illegal sex determination and directed all state to confiscate ultra-sound equipment from clinic that are being run without licenses.

The increasing number of dowry death is a serious concern. *Dowry Prohibition Act* 1961 is a social legislation but implementation of the Act and rules were not effective and has not taken up to zeal by government. It is necessary to arisen conscience of the people against the demand and acceptance of dowry. Thereby, insertion of Sec. 304B as dowry dearth in *India Penal Code* 1860 made punishable and imprisonment not less than 07 years which may extend to imprisonment of life. Sec 498A Indian Penal Code 1860 reflects the anxiety to extend protection to the weaker spouse. Life of a woman in the family of the husband is sometime so intolerable and miserable that it drags towards suicide. Very recent *Domestic Violence Act* 2005 has formulated for more effective protection of the rights of woman guaranteed who are victims of violence any kind of incident within family. This Act provides protection to the wife or female live in partner house tortured and victim of domestic violence at the hands of husband or any family member.

For the protection of woman, a guideline incorporated under section 174 of Criminal Procedure Code 1973 and empowers police officers to investigate suicide cases and unnatural deaths of bride. Sec.174 (3) it is mandatory for police officer to send the dead body for post-mortem. Sec.176 makes inquiry for Magistrate into cause of death into police custody. By amending 1st Schedule to Criminal Procedure Code 1973, the offence of dowry death has been made cognizable, non-bailable and triable by Court of Session. 84th *Law Commission Report* inserted Sec. 113B and Sec.114A *Evidence Act* 1872 as appeared to have gone to the farthest limits to facilitate the punishment of guilty. The Supreme Court in *Bhagwant Singh vs. Commissioner of Police, Delhi* (1983), pointed out that young woman of education; intelligence and character do not set fire to themselves to welcome the embrace of death unless provoked by someone or situations.

Remarkable Developments in Women Empowerment

As women try to fight economic disparity to man, another form of crime emerges – sexual harassment at the work place. Each case of sexual harassment leads to violation of fundamental rights and incompatible with dignity and honor of women. In *Vishakha vs. Union of India* (1997) Case, the Supreme Court laid down guidelines by focusing Art. 11 and 24 of *CEDAW* 1979, for violence against woman constitutes violation of fundamental rights and freedom of woman. The woman empowerment or gender justice

is a huge concept covering various pros and cons and it is an umbrella term for harmful act that perpetrated against women's will and based on socially ascribed differences between man and woman. It cannot negate that legislative responses against gender based violence's is delayed and grossly inadequate and lacks the political commitment to address issue. But Indian judiciary tried to provide few acclamatory results in rescuing dignity of woman to an extent. In *Chandrima Das vs. Chairman, Railway Board* (2000) held that where a rape was committed by railway employee on a woman in building belonging to railways a writ petition for compensation filed by victim against government.

Society changes and law changes and status of woman have gone through various phases. Sexual Harassment of women Bill at workplace 2010 is now pending in Rajya Sabha of Indian Parliament and has still to get status of enacted law. With the famous Delhi Rape Case of 2012 December, the *Criminal Law Amendment Ordinance 2013* considered reforms to strengthen laws against sexual violence against women. It included new offences like acid attacks, sexual harassment, voyeurism, cyber-stalking and amendments in *Indian Penal Code 1860*, *Indian Evidence Act 1872* and *Criminal Procedure Code, 1973* changed the dimensions of offences relating to women.

Conclusion

In concluding part it can be said that women abuses can leave psychological scars, damage on health including their reproductive and sexual health and in some instances resulted to death. There is a need to alter the demographic composition of Indian's population and tackle the violence against women. Enactment of law is insufficient; laws must be adhered and rigorously applied. Apart from various legislations, and measures and their effective implementations, it is also necessary to train and teach youth generation to be caring, supportive to their counter parts and this would help to respect and value the dignified status of woman. They should be respected by man. Their honor and dignity should never be touched and encroached. Days are not so far, where there may be emergence of situations where females will be preferred and a feeling will be inculcated in mind that she is a daughter, she is a sister, she is a life partner and she is a mother of a man.

SEDITION CHARGES CONSTANTLY EVOKED; BUT HARDLY STICK

- Pearl Maheshwari
Indore Institute of Law

Introduction

Prior independence, the provision of sedition was propounded and inserted into the statute book by the British colonial rulers in order to suppress the revolutions carried out by the freedom fighters such as Mahatma Gandhi, Bal Gangadhar Tilak, Lala Lajpat Rai etc against the British Raj. It was a colonial-era-law of that time which intended to quash the voice of freedom. The British rulers in order to uphold their tyranny enacted such draconian law so as to stifle and restrain the voices of dissent that emerged against them during that period of time.

The offence of sedition is an offence against the state. It embraces all those practices, whether by words, deeds or writing which are mainly determined to disturb the tranquility of the state. Sedition has been explained as disloyalty in action which leads to a civil war, creates public disturbance, excites discontent or disaffection or ordinarily all the endeavors that promote public disorder. It is in force in India in the form of a penal offence.

Sedition was brought into Indian Penal Code in 1870, almost 10 years after the code was enacted. This section was amended in 1891 and explanations were added to it. Sedition is an offence defined under section 124A of IPC, 1860. As per this section:

“124-A.Sedition - Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1- The expression “disaffection” includes disloyalty and all feelings of enmity.

Explanation 2 - Comments expressing disapprobation of the measures of the government with a view to obtain their alteration by lawful means, without exciting or

attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3 - Comments expressing disapprobation of the administrative or other action of the government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.”¹

The existing section of sedition under 124A of IPC was originally framed under section 113 of Macaulay’s draft Penal Code of 1837-39.

Sedition is a violent revolt against an established authority or government mainly in the form of defamation against the government. It is a type of conduct or a speech given that incites people to rebel against the authority of a state or monarch. The fundamental characteristic of sedition consisted in the betrayal and dishonesty of that faith and fidelity which were due from a subject to his sovereign as supreme head of state. It is an insurrectionary movement which involves all the attempts made by the meetings, speeches or publications that interferes with law and order of the state. Sedition is considered as a subversive act whose ultimate object is the violation of public peace though not aimed at direct and open violence against the laws. A seditionist is one who is involved in or fosters the interests of sedition and if convicted, he can face punishment up to life in prison.

History of sedition laws in India

Before Independence

The history of offence of sedition in IPC holds one of the major conflicts in the judicial interpretations and enactments. In pre-Independence era, huge number of cases were decided and pronounced by Privy Council as well as Federal Court. These two highest judicial bodies at that time have taken absolutely opposite and different standing on the meaning and scope of sedition as a penal offence. The judges of the Federal Court were of the view that sedition implies resistance or disorder of some kind and has emphasized mainly on the point that if there is no incitement to violence or public disorder then there is no offence of sedition. On the other hand, Privy Council was of the view that while deciding the blameworthiness and culpability of a person charged with offence of sedition, it would be immaterial to take into consideration the acts like incitement to violence and insurrection.

¹ <https://indiankanoon.org/doc/1641007/>

Being a Victorian-era law, sedition law has been applied several times and has undergone several interpretations in number of cases:-

Queen v. Balgangadhar Tilak²

Bal Gangadhar Tilak, a leading advocate and freedom fighter of India, was charged with sedition on two of the occasions. He was prosecuted for the speeches rendered by him and for the seditious writings in his newspaper. He was convicted and sent to jail for six years.

In this case, the disaffection was mainly described as the absence of affection towards the government. Strachey J. stated that a man must not make or attempt to make others feel ill will or abhorrence of any kind towards the government. To constitute an offence under this section, it is not necessary that one must excite or attempt to excite mutiny or rebellion or any sort of actual disturbance towards the government. But it would be sufficient that one tries to excite feeling of hatred or contempt or certain other bad feelings towards the government.

Emperor v. Sada Shiv Narayan³

In this case, the Privy Council restated the law on sedition which was enunciated in Tilak's case and held that if accused neither excited nor intended to excite any rebellion or forcible resistance against the authority of government but if he still attempted to excite the feelings of enmity against government then it would be sufficient to make him guilty under this section.

After Independence

Post independence, there has been a huge debate regarding freedom of speech and expression and the offence of sedition. While interpreting the offence of sedition, K.M. Munshi said that a line must be drawn between constructive criticism of government which should be allowed and welcomed and incitement that leads to impairment of security or public interest or destroys the set-up of civilized life or aimed at the subversion or overthrowing of the government which should be restrained. After coming into force of the Constitution, the constitutional validity of offence of sedition was taken into account by the Supreme Court of India in many of the cases:

² I.L.R. 22 Bom. 112

³ A.I.R. 1943 P.C. 82

Kedar Nath Singh v. State of Bihar⁴

The subject matter of case was that the accused was a member of the Forward Communist Party and had given a harsh speech against the government in power and rendered the speech in a violent language. It then became necessary to decide the constitutional validity of Section 124A which was questioned on the ground that the provisions of this section were in violation with the freedom of speech and expression. The plea was dissented by the court and the section was held to be constitutional. In order to make sure that section 124A did not infringe the fundamental rights, the explanation to the section was added by the Supreme Court stating that strong words expressing disapprobation of the measures of government with a view of obtaining their alteration or improvement by lawful means and comments on government action or criticism of public measures, however strongly worded, within the reasonable limits and consistent with the fundamental right of freedom of speech and expression would not constitute an offence under this section. It is only when the words having malignant or detrimental tendency or intention of creating public disorder or disturbance of law and order, the provisions of this section are attracted. In other words any written or spoken words etc. implicitly having an idea of subverting government through violent means have been made penal under this section.

Balwant Singh v. State of Punjab⁵

After the assassination of Indira Gandhi, two Sikhs raised anti-slogans in Chandigarh. These slogans included – “Khalistan Zindabad”, “Raj karega Khalsa” and “Hinduan nun Punjab chon kadh ke chhadange, hun mauka aya hai raj kayam karan da” [We will drive Hindus out of Punjab and establish our rule]. Instead of the disturbance and annoyance created by these slogans, the Supreme Court acquitted both of them because these slogans did not imminently incite the violence. The court observed that such casual raising of the slogans by appellant cannot be said to be aimed at exciting or attempt to excite hatred or disaffection towards the Government and it also didn't stimulate any response from any person of Sikh community or any other reaction from the people of any other communities and the people remain unaffected and carried on with their normal activities. Thus a person can be punished for the offence of sedition only if there is any menacing and forthcoming incitement to violence in pursuance of his conduct or action.

In brief, the Supreme Court has tried to indicate that the sedition charges will only stand

⁴ A.I.R. 1962 S.C. 955

⁵ 1995 (1) SCR 411

when it is being used to incite the mob which leads to a violent action. Just shouting out words in a public place does not amount to sedition unless and until this leads to immediate incitement of violence. Mere words and phrases spoken, no matter how much dissatisfactory, do not amount to a criminal offence unless the above mentioned condition is met.

Recent cases indicating changes in the concept of sedition

1.) Sedition turmoil going on in JNU:-

What had happened in JNU which leads to a huge sedition uproar?

Sedition is in the air and a lot of hot air has been generated after the JNU incident.

Kanhaiya Kumar, a young student leader from Jawaharlal Nehru University (JNU) is the latest victim of sedition charges. He is the current president of Jawaharlal Nehru's University Student's Union and also a leader of All India Student Federation (AISF), the student wing of Communist Party of India (CPI).

The 28-year-old student was arrested on 12 February, 2016 and charged with sedition charges by Delhi police for allegedly raising anti-Indian slogans in a student rally. Marking the death anniversary of Afzal Guru, the rally was called in order to protest against the hanging of Mohammad Afzal Guru, a Kashmiri who was convicted and hanged in Delhi's Tihar jail in 2013 for his alleged role in Indian Parliament attack, 2001. Two more students, Umar Khalid and Anirban Bhattacharya were arrested on the same charges and remanded to 14 days judicial custody.

A case was registered against Kanhaiya on 13 February, under sections 124A and 120B of IPC. He, however, denied the charges and said that he was neither shouting any slogan nor saying anything against the integrity or solidarity of nation. He claimed that he didn't say anything that was seditious and insisted that he had full faith in the Constitution of country.

Kanhaiya Kumar's arrest led to huge students protests both at the university as well as in many cities across the country. His arrest has triggered a public debate around the country regarding freedom of speech and expression.

Why JNU's Kanhaiya Kumar did not commit sedition and won't get convicted for it?

In 1962, the Supreme Court in Kedar Nath case had already added a caution that sedition

charges must be surely accompanied by violence or direct incitement to violence. Raising anti-Indian slogans do not amount to incitement of violence.

In recent years, local authorities and state have used sedition laws to intimidate peaceful protestors and to silent the criticism. Kanhaiya Kumar finds himself in exalted company of many Indians who have been slammed by charges of sedition which includes Assem Trivedi, Simranjeet Singh Man, Arundhati Roy etc. but the charges could not stand against them due to the absence of inciting violence against the nation.

Noted writer Arundhati Roy and Hurriyat leader Syed Geelani were booked on charges of sedition for their “anti-India” speech at a seminar on Kashmir titled “Azaadi-the only way” in 2010 but the charges were lastly dropped because merely criticizing the government do not cause the threat of violence against the nation.

Simranjeet Singh Mann, president of Shiromani Akali Dal- Amritsar, was also arrested for raising pro-Khalistan slogans in the golden temple on 21st anniversary of Operation Blue Star and thus was booked under section 124A of IPC for making provocative speeches but was again not prosecuted as the investigations could not substantiate the charges against him. Aseem Trivedi, a cartoonist and free speech activist was also held guilty under section 124A for allegedly poking fun at the Constitution and national emblem by drawing cartoons but again the charges were dropped against him because the cartoons displayed were against the corruption prevailing in political system and not exhibited with the purpose of evoking violent actions against the government.

While going through all the cases mentioned aforesaid, it is almost certain that Kanhaiya Kumar won't get convicted for sedition because merely raising anti-Indian slogans or speeches do not leads to inciting violence or creating public disorder.

Various views expressed over JNU incident

Senior advocate Raju Ramachandran emphasizes on the point that Delhi police has to prove that Kumar literally made an attempt to incite a mob against the government but if it failed to do so then the case has to be quashed at the threshold. In order to make Kanhaiya guilty of sedition, there must be an element of incitement of violence.

As per a senior criminal advocate Sushil Kumar, there is hardly any conviction in such cases because it is more of a political gimmick and the law is often misused to stifle free speech and expression. He says, “There is nothing seditious when a group of students protest over an incident which they believe to be wrong or debate over a judgment which

they feel to be erroneous. But if the spokesman motivates the crowd to pick up arms and attack the government then it would be termed as seditious”.

Justice Ajit Kumar Sinha, former judge of the Jharkhand High Court, stated that a simple protest cannot come under the law of sedition if it was held to criticize the government or any action of the government and not to break the country.

A major point that has been mainly affirmed by many of the experts over the JNU incident was that the anti-Indian slogans are not always seditious as long as they are made with the tendency to criticize and not to overthrow the established authority or existing government.

Kanhaiya Kumar released on an interim bail

The Delhi High Court approved Kanhaiya Kumar's interim bail for 6 months on 2nd March, 2016 on a conditional bond of Rs. 10,000. He was released on bail but has been asked to assure that he will not take part in any of the further 'anti-national activity' and he will be present whenever required for investigations regarding the speech delivered by him to commemorate the hanging of Afzal Guru. However, the police had argued against his bail by claiming that they have enough evidence of anti-national activities against him.

2.) Sedition charges against Hardik Patel

Hardik Patel is a leader of Patidar Anamat Andolan Samiti (PAAS) and is an Indian political activist who is campaigning for inclusion of Patidar caste in the Other Backward Class (OBC) category so that they can qualify for the reserved quotas in education and other government jobs.

Patel quota agitation leader Hardik Patel was slapped by sedition charges under IPC sections 124A (sedition), 121A (conspiracy to wage war against the government) and 120B (criminal conspiracy) in Surat on 19th October, 2015 for his alleged comments and remarks for instigating a community youth to kill policemen instead of committing suicide.

The charge-sheet filed by the cops against Hardik Patel contended that accused was involved in provoking Patel community youths to resort to violence in order to put an undue pressure upon the government so that their unconstitutional demand of quotas in educational and government jobs can be accepted. Sessions court in Ahmedabad rejected the bail application of Patel reservation movement leader Hardik Patel and he

is still in judicial custody facing charges of “waging war against the nation” and many others.

3.) Sedition charges against Kashmiri students

Around 67 Kashmiri students from Swami Vivekanand Subharti University in Meerut, Uttar Pradesh, who had cheered and supported Pakistan team against India and some of them shouted slogans such as “Pakistan Zindabad” in Asia Cup match were slammed with sedition charges under sections 124A, 153 and 427 of IPC. Their act triggered tension in the university.

Hours after the Uttar Pradesh police slapped sedition and other charges on 67 Kashmiri students of a private university in Meerut, the State government dropped the charge of sedition against them as the charges against them had caused dismay and outrage in political and legal circles and had also been criticized severely across the country. However, the other charges such as promoting enmity between different groups (Section 153A) and mischief (Section 427) under the IPC invoked against them stayed. The framing of sedition charge against the Kashmiri students was a gross abuse of law. It is evident and clear that sedition law applies only against those who incite violence against the government of India and mere cheering for Pakistan, even if it is true does not attract the provisions of this section.

Sedition and Freedom of Speech & Expression in India

One of the constant and controversial judicial problems is balancing the treatment between sedition and freedom of speech and expression. It is mostly argued that along with the colonial laws like criminal defamation, laws on obscenity and blasphemy, sedition law also runs against freedom of speech and expression which is being guaranteed under Article 19(1) (a) of the Indian Constitution although it is not as such that sedition laws curb the freedom of speech and expression in India if it is so used in diligent and proper manner.

Article 19 (1) (a) of the Indian Constitution says that all the citizens have the right to free speech and expression that means the right to express one’s own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. It also includes expression of one’s idea through any of the communicable medium or any type of visible representation such as gestures, signs or the like. But this right is not absolute and it is limited by ‘reasonable restrictions’ which is laid down in Article 19(2). These reasonable restrictions are in the interest of public order, security of the state, friendly

relations with foreign states, sovereignty and integrity of India, decency or morality or in relation to contempt of court, defamation or incitement to violence.

According to Mahatma Gandhi, "Affection cannot be produced or regulated by law. If one is having no affection for a person then he/she should be freely given the fullest opportunity and expression to his/her disaffection as long as he/she does not envisage, stimulate or provoke violence".

The debate regarding the scope and constitutional validity of sedition law revolves around the question of limits granted in the course of legitimate protests and strikes, dissent and criticisms of government which is being restricted in the interest of public order. The constitutional validity of sedition law has been decided in many of the cases in post independence era as discussed above.

In *Romesh Thappar*⁶ case, the Madras government, after declaring the Communist party illegal, banned the left leaning magazine *Crossroads* for being excessive condemnatory and negative in respect of Nehru government. But the court found that the ban constituted a violation of right to freedom of expression which includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation and liberty of publication.

In *Kedarnath Singh*⁷ case, section 124A was held valid but if it is used arbitrarily then it would violate freedom of speech and expression guaranteed under Article 19 of the Indian Constitution.

The main assertion here is that criticizing government policies and their decisions within just and reasonable limit that does not lead to incitement of violence or hatred amongst the people or provoke them to rebel against government is consistent and compatible with freedom of speech and expression. Only when any speech or mode of expression amounts to an incitement to violence, such section should be brought in and the person should be strictly punished in accordance with law.

Citizens in India are free to criticize their government as it exhibits participatory democracy though freedom of speech has never been a cake walk or bed of roses in any democracy. The recent affair at JNU shows that the dissent has totally lost its ground and

⁶ A.I.R. 1950 S.C. 124

⁷ A.I.R. 1962 S.C. 955

that too in a democratic country. Our founding fathers have showed a love for dissidence but it's really shocking that Indian government has little patience for the same.

With the help of various judgments given in the pretext of sedition laws, it can be affirmed that freedom of speech and expression cannot be encroached upon if there is no incitement to violence or intention of disrupting public disorder. Mere criticism against the government is not seditious in the eyes of law.

Conclusion

During the pre independence era, colonial government in India inserted section 124A in the code for the purpose of suppressing the dissenting voices from Indian media, intellectuals and freedom fighters. As the time passes, the law on sedition kept on interpreting by various judicial experts as per the time and need of the situation. Post independence, sedition is said to be made out when someone performs such an action that is likely to obstruct or destabilize the government or lead to disintegration of the country. The intention to commit violence must be real and credible but it should not be imposed to suppress political dissent which was mainly done during the British Raj but in today's scenario if an act does not amount to violence then it will not be termed as crime of sedition under section 124A.

The colonial legacy like sedition law, which presumes popular affection for state as a natural condition and expects citizens not to show any type of enmity, hatred, contempt or hostility towards the government established by law needs to be charged and invoked with utmost caution and care because sedition charges have been frequently framed without having any regard to substantial evidences and thus as a result it leads to acquittal of accused due to lack of evidences.

Sedition laws as a part of framework of colonial laws should not be used by government as a weapon to curb the citizens' freedom of speech and expression. The ability of citizens to freely express themselves as well as to constructively criticize or express dissent against the government would not be treated as seditious expression against the state.

In the modern era, merely shouting and raising slogans would not amount to sedition as it requires violent actions which would endanger the security of state. Criticizing the government or any of its decisions is not enough to formulate the charges of sedition unless and until it is accompanied with intention to overthrow the government or creates a situation which is a menace or threat to security of nation.

Sedition law should not be used as a convenient medium to stifle any form or expression of dissent or criticism. The alacrity with which government uses colonial laws to crush people with whose views they don't agree with is completely unacceptable.

Freedom of speech and expression must be balanced with integrity and solidarity of nation. This right must be used in such a manner so as not to harm the integrity of state and any form of speech or expression does not lead to incitement to violent actions against state or hampers the security and safety of nation and if this right does not comply with the above mentioned conditions then it would lead to seditious expression against the state that has been made punishable under section 124A of IPC subject to the condition that the sedition law should not be allowed to limit the freedom of speech.

RES JUDICATA: HISTORY AND SHAPING OF THE CONCEPT THROUGH FOREIGN JUDGMENTS

- **Samarth Chaddha**
Jindal Global Law School

- **Himanshu Chauhan**
Jindal Global Law School

Abstract

Under most legal systems of the world, a “legislative adventure” is what courts tend to discourage. This is what the Supreme Court of India decided its take would be on the doctrine of res judicata in its decision in *M Nagabhushana v. State of Karnataka & Others*.¹ Traditional belief amongst Indian courts about idea of having a more than one chance to legislative adventure is that it is an abuse of the Court process. Lord Simon of Gaisdale has expressed how courts have been provided for rival contentions to be heard, but “in the end you must accept what has been decided. Enough is enough.” And the law echoes: “res judicata, the matter is adjudged.”²

Res judicata (‘a thing decided’- Latin) is based on two principles. First is ‘*interest reipublicae ut sit finis litium*’³ that translates to the idea that it is in the interest of the State that there should be an end to litigation. Second is ‘*nemo debet his ve ari, si constet curiae quod sit pro un aet eademn*’⁴ which basically means no one should be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. SC believes that the finality of litigation is based strongly on public policy and absence of the principle would amount to a never ending cycle of litigation in which the rich and malignant have a huge incentive to exploit the poor and the ones with *bona fide* intentions. Thus, the doctrine of *Res Judicata* has evolved to prevent such anarchy. It seeks to promote honesty and a fair administration of justice.⁵ Thus, the individual right of protection from repetitive litigation has been expressed by Lord Coke:

¹ “Res judicata is not a technical doctrine. It is a fundamental principle sustaining the rule of law ensuring finality of litigation. It prevents the parties from approaching courts for re-agitating same issues which have already been finally decided between parties.” (2011) 3 SCC 408

² The Amphyll Peerage Case (1977) A.C. (H.L) 547 at 575-76 (U.K.).

³ Ibid, paragraph 12.

⁴ Ibid, paragraph 13.

⁵ Ibid, paragraph 13.

“Otherwise great oppression might be done under color and pretense of law; for if there should not be an end to suits, then a rich and malicious man would indefinitely vex him who hath right by suits and actions; and in the end (because he cannot come to any end) compel him (to redeem to his charge and vexation) to leave and relinquish his right...”⁶

However, the doctrine has been shaped along time through interpretations of the present Sections 11, 13 of the Code of Civil Procedure through a series of judgments. Thus, it is important not just to look at the history of how *res judicata* was introduced into the Indian legal system, but also how it has been molded through exceptions provided in the reasoning of the Supreme Court and the questions that have been raised through the treatment of foreign arbitral awards by Indian courts.

History of Res Judicata in India

Justice Tek Chand has delivered a Full Bench decision in *Lacchmi v. Bhulli*,⁷ that points to the historical origins of *res judicata* in Hindu and Mohammedan jurisprudence. *Mitakshara*⁸ provides “a plea by former judgment” as one of the four kinds of effective answers to a suit, which seems proximate to the definition of *res judicata*. Also, in verse 10 of the *Mitakshara*,⁹ Katyayana has been quoted as ‘laying down as the basis for *res judicata* if a matter was to be brought forward again.’ He thinks that if has been formerly been given, it must be answered by a plea of *Purva Nyaya* or former judgment.¹⁰ Also, ‘in verse 221 he propounds a rule similar to the rule of constructive *res-judicata*.’¹¹ *Smriti Chandrika*¹² and the *Virmitrodaya*¹³ base the defense of *Prang Nyaya* (which

⁶ Ferrer v. Arden (1599) 77 Eng Rep. 263, 266; 6 Co. Rep. 7 a (Eng).

⁷ ILR (1927) 8 Lah 384.

⁸ (Book.II, Chap. 1, Section V, verse 5) as cited by Justice Chand in *Lachhmi v. Bhulli* which has been mentioned in *M Nagabhushana v. State of Karnataka & Others*.

⁹ Ibid.

¹⁰ Macnaughten and Colebrooke’s translation, page 22 as cited by Justice Chand in *Lachhmi v. Bhulli* which has been mentioned in *M Nagabhushana v. State of Karnataka & Others*.

¹¹ Justice Mandagadde Rama Jois, “Legal and Constitutional History of India: Ancient legal, judicial, and constitutional system,” Accessed April 5th, 2014: http://books.google.co.in/books/about/Legal_and_Constitutional_History_of_Indi.html?id=V552bAz5xFAC&redir_esc=y

¹² Mysore Edition, pages 97-98 as as cited by Justice Chand in *Lachhmi v. Bhulli* which has been mentioned in *M Nagabhushana v. State of Karnataka & Others*.

¹³ Vidya-Sagar Edition, page 77 as cited Justice Chand in *Lachhmi v. Bhulli* which has been mentioned in *M Nagabhushana v. State of Karnataka & Others*.

literally means ‘former justice’) provided by Harita¹⁴. According to the texts of *Prasara* and the *Mayukha*: “the plaintiff should be nonsuited if the defendant avers, there was litigation between him and the defendant previously, and it is found that the plaintiff lost his case.”¹⁵ Hindu law texts such as the *Mitkashara* embodied the spirit of *res judicata*, by mentioning that if a person was defeated at law he should be answered: “You were defeated formerly,” also known as the plea of former judgment.¹⁶

Under Roman law, a defendant had the right to repel a plaintiff’s claim by means of ‘*exceptio rei judicatae*’ or plea of former judgment. Roman jurists toyed with the idea considerably and the principle was recognized that “one suit and one decision was enough for any single dispute” and that “a matter once brought to trial should not be tried except by way of appeal,”¹⁷ a core attribute of the doctrine. The doctrine was introduced in India from where it exists today by Section 16 of the Bengal Regulation III of 1973 that prevented the Zilla (District) and City Courts from entertaining any cause, which appears to have been heard and determined by any Judge or any Superintendent or a Court having competent jurisdiction. Section 2 of the 1859 Civil Procedure Code, barred every Court from taking cognizance of suits which had been decided by Courts of competent jurisdiction.¹⁸ The “cause of action” would mean the substance rather than the form of action, and in *Gregory v. Molesworth*,¹⁹ Lord Hardwicke expressed when deciding between parties to a suit that ‘parties could not raise the same question as between in any other suit in any form.’

After the Code was revised in 1877, operation of *res judicata* was extended to Section

¹⁴ M.Nagabhushana vs State Of Karnataka & Ors on 2 February, 2011 “, who is believed by some Orientalists to have flourished in the 9th Century B.C. and whose Smriti is now extant only in fragments. ”

The plaintiff should be non-suited if the defendant avers: ‘in this very affair, there was litigation between him and myself previously,’ and it is found that the plaintiff had lost his case”.

There are texts of *Prasara* (Bengal Asiatic Society Edition, page 56) and of the *Mayukha* (Kane's Edition, page 15) to the same effect.”

¹⁵ Texts of *Prasara* (Bengal Asiatic Society Edition, page 56) and *Mayukha* (Kane’s Edition, page 15). as cited by Justice Chand in *Lachhmi v. Bhulli*, which has been mentioned in *M Nagabhushana v. State of Karnataka & Others*.

¹⁶ Supra Note 7, Page 524

¹⁷ Roby’s Roman Private Law (Vol.II, page 338,391-392) as cited by Justice Chand in *Lachhmi v. Bhulli*, which has been mentioned in *M Nagabhushana v. State of Karnataka & Others*.

¹⁸ Section 2 of 1859 Civil Procedure Code: “The civil courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by court of competent jurisdiction, in a former suit between the same parties, or between the parties under whom they claimed.”

¹⁹ 3 Atk. 627.

13. From then onwards, bar was no longer just on the retrial of a dispute relating to the same cause of action, but prohibition was extended against re-agitating an issue which had been heard and finally decided between same parties in a former suit by a competent court.²⁰

Res Judicata Through Common Law

In common law systems, the doctrine of res judicata takes two main forms: issue estoppel and cause of action estoppel (seen in jurisdictions such as England and Canada).²¹ In the United States, the two are collectively referred to as “issue preclusion” and “claim preclusion” respectively.²² In *Arnold v. National Westminster Bank*,²³ the House of Lords differentiated between these two forms, in which cause of action estoppel was defined as ‘arising where the cause of action in the later proceedings is identical to that in the earlier proceedings.’ Issue preclusion was defined as ‘where a particular issue forming a necessary ingredient in a cause of action had been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties wishes to re-litigate that issue.’²⁴ In English law, the estoppel is not only applicable to claims that have actually been decided but also to claims which ought to be litigated and which the parties, with reasonable diligence should have been able to bring forward at the time of the earlier suit.²⁵ In the words of Zuckerman, “the bar to advancing an identical cause of action is absolute.”²⁶

The laws governing cause of action estoppel in Canadian courts are similar to the English ones, since even in Canada the plaintiffs are required to present the subject matter of the entire case once and for all and the remedies are based on that subject matter (applying to defendants as well.)²⁷ Canadian courts too based *res judicata* upon

²⁰ Justice Chand in *Lachhmi v. Bhulli*, which has been mentioned in *M Nagabhushana v. State of Karnataka & Others*.

²¹ Neil Andrews, “Principles of Civil Procedure 501-12” and Donald Lange, *The Doctrine of Res Judicata in Canada* as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

²² Allen D. Vestal *Res Judicata/Preclusion* as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

²³ (1991) 2 A.C. 93 (H.L.) (104-05) (appeal taken from Eng.).

²⁴ *Ibid*, at 105.

²⁵ *Henderson v. Henderson*, (1843) 3 Hare 100, 115; 67 E.R. 313, 320.

²⁶ Adrian Zuckerman, *Zuckerman on Civil Procedure* ch.24 (2006) as mentioned by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

²⁷ Key principles mentioned in *Laufer v. Canadian Investment Protection Fund* (2004) O.J. No. 4016, para. 7(S.C.J.).

policy considerations, which was seen by the Supreme Court of Canada's judgment in which *res judicata* must be applied because of the following public policy reasons: "That judgment must conclude the parties and negative the defense here as well upon the ground of public policy."²⁸ In the United States, claim preclusion refers to the effects post a former judgment on a second action, especially when the second action proceeds on all or part of the claim that was the subject of the first action.²⁹ The judgment would then, 'bar' or annul the entire cause of action or claim, including items that were not even thought of in the first action if the court that they ought to have been necessarily brought on board. The U.S. Supreme Court in *Allen v. McCurry*,³⁰ have formulated the concept of claim preclusion as a final judgment on the merits that they were or could have been raised, in the previous suit. The present trend regarding the "claim" regarding *res judicata*³¹ is to think of claim as something that coincides with a transaction, irrespective of what theories or relief may be available to the plaintiff. Also, this is irrelevant to what or how many primary rights may have been infringed upon; and irrespective of how different the evidence needed to support the theories or rights may be.³² As per the modern, transitional view of *res judicata*, the plaintiff should fully litigate all grievances or causes of action arising from a transaction in a single lawsuit.³³ As James puts it,³⁴ the defendant extinguishes the entire cause of action or claim, which would include items of the claim that were not in fact raised in the former action.³⁵ The plaintiff is prevented from suing on the original cause of action or any item of it even if that item was omitted from the original action. The second effect of *res judicata*, which has been referred to in the United States as "issue preclusion," is that an issue adjudicated in a prior action cannot be re-litigated if it arises in a later action based on different cause of action.³⁶ However, Rules 59 and Rules 60 of the U.S. Federal Courts of Civil Procedure describe circumstances in which an American court can reopen a case to correct a judgment.³⁷

²⁸ Clark v. Phinney (1896) S.C.R. 633, 642-44 (Can.).

²⁹ Fleming James, et.al, Civil Procedure 673 (5th ed.2001) as mentioned by Yuval Sinai in his paper called Reconsidering Res Judicata: A Comparative Perspective.

³⁰ 449 U.S. 90,94 (1980).

³¹ Casad and Clermont, Res Judicata: A Handbook on its Theory, Doctrine and Practice (2001) as mentioned by Yuval Sinai in his paper called Reconsidering Res Judicata: A Comparative Perspective.
Restatement (Second) of Judgments S.24 (1982).

³² Casad and Clermont, Res Judicata: A Handbook on its Theory, Doctrine and Practice (2001) as mentioned by Yuval Sinai in his paper called Reconsidering Res Judicata: A Comparative Perspective.

³³ Fleming James, et.al, Civil Procedure 673 (5th ed.2001) as mentioned by Yuval Sinai in his paper called Reconsidering Res Judicata: A Comparative Perspective.

³⁴ Restatement (Second) of Judgements Sec. 17 cmt, b, 19 (1982).

³⁵ Fleming James, et.al, Civil Procedure 673 (5th ed.2001) as mentioned by Yuval Sinai in his paper called Reconsidering Res Judicata: A Comparative Perspective.

³⁶ Fed.R. CIV. P. 60(b); JAMES et AL.

Foreign Judgments Under Section 13

Under Section 13, a foreign judgment is conclusive and will operate as *res judicata* between the parties, but when a foreign judgment is not conclusive as to any matter directly adjudicated upon, and if one of the conditions specified in clauses a) to f),³⁸ the judgment will be “open to collateral attack.”³⁹ If there is competent jurisdiction, then the judgment or order passed by a foreign court on the matter would operate as *res judicata*. Thus, if Himanshu sues Samarth in a court outside India, and if the suit is dismissed, the decision will operate as a bar to a fresh suit on the same issue or cause of action. If Himanshu was successful in his dispute against Samarth, Samarth will be prevented from putting forward the issue towards as Indian court in a similar matter that was directly and substantially the same.

The case of *Gurdayal Singh v. Rajah of Faridkot*,⁴⁰ is a good example where A filed a suit against B in the state of Faridkot in 1879, and claimed Rs.60,000 which B misappropriated while he was at A's service at Fardikot. On B's not appearing, an ex par tee decree was passed against him in Faridkot – B was a native of Jhind. B neither resided nor was he domiciled there since in 1869 he had left A's service and returned to Jhind. The Faridkot court had no jurisdiction to entertain a suit against B on a mere personal claim against him and the decree passed against B was a nullity. Even the fact that embezzlement had taken place in Faridkot was not enough to give jurisdiction to Faridkot court. However, even though a judgment that is declared *res judicata* and not impeachable from within, it might be possible that a court has been “misled.”⁴¹ Thus, even with the concept of *res judicata*, it becomes important to decipher between mistake and trickery. Thus, an action to set aside a judgment cannot be brought on the grounds of an incorrect decision, but it can be set aside if it is proven that the court was tricked into making its final decision. Thus in *Satya v. Teja Singh*, when the court felt the American courts had been misled in granting divorce to a gentleman, who had tricked them into believing he was a resident of America, the Supreme Court held that the decree was without jurisdiction and therefore a nullity.⁴² Also, in the case of *Lalji Raja & Sons v. Firm Hansraj Nathuram*,⁴³ the court noted that if *res judicata* would be non-operative in case of foreign.

³⁸ a) to f): not by competent court, not on merits, foreign judgment against Indian law, opposed to natural justice, judgment by fraud, judgment on breach of Indian law.

³⁹ *Satya v. Teja Singh* (1975) 1 SCC 120.

⁴⁰ (1895) 22 Cal 222 (PC): 21 1A 171.

⁴¹ *Duchess of Kingston*: Smith's Leading Cases, 13th Edn., p. 644(651).

⁴² (1975) 1 SCC 120.

⁴³ AIR 1974 SC 1764 at. 1768

Criticism of Section 13 of Civil Procedure Code

However, the Courts often by using terms like ‘principles of natural justice’ and ‘merits of the case’ simply

end up expanding the discussions on interpretation and thereby extend litigation. In relation to child

custody issues, the courts do not just look at the merits of the decree, but also rather to arbitrary standards of

which place will benefit the spouses and the children of the marriage most. It can be debatable as to what in

Section 13 of the CPC gives an Indian court the authority to reject an ex parte decree by the New Mexico

Court, such as that in *Y.Narasimha Rao v. Y. Venkatalakshmi*.⁴⁴ The decision should have applied as a

res judicata to the suit brought in India, but it was seen as conflicting with Indian law, and was thus

deemed unenforceable.

Even if this is seen as a conflict, the Supreme Court has made the analysis of Section 13 more difficult by granting an exception (as pointed out by the Supreme Court in *Y.Narasimha Rao*) for defendants who have consented to the grant of relief although the jurisdiction of the forum is not in accordance with Indian law. Apart from the difficulties in defining consent, an allegation of fraud (as seen in the *Satya v. Teja Singh* case) involves reopening merits of the cases, which have already been determined by that particular court. Thus, the idea of res judicata that prevents claim from being litigated twice suffers a setback.

Additionally, res judicata is further eroded by the common law principle, which mentions that despite local judgments being immune from being impeached for fraud in absence of fresh evidence, foreign judgments can be investigated for fraud even without evidence. Lord Bridge in a recent House of Lords decision has defended the illogical common law rule but Section 13(e) of the CPC actually makes a mockery of the *Doctrine of Comity*⁴⁵ that has been a product of impartiality and objectivity of the legal

⁴⁴ (1991) 3 SCC 451.

⁴⁵ Definition of Comity is that it is a legal principle that political entities (such as states, nations, or courts from different jurisdictions) will mutually recognize each other's legislative, executive, and judicial acts. The underlying notion is that different jurisdictions will reciprocate each other's judgments out of deference, mutuality, and respect. (Legal Information Institute, Cornell University Law School - <http://www.law.cornell.edu/wex/comity>)

systems of the civilized world. Justice Sawant in the case of *Y. Narasimha Rao* did acknowledge the archaic law (still adopted by foreign courts) that a wife's domicile follows her husband's but the judgment overall confuses the procedural issue of which court has jurisdiction and the substantive issue of granting relief. It is for the *lex fori* (laws of jurisdiction where action is brought) to determine in accordance with conflict of laws, that a grant of matrimonial relief has to be in accordance with Hindu law. Justice Sawant might have missed the fact that the issue of granting relief was governable only under Hindu law.

Res Judicata and Foreign Arbitral Awards

While a local judgment or arbitral award vis-à-vis a foreign judgment or a foreign arbitral award is that, whereas a local judgment or arbitral award operates as *res judicata*, the same is not the case with a foreign arbitral award. If it is a foreign judgment, it would be dependent on receiving confirmation for a judiciary since that may be the requirement of the procedural law in that country. Whether it be a foreign judgment or a foreign arbitral award, in order for enforcement of the award given in other than the country in which the judgment was given, a separate suit may have to be instituted for its recognition and enforcement. However, from a legal standpoint in the case of a foreign judgment, it merely requires an institution of a suit in the concerned country by the successful party. In the case of an award, though, the parties in dispute can sue on the basis of the foreign award or the on the original cause of action that arose. There is some confusion as to whether the foreign award is worth less than a foreign judgment, but that is not the case.⁴⁶

In *Badat & Co. v. East India Trading Co.*,⁴⁷ the East India Trading Company, incorporated in New York, entered into a contract with a partnership firm who were dealing with imports and exports through Bombay. The plaintiff was East India, and the firm, were the defendants. The contract was based on the terms of the American Spice Trade Association, and one of the terms was that if there would be any dispute between the parties, this would be settled by arbitration and the award would be final and binding on the parties. Eventually, a dispute did arise and as per the contract, they were referred to arbitration, and lead to two *ex-parte* awards. These were confirmed by the Supreme Court of New York in accordance with the procedural law of New York so as to facilitate

⁴⁶ As mentioned on pg. 216 of V.C. Govindaraj's, "The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict", Oxford University Press 2011.

⁴⁷ (1964) AIR 538 as cited in V.C. Govindaraj's, "The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict", Oxford University Press 2011.

their enforcement in a foreign court. The East India Trading Company filed a suit against the firm on the basis of the judgment or on the basis of the awards themselves.

The Supreme Court allowed this appeal,⁴⁸ on the basis that the idea of cause of action for the East India Company (as far as it rests on the judgment of the New York Supreme Court), should be presumed to have arisen outside the original jurisdiction of the Bombay High Court and the suit based upon that judgment to the exclusion of the original cause of action must be held to be beyond the jurisdiction of the High Court of Bombay. In addition, it was decided that the arbitral awards lack finality or conclusiveness as per the law of New York.

But as V.C. Govindaraj points out in his book, the ratios adopted by the Supreme Court were a bit outdated.⁴⁹ The first contradiction comes through the High Court does not arise, especially if Section 13 (a) and 13 (b)⁵⁰ of the Indian Civil Procedure Code incorporating the doctrine of obligation is understood. The judgment would become *res judicata*. In addition, the technical procedure rule of nexus between jurisdiction and cause of action has no relevance with respect to actions before courts and enforcing of foreign judgments.⁵¹

Govindaraj further critiques that it is a bit difficult to digest why the foreign arbitral award was given an inferior legal status as compared to foreign judgments. It is equivalent to a foreign judgment and does establish a valid cause of action for a suit. The procedural formality was just a further ratification by the Supreme Court of New York. This should neither have increased its validity any more nor should have it been made less binding. Ideally the Bombay High Court should have looked at it with the lens of *res judicata*.

Conclusiveness of a foreign arbitral award must be assumed irrespective of the formality of the ratification. All three elements required of awards (submission of the

⁴⁸ Ibid.

⁴⁹ Pg 218 of V.C. Govindaraj's, "The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict", Oxford University Press 2011.

⁵⁰ Section 13 of CPC - When foreign judgment not conclusive.

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

⁵¹ Ibid.

parties to arbitration, conduct of arbitration in accordance with submission, its validity by the law of the forum are present in the award in this case. However, India is a party to both the Geneva Convention of 1937 as well the New York Arbitration Convention of 1958, and the latter has substituted for the phrase 'the award has become final' in the country in which it was made the phrase 'the award has not yet become binding' on the parties. This change has overcome difficulties (since New York is an improvement to the Geneva Convention) with respect to the 'finality and conclusiveness' of an award rendered by an arbitration but it does require that if the proper law happens to be in a country which is a party to the New York Convention, an award does not become final unless it is ratified by the Supreme Court of New York.

In the case of *ONGC v. Western Co. of North America*,⁵² the Supreme Court of India employed the ratio they used from the *Badat* case through their interpretation of Article V(1)(e) of the New York (Arbitration) Convention (1958)⁵³, which is namely that the enforce-ability must be determined *as per the law applicable to the award*. Eventually, French, German and Indian courts have taken that enforce-ability as per the law of the country is essential precondition for asserting that it has become binding under Article V (1)(e).⁵⁴

Res Judicata and Public Policy

Awards and decrees need to qualify the test laid down in S. 13 of the CPC on the basis of *res judicata* as it is a principle that needs utmost affinity with Public Policy. Specifically while considering *res-judicata*, it needs to be kept in mind that the diversity of questions that might arise and complexity may vary with the number of sovereign jurisdiction involved, reciprocation ties between them, judicial recognition on the status of foreign legal person (Incorporation's Theory or First Seat Theory), nature of dispute and other factors like political outlook, international relation and understanding between the nation and availability and applicability of dispute resolution mechanisms.

'Public Policy' is a term related to culture and general mind set. A plaint can be rejected in India if the Bench considers it to be in contravention to public policy. India has already

⁵² (1987) 1 SCC 496 p. 514.

⁵³ New York Arbitration Convention (1958)

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

⁵⁴ Ibid

seen the havoc of ambiguities when it was made law that arbitration awards can become unbinding and be brought to the court if found against public policy⁵⁵, a term whose concise definition is absconding. More situations can arise, despite here being a reciprocation agreement between two countries, if one accepts the doctrine and another partner does not. A Constitutional Bench of the Court in *Devilal Modi v. Sales Tax Officer*⁵⁶ explained the principle as to whether a citizen can be allowed to challenge the validity of the same order by successive petitions under Article 226, since such a question cannot just be seen in terms of citizens' fundamental rights. Ultimately, res judicata is based on consideration of public policy. Public policy as explanation by Lord Somervell in *Greenhalgh v. Mallard*⁵⁷ that was mentioned in *State of Karnataka and Anr. Vs. All India Manufacturers Association and Anr.*⁵⁸ is particularly useful. He writes how res judicata is not confined to the issues which the court is actually asked to decide, but rather that it covers issues or facts that are part of the subject-matter of litigation and ought to have been raised and that it would be an abuse of process of the Court to allow a new proceeding to be started in respect to them.

As the judicial system has grown over the years, there has been a significant increase in the number and nature of quasi-judicial bodies that have emerged to assist the judicial mind in disposing disputes that could be solved otherwise. There is great debate over whether a bar due to an award should be maintained, especially with respect to arbitral awards. The picture becomes further interesting when it is a case of international arbitration and the enforcement of the award has incidence in multiple national jurisdiction.

On a prima facie level, res judicata appears to be a safe doctrine (by that we mean that it should not have many negatives to its application) that is an integral part of civil legal systems and serves (though arguably) as one of the pillars on which judicial institutions stand. The arguments for its side are voluminous and little can be found to the contrary. However, much of this bias can be attributed to the analytical lens that is applied whilst analyzing legal doctrines. Generally while commenting upon legal doctrines and principles, it is easy to be overpowered by how common law perceives it to be and the

⁵⁵ Section 34(2) in THE ARBITRATION AND CONCILIATION ACT, 1996

(2) An arbitral award may be set aside by the Court only if—

(b) the Court finds that—

(ii) the arbitral award is in conflict with the public policy of India.

⁵⁶ AIR 1965 SC 1150

⁵⁷ (1947) 2 ALL ER 255 (CA).

⁵⁸ (2006) 4 SCC 683.

efficiency quotient that is overwhelmingly attributed to it in case laws. The problem with this approach of understanding and criticizing is that the pattern of analysis goes into the vertical of present past back and forth only. Another reason of this phenomenon is the overpowering effect that common law has left on all legal traditions due to its strong historical-colonial influence throughout the world. So to say, the context is narrowed down.

A ‘comparative analyses’ across legal culture vertices can be enlightening in this regard. The advantage of a comparative lens is that it facilitates the analysis to go beyond traditional dimensions of perceiving the matter. Also, contrast brings makes the desirable alterations more apparent as one is enabled to get a view of the opportunities that exist beyond available imagination.

One such magnificent attempt has been done by Yuval Sinai⁵⁹ in his research titled - Reconsidering *Res Judicata*: A Comparative Perspective.⁶⁰ In this paper Sinai brings into notice mainly the application and rationale behind *res judicata* in Anglo-American, Rabbinical (Jewish Courts in Israel that adjudicate family matters) and German law:

*“maintain(s) that the traditional justifications presented...are not the major reason for accepting res judicata in its broad scope. A legal system that favors a broad-scope res judicata, such as the common law, reflects an approach that in principle emphasizes such values as public interest, consistency, stability, and efficiency over revealing the truth.”*⁶¹

In Metaphysics of Morals, Emmanuel Kant famously quotes – “Justice ceases to be justice if it can be bought at a price.”⁶² We want to deliberate an inference out of it that it would be an embarrassment to justice if cost benefits override the pursuit of truth and justice, which ought to be the core philosophy behind judicial decision-making. Even

⁵⁹ Ph.D; L.L.B; Senior Lecturer of Civil Procedure and Jewish Law, Director of the Center for the Application of Jewish Law (ISMA), Law School, Netanya Academic College, and also teaches in the Law Faculty of Bar-Ilan University (Israel); Visiting Professor at McGill University, Canada (2007- 2008).

⁶⁰ Yuval Sinai, Reconsidering *Res Judicata*: A Comparative Perspective, 21 Duke Journal of Comparative & International Law 353-400 (2011), <http://scholarship.law.duke.edu/djcil/vol21/iss2/3>

⁶¹ Ibid.

⁶² Immanuel Kant, Metaphysical Elements of Justice: Part 1 of the Metaphysics of Morals. Page 332, Accessed online: http://books.google.co.in/books?id=OhNR-xIkSVoC&pg=PA138&lpg=PA138&dq=immanuel+kant+metaphysics+of+morals+justice+ceases+to+be+justice&source=bl&ots=VsE1fP9bos&sig=6Z8SjJDNY8HBMsXj5Mf8Y9jO0bA&hl=en&sa=X&ei=1UJhU9a_LsO0uASzq4Jo&ved=0CC4Q6AEwAQ#v=onepage&q=immanuel%20kant%20metaphysics%20of%20morals%20justice%20ceases%20to%20be%20justice&f=false

from practical purview, it should be kept on the highest pedestrian. This is a typical Kant v. Bentham situation of utility pitched against righteousness. To the contention that *res judicata* provides efficient application to the judicial mind and national resources, Sinai rebuts with counter argument given by Edward W. Cleary:

Courts exist for the purpose of trying lawsuits. If the courts are too busy to decide cases fairly and on the merits, something is wrong. Decision solely in terms of the convenience of the court approaches the theory that the individual exists for the state. Maintenance of the judicial system is a very minor portion of the cost of government. If the judges are too few to be able to decide cases fairly and on the merits, the public probably can afford to have more judges.⁶³

In a country like India where average pendency of suit is a nightmare figure of about 15 years,⁶⁴ the efficiency argument can be more aggressively asserted. But the fact remains that these argument holds no ground as a judicial decision that prefers settlement over justice and righteousness will have lesser hesitation in committing moral turpitude.

It is easy to indict this thought as a Utopian statement but judicial ambition cannot be structured with mediocrity. It is not just any institution but also the force behind societal harmony and faith of the people in the system to which they subordinate themselves. A compromising attitude towards immediate settlements might give a cost-benefit advantage but when such compromises become reoccurring regulated trends, it indicates decadence in the quality of the judicial thought. Thought is what exists in the mind and that too the judicial mind.

The argument that *res judicata* is good in public policy will still find a lingering affinity in a settlement minded universe which is more utility and delivery based. But then it would be ideal to look into the case from multiple sides of practical and more specific return based angles.

It remains true that evidence can generally be admitted at the trial level with only narrow exceptions provided under special circumstances as provided through the route narrow route prescribed in Section 107(1) (d) of the Indian CPC⁶⁵ whose elaborations are

⁶³ Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948) Pg. 348 http://heinonline.org/HOL/Page?handle=hein.journals/ylr57&div=30&g_sent=1&collection=journals#351

⁶⁴ National Litigation Policy Document- 23-June, 2010; <http://pib.nic.in/newsite/erelease.aspx?relid=62745>

⁶⁵ Section 107 (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-
(d) to take additional evidence or to require such evidence to be taken.

provided in Order 41 Rule 27⁶⁶. High Courts and Supreme Courts are not courts of fact but that of law.⁶⁷ This means that if there is lapse on the account of party or the counsel in submitting some relevant fact or evidence, there is little scope for such submissions. When this fact is realized in the Indian context where legal literacy, quality of search and investigation and lawyerly skills especially at the trial level leaves much to be desired, one can understand the dire need of flexibility in the procedures. Due to a lapse in procedure, the remedy can become erroneous. If one of the logic for *res judicata* is reducing litigation costs, then it would be traumatic to think how much a litigant will have to strive with cost and time at the appellate level with a comparatively weaker case than what it could have been, had reasonable submissions of evidence been allowed.

Now compare this with German procedural norms. In Germany, submission of evidence is allowed at any time during the trial. As Sinai quotes in his work:

In the German civil system, only a judgment that is not “subject to further appeal (formelle Rechtskraft) stands as the conclusive adjudication” and is subject to *res judicata*. The rationale for this system is simple. Wherever there is a multilevel apparatus of justice, as in the continental system in general and the German civil justice system in particular, original decisions can be treated as tentative and decision stability is needed only after the highest authority has spoken.⁶⁸

He further quotes from German rules as provided in Peter L.Murray & Rolf Stürner, *German Civil Justice*:⁶⁹

⁶⁶ Order 41 Rule 27: Production of additional evidence in Appellate Court—
 (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if—
 (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
 [414] [(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]
 (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.
 (2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

⁶⁷ Jatindra Kumar Das, “Code of Civil Procedure,” p. 673.

⁶⁸ *Supra* Note 60

⁶⁹ *Ibid*; Peter L.Murray & Rolf Stürner, *German Civil Justice* 355-66 (2004).

“German civil procedure does not recognize the concept of claim preclusion in the broad sense as is the case in common law countries.” The basic rule is that a judgment binds the parties with respect to the subject matter of claims actually asserted and decided, but parties are not bound in actual or potential claims not submitted for adjudication.⁷⁰

Though Sinai raises questions of the cost efficiency of this system, but still admits that nevertheless, it is better than that of jurisdictions where such flexibility is not present.⁷¹ Also such privileges are only available during the life of the suit only.

There are some other crucial questions that can be hypothetically construed around these ambiguities. For the sake of understanding if we imagine that there is a claim of heredity and it requires conclusive proof of inheritance. There is a suit filed in an era where the facility of DNA fingerprinting and other technologies are unavailable and the only proof is access or non-access between the parents (which is reflected in Section 112 of the Indian Evidence Act till date as use of genetic technology is considered akin to breach of privacy). Now say the decision that came out was wrong and the inherited property passes to a wrongful pretender after being heard in the Apex Court. In case at some point of during the lifetime of the parties technologies such as DNA fingerprinting become available and they would like to conclusively determine their rights by challenging such a decree, will the rights be granted in the presence and prevalence of the doctrine of *res judicata*. Then in turn will not *res judicata* be elemental in disregarding the opportunities created by innovation in technology and newer inventions in cases analogous to this hypothesis.

The rule of *res judicata* forbids the re-litigation of a cause of action once litigated and even of matters not litigated at all if they are part of a cause of action, which once was litigated in part.⁷² Edward Cleary in *Res Judicata Re-examined* further bifurcates rules determining the suits to be barred by *res judicata* into two divisions to make the issues more apparent. First part deals with what was determined in the former action this portion poses no practical or theoretical difficulty. It is the second part that he suggests that is more problematic as it deals with what might have been litigated in the former action.⁷³ He has had his day in court, even though the subject matter of the second proceeding was not even mentioned in the first one.⁷⁴

⁷⁰ Supra Note 60

⁷¹ Ibid.

⁷² Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948) Pg. 348
http://heinonline.org/HOL/Page?handle=hein.journals/ylr57&div=30&g_sent=1&collection=journals#351

⁷³ Ibid

⁷⁴ Ibid

Exception to Res Judicata: Habeus Corpus

Much like the courts of the US and the UK, Indian courts have taken the view that res judicata is not applicable to a writ of *habeus corpus*. Thus, the writ of *habeus corpus* is an exception to the rule of res judicata. Thus, a plaintiff may file a petition for the same writ under Article 32 of the Constitution, even where a writ of habeus corpus has been refused by a High Court. In fact, the rule of constructive res judicata also does not apply in such cases.⁷⁵ In *State of Punjab v. Davinder Pal Singh Bhullar*,⁷⁶ the Supreme Court observed that there may be certain exceptions to the rule that a person was not aware of certain material facts while filing the first petition. Also it may be possible that events may have arisen subsequent to the making of the first application. Thus, in such circumstances the courts have to bear in mind that res judicata cannot apply, and is confined to civil actions. It is inapplicable to illegal action or fundamentally lawless orders. A subsequent petition of habeus corpus on fresh grounds, which were not taken in the earlier petition for the same relief may be permissible.

Similarly in *Lallubhai Jogibhai Patel v. Union of India*,⁷⁷ the petitioner was detained and the petition filed against the said order was dismissed by the Supreme Court by an order dated May 9, 1980, but the reasons given on August 4, 1980. The petitioner filed additional grounds on July 21, 1980 post the order of dismissal but before the reasons were recorded. However on July 30, 1980, he was informed that he may file on additional grounds and the question before the Supreme Court was whether res judicata could apply to a writ of habeas corpus. Justice Sarkaria eventually concluded that res judicata was confined to civil actions, and the principle of public policy was inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeus corpus under Article 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same relief.

However, in *T.P.Moideen Koya v. Govt of Kerala*,⁷⁸ the Supreme Court held that the bar of res judicata would apply to a petition filed under Article 32 of the Constitution. This would be when a similar petition, seeking a similar petition under Article 226 before the High Court and the decision has become final without an appeal to the Supreme Court.

⁷⁵ Srikant v. District Magistrate, 2006(12) SCALE 270: (2007) 1 SCC 486; T.P. Moideen Koya v. Government of Kerala, 2004 (8) SCALE 364: (2004) 8 SCC 106; A.R. Antulay v. R.S. Nayak, AIR 1988 SC 1531: (1988) 2 SCC 602; Sunil Dutt v. Union of India, (1982) 3 SCC 405: AIR 1982 SC 53; Ghulam Sarwar v. Union of India, AIR 1967 SC 1335: (1967) 2 SCR 271 as cited in Jatindra Kumar Das, Code of Civil Procedure, pg 173.

⁷⁶ JT 2011 (14) SC 213: 2011 (3) SCALE 394 as cited in Jatindra Kumar Das, Code of Civil Procedure, pg 173.

⁷⁷ AIR 1981 SC 728: (1981) 2 SCC 427 in Jatindra Kumar Das, Code of Civil Procedure, pg 173.

⁷⁸ (2004) 8 SCC 106: AIR 2004 SC 4733 in Jatindra Kumar Das, Code of Civil Procedure, pg 174.

However, this principle would not apply to a writ of *habeus corpus*, in which the petitioner has prayed for liberty. If a person under detention files a writ of *habeus corpus* under Article 226 before the High Court and the writ petition is dismissed (whether by a detailed order after considering the case on merits by a non-speaking order) and the decision is unchallenged by preferring a special leave petition under Article 136 and is allowed to become final, it would still be open to him to file an independent petition under Article 32 seeking a writ of *habeus corpus*. In *Srikant v. District Magistrate*,⁷⁹ the Supreme Court set out exactly that *res judicata* does not apply to *habeus corpus* proceedings. They acknowledged that it was a principle accepted by both English and American law, but differed on one key point. In India, unlike in England, the person detained can file original petition for enforcement of fundamental right to liberty before a Court other than the High Court (e.g. Supreme Court). Thus, in that situation the High Court's order will not be *res judicata* as it would be under English or American law. This because, according to the Supreme Court, the principle of *res judicata* is not applicable to a lawless order.

Constructive Res Judicata and Writ Petition

In *Amalgamated Coalfields Ltd v. Janapada Sabha*,⁸⁰ the Supreme Court opined that constructive *res judicata* was a special and an artificial form of *res judicata*. They believed that this was coming through Section 11 of the CPC, and should not be applied to writ petitions under Article 32 or Article 226. However, at the same time there is also case law to suggest that *res judicata* could be applied to writ petitions. In *Devilal v. Sales Tax Officer*,⁸¹ the Supreme Court ruled that if a plea could have been taken by a party in proceeding between him and his opponent, a person would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action. But this view stems from the same public policy consideration (argued for earlier in the paper). It would be open to the party to bring new grounds each and every time, and that would be inconsistent with the grounds of public policy.

Conclusion

A common justification given for *res judicata* is the need to end litigation, and bring down costs, and boost economic efficiency of the courts and expedite adjudication of

⁷⁹ 2006 (12) SCALE 270; (2007) 1 SCC 486.

⁸⁰ AIR 1964 SC 1013; (1963) Supp (1) SCR 172.

⁸¹ AIR 1965 SC 1150.

issues. The doctrine of *res judicata* then becomes a convenient justification for avoiding squandering the courts' resources and imposing additional costs on litigants.⁸² Litigating the same matter more than once defeats this purpose.⁸³ *Res judicata* also becomes a means to reduce controversies, and promote stability,⁸⁴ which is an important requirement for the court system.⁸⁵ It is, as has been argued earlier, in the public interest to prevent, or at least reduce, the possibility of inconsistent judgments.⁸⁶ This is because inconsistent judgments undermine the courts' prestige and the respect the courts inspire.⁸⁷ As per some Anglo-American jurists, *res judicata* supports the prestige of courts.⁸⁸ Also, there is this mentality that courts will tend to respect other courts' decisions. This is a practice that fosters a general attitude that later decisions should be consistent with earlier ones, with Canadian courts agreeing that the doctrine of *Res Judicata* avoids conflicting decisions and promotes both confidence in courts and predictability.⁸⁹ The English law jurist Andrews⁹⁰ has also stressed how the principle of finality is rooted in several policies; if a decision was not final, it would result in a dispute dragging on and on. Also, were it not for *res judicata*, scarce "judge-time" would be spent on re-hearing matters thus leading to inconsistent matters.

However, as Harmon⁹¹ points out, a legal system which favors an approach which in principle emphasizes private interest of the parties rather than the public interest, values

⁸² Donald Lange, *The Doctrine of Res Judicata in Canada* (policy considerations have also been expressed by Canadian courts) as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

⁸³ Allen D. Vestal *Res Judicata/Preclusion* as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

⁸⁴ Fleming James, et.al, *Civil Procedure* 673 (5th ed.2001) as mentioned by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.
⁸⁵ *Ibid*.

⁸⁶ Neil Andrews, "Principles of Civil Procedure 501-12" and Donald Lange, *The Doctrine of Res Judicata in Canada* as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

⁸⁷ *State Hosp. v. Consol. Water Co.*, 267 Pa. 29,38 (1920) ("The doctrine of *res judicata* produces certainty as to individual rights and gives dignity and respect to judicial proceedings).

⁸⁸ Allen D. Vestal *Res Judicata/Preclusion*, and Eliahu Harnon, *Res Judicata and Identity of Actions: Law and Rationale*, 1 *ISR.L.REV.* 539, 539(1966) as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

⁸⁹ Donald Lange, *The Doctrine of Res Judicata in Canada* (policy considerations have also been expressed by Canadian courts) as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

⁹⁰ Neil Andrews, "Principles of Civil Procedure 501-12" and Donald Lange, *The Doctrine of Res Judicata in Canada* as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

⁹¹ Eliahu Harnon, *Res Judicata and Identity of Actions: Law and Rationale*, as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

efficiency over revealing the truth. Also, courts expect parties to raise *res judicata* by themselves because courts will not do so on their own.⁹² In Anglo-American systems, *res judicata* fails to be applied according to the main justification of the public interest. Critics have argued that if the main focus of *res judicata* was the public interest the litigant's wishes, or convenience would not be relevant to *res judicata*. The decisive factor driving decisions would be just the fact that there is a former judgment on the same case already exists. Post a judgment's decision, and the court settling controversy between the parties, further referring to the court on the same matter would be a waste of courts' time.⁹³ But, in the Anglo-American view, the court can ignore former judgments if nobody complains of being vexed or harassed. The American court system sometimes values procedure over substance, the result of which are not often fair.⁹⁴ However, the fact that an issue is not re-litigated absent a party's request, is more a reflection of the adversary system than any reflection of the system's lack of concern for a just outcome. Some US decisions though have actually deviated from this idea of valuing procedure, and have allowed the courts to initiate *res judicata*.⁹⁵

Even though the public interest rationale of *res judicata* is based on a need to stabilize the system and encourage consistency, in practice modern Anglo-American rules often do not promote these values. The major trend in the development of the modern doctrine of *res judicata* expands the theoretical applicability of the preclusion rules,⁹⁶ and also at the same time recognizes and generates more broad exceptions to the doctrine.⁹⁷ In English law, new evidence unavailable at the time of trial can under certain circumstances, constitute an exception to *res judicata*.⁹⁸

⁹² Restatement of the Law (First) of Judgments § 1(a) (1942) ("Although the principle is based upon the interest of the public as well as that of the parties, yet if the prior judgment is not relied upon in pleadings or in evidence in the new action, the prior judgment will not preclude the new litigation of matters determined by the judgment. The courts do not take judicial notice of the existence of defense of *res judicata*.")

⁹³ Eliahu Harnon, *Res Judicata and Identity of Actions: Law and Rationale*, as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

⁹⁴ Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective*.

⁹⁵ *Alyeska Pipeline Service Co v. United States*, 688 F.2d 767, 771 (Ct.Cl. Sept. 8, 1982); *Walsh v. Int'l Longshoremen's Ass'n*, 630 F.2d 864, 867 (1st Cir. 1980); *Boone v. Kurtz*, 617 F.2d 435, 436.

⁹⁶ Neil Andrews, "Principles of Civil Procedure 501-12" as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

⁹⁷ Casad and Clermont, *Res Judicata: A Handbook on its Theory, Doctrine and Practice* (2001) as mentioned by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

⁹⁸ Neil Andrews, "Principles of Civil Procedure 501-12" as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

Some commentators and question the desirability of this trend.⁹⁹ This trend does not contribute to certainty and consistency, in their minds, since in many cases all the factors of the action appear to support a general rule of preclusion. Also, another factor causing uncertainty and inconsistency are the variety of definitions offered by judges, scholars, and statute-writers regarding the definition of “cause of action.” The broader the definition, the broader the scope of preclusion and despite attempts to find an acceptable definition of a cause of action,¹⁰⁰ no consensus has been reached.¹⁰¹ As Harnon criticizes, it is not always easy to justify *res judicata* on the grounds of the public interests to prevent inconsistent judgments and to contribute the prestige of courts. By granting a right of appeal, the law actually invites possible inconsistencies.¹⁰²

Thus, as Sihai argues, *res judicata* is best understood in the Anglo-American systems as a product of competing private interests that are valued in the adversarial system rather than a principle rooted in the traditional proffered jurisdictions that appear to be more rhetorical than an actual basis for *res judicata*.¹⁰³ The explanation of the well-known jurist John Salmond also illustrates the idea of a judgment as conclusive evidence and sometimes against the world of the matter adjudicated upon. Salmond believed the Court of Justice could make mistakes, but no one will be heard to say so. For their function is to terminate disputes and their decisions must be accepted as final and beyond question.¹⁰⁴ The idea of terminating disputes becomes a justification for *res judicata*’s operation; a typical feature of the adversarial system. But, it remains to be seen whether this same thinking would be adopted by other legal traditions since *res judicata* is mostly the product of the adversary system of litigation practiced in English courts.¹⁰⁵ Its essence is that as between opposed parties an issue, once litigated should be regarded as forever decided – which is where the problem lies. Bower and Turner have

⁹⁹ Casad and Clermont, *Res Judicata: A Handbook on its Theory, Doctrine and Practice* (2001) as mentioned by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

¹⁰⁰ Fleming James, et.al, *Civil Procedure* 673 (5th ed.2001) and Edward W. Cleary, *Res Judicata Reexamined*, 57 *YALE L.J.* 339 (1948) Pg. 348 http://heinonline.org/HOL/Page?handle=hein.journals/ylr57&div=30&g_sent=1&collection=journals#351 as mentioned by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

¹⁰¹ Eliahu Harnon, *Res Judicata and Identity of Actions: Law and Rationale*, as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

¹⁰² *Ibid.*

¹⁰³ Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective*.

¹⁰⁴ John Salmond, *Jurisprudence* 484 (Williams eds., 10th ed. 1947) (1920).

¹⁰⁵ George Spencer Bower & Alexander K. Turner, “The Doctrine of *Res Judicata* (2d ed. 1969) as mentioned in Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective*.

further critiqued *res judicata* by mentioning that in a different system of jurisprudence where the court exercise an inquisitorial function, it might be thought unjust or inexpedient that it should be impeded in its search for truth by the principle of *res judicata*... But this is not the system under which English courts administer justice...¹⁰⁶

Thus, one can see that in a different legal system *res judicata* would be looked at as hampering the process of administering justice to parties. We agree with Mirjan Damaska's¹⁰⁷ comments on *res judicata*, in that the doctrine seems to fit the conflict-resolving model of the Anglo-American legal system best. Is there a trade off between trying to achieving stability and consistency and administering justice in its true form? The conflict-resolving style used in the common law is averse to changing decisions, even if they are based on the legal or factual error.¹⁰⁸ Thus, this probably does create a disincentive for parties that wish to re-litigate, since the great desire for stability that is typical to common law adversarial systems, produces a broad preclusion effect on future litigation.¹⁰⁹ Also, here additionally the problem of barring re-litigation becomes complex since reconsideration of decisions can occur, but only on the initiative of parties, and not on the courts' insistence.¹¹⁰ As Damaska puts it, to outsiders a system of justice such as this one may seem flawed since it can justify substantively erroneous decisions amidst faulty procedures.¹¹¹

Thus, one can argue that the cart has been put before the horse, but in a system which values the integrity of the contest above the attainment of an accurate outcome, such behavior seems unsurprising.¹¹² The adversarial trial judge is compared to that of a referee in a game where he plays no active part.¹¹³ The adjudication of issues has been compared to a competition in which the party breaching rules of the game incurs a loss. This occurs whilst the winner is determined by comparing the parties' competitive levels at the end of the game.¹¹⁴ Then are we to say that the role of the judge is not to

¹⁰⁶ Ibid.

¹⁰⁷ Mirjan R. Damaska, *The Faces of Justice and State Authority* 145-46 (1986) as cited by Yuval Silai in *Reconsidering Res Judicata: A Comparative Perspective*.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ *Jones v. Nat'l Coal Bd.*, (1957) 2 Q.B. 55 at 63 (Eng).

¹¹⁴ Mirjan Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U.P.A. L. REV. 506,581 (1973) as cited by Yuval Silai in *Reconsidering Res Judicata: A Comparative Perspective*.

determine the truth but simply to resolve disputes, of which res judicata is a tool to assist him? Does res judicata then favor values other than truth finding? Or could it just be that it is in this particular legal system that courts have to make this choice, this tradeoff between contentions of law and the facts laid before them by litigants.

Sinai in his work forcefully confronts the common assumption that legal systems cannot exist without res judicata and that every legal system has produced a body of res judicata laws.¹¹⁵ The German system uses res judicata in a narrower scope and the Rabbinical Courts' adjudicative machinery takes an even flimsy view of it. Contrary to that, he finds that the primary reason for inculcating res judicata in Anglo-American systems can at best be understood under conceptually "*conflict solving adversarial approach whereas the traditional justifications are more of rhetoric in nature.*"¹¹⁶

When observed from the standpoint of claims preclusion, the doctrine is highly problematic because of mainly two reasons. One that the plaintiff has to take the entire bulk of issues into a single suit, which aggravates legislative cost.¹¹⁷ Had an option been given to him to break his bulk, it would be far less stressing for the plaintiff because he can choose the issues which are of primary or immediate importance at the time and then decide later complaints more precisely, based on the present judgment. This is a good ground for argument but there is an inherent problem in it to the Indian context. The average pendency of cases in India is stretched to about one and a half decade. Given this state of affairs and the multiple number of appeals that arise out of litigation, breaking bulk can be a nightmare because till the issue is finally settled by the concerned appellate authority, the world can be a totally different to be.

The other is the issue is related to evidence and trial level proceedings. The argument here against res judicata is very strong and the best solution that we are able to find is inferred from the German Laws, which allow evidence to be submitted till the Apex Court gives its verdict on the case. It has distinct advantages especially to the Indian scenario. One is that if a piece of evidence can be elemental in expediting justice then that particular piece will not suffer from any hindrance and can be brought to the notice of the court at any point of time. Although reasonable restrictions would be necessary as under any scenario, the present rules are too stringent and counterproductive. Especially in context to re-arguing evidence, res-judicata provides an undue cap that weakens

¹¹⁵ Supra Note 60.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

appreciation of even genuine pieces of evidence and their interpretation because once they get processed at the trial level, the appellate bodies cannot appreciate them at lengths. If the appellate bodies consider this as an additional burden upon them, a short-circuiting mechanism which allows particular pieces of evidence to be examined by the trial court by simple application and then direct consideration of it at the level on which the litigation is going would be a measure worthy of notice.

Re-arguing of evidence is another problematic bar. What happens if the party changes the advocate and the new attorney finds out that some crucial and game changing evidence have been totally left unconsidered or that those which were argued were not put forth in the best possible manner? How much would he be able to do if crucial elements are barred? Further it is totally un-understandable why upper courts should not be re-considering evidence if they observe good enough reason to do so but that is a connected concern and we can put it to rest for another research expedition.

Now it cannot be totally overruled that this would require some quantitative upgrades in the judiciary but that has to happen if that needs to happen. The existential purpose of courts is justice and they should be overhauled in order to meet its ends. This in itself is an extension of public policy and a constructive and positive one. Over everything, parliamentary mediocrity in not renovating the judicial machinery according to the needs of the present time cannot become a universal answer in the disguise of a compromised bid of public policy.

References

Adrian Zuckerman, Zuckerman on Civil Procedure ch.24 (2006) as mentioned by Yuval Sinai in his paper called Reconsidering Res Judicata: A Comparative Perspective.

Allen D. Vestal Res Judicata/Preclusion as cited by Yuval Sinai in his paper called Reconsidering Res Judicata: A Comparative Perspective.

Allen v. McCurry, 449 U.S. 90,94 (1980).

Alyeska Pipeline Service Co v. United States, 688 F.2d 767, 771(Ct.Cl. Sept. 8, 1982);

Amalgamated Coalfields Ltd v. Janapada Sabha, AIR 1964 SC 1013: (1963) Supp (1) SCR 172

Arnold v. National Westminster Bank, (1991) 2 A.C. 93 (H.L) (104-05) (appeal taken from Eng.).

A.R. Antulay v. R.S. Nayak, AIR 1988 SC 1531: (1988) 2 SCC 602.

Badat & Co. v. East India Trading Co, (1964) AIR 538.

Boone v. Kurtz, 617 F.2d 435, 436.

Casad and Clermont, *Res Judicata: A Handbook on its Theory, Doctrine and Practice* (2001) as mentioned by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

Clark v. Phinney (1896) S.C.R. 633, 642-44 (Can.).

Definition of Comity is that it is a legal principle that political entities (such as states, nations, or courts from different jurisdictions) will mutually recognize each other's legislative, executive, and judicial acts. The underlying notion is that different jurisdictions will reciprocate each other's judgments out of deference, mutuality, and respect. (Legal Information Institute, Cornell University Law School - <http://www.law.cornell.edu/wex/comity>)

Devilal v. Sales Tax Officer, AIR 1965 SC 1150.

Donald Lange, *The Doctrine of Res Judicata in Canada* (policy considerations have also been expressed by Canadian courts) as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

Duchess of Kingston: Smith's Leading Cases, 13th Edn., p. 644(651).

Eliahu Harnon, *Res Judicata and Identity of Actions: Law and Rationale*, as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*. George Spencer Bower & Alexander K. Turner, "The Doctrine of Res Judicata (2d ed. 1969) as mentioned in Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective*.

Ghulam Sarwar v. Union of India, AIR 1967 SC 1335: (1967) 2 SCR 271.

Gregory v. Molesworth, 3 Atk. 627.

Greenhalgh v. Mallard, (1947) 2 All ER 255 (CA).

Gurdayal Singh v. Rajah of Faridkot, (1895) 22 Cal 222 (PC): 21 1A 171.

Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948) Pg. 348

http://heinonline.org/HOL/Page?handle=hein.journals/ylr57&div=30&g_sent=1&collection=journals#351

Fed.R. CIV. P. 60(b); JAMES et AL.

Ferrer v. Arden (1599) 77 Eng Rep. 263, 266; 6 Co. Rep. 7 a (Eng).

Fleming James, et.al, Civil Procedure 673 (5th ed.2001) as mentioned by Yuval Sinai in his paper called Reconsidering Res Judicata: A Comparative Perspective.

Fleming James, et.al, Civil Procedure 673 (5th ed.2001) and Edward W. Cleary, Res Judicata Reexamined, 57 YALE L.J. 339 (1948) Pg. 348 http://heinonline.org/HOL/Page?handle=hein.journals/ylr57&div=30&g_sent=1&collection=journals#351 as mentioned by Yuval Sinai in his paper called Reconsidering Res Judicata: A Comparative Perspective.

Harita, M.Nagabhushana vs. State Of Karnataka & Ors on 2 February, 2011 “, who is believed by some Orientalists to have flourished in the 9th Century B.C. and whose Smriti is now extant only in fragments.

The plaintiff should be non-suited if the defendant avers: ‘in this very affair, there was litigation between him and myself previously,’ and it is found that the plaintiff had lost his case”.

There are texts of Prasara (Bengal Asiatic Society Edition, page 56) and of the Mayukha (Kane's Edition, page 15) to the same effect.”

Henderson v. Henderson, (1843) 3 Hare 100, 115; 67 E.R. 313, 320.

Immanuel Kant, Metaphysical Elements of Justice: Part 1 of the Metaphysics of Morals. Page 332, Accessed online: http://books.google.co.in/books?id=OhNR-xIkSVoC&pg=PA138&lpg=PA138&dq=immanuel+kant+metaphysics+of+morals+justice+ceases+to+be+justice&source=bl&ots=VsE1fP9bos&sig=6Z8SqjDNY8HBMsXj5Mf8Y9jO0bA&hl=en&sa=X&ei=1UJhU9a_LsO0uASzq4Jo&ved=0CC4Q6AEwAQ#v=onepage&q=immanuel%20kant%20metaphysics%20of%20morals%20justice%20ceases%20to%20be%20justice&f=false

Jatindra Kumar Das, “Code of Civil Procedure,” p. 673.

John Salmond, Jurisprudence 484 (Williams eds., 10th ed. 1947) (1920).

Jones v. Nat’l Coal Bd., (1957) 2 Q.B. 55 at 63 (Eng)

Justice Chand in *Lachhmi v. Bhulli*, which has been mentioned in *M Nagabhushana v. State of Karnataka & Others*.

Justice Mandagadde Rama Jois, “Legal and Constitutional History of India: Ancient legal, judicial, and constitutional system,” Accessed April 5th, 2014:

http://books.google.co.in/books/about/Legal_and_Constitutional_History_of_Indi.html?id=V552bAz5xFAC&redir_esc=y

Lacchmi v. Bhulli, ILR (1927) 8 Lah 384

Lallubhai Jogibhai Patel v. Union of India, AIR 1981 SC 728: (1981) 2 SCC 427 in *Jatindra Kumar Das*, Code of Civil Procedure, pg. 173.

Laufer v. Canadian Investment Protection Fund (2004) O.J. No. 4016, para. 7(S.C.J.).

Macnaughten and Colebrooke’s translation, page 22 as cited by Justice Chand in *Lachhmi v. Bhulli*, which has been mentioned in *M Nagabhushana v. State of Karnataka & Others*.

Mitakshara, Book.II, Chap. 1, Section V, verse 5) as cited by Justice Chand in *Lachhmi v. Bhulli* which has been mentioned in *M Nagabhushana v. State of Karnataka & Others*.

Mirjan Damaska, “Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U.P.A. L. REV. 506,581 (1973) as cited by Yuval Sinai in *Reconsidering Res Judicata: A Comparative Perspective*.

Mirjan R. Damaska, *The Faces of Justice and State Authority* 145-46 (1986) as cited by Yuval Sinai in *Reconsidering Res Judicata: A Comparative Perspective*.

M Nagabhushana v. State of Karnataka & Others (2011) 3 SCC 408
Texts of Prasara (Bengal Asiatic Society Edition, page 56) and Mayukha (Kane’s Edition, page 15). as cited by Justice Chand in *Lachhmi v. Bhulli*, which has been mentioned in *M Nagabhushana v. State of Karnataka & Others*.

National Litigation Policy Document- 23-June, 2010; <http://pib.nic.in/newsite/erelease.aspx?relid=62745>

Neil Andrews, “Principles of Civil Procedure 501-12” as cited by Yuval Sinai in his paper called *Reconsidering Res Judicata: A Comparative Perspective*.

New York Arbitration Convention (1958): Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

ONGC v. Western Co. of North America, 1987) 1 SCC 496 p. 514.

Order 41 Rule 27: Production of additional evidence in Appellate Court-

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have

been admitted, or

[414] [(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

Jatindra Kumar Das, “Code of Civil Procedure,” p. 673.

Peter L. Murray & Rolf Stürner, German Civil Justice 355-66 (2004).

Ph.D; L.L.B; Senior Lecturer of Civil Procedure and Jewish Law, Director of the Center for the Application of Jewish Law (ISMA), Law School, Netanya Academic College, and also teaches in the Law Faculty of Bar-Ilan University (Israel); Visiting Professor at

McGill University, Canada (2007- 2008).

Restatement (Second) of Judgments Sec. 17 cmt, b, 19 (1982).

Restatement of the Law (First) of Judgments § 1(a) (1942) (“Although the principle is based upon the interest of the public as well as that of the parties, yet if the prior judgment is not relied upon in pleadings or in evidence in the new action, the prior judgment will not preclude the new litigation of matters determined by the judgment. The courts do not take judicial notice of the existence of defense of res judicata.”).

Roby’s Roman Private Law (Vol.II, page 338,391-392) as cited by Justice Chand in Lachhmi v. Bhulli, which has been mentioned in M Nagabhushana v. State of Karnataka & Others.

Section 2 of 1859 Civil Procedure Code: “The civil courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by court of competent jurisdiction, in a former suit between the same parties, or between the parties under whom they claimed.”

Section 107 (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-
(d) to take additional evidence or to require such evidence to be taken.

Section 34(2) in THE ARBITRATION AND CONCILIATION ACT, 1996

(2) An arbitral award may be set aside by the Court only if—

(b) the Court finds that—

(ii) the arbitral award is in conflict with the public policy of India.

Section 13 of CPC - When foreign judgment not conclusive.

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

Srikant v. District Magistrate, 2006(12) SCALE 270: (2007) 1 SCC 486

State Hosp. v. Consol. Water Co., 267 Pa. 29,38 (1920) (“The doctrine of res judicata produces certainty as to individual rights and gives dignity and respect to judicial proceedings”).

State of Karnataka and Anr. Vs. All India Manufacturers Association and Anr, (2006) 4 SCC 683.

State of Punjab v. Davinder Pal Singh Bhullar, JT 2011 (14) SC 213: 2011 (3) SCALE 394 as cited in Jatindra Kumar Das, Code of Civil Procedure, pg 173.

Smriti Chandrika, Mysore Edition, pages 97-98 as as cited by Justice Chand in Lachhmi v. Bhulli which has been mentioned in M Nagabhushana v. State of Karnataka & Others. Sunil Dutt v. Union of India, (1982) 3 SCC 405.

T.P.Moideen Koya v. Govt of Kerala, (2004) 8 SCC 106: AIR 2004 SC 4733 in Jatindra Kumar Das, Code of Civil Procedure, pg 174.

The Ampthill Peerage Case (1977) A.C. (H.L) 547 at 575-76 (U.K.).

V.C. Govindaraj’s, “The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict”, Oxford University Press 2011.

Virmitrodaya, Vidya-Sagar Edition, page 77 as cited Justice Chand in Lachhmi v. Bhulli which has been mentioned in M Nagabhushana v. State of Karnataka & Others.

Walsh v. Int’l Longshoremen’s Ass’n, 630 F, 2d 864, 867 (1st Cir. 1980).

Y.Narasimha Rao v. Y. Venkatalakshmi, (1991) 3 SCC 451.

Yuval Sinai, Reconsidering Res Judicata: A Comparative Perspective, 21 Duke Journal of Comparative & International Law 353-400 (2011), <http://scholarship.law.duke.edu/djcil/vol21/iss2/3>



My IDA Reality Kings Award For Best Education Building Of Central India
Presented By Dainik Bhaskar & Ernst & Young.



POWERED BY :

INDORE INSTITUTE OF LAW

Approved by BAR COUNCIL OF INDIA and Affiliated to Devi Ahilya Vishwa Vidyalaya, Indore

Campus :

"GENDALAL BAM PARISAR" Rau Pithampur,
Opp. IIM, Village Dehari-Rangwasa,
INDORE - 453 331 (M.P.) Phone : 99770-91777

City Office Campus :

"GENDALAL BAM PARISAR" 1st Floor,
Mangal Compound, Near BMW Showroom, MR-11,
Ring Road Corner, Nipania, INDORE (M.P.)